Date and Time: Sunday, October 22, 2023 1:12:00 PM CST

Job Number: 208634653

Documents (100)

1. [Fears v. Wilhelmina Model Agency, Inc., 2004 U.S. Dist. LEXIS 5045]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

2. [Flash Elecs. v. Universal Music, 312 F. Supp. 2d 379]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

3. [In re Scrap Metal Antitrust Litig., 2004 U.S. Dist. LEXIS 33482]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

4. [Morris Communs. Corp. v. PGA Tour, Inc., 364 F.3d 1288]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

5. [Nobody in Particular Presents, Inc. v. Clear Channel Communs., Inc., 311 F. Supp. 2d 1048]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

6. *In re Vitamins Antitrust Litig., 320 F. Supp. 2d 1*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

7. *United Wis. Servs. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litig.), 220 F.R.D. 672*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

8. *Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

9. *In re Initial Pub. Offering Antitrust Litig., 2004 U.S. Dist. LEXIS 6248*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

10. *Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

11. *Dooley v. Crab Boat Owners Ass'n, 2004 U.S. Dist. LEXIS 7117*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

12. *Commonwealth Elec. Inspection Servs. v. Town of Clarence, 6 A.D.3d 1185*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

13. *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 316 F. Supp. 2d 186*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

14. *Am. Chiropractic v. Trigon Healthcare, 367 F.3d 212*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

15. *Schecher v. Purdue Pharma L.P., 317 F. Supp. 2d 1253*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

16. *In re Relafen Antitrust Litig., 221 F.R.D. 260*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

17. *Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

18. *Freeman Indus. L.L.C. v. Eastman Chem. Co., 2004 Tenn. App. LEXIS 321*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

19. *Patel v. Soriano, 369 N.J. Super. 192*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

20. *Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers, 2004 U.S. Dist. LEXIS 29965*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

21. *G&R Moojestic Treats Inc. v. MaggieMoo's Int'l, LLC, 2004 U.S. Dist. LEXIS 8806*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

22. Ocean Spray Cranberries, Inc., Litig., 382 F. Supp. 2d 221

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

23. Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

24. Textron Financial Corp. v. National Union Fire Ins. Co., 118 Cal. App. 4th 1061

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

25. Hallam v. Alaska Airlines, Inc., 91 P.3d 279

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

26. Clarett v. NFL, 369 F.3d 124

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

27. [Macpherson's Inc. v. Windermere Real Estate Servs., 100 Fed. Appx. 651]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

28. [Masimo Corp. v. Tyco Health Care Grp., L.P., 2004 U.S. Dist. LEXIS 32404]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

29. [Mid-America Real Estate Co. v. Iowa Realty Co., 2004 U.S. Dist. LEXIS 10155]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

30. [Dagher v. Saudi Ref., Inc., 369 F.3d 1108]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

31. [Lorix v. Crompton Corp., 680 N.W.2d 574]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

32. [Masimo Corp. v. Tyco Health Care Group, L.P., 2004 U.S. Dist. LEXIS 26916]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

33. [Roquette Am., Inc. v. Amylum N.V., 2004 U.S. Dist. LEXIS 12297]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

34. [B-S Steel of Kan. v. Tex. Indus., 321 F. Supp. 2d 1214]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

35. [F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

36. [GOLKA v. AWNINGS, 2004 Cal. App. Unpub. LEXIS 5676]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

37. [Alpha Sch. Bus Co. v. Wagner, 2004 U.S. Dist. LEXIS 11031]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

38. [Champagne Metals v. Ken-Mac Metals, Inc., 2004 U.S. Dist. LEXIS 27313]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

39. [Ass'n of Am. Med. Colleges v. Princeton Review, Inc., 332 F. Supp. 2d 11]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

40. [Green Country Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

41. [United States v. Northern Trust Co., 372 F.3d 886]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

42. [Benson v. State, 2004 Md. Cir. Ct. LEXIS 27]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

43. Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

44. Tex. Commer. Energy v. TXU Energy, Inc., 2004 U.S. Dist. LEXIS 13908

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

45. Covad Communs. Co. v. BellSouth Corp., 374 F.3d 1044

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

46. Larobina v. First Union Nat'l Bank, 2004 Conn. Super. LEXIS 1784

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

47. Ferrell v. Wyeth-Ayerst, Labs., Inc., 2004 U.S. Dist. LEXIS 15127

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

48. *Island Mortgages of New Jersey v. 3M (Minnesota Min. and Mfg. Co.), 373 N.J. Super. 172*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

49. *Massachusetts v. Microsoft Corp., 373 F.3d 1199*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

50. *Monsanto Co. v. Scruggs, 342 F. Supp. 2d 568*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

51. *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 323 F. Supp. 2d 559*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

52. *Spanish Broad. Sys. of Fla. v. Clear Channel Communs., 376 F.3d 1065*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

53. Unitherm Food Sys. v. Swift-Eckrich, Inc., 375 F.3d 1341

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

54. C.H. Robinson Worldwide, Inc. v. Ghirardelli Chocolate Co., 2004 U.S. Dist. LEXIS 13943

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

55. Multiple Listing Serv. of N. Ill., Inc. v. Amerihall of Ill., LLC, 2004 U.S. Dist. LEXIS 14048

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

56. Nat'l Credit Reporting Ass'n v. Experian Info. Solutions, Inc., 2004 U.S. Dist. LEXIS 17303

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

57. AG Acceptance Corp. v. Glinz, 2004 ND 154

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

58. [United States ex rel. Gutierrez v. Persons Holding Office as Pub. Officers Within the State Gov't of N.M., 2004 U.S. Dist. LEXIS 34165]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

59. [Bronco Wine Co. v. Jolly, 33 Cal. 4th 943]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

60. [Consol. Credit Agency v. Equifax, Inc., 2004 U.S. Dist. LEXIS 31061]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

61. [Hull v. D & J Sports, Inc., 2004 U.S. Dist. LEXIS 15798]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

62. [Thales Avionics, Inc. v. Matsushita Avionics Sys. Corp, 2004 U.S. Dist. LEXIS 32433]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

63. Z-TEL Communs., Inc. v. SBC Communs., Inc., 331 F. Supp. 2d 513

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

64. Public Util. Dist. No 1 v. IDACORP Inc., 379 F.3d 641

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

65. United States v. LSL Biotechnologies, 379 F.3d 672

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

66. Jung v. Ass'n of Am. Med. Colleges, 339 F. Supp. 2d 26

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

67. Rambus, Inc. v. Infineon Techs. AG, 330 F. Supp. 2d 679

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

68. Water Craft Mgmt., L.L.C. v. Mercury Marine, 361 F. Supp. 2d 518

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

69. *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

70. *Thornberry Oil Field Servs. v. Gulf Coast Pipeline Ptnrs., L.P., 2004 U.S. Dist. LEXIS 30750*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

71. *United States v. Gosselin World Wide Moving N.V., 333 F. Supp. 2d 497*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

72. *Blue Dot Energy Co. v. United States, 61 Fed. Cl. 548*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

73. *Natsource LLC v. GFI Group, Inc., 332 F. Supp. 2d 626*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

74. [JamSports & Entm't, LLC v. Paradama Prods., 336 F. Supp. 2d 824]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

75. [M, G, & B Servs. v. Buras, 2004 U.S. Dist. LEXIS 16624]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

76. [Birdsong Tractor & Supply, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 332 F. Supp. 2d 890]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

77. [Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers, 2004 U.S. Dist. LEXIS 17330]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

78. [In re Linerboard Antitrust Litig., 223 F.R.D. 335]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

79. *Cheryl Terry Enters. v. City of Hartford, 270 Conn. 619*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

80. *Next Generation Realty, Inc. v. Iowa Realty Co., 686 N.W.2d 206*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

81. *Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

82. *In re Relafen Antitrust Litig., 225 F.R.D. 14*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

83. *Blind Doctor, Inc. v. Hunter Douglas, Inc., 2004 U.S. Dist. LEXIS 18480*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

84. [United States v. Oracle Corp., 331 F. Supp. 2d 1098]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

85. [Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

86. [Gutzwiller v. Visa U S A Inc., 2004 Minn. Dist. LEXIS 19]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

87. [MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

88. [Applera Corp. v. MJ Research, Inc., 2004 U.S. Dist. LEXIS 21100]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

89. [Nelson v. Pilkington PLC (In re Flat Glass Antitrust Litig.), 385 F.3d 350]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

90. *Davidson & Assocs. v. Internet Gateway, 334 F. Supp. 2d 1164*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

91. *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

92. *N. Jackson Pharm., Inc. v. Express Scripts, Inc., 345 F. Supp. 2d 1279*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

93. *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

94. *Triple 7, Inc. v. Intervet, Inc., 338 F. Supp. 2d 1082*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

95. *Knowles v. Visa U.S.A., 2004 Me. Super. LEXIS 227*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

96. *Doe v. Abbott Labs., 2004 U.S. Dist. LEXIS 29129*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

97. *Fabri v. United Techs. Int'l, Inc., 387 F.3d 109*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

98. *Telecom Tech. Servs. v. Rolm Co., 388 F.3d 820*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

99. *In re Pineapple Antitrust Litig., 342 F. Supp. 2d 1348*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

100. *Crouch v. Crompton Corp., 2004 NCBC 7*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Sep 14, 1998 to Dec 31, 2022

Fears v. Wilhelmina Model Agency, Inc.

United States District Court for the Southern District of New York

March 29, 2004, Decided ; March 29, 2004, Filed

02 Civ. 4911 (HB)

Reporter
2004 U.S. Dist. LEXIS 5045 *

CAROLYN FEARS, et al., Plaintiffs, -against- WILHELMINA MODEL AGENCY, INC., et al., Defendants.

Subsequent History: Objection sustained by, in part, Objection denied by, in part Fears v. Wilhelmina Model Agency, 2004 U.S. Dist. LEXIS 5575 (S.D.N.Y., Mar. 29, 2004)

Prior History: Fears v. Wilhelmina Model Agency, Inc., 2004 U.S. Dist. LEXIS 4502 (S.D.N.Y., Mar. 23, 2004)

Disposition: **[*1]** Defendants' summary judgment motions were granted-in-part and denied-in-part. All of Plaintiffs' claims against defendant Que were dismissed. Plaintiffs' Sherman Act claim, based on a conspiracy to fix client service fees, was dismissed against all defendants. Plaintiffs' conspiracy to evade Article 11 claim was dismissed against all defendants.

Core Terms

conspiracy, models, commissions, plaintiffs', pricing, antitrust, agencies, rates, management company, price-fixing, memorandum, summary judgment, competitors, conspire, rule of reason, service fee, defendants', alleged conspiracy, client services, cases, service charge, ten percent, informing, suggests, percent, employment agency, increased price, Sherman Act, inter-firm, concerted

LexisNexis® Headnotes

Governments > State & Territorial Governments > Licenses

HN1[] State & Territorial Governments, Licenses

N.Y. Gen. Bus. Law §§ 170-90 (1998) requires employment agencies to be licensed and places restrictions (caps of 10 percent) on the amount of commissions they may charge.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] Entitlement as Matter of Law, Genuine Disputes

Pursuant to *Fed. R. Civ. P. 56(c)*, a district court must grant summary judgment if the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] Summary Judgment, Burdens of Proof

The court's role at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Fed. R. Civ. P. 56(c)* requires a court to enter summary judgment when, after adequate time for discovery a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN5[] Regulated Practices, Private Actions

In antitrust cases, the non-moving party upon a motion for summary judgment must set forth evidence that tends to exclude the possibility that the movants were acting independently. To prevail, plaintiffs must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed plaintiffs. While some assessing of evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] Regulated Practices, Private Actions

The United States Supreme Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN7[] Regulated Practices, Private Actions

While the inferences that may be drawn from ambiguous evidence in antitrust cases upon a motion for summary judgment may be limited, no special burden is imposed on a plaintiff opposing summary judgment in an antitrust case. At a minimum, the circumstances must be such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

Section One of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. In order to establish a *§ 1* violation, a plaintiff must sufficiently demonstrate (1) a combination or some form of concerted action between at least two legally distinct economic entities; and that (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Defenses, Ambiguities & Mistakes

In analyzing claims under *15 U.S.C.S. § 1*, the court may entertain both direct and circumstantial evidence. Direct evidence is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted. Illegal conspiracies can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators. Circumstantial evidence provides the material for such inferences and encompasses everything else including ambiguous statements.

Antitrust & Trade Law > Sherman Act > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

When pursuant to claims under the Sherman Act, 15 U.S.C.S. § 1, the alleged scheme is implausible, such as a price cutting agreement, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence. Further, while schemes that involve long-term complex relationships among competitors are more susceptible to direct proof, short-term simple schemes are less apt to involve express agreements.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

HN11[] Conspiracy, Elements

While parallel conduct may be probative of an antitrust conspiracy, it does not alone establish a conspiracy, even if the alleged conspirators knew the other defendant companies were doing likewise. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But the United States Supreme Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act, 15 U.S.C.S. § 1, offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

"Conscious parallelism" pursuant to claims under Sherman Act, 15 U.S.C.S. § 1, describes conduct by rivals in an industry who coordinate their conduct simply by observing and reacting to the moves of their competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN13[] Antitrust & Trade Law, Sherman Act

Because parallel activity may be equally suggestive of independent conduct, plaintiffs offering parallel conduct as evidence of an antitrust conspiracy under the Sherman Act, *15 U.S.C.S. § 1*, must demonstrate additional circumstances, often referred to as "plus factors," which provide a supplemental basis to infer a conspiracy. "Plus factors" have been recognized to include (1) a common rational motive to conspire; (3) the performance of actions that are against a defendant's own business interest without collective involvement; (4) evidence of coercion; and (5) market phenomena that may only be attributed to concerted action. It is enough that a concert of action is contemplated and that the defendants conformed to this arrangement.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Per Se Rule & Rule of Reason, Per Se Violations**

While factors considered independently, such as the dissemination or gathering of price-related information, may be insufficient to establish an inference of conspiracy under the Sherman Act, *15 U.S.C.S. § 1*, the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. In the same vein, seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background in which the behavior takes place.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Conduct is only deemed illegal per se in a limited context of cases where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming procompetitive values that they are conclusively presumed illegal without further examination.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

With per se illegal conduct, there is no need to establish that the restraint was unreasonable, i.e. that it had a negative effect on competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN17[] **Practices Governed by Per Se Rule, Boycotts**

Per se violations have been held to include, inter alia, horizontal and vertical price-fixing, territorial market division, and certain group boycotts involving concerted refusals to deal. However, the majority of cases fall outside these narrow categories found to be illegal per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

International Trade Law > General Overview

HN18[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The specific elements necessary to prove a claim of horizontal price fixing, as set forth by the United States Supreme Court, are: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity, (4) in interstate or foreign commerce.

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

Conscious parallelism alone is insufficient to create a material issue of fact as to whether an agreement was formulated under the Sherman Act, *15 U.S.C.S. § 1*. For purposes of summary judgment, additional circumstances, referred to as "plus factors," must provide a supplemental basis to infer a conspiracy. Among recognized plus factors, two in particular have received significant exposure in case law, a motive to conspire and a high level of inter-firm communication.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

HN20[] **Antitrust & Trade Law, Sherman Act**

The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred under the Sherman Act, *15 U.S.C.S. § 1*.

Criminal Law & Procedure > Defenses > Abandonment & Withdrawal

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN21[] **Defenses, Abandonment & Withdrawal**

To withdraw from a conspiracy, a defendant must show: (1) affirmative acts inconsistent with the object of the conspiracy, that are (2) communicated in a manner reasonably calculated to reach co-conspirators. Mere cessation of activity is not enough. A defendant must take an affirmative action to disavow or defeat the purpose of the conspiracy, to make sure that a withdrawal did occur and is not simply being invented ex post.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN22[] **Conspiracy, Elements**

Until affirmative evidence of withdrawal has been produced, a defendant's participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators. The burden of demonstrating withdrawal lies on the defendant. Whether a defendant withdrew from a conspiracy is often a question of fact for the jury, however, when the material facts are not disputed, courts have decided the issue as a matter of law.

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Antitrust & Trade Law, Sherman Act**

A corporate officer can be held liable in civil antitrust actions under the Sherman Act, *15 U.S.C.S. § 1*.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN24[] **Concerted Action, Civil Conspiracy**

Once a conspiracy is shown, only slight evidence is needed to link another defendant with it.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN25[] **Private Actions, Remedies**

In order to recover for an alleged antitrust violation, a plaintiff must have suffered the kind of injury that the antitrust laws were directed at. And, a plaintiff must have antitrust standing, which fails where the indirectness of the asserted injury, the speculative nature of the damage theory, the risk of duplicative recoveries and the danger of complex apportionment are at issue.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN26[] Purchasers, Direct Purchasers

A customer of a customer who is overcharged does not have antitrust standing. It is difficult to calculate the damages suffered by an indirect purchaser. The indirect purchaser is only damaged to the extent that the direct purchaser passes on to it the overcharge resulting from the anticompetitive conduct. Any such calculation would be imprecise and could result in double recovery if both the direct and indirect purchasers sue and the calculations in their suits differed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN27[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In the preponderance of cases (those not within the per se illegal categories), a plaintiff must establish an antitrust injury under the rule of reason. Under this test plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. The traditional indicators of an adverse effect are reduced output, increased price, or decreased quality.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN28[] Private Actions, Remedies

A plaintiff may establish antitrust injury by proving that the defendant possesses sufficient "market power" to hinder competition on a market-wide basis. Such power is defined as the power to raise prices significantly above the competitive level without losing all of one's business.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN29[] Antitrust & Trade Law, Sherman Act

Through requiring that a plaintiff demonstrate injury to a relevant market, the Sherman Act, *15 U.S.C.S. § 1*, protects competition within a market, instead of the individual competitors within that market. Once a plaintiff has fulfilled its initial burden of proof, the burden shifts to the defendant to provide evidence of the pro-competitive "redeeming virtues" of their combination. If the defendant can make this showing, the burden shifts back to the plaintiff to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN30[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A court's rule of reason analysis involves a weighing of harms and benefits in order to make a determination as to whether conduct purports to promote or to destroy competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN31[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The true test of legality under a Rule of Reason analysis, is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, therefore reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN32[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In carrying out a rule of reason analysis, the existence of less restrictive alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct.

Counsel: For Carolyn Fears: Andrew W. Hayes, Ann Moriarty Galvani, Brian Rishwain, Eugene A. Spector, Merrill G. Davidoff, Neville L. Johnson, Paul R. Verkuil, LEAD ATTORNEYS.

For Carolyn Fears: David Felderman, Jeffrey J. Corrigan, John Macoretta, LEAD ATTORNEYS, Spector, Roseman & Kodroff, Philadelphia, PA.

For Wilhelmina Model Agency, Inc., Defendant: Sandor Frankel, LEAD ATTORNEY, Frankel & Abrams, Aaron Richard Golub, LEAD ATTORNEY, New York, NY.

Judges: Harold Baer, Jr., U.S.D.J.

Opinion by: Harold Baer, Jr.

Opinion

OPINION & ORDER

Hon. HAROLD BAER, JR., District Judge:

Defendants, Ford Models, Inc. ("Ford"), Mr. Gerald W. Ford ("G. Ford"), Que Management, Inc. ("Que"), Wilhelmina Models, Inc. ("Wilhelmina"), [1] Elite Model Management Corp. ("Elite"), Next Management Co. ("Next"), IMG Models, Inc. ("IMG"), Click Model Management, Inc. ("Click"), **[*2]** Images Management ("Images"), and Model Management Corp. ("MMC") f/k/a International Model Managers Association, Inc. ("IMMA"), (collectively "moving defendants"), [2] all of whom are New York model management companies (and one modeling association), move for

[1] Wilhelmina is incorrectly sued as Wilhelmina Model Agency, Inc.

summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure* ("Fed. R. Civ. P."), dismissing the lawsuit brought by plaintiffs, a class of models who now work or have worked at some point over the past three decades for one or more of the defendant modeling management companies. Plaintiffs oppose defendants' motions for summary judgment. For the foregoing reasons, defendants' motions are granted-in-part and denied-in-part.

I. BACKGROUND

A. Procedural History

Plaintiffs filed their first complaint in their action on **[*3]** June 25, 2002, an amended complaint on August 12, 2002, and a first consolidated complaint on September 24, 2002. Defendants moved to dismiss the first consolidated complaint and fully-briefed motions were submitted in November 2002. In an Opinion and Order dated January 17, 2003, this Court dismissed plaintiffs' Article 11 cause of action and the antitrust claims beyond the statute of limitations, i.e., prior to June 25, 1998. Plaintiffs filed a second amended complaint on February 5, 2003 and a third amended complaint on April 30, 2003. The moving defendants submitted their fully-briefed summary judgment motions on January 15, 2004. Oral argument on the summary judgment motions was held on March 9, 2004.

B. Factual Background

Plaintiffs allege that defendants, through their membership in or association with others who were or had been members of the modeling industry's trade association, IMMA (now called MMC), had the opportunity to -- and indeed did -- fix prices (of both models' commissions and clients' service fees), terms and conditions of models' employment, and the manner in which to structure their businesses (as management companies rather than employment agencies).

[*4] Plaintiffs assert that defendants' price-fixing conspiracy originated with "an intention and plan collectively to evade the licensing requirements and fee restrictions imposed by New York state law [General Business Law ("GBL") §§ *170-90 (1998)* ("Article 11")]." Plaintiffs' Opposition ("Pl. Opp.") at 8. Plaintiffs argue that by claiming "that they were each entitled to the 'incidental booking' exception (licensure required if more than incidentally involved in procuring work for clients), defendants gained exemption from the licensure and 10% fee restriction under *GBL Article 11.*" Pl. Opp. at 8. By way of background, ***HN1***[] "Article 11 requires *employment agencies* to be licensed and places restrictions [caps of ten percent] on the amount of commissions they may charge." *Masters, et al. v. Wilhelmina Model Agency, Inc., et al., 02 Civ. 4911, 2003 U.S. Dist. LEXIS 698, at *8 (S.D.N.Y. Jan. 16, 2003)* (emphasis added). Under plaintiffs' theory, collusion provided support and credibility for defendants' transformation--i.e., it was more believable that Ford -- the first agency to undergo the change -- was now legitimately a management company if Elite and Wilhelmina were **[*5]** simultaneously undergoing the same transformation. And, plaintiffs would not bolt against a *particular* agency that raised its commission, became a management agency, or adopted unfavorable terms and conditions if all of the major New York agencies acted together.

Plaintiffs' theory is that defendants agreed upon uniform practices on several fronts - all with the motive to quash competition and preclude objection or dissent.

II. DISCUSSION

A. Summary Judgment Standard

HN2[] Pursuant to *Fed. R. Civ. P. 56(c)*, a district court must grant summary judgment if the evidence demonstrates that "there is no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. ***HN3***[] "Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an

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[2] There are other defendants in the lawsuit but only these ten defendants moved for summary judgment.

integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), quoting Fed. R. Civ. P. 1 **[*6]** . HN4[] The Court's role at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Rule 56(c) requires a Court to enter summary judgment when, "after adequate time for discovery … a party [] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

HN5[] In antitrust cases, the non-moving party must set forth "evidence that tends to exclude the possibility that the [movants] were acting independently." Apex Oil Co. v. Dimauro, et al., 822 F.2d 246, 253 (2d Cir. 1987) (reversing district court's grant of summary judgment as to certain defendants), citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). To prevail, plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]." Matsushita, 475 U.S. at 588, **[*7]** citing First Nat'1 Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). "While some assessing of evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial." Apex Oil Co., 822 F.2d at 253 (citations omitted).

> HN6[] The Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.

Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992). Therefore, HN7[] while the inferences that may be drawn from ambiguous **[*8]** evidence in antitrust cases may be limited, "no special burden is imposed on a plaintiff opposing summary judgment in an antitrust case." Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 262 (2d Cir. 2001) (citations omitted). "At a minimum, … 'the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Int'l Distribution Cntrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 793 (2d Cir. 1987), quoting Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir. 1976).

B. Section One Violations

HN8[] Section One of the Sherman Act ("Section One"), 15 U.S.C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States …" In order to establish a Section One violation, a plaintiff must sufficiently demonstrate "(1) a combination or some form of concerted action between at least two legally distinct economic entities; and [that] (2) such combination **[*9]** or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason." Dresses For Less, Inc., et al. v. CIT Group/Commercial Servs., Inc., et al, 01 Civ. 2669, 2002 U.S. Dist. LEXIS 18338, at *17 (S.D.N.Y. Sept. 30, 2002), quoting Virgin Atlantic Airways Ltd., 257 F.3d at 273.

HN9[] In analyzing claims under Section One, the Court may entertain both direct and circumstantial evidence. Direct evidence is "evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.), 166 F.3d 112, 118 (3d Cir. 1999). "Illegal conspiracies, of course, can rarely be proved through evidence of explicit agreement, but must generally be proved through inferences from the conduct of the alleged conspirators." Venture Tech., Inc. v. Nat'l Fuel Gas Co., et al., 685 F.2d 41, 45 (2d Cir. 1982) (citations omitted). Circumstantial evidence provides the material for such inferences and encompasses "everything else *including* ambiguous statements." In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 662 (7th Cir. 2002). **[*10]**

HN10[] When the alleged scheme is implausible, such as a price cutting agreement, "a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence." Apex Oil Co., 822 F.2d at 253, citing Matsushita, 475 U.S. at 594-598. Further, while schemes that involve long-term complex relationships among competitors are more susceptible to direct proof, short-term simple schemes are less apt to involve express agreements. *See* Apex Oil Co., 822 F.2d at 253 (citation omitted).

HN11[] While parallel conduct [3] may be probative of an antitrust conspiracy, it does not alone establish a conspiracy, even if the alleged conspirators "knew the other defendant companies were doing likewise." Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110 (2d Cir. 1975).

> To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behavior conclusively establishes agreement **[*11]** or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.

Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-541, 98 L. Ed. 273, 74 S. Ct. 257 (1954) (internal citations omitted).

HN13[] Because parallel activity may be equally suggestive of independent conduct, plaintiffs offering parallel conduct as evidence of an antitrust conspiracy must demonstrate additional circumstances, often referred to as "plus factors," which provide a supplemental **[*12]** basis to infer a conspiracy. *See* Apex Oil Co., 822 F.2d at 253. "Plus factors" have been recognized to include (1) a common rational motive to conspire (*see* Ambook Enters. v. Time Inc., 612 F.2d 604, 616 (2d Cir. 1979)); (2) a concentrated degree of inter-firm communications (*see* Apex Oil Co., 822 F.2d at 254); (3) the performance of actions that are against a defendant's own business interest without collective involvement (*see id.*); (4) evidence of coercion (*see* Ambook Enters., 612 F.2d at 616); and (5) market phenomena that may only be attributed to concerted action (*see* Stephens, et al. v. CMG Health, et al., 96 Civ. 7798, 1997 U.S. Dist. LEXIS 23797, at *19 n.13 (S.D.N.Y. July 22, 1997) (citation omitted). "It is enough that a concert of action is contemplated and that the defendants conformed to this arrangement." In re Nasdaq Market-Makers Antitrust Litig., 894 F. Supp. 703, 713 (S.D.N.Y. 1995), quoting Ambook Enters., 612 F.2d at 614.

HN14[] While factors considered independently, such as the "dissemination or gathering of price-related information," may be insufficient **[*13]** to establish an inference of conspiracy (Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980) ("advance price announcements are perfectly lawful"); United States v. Citizens & S. Nat'l Bank, et al., 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975) ("dissemination of price information is not itself a *per se* violation of the Sherman Act.")), "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole" (Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)). In the same vein, "seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background in which the behavior takes place." In re Medical X-Ray Film Antitrust Litig., 946 F. Supp. 209, 218 (E.D.N.Y. 1996), quoting Minpeco, S.A. v. Conticommodity Servcs., Inc., 673 F. Supp. 684, 688 (S.D.N.Y. 1987), quoting Apex Oil Co., 822 F.2d at 254-55.

1. *Per Se* Violations

[3] HN12[] "'Conscious parallelism' describes conduct by rivals in an industry who 'coordinate their conduct simply by observing and reacting to the moves of their competitors.' Stephens v. CMG Health, 96 Civ. 7798, 1997 U.S. Dist. LEXIS 23797, at *18 n.12 (S.D.N.Y. July 21, 1997) (citation omitted).

HN15[] Conduct is only deemed illegal *per se* in a limited context of cases "where a defendant's actions are so **[*14]** plainly harmful to competition and so obviously lacking in any redeeming procompetitive values that they are 'conclusively presumed illegal without further examination.'" *Capital Imaging v. Mohawk Valley Medical Ass'n, 996 F.2d 537, 542 (2d Cir. 1993)*, citing *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. ***HN16***[] With *per se* illegal conduct, there is no need to establish that the restraint was unreasonable, i.e. that it had a negative effect on competition. *See NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. ***HN17***[] *Per se* violations have been held to include, *inter alia,* horizontal and vertical price-fixing (*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; *Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 405, 55 L. Ed. 502, 31 S. Ct. 376 (1911))*, territorial market division, and certain group boycotts involving concerted refusals to deal (*NYNEX, 525 U.S. at 133*; *Capital Imaging, 996 F.2d at 542-43*). The majority of cases fall outside these narrow categories found to be illegal *per se. See Capital Imaging, 996 F.2d at 543*; *CDC Techs., Inc. v. IDEXX Laboratories, Inc., 186 F.3d 74, 79 (2d Cir. 1999).* **[*15]** *See also Nat'l Camp Assoc., Inc. v. Am. Camping Assoc., Inc., 99 Civ. 11853, 2000 U.S. Dist. LEXIS 18194, at *15 (S.D.N.Y. Dec. 15, 2000)* (highlighting Supreme Court's refusal to expand *per se* categories).

a. *Conspiracy to Fix Models' Commissions*

In Count I of their third amended complaint ("complaint"), plaintiffs assert that defendants violated Section One by (1) initially conspiring to charge the majority of their models a commission in excess of the ten percent statutory cap imposed by Article 11, and then (2) conspiring to increase this commission to fifteen percent, and finally twenty percent. 3d Am. Compl. PP 98-99.

Plaintiffs allege that defendants colluded to fix models' commissions through discussions, exchanges, and agreements at IMMA meetings and outside of IMMA's formal setting. Because the alleged conspiracy, as it involves horizontal price-fixing, is illegal *per se,* this Court need only determine whether plaintiffs have established a material issue of fact as to whether defendants conspired to fix models' commissions. *See Capital Imaging, 996 F.2d at 542*. Although the defendants, through well-briefed and argued motions, **[*16]** have convinced me that this claim raises difficult questions and close calls, I conclude that, at least with regard to all defendants other than Que, who was never a member of IMMA or MMC, plaintiffs have provided sufficient evidence to allow for a reasonable inference of collusion on models' commissions. It will be for the jury to decide, after watching and listening to live testimony and cross-examination, whether these defendants actually conspired to fix the commissions required to be paid by the models to the defendants.

HN18[] "The specific elements necessary to prove a claim of horizontal price fixing, as set forth by the Supreme Court, are: (1) the existence of an agreement, combination or conspiracy, (2) among actual competitors, (3) with the purpose or effect of 'raising, depressing, fixing, pegging, or stabilizing the price of a commodity,' (4) in interstate or foreign commerce." *In re Medical X-Ray Film Antitrust Litig., 946 F. Supp. at 215-16*, citing *Socony-Vacuum Oil Co., 310 U.S. at 223-24*. The critical element here, and the one in dispute, is the first - whether defendants *agreed* to fix models' commissions.

i. *Parallel Pricing "Plus"*

[*17] While plaintiffs have not uncovered direct "smoking gun" evidence to confirm that defendants operated under an agreement to fix models' commissions, it is undisputed that there is evidence of parallel pricing, both at rates exceeding ten percent, and at rates of twenty percent. [4] Plaintiffs' expert, Martin A. Asher, Ph.D. ("Asher") concluded, "from data provided by defendants" that "more than 97 percent of models who had billings within the class period, from 1998 through 2003, paid commissions in excess of 10 percent." Asher, 12/15/03, at 6. [5] Further,

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[4] While defendants may contest the reliability of the evidence utilized by plaintiffs' experts to make conclusions as to pricing, and offer evidence of "variation in average earning by commission rates among Defendants," (Daniel S. Levy, Ph.D., at 7), the task of weighing the competing evidence is the role of the jury. *Anderson, 477 U.S. at 249*.

Asher reports that "approximately 91 percent of the models paid commission rates of 20 percent." *Id.* at 8. Similarly, plaintiffs' second expert, John C. Beyer, Ph.D. ("Beyer"), concludes that "most models (approximately 96 percent) have been charged a commission rate of 20 percent or more …" Beyer, 12/15/03, at 4. While plaintiffs' experts demonstrate parallel pricing, assuming defendants were aware of each other's pricing patterns, which the evidence suggests they were, ***HN19***[] conscious parallelism alone is insufficient to create a material issue of fact as to whether an agreement was formulated. For purposes of summary judgment, **[*18]** additional circumstances, referred to as "plus factors," must "provide a supplemental basis to infer a conspiracy." *Theatre Enters., 346 U.S. at 540-41*. Among recognized plus factors, two in particular have received significant exposure in case law, both of which have a strong presence in this case - a motive to conspire and a high level of inter-firm communication. *See Modern Home Institute, Inc., 513 F.2d at 110*; *Ambook Enters., 612 F.2d at 616*.

[*19] With regard to the first plus factor, there is no question that defendants possessed a common rational motive to conspire - the ability to raise models' commissions without suffering loss of business. General theories of competition make clear that without collective action, price increases can result in loss of business. *See Apex Oil Co., 822 F.2d at 254*. The benefit of joint action with regard to pricing was discussed at a September 16, 1986 IMMA meeting, when Monique Pillard ("Pillard") of Elite "made a point about lowering the prices of catalogs; that we are all committing suicide, if we do not stick together … Pauline's agreed with me … by not sticking together, we would have to make 40% more volume in order to make the same figures as last year …" Haazen Affirmation, Exhibit. ("Pl. Exh.") 26 at EL 04131.

Second, it is beyond peradventure that IMMA members engaged in a concentrated degree of inter-firm communication (*Apex Oil Co., 822 F.2d at 254*), including but hardly limited to models' commissions directly. This Court was unable to find any cases in this Circuit or in this District that elucidated whether the inter-firm communication, **[*20]** in order to be relevant, had to be specifically about the subject matter of the alleged conspiracy, or instead, whether it was sufficient to uncover extensive discussions and agreements among defendants, on related but collateral issues. The cases merely state that "a high level of interfirm communications" can serve to bolster the inference of a conspiracy drawn from parallel acts. *See, e.g. In re Medical X-Ray Film Antitrust Litig., 946 F. Supp. at 218*; *Apex Oil Co., 822 F.2d at 254*; *Minpeco, 673 F. Supp. at 688*. While I agree with defendants that evidence of discussions directly *about models' commissions* would represent the strongest inference of price-fixing, I disagree that evidence of discussions and agreements, even related to other pricing strategies, lacks relevance here and fails to bolster an inference that defendants colluded on commissions as well. The evidence of parallel pricing, the sheer volume of communications and agreements, coupled with crystal clear evidence that suggests IMMA members even colluded to fix client service fees, a close cousin of models' commissions, when viewed together, "tends to exclude the **[*21]** possibility" that the defendants acted independently with regard to models' commissions.

a. Inter-firm Communications.

1. <u>About Pricing (Commissions, Rates, Service Fees) and Billing Practices</u>

Plaintiffs assert that the conspiracy began with an agreement among defendants, collectively, to transform the structure of their businesses from employment agencies to management agencies for the express purpose of avoiding the ten percent cap imposed upon employment agencies by Article 11. [6] **[*23]** According to plaintiffs, Ford

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[5] Asher noted that he had incomplete financial data productions from a few defendants, and intended to "supplement [his] presentation with respect to the defendants from whom more complete computerized data may be required and may hereafter be obtained." Asher, 12/15/03, at 7 fn 9. This "intention" resulted in an Order to Show Cause by several of these defendants, aimed at blocking plaintiffs' ability to supplement the record. Shortly thereafter, the parties amicably resolved their dispute without the need for a hearing. Although plaintiffs again raise questions, in supplemental submissions, requested by the Court, about the adequacy of certain defendants' productions, and defendants again hotly contest any deficiencies, plaintiffs and defendants agree that their dispute should not affect the timing of the summary judgment decision. Therefore, although unaware of the substance of plaintiffs' and defendants' discussions and resolutions concerning productions, the Court will proceed under the assumption that these percentages apply to *all* defendants.

initiated the formal transformation on April 15, 1971, [7] when it declined to renew its license with the DCA because it had "now become management." Pl. Opp. at 11, citing Pl. Exh. 4 (letter to DCA). Notably, Ford retained its licensure as an employment agency in California (Pl. Exh. 261D (California Licensure Certificates, including 2003)), a fact which plaintiff's suggest warrants an inference that Ford needed the unified action of its New York co-conspirators to effectuate this transformation without scrutiny. [8] **[*24]** Plaintiffs then assert that "shortly after IMMA was founded [in 1971,]" predominantly by Ford, "each IMMA member--comprising essentially the entire industry **[*22]** in New York -- had either resigned or not renewed its license." [9] Pl. Opp. at 7, citing Pl. Exh. 317 (Foster-Fell Dep.) at 42:14-21. Plaintiffs assert that this pattern was hardly a coincidence, as a requirement of membership in IMMA was "that they be managers and not employment agents." Pl. Exh. 283 (Gerald Ford Dep.) at 71:18-20. Prior to IMMA's eventual adoption of a form contract, plaintiffs assert that several defendants, Ford, IMG, and Wilhelmina, utilized essentially identical contract language to elucidate the position that they were not artist managers, but rather were personal managers, and that they were not employment agencies under Article 11. Pl. Exhs. 304 (Ford Contract) at P 10; 306 (IMG Contract) at P 9; 309 (Wilhelmina Contract) at P 3.

Therefore, the agencies that subsequently joined IMMA were all unlicensed. Pl. Opp. at 13. Plaintiffs assert that Que, though never a member of IMMA, still adopted contracts "that were either silent regarding the agencies' role in

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[6] Defendants expend considerable time and effort arguing that plaintiffs are barred by the *Noerr-Pennington* doctrine from introducing evidence of defendants' alleged evasion of Article 11. The *Noerr-Pennington* doctrine, however, does not protect conspiracies so defendants may *evade* the law, but rather, conspiracies so defendants may *change* the law. *See* *Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* ("We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination[s] … in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.") (emphasis added), citing *15 U.S.C. § 1*; *United Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (citing to *Noerr* and stating that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."). To the extent that plaintiffs have any intention of introducing evidence of defendants' joint efforts to "seek legislation" by, for example, lobbying to amend or revoke Article 11, which this Court has no reason to believe they do, such evidence will be barred by the *Noerr-Pennington* doctrine. In other words, while any efforts that defendants undertook to influence the DCA are protected by the *Noerr-Pennington* doctrine, defendants' joint efforts to avoid the DCA's enforcement are not shielded.

[7] Ford asserts that it altered its business structure in the mid-1960's but did not formalize the change with the DCA until 1971. Pl. Opp. at 12.

[8] Although the parties dispute whether defendants are employment agencies (subject to Article 11) or management agencies (permitted to exceed the ten percent cap), this Court does not have jurisdiction to adjudicate this substantive disagreement. *See* *Masters, 2003 U.S. Dist. LEXIS 698, at *29-32* (the statute's legislative scheme provides for exclusive enforcement (in New York City) by the Department of Consumer Affairs ("DCA")). Though not controlling, it is interesting to note that on April 11, 2003, after this Court held that it lacked jurisdiction to determine whether defendants were in violation of Article 11, the DCA determined that "… we are unpersuaded by your [plaintiffs'] contention that model management companies … meet the New York General Business Law ("GBL") *§ 171* definition of an 'employment agency.' Instead, every indication is that these types of companies fall under the theatrical managers exception of *GBL § 171(8)*. This is because they are primarily career managers and only 'incidentally' do job placements for their clients." After plaintiffs proffered additional evidence,, the DCA concluded that "… we remain unconvinced that model management companies do not fall within the managers exception to the employment agency licensing law in *§ 171(8)*." Def. Reply at 2.

[9] Ford was a member of IMMA from October 1974 through December 2003, Wilhelmina from the early 1970's through December 2003, Elite from 1979 through November 1993, Next from April 1990 through September 1994 and again from March 1996 through April 1997, IMG from in or about 1980 through December 2003, Click from April or May 1994 through December 2003, and Images from 1982 through December 2003.

finding work for the model, or affirmatively disavowed any obligation to do so." Pl. Opp. at 13. And, plaintiffs assert that the fact that Elite was invited to join IMMA, when Ford was currently suing it [10] and Gerald Ford had made statements attacking Elite's founder, John Casablancas ("Casablancas"), and more particularly, his moral fiber, suggested that the current members of IMMA had an ulterior interest in securing the membership of all major New York modeling companies **[*25]** -- i.e., a desire to perpetuate the conspiracy. Pl. Opp. at 13, citing Pl. Exh. 283 at 67:19-70:5. After all, if a predominant agency were excluded, and that agency were not forced, through membership, to become a management company, models would have the option of hiring a modeling *agency,* which would be obliged to charge a commission at or below ten percent.

Plaintiffs argue that through their conspiracy to evade Article 11, or more aptly their joint agreement **[*26]** to become management companies, defendants were able to raise the commission that they charged to models above Article 11's ten percent cap, and eventually agree to uniformly charge models commissions of twenty percent -- a commission rate which would have been impossible under their previous configurations. While defendants hotly contest the formation of any agreements as to models' commissions, they concede that there was significant information exchanged among IMMA members about pricing. Casablancas noted proudly that each company "basically knew the price practices of all the agencies … everybody knows what everybody else is doing." Pl. Exh. 281 (Casablancas Dep.) at 109:5-6, 44:22-23. He also admitted that he "knew instantly every time an agency raised or when an agency didn't raise." *Id.* at 143:1-2. [11] Dieter Esch ("Esch"), then President and Chief Executive Officer of Wilhelmina, admitted that he may have announced to attendees of an IMMA meeting, in the approximate timeframe of 1996 through 1998, that he was charging a twenty-five percent commission to models (Pl. Exh. 279 (Esch Dep.) at 299:12-24, 323:12-16) and Casablancas made a similar, yet even more troubling announcement **[*27]** at the December 12, 1991 IMMA meeting that he too "***would be*** charging twenty percent commission to all clients as a firm policy." Pl. Exh. 53 at FORD 058239 (emphasis added). While Casablancas' announcement does not explicitly demonstrate an agreement among IMMA members to follow course, it suggests that IMMA members were made aware of their competitors' price increases before the price increases were enacted -- leaving time for others to agree to increase their fees accordingly. Further, Casablancas conceded that "the more uniformity in the prices, the more I think it was -- it was something that you could then compete on the quality of your models on the service, and not just on -- on rates, you know. So we were always favorable to letting everyone know as much as possible about -- about our pricing policies." Pl. Exh. 281 at 121:8-16. Casablancas also testified that "I was always hoping that as leaders, we would be followed, and that we would not be left as we were on many instances by ourselves with higher rates, and having a lot of clients segregating against us because we were too expensive." *Id.* at 112:9-113:15. While it is possible that Elite simply took the lead **[*28]** in raising its commissions, with the blind hope that other members would follow, it is far more reasonable to assume that Elite sought some guarantee that the other defendants would acquiesce, to ensure that its clients would not segregate against them.

This assumption is bolstered by significant evidence of discussions and agreements concerning raising the client service fees. Elite's internal memorandum "RE: IMMA Meeting -- Minutes," reports that at a January 21, 1980 IMMA meeting, trade association members acted in unison with regard to pricing decisions. The memorandum reads in part that "the suggestion of increasing client service charge from 10% which Alain Kittler suggested I [Jo Zagami ("Zagami")] make at this meeting **was not accepted by the Association.** The general feeling was that **with the increase of model rates,** and the agencies **[*29]** benefiting by models' commissions, clients would not be agreeable to a higher service charge." Pl. Exh. 13 at EL 04073 (emphasis added). This memorandum reveals both that one agency sought the "acceptance" of the trade association before increasing its client service fee and also

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[10] Quite notably, Elite's suit alleged (almost identically to plaintiffs' current action) that Ford, Wilhelmina, and other IMMA members "had agreed to increase their rates and adopt a uniform price structure and circumvent the licensing requirements of the New York General Business Law." Pl. Opp. at 15, citing Pl. Exhs. 7-10 (Court Documents). John Casablancas, Elite's founder, was even quoted as stating that he was contemplating an antitrust class action on behalf of the models. It appears that Elite abandoned the action, and instead joined IMMA.

[11] Whether Casablancas learned about the other defendants' pricing practices from clients or from discussions with defendants will be for the jury to decide.

strongly suggests that the "increase of model rates" was applicable to all members and not a decision made unilaterally by each company. Similarly, a memorandum recounting a November 14, 1980 IMMA meeting, makes clear that "certain members" had made "requests" "to increase the service charge from 10 to 15%." This Court can think of no other rationale for the need for such a "request," other than that members were required to act jointly with regard to price increases. At the same meeting, the memorandum reflects that Zagami suggested that "IMMA send out a letter stating that **we plan on pursuing** [a 1 1/2 percent finance charge on clients who pay after 30 days] **in lieu of increasing our service charge.**" *Id.* at EL 04086-04087. Again, this statement suggests joint action.

At this same November 14 meeting, the members also discussed the lost fees associated with allowing models to book hourly **[*30]** rates instead of day, quarter day, half day, or three quarter day rates, which have increased at levels greater than hourly rates. G. Ford "came up with a much better suggestion which he has in effect, that being: certain of his top girls can only be booked half and full days. It was the general feeling that Elite too would put this into effect, although as John mentioned, we would have to give the clients the availability of half and three quarter days." *Id.* at 04085. Members even discussed, as proposed by Casablancas, "that IMMA members have meeting [sic] with the different branches of the industry, such as publishing houses, administrative agencies, etc." regarding rates. *Id.* At his deposition, Casablancas could not recall this discussion concerning hourly/day rates, but stated that "at this time I think it's not good [to discuss]." Pl. Exh. 283 at 119:21.

The evidence suggests that the management companies did approve an increase in the client service fee to twenty percent, with Elite taking the initiative in doing so. On April 14, 1987, Casablancas sent Pillard the letter that he intended to send to his clients, announcing the increase in the service fee, and explained **[*31]** that "you may show [the letter] to some people at the next IMMA meeting." He explained further that "you should say that **it is our intent to send this letter** and you should be very careful that in no way can this be construed as 'price fixing'. You are merely to inform our competitors of our intention to send this letter or a similar one." Pl. Exh. 30 at EL 04160. The tone and tense of this letter suggests that Casablancas provided his fellow IMMA members with advance notice of Elite's intended price increase. [12] As further evidence that Elite actually provided its competitors with notice of its intended price increase, and secured their agreement to follow suit, plaintiffs provide a May 5, 1987 memorandum from Pillard to all Elite staff, informing them of the service charge increase from fifteen to twenty percent, effective June 1, and stating that "**all other agencies will go along with this increase.** Please inform you clients accordingly so that there is no misunderstanding." Pl. Exh. 32. Only a rich fantasy life could lead one to an inference other than that Pillard was directing her staff to inform clients that the other agencies would institute similar increases **[*32]** so that clients would not "misunderstand" and cease utilizing Elite's services, in hopes of moving to a management company with lower fees. Additionally, in October 1987, Zagami circulated to all IMMA members a copy of an article, published in a trade publication, denouncing the increase in service fees by Elite, Wilhelmina, and Zoli. At the same time, Zagami circulated Casablancas' July 17, 1987 letter response to Stan Malinowski (the author), in which he asked, "why did you single out Elite Wilhelmina and Zoli" and informs Malinowski that "Ford, as well as American Models, Faces and others have also increased their service charge." Pl. Exh. 33 at DEV 00427-00430. For obvious reasons, both Casablancas' knowledge that other companies had increased their service charges and his interest in informing the public of such a fact, support powerful inferences of a conspiracy as to service fees.

[*33] At a September 16, 1986 IMMA meeting, as reflected in an internal Elite memorandum, Pillard "made a point about lowering the prices of catalogs; that we are all committing suicide, if we do not stick together. Pauline's agreed with me but as usual, Bill Weinberg [of Wilhelmina] cautioned me about price fixing … Ha! Ha! Ha! …. the usual bulls..t! I warned him that by not sticking together, we would have to make 40% more volume in order to make the same figures as last year, but you know Bill, he always thinks he can get more if he acts that way." Pl. Exh. 26 at EL 04131. Again, it is difficult for me to escape the inference that discussions of the benefits of joint action on pricing ensued. While Wilhelmina objects to the outward discussion of price fixing, it is plausible from Pillard's

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[12] Pillard's testimony that she "decided it was best not to show the letter" (Pl. Exh. 288 (Pillard Dep.) at 61:8-62:2) at best, creates an issue of fact as to whether Pillard did in fact follow Casablancas' instructions.

reaction that Wilhelmina's objection was to the dissemination of information not to the underlying price-fixing agreement.

On March 31, 1987, Zagami wrote to Joseph Hunter ("Hunter"), then the President of IMMA, to assert that "the members of IMMA must stop the photographers and or studios from using us to increase their profits. As long as models fees are billed to the various studios and not **[*34]** directly to the client, this practice will never cease." Zagami suggested "a meeting first with all IMMA members" and then "a meeting with the Photo Studio Association and Photographers Association." He explained that "unless we curtail the holding back of money due us … we as managers will lose our ability to control model fees even more in the future." Pl. Exh. 29 at PAU 00417. On the flip-side of this letter is what appears to be a proposed letter on IMMA stationery, with a blank where the recipient(s) name(s) would be inserted, informing the recipient(s) that after "discuss[ions] at recent IMMA meetings … we have [] decided that as of this date we will honor bookings only and exclusively when they have been directly made to the mother agency in New York City [not by out-of-town agencies]." *Id.* at PAU 00418. Earlier, on March 19, 1987, Jeremy Foster-Fell ("Foster-Fell") had written to Hunter, regarding "the [same] issue of 'out of town agency' bookings." He had explained that "we discussed and partially resolved" that all agencies would send letters "along the lines of the drafted example handed out at the meeting, to those clients who have made this practice the **[*35]** norm." However, he suggested, instead, that IMMA send "one letter signed by the industry in unison," which in his opinion, would be more "startling." He added that "I don't believe all our clients are aware of the existence of IMMA and its members **who can and will act in concert together.**" Pl. Exh. 28. He also explained that discussions had ensued regarding "the contractual relationship between manager and model" and creating a system of exclusivity to prohibit models from working through out-of-state agencies. In Foster-Fell's words, "[a] model can afford to lose one New York agent but cannot afford to lose New York." *Id.* These letters demonstrate once more that the members viewed (and wanted the public to view) IMMA as a unified front who worked in concert to achieve jointly beneficial results.

Notably, just prior to IMMA's distribution of its standard Model Management Agreement to its members in May 1993, its counsel Edward Klagsbrun ("Klagsbrun") found serious antitrust problems with pertinent sections. Klagsbrun noted in an April 6, 1993 memorandum to co-IMMA counsel David Blasband ("Blasband") that "any agreement suggested by a trade association to its members who **[*36]** are competitors is inherently suspect and vulnerable to attack from the point of view of Federal and state ***antitrust law***." Pl. Exh. 65. In this same memorandum, Klagsbrun stated that "if it is in any way mandated rather than suggested it is unlawful per se." *Id.* Klagsbrun instructed that "the risks associated with the proposed agreement … may be reduced by … making it clear to all members on the record that it is a recommended agreement and that agencies are entirely free to develop their own agreements …" *Id.* When this "proposed form of management agreement" was sent to IMMA members on or about May 7, 1993, Blasband was careful to instruct that "there are no financial terms incorporated in this form, and none are suggested. Each manager should insert in their form the financial terms that they have negotiated with models, as well as any other terms that they believe should be added, deleted from or otherwise modify the enclosure." Pl. Exh. 75 at 1. [13] However, in July 1993, Casablancas sent Blasband a draft of the letter that he wished to circulate among IMMA members -- a letter which can, without much embellishment, be read to urge agreement on forbidden terms such **[*37]** as rates, fees, and commissions. Pl. Exh. 79 at M&SX 01938-01940. For example, Casablancas wrote that "Blasband took note of our 'wish list' of elements to be included into the contract" but that "unfortunately some elements could be interpreted as restraining models trade, and therefore can not be included …" *Id.* at M&SX 01938. Casablancas explained further that "it will be up to each agency thereafter to add, on an individual basis, the elements that they feel are missing; but such additions may not be discussed collectively." *Id.* With regard to a clause concerning agreements between competitors as to models who switch agencies, Casablancas explained that while this issue could not be decided "collectively," "there is nothing objectionable about this type of agreement existing between managers on a one to one basis." *Id.* at M&SX 01939. Further, with regard to the reimbursement of models' debts, Casablancas similarly offered that "even though there

[13] Defendants rightly assert that form contracts are efficiency-enhancing tools that do not violate ***antitrust law*** when the use of the form contract is voluntary and the rate or fee is left blank. *See* U.S. Dep't of Justice, Antitrust Division, Business Review Letter 02-7 (Nov. 15, 2002).

may not be a concerted agreement, there can exist a substantial amount of information that allows each agency, if it so wishes, to harmonize their policies with other members of their profession." *Id.* As to "payments and **[*38]** advances to models," Casablancas stated that while "we may <u>not</u> agree on a common policy … there is nothing wrong with individual managers, informing each other case by case about their own methods of payment …" *Id.* at M&SX 01940. In general, Casablancas urged that while "the guidelines set by the law are clearly strict and [] limit IMMA's ability, as an association, to discuss certain matters or to take any decision that could, in anyway [sic], be interpreted as a restraint of trade for either models, other competitors, or clients … it is obvious that a certain harmonization of systems can only benefit our profession …" *Id.* Casablancas closed his letter with the following plea: "our attorney and Joey Hunter will include into our model contracts as many common elements as the law permits, the rest can only be left to each manager's individual initiative." *Id.* While it is unclear whether Casablancas' letter was ever circulated, it provides evidence that management companies -- members of IMMA and beyond -- may have entered into implicit agreements on terms that were omitted from the model contract.

[*39] Despite advice of counsel as to the antitrust problems associated with mandating any agreement, by cover letter of August 16, 1993, Hunter circulated a draft of the model contract and wrote that he felt that it was "a very good contract for IMMA Members to **endorse.**" Pl. Exh. 78 (emphasis added). Similarly, draft IMMA meeting minutes from September 15, 1993 reflect that "members who <u>had</u> received copies of the draft agreement were in agreement that the contract was ready to be adopted." Pl. Exh. 81 at M&SX 01889. While it is unclear who objected to the words "ready to be adopted," it is obvious that someone recognized that a record reflecting the "adoption" by the members could be seen to contradict the advice of counsel that the agreement must not be "in any way mandated." These IMMA minutes were later amended to replace the troublesome language with the words "in good order." Pl. Exh. 83 at M&SX 01580. Shortly after IMMA adopted its standard Model Management Agreement in 1993, plaintiffs assert that four defendants, Ford, IMG, Next, and Wilhelmina, inserted substantially identical language in the section stating that models understood that managers were also "entitled to **[*40]** receive a service charge from clients." Pl. Exhs. 305 (Ford Agreement), 306 (IMG Agreement), 308 (Next Agreement), 309 (Wilhelmina Agreement).

2. <u>About Terms, Conditions, and Practices</u>

An internal Elite memorandum, [14] reflecting discussions at a January 21, 1980 IMMA meeting, suggests that members entered into tentative agreements concerning cancellation fees. In this memoranda, Zagami explains to Casablancas and Pillard, all of Elite, that "as you recall my discussion with you, this matter was brought up at the first meeting and at that time it was decided that this was a policy **we would only <u>try</u> to implement.** However, the other agencies went ahead without notifying Elite that **they had put this into effect.** Pl. Exh. 13 at EL 04072 (bold emphasis added). An Elite memorandum from a May 5, 1982 IMMA meeting reflects an agreement between G. Ford and Zagami about "problem clients," namely that "if we work together … we will eliminate additional work or collection problems." Pl. Exh. 16 at EL 04101. This same memorandum also provides evidence of an agreement between IMMA members, that was formalized in a letter from IMMA to the Fashion Photographers Association, **[*41]** that "tentative bookings when cancelled by photographers are not billed as cancellations" so "no model could be charged if the model or agency does not honor a tentative." *Id.* at EL 04102.

IMMA minutes also reflect that IMMA members adopted uniform schedules for the Christmas holiday. For example, in 1990, "it was confirmed that **[*42]** IMMA agencies will close … on Friday, December 21 and reopen on Wednesday, January 2." Pl. Exh. 47. And, in 1992, "all agencies agreed to be closed December 24th and to reopen January 4th 1993." Pl. Exh. 54 at FORD 058322. Similarly, in 1993, "members agreed to close at 6:00 P.M. December 23, 1993 and to re-open on January 3, 1994." Pl. Exh. 81 at M&SX 01890. The fact that IMMA members

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[14] Defendants argue that plaintiffs, in opposing summary judgment, may not rely on internal Elite memoranda, summarizing IMMA meetings, which have yet to be authenticated, as the non-movant may only rely on "such facts as would be admissible in evidence." *Fed. R. Civ. P. 56(e)*. While defendants are correct as to *Rule 56(e)*'s requirement on admissibility, I have no reason to believe that these memoranda are inherently inadmissible, and instead find, based on the arguments presented at this stage, that plaintiffs may, for example, authenticate these documents as business records pursuant to Federal Rule of Evidence ("Fed. R. Evid.") 803(6).

realized the benefit in eliminating differences among them in seemingly innocuous areas such as holiday schedules, lends credence to plaintiffs' assertion that IMMA members agreed to significantly more crucial details. At the very least, the inference to be drawn from these minutes raises an issue of fact for the jury.

Plaintiffs also provide evidence that IMMA has "generally accepted rules by which we all agree to ethically operate," which include "never offering a model a guarantee to intice [sic] a model to leave an agency at which they were happy, to come to your agency." In particular, plaintiffs offer a November 27, 1991 letter from Millie Pellet ("Pellet") of Next to Esch, copying all members of IMMA, bringing to light that Esch broke this rule with regard to a particular model, Michele Weweje. **[*43]** Pellet wrote that "if I am naive in believing what is said and agreed to by all of the participating agencies, then the IMMA meetings are just a waste of everyone's time." Pl. Exh. 52. While this agreement alone obviously strikes at the essence of competition, Pellet's statement is broad enough to warrant a general inference that the "generally accepted rules" forbade additional actions that could stir competition.

The record also contains a November 18, 1993 memorandum from Blasband to Klagsbrun, requesting that Klagsbrun "look over the attached resolution, which may have actually been voted on as an amendment to IMMA's by-laws back in 1979" because Blasband believed that the resolution "may violate the antitrust laws." Pl. Exh. 90 at M&SX 01831. The resolution, which begins: "Upon motion duly made, seconded, and unanimously carried, it is RESOLVED …" establishes a system whereby, in the event of a change in representation from one New York agency to another, a model's debts with the first agency would be subsumed by the second. *Id.* at M&SX 01832. Subsequently, the minutes from a March 30, 1995 IMMA meeting reflect that "an additional document purporting to be an agreement **[*44]** among the membership of IMMA has been found in the IMMA files … The members of IMMA do not recognize the document or its validity." The members then voted unanimously that "the document has no force or effect and does not constitute either a by-law of IMMA or an agreement among its members." Pl. Exh. 123 at DEVX 04328. In this manner, IMMA members rid themselves of this problematic resolution in a manner that questioned, perhaps dishonestly, its validity and hinted that it had never been adopted by IMMA. [15]

ii. *Sufficiency of Evidence To Establish Price-Fixing Conspiracy*

While I agree with defendants that the majority **[*45]** of this evidence more directly demonstrates agreement on elements other than models' commissions, about which, for other reasons, plaintiffs' claims do not survive (*see infra*), I do not agree that, as a result, such evidence is irrelevant. Rather, I find that the extensive evidence of agreements between IMMA members, on various components of their businesses, such as client service fees, holiday closing schedules, cancellation policies, and penalties borne by management companies who attract models from competitors, may reasonably be inferred to demonstrate an industry inundated with collusion. [16] This evidence provides additional support for an inference of collusion on models' commissions.

[*46] Despite the artful innocent explanations that defendants have offered for their parallel pricing, and sworn testimony, expressly refuting that any conspiracy occurred, the fact that "associations are not walking conspiracies" [17] (*AD/SAT v. Assoc. Press, et al., 920 F. Supp. 1287, 1308 (S.D.N.Y. 1996)* (citation omitted), *aff'd,* 181 F.3d 216

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[15] Notably, at an IMMA meeting on January 21, 1980, "all members were very much in favor of instituting" "an agreement among ourselves whereas any model debt will be honored by any agency in the event the model should switch agencies." Pl. Exh. 14 at EL 04086-04087. "John mentioned the procedure at Elite wherby [sic] all models sign a letter to this effect …" *Id.* at EL 04086.

[16] I find plaintiffs' reliance on *Fed. R. Evid. 404*, as the basis for which to allow evidence of collateral agreements to establish a conspiracy on models' commissions, to be inapposite. *Rule 404*, as an evidentiary rule, pertains to the *admissibility* of evidence, not to the *sufficiency* of evidence on a summary judgment motion in an antitrust case.

[17] *See In re Citric Acid Litig., 191 F.3d 1090, 1098 (9th Cir. 1999)*("Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services."), citing *Maple Flooring Mfrs.*

(2d Cir. 1999)), and that HN20[] "the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred" (Capital Imaging, 996 F.2d at 545 (citation omitted)), when analyzed together, as it must be, the evidence of parallel pricing coupled with the evidence of discussions and agreements among association members, demonstrates a material issue of disputed fact as to whether IMMA members acted independently with regard to models' commissions. *See* In re Med. X-Ray Film Antitrust Litig., 946 F. Supp. at 220 ("Despite the plausibility of defendants' innocent explanations for the circumstantial evidence plaintiffs have presented when considered piece by piece, this evidence when taken in combination tends to exclude the possibility that **[*47]** defendants acted independently in setting their prices for medical x-ray film each year.").

Plaintiffs have established that all defendants who were members of IMMA, and therefore participated **[*48]** in or were privy to the conversations and agreements discussed above, "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Int'l Distribution Centers, Inc., 812 F.2d at 793. None of these defendants have sufficiently established, through their cessation of involvement in IMMA, that they withdrew from the alleged price-fixing conspiracy. Even the strongest cases, where certain defendants terminated their membership because they disagreed with particular agreements adopted by the association, do not establish such defendants' withdrawals from the alleged price-fixing conspiracy, as these contested agreements were collateral to the conspiracy on models' commissions. [18] **[*49]** Therefore, Ford's, G. Ford's, [19] Wilhelmina's, Elite's, Next's, IMG's, Click's, Images, and MMC's motions for summary judgment on plaintiffs' claim of a conspiracy to fix models' commissions are denied.

Despite the fact that HN24[] "once a conspiracy is shown, only slight evidence is needed to link another defendant with it" (Apex Oil Co., 822 F.2d at 257, quoting United States v. Wilkinson, 754 F.2d 1427, 1436 (2d Cir. 1985) (citations omitted)), there is still insufficient evidence to link Que to any illegal price-fixing scheme. It is undisputed that Que has never been a member **[*50]** of IMMA or MMC and has never even attended a meeting of either association. Further, plaintiffs fail to highlight any discussions that Que had with any of the other defendants, from which Que's participation in the alleged conspiracy could be inferred. Instead, plaintiffs argue that the fact that the contracts utilized by Que resembled the ones utilized by the other defendants, especially with regard to the classification of the companies as management rather than employment agencies, coupled with the concept that when Que opened in 1998, two of its employees had previously worked for management companies with ties to

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Ass'n v. United States, 268 U.S. 563, 567, 69 L. Ed. 1093, 45 S. Ct. 578 (1925). Here, IMMA members engaged in significantly more than "gathering information about pricing and competition."

[18] *See* Drug Mart Pharm. Corp. v. Am. Home Prods. Corp., 288 F. Supp. 2d 325, 328-329 (E.D.N.Y. 2003) HN21[] ("To withdraw from a conspiracy, a defendant must show: (1) 'affirmative acts inconsistent with the object of the conspiracy,' that are (2) 'communicated in a manner reasonably calculated to reach co-conspirators.' United States v. United States Gypsum Co., 438 U.S. 422, 464-65, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978); Hyde v. United States, 225 U.S. 347, 369, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). 'Mere cessation of activity is not enough.' United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964); United States v. Greenfield, 44 F.3d 1141, 1149 (2d Cir. 1995). A defendant must take an affirmative action 'to disavow or defeat the purpose of the conspiracy,' United States v. Nerlinger, 862 F.2d 967, 974 (2d Cir. 1988) (quoting United States v. James, 609 F.2d 36, 41 (2d Cir. 1979)), 'to make sure that a withdrawal did occur and is not simply being invented ex post,' Greenfield, 44 F.2d at 1150. HN22[] Until affirmative evidence of withdrawal has been produced, a defendant's participation in the conspiracy is presumed to continue until the last overt act by any of the conspirators. United States v. Panebianco, 543 F.2d 447, 453 (2d Cir. 1976). The burden of demonstrating withdrawal lies on the defendant. *See* United States v. Berger, 224 F.3d 107, 118 (2d Cir. 2000); James, 609 F.2d at 41; Borelli, 336 F.2d at 388. Whether a defendant withdrew from a conspiracy is often a question of fact for the jury, *see, e.g.,* Panebianco, 543 F.2d at 454 n.5; Borelli, 336 F.2d at 390; however, when the material facts are not disputed, courts have decided the issue as a matter of law, *see, e.g.,* United States v. Goldberg, 401 F.2d 644, 648-49 (2d Cir. 1968); Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 839 (11th Cir. 1995) …").

[19] Because HN23[] a "corporate officer can also be held liable in civil antitrust actions" under Section One of the Sherman Act (New York ex rel. Spitzer v. Feldman, 01 Civ. 6691, 2003 U.S. Dist LEXIS 11759, at *8 (S.D.N.Y. July 10, 2003) (denying summary judgment for an individual dealer), citing 15 U.S.C. § 15c)), G. Ford may be held liable in his representative capacity. Notwithstanding G. Ford's assertions to the contrary (G. Ford Decl. PP 22, 37), the evidence discussed *supra,* in addition to G. Ford's concession that "only liars like competition" (Pl. Exh. 283 at 138:10-15), allows for a reasonable inference that G. Ford participated in the conspiracy.

IMMA and the alleged conspiracy, together establishes Que's involvement. [20] I disagree. Although plaintiffs assert that the two individuals who came to Que from other management companies, carried with them information about the price-fixing conspiracy and other illicit agreements, whereby infecting Que, plaintiffs offer no evidence to establish that these two individuals actually convinced Que to join the conspiracy, or for that matter, to act in any way upon any such information. While this Court credits plaintiffs' theory as credible, albeit a bit of a stretch, the **[*51]** inference urged by plaintiffs does not "tend to exclude the possibility that [Que was] acting independently in following the pricing pattern of the industry." *Monsanto Co. v. Spray-Rite Serv. Co., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. Therefore, Que's motion for summary judgment on plaintiffs' models' commissions claim, is granted.

b. *Conspiracy to Fix Client Service Fees*

Plaintiffs also seek to recover damages from defendants' alleged price-fixing conspiracy to fix, at an inflated rate, the service fee charged to clients (those who hired models), based on a theory that clients would have been more willing to pay plaintiffs a higher rate for their services had they not been charged an inflated fee by defendants. While there is evidence of significant inter-firm communication about instituting and raising client service **[*52]** charges, as demonstrated *supra,* plaintiffs are not the proper class to assert this claim.

HN25[] In order to recover for an alleged antitrust violation, a plaintiff must have suffered "the kind of injury that the antitrust laws were directed at." *G.K.A. Beverage Corp., et al. v. Honickman, et al., 55 F.3d 762, 766 (2d. Cir. 1995)*, citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. And, a plaintiff must have antitrust standing, which fails where "the indirectness of the asserted injury, the speculative nature of the damage theory, the risk of duplicative recoveries and the danger of complex apportionment" are at issue. *Triple M Roofing Corp. v. Tremco, Inc., 753 F.2d 242, 247 (2d Cir. 1985)*, citing *Assoc. Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. *See also* *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* (indirect purchasers lack standing to recover for antitrust violations). In this case, the clients, as they were the parties directly charged the allegedly inflated service fees, not the models, whose injury, if any, is indirect and speculative, **[*53]** would be the proper plaintiffs.

> ***HN26***[] A customer of a customer who is overcharged … does not have antitrust standing … it is difficult to calculate the damages suffered by an indirect purchaser. The indirect purchaser is only damaged to the extent that the direct purchaser passes on to it the overcharge resulting from the anticompetitive conduct. Any such calculation would be imprecise and could result in double recovery if both the direct and indirect purchasers sue and the calculations in their suits differed.

Law Offices of Curtis V. Trinko, L.L.P., et al. v. Bell Atlantic Corp., 305 F.3d 89, 106 (2d. Cir. 2002), *rev'd and remanded on other grounds sub nom.* *Verizon Commns., Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, citing *Illinois Brick, 431 U.S. at 737-47*.

In this case, as in *Illinois Brick,* the plaintiffs are not the direct victims, but rather seek damages based on an argument that overcharges have been passed down the stream. It is clear beyond cavil that the clients, whom defendants allegedly charged a fixed inflated service fee, suffered the most direct injury. Therefore, as **[*54]** indirect victims, plaintiffs lack antitrust standing to assert a claim that carries the potential for duplicative recovery. Further, plaintiffs' damage theory -- that clients would have been willing to pay more for their services, had they been charged less by defendants -- is highly speculative. This Court finds possible defendants' assertion that if defendants had not recouped this needed capital from their clients, by way of increased service fees, they would have looked to plaintiffs to supplement their profits, by way of further increases in commissions. While it is impossible to know with any definiteness exactly what would have ensued, had defendants not increased the service fees, one thing is clear -- and that is that any damage suffered by plaintiffs is wholly speculative. Therefore,

[20] Que contests both that its contracts parallel those of the other defendants and also that anyone on its staff was ever a former executive of any of the other defendants.

plaintiffs' claim that defendants conspired to fix the service charges invoiced to their clients is dismissed, as against all defendants, for lack of standing.

2. Rule of Reason Claims

HN27[] In the preponderance of cases (those not within the *per se* illegal categories), a plaintiff must establish an antitrust injury under the rule of reason. "Under this test plaintiff bears the initial burden **[*55]** of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging, 996 F.2d at 543* (emphasis in original). "The traditional indicators of an adverse effect [are] reduced output, increased price, or decreased quality …" *Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp., 262 F. Supp. 2d 50, 78 (S.D.N.Y. 2003)*, citing *Virgin Atlantic Airways, Ltd., 257 F.3d at 264*. ***HN28***[] A plaintiff may establish antitrust injury by proving that the defendant possesses sufficient "market power" to hinder competition "on a market-wide basis." *Dresses For Less, Inc., 2002 U.S. Dist. LEXIS 18338, at *19*. "Such power is defined as the power to 'raise prices significantly above the competitive level without losing all of one's business.' *Id.,* citing *CDC Techs., Inc., 186 F.3d at 81*, quoting *Capital Imaging, 996 F.2d at 546*. ***HN29***[] Through requiring that a plaintiff demonstrate injury to a relevant market, the Sherman Act protects competition within a market, **[*56]** instead of "the individual competitors within that market." *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998)*, citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342-44, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*. Once a plaintiff has fulfilled its initial burden of proof, the burden shifts to the defendant to provide evidence of the "pro-competitive 'redeeming virtues' of their combination." *Capital Imaging, 996 F.2d at 543* (citation omitted). If the defendant can make this showing, the burden shifts back to the plaintiff "to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole." *Id.* (citations omitted).

HN30[] A Court's rule of reason analysis involves a weighing of harms and benefits in order to make a determination as to whether conduct "purports to promote or to destroy competition." *Capital Imaging, 996 F.2d at 543*.

> ***HN31***[] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether **[*57]** it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, therefore reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id., citing *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*. ***HN32***[] "In carrying out a rule of reason analysis, 'the existence of (less restrictive) alternatives is obviously of vital concern in evaluating putatively anticompetitive conduct.'" *North Am. Soccer League, et al. v. Nat'l Football League, et al., 670 F.2d 1249, 1259 (2d Cir. 1982)*, citing *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979)*.

a. *Conspiracy* [*58] *to Evade Article 11*

Plaintiffs argue, in Count II of their complaint, as a separate and distinct Section One violation, that defendants conspired to evade Article 11, by collusively holding themselves out to be management companies, entitled to charge commissions greater than the ten percent cap imposed by Article 11. Although plaintiffs have, in their complaint, throughout the discovery process, and again in their summary judgment opposition, taken the position that this claim is also a *per se* violation (3d Am. Compl. P 109; Pl. 56.1 Opp. P 129 ("Market share is irrelevant in a per se case."); Oral Argument Transcript, 3/9/04 ("Oral Arg. Tr.") at 46:9-11), they have not provided any foundation for such an argument, either directly or by analogy. Because of their reliance on this position, plaintiffs have also failed to make the necessary showing required for a rule of reason claim, i.e., to define the relevant market, or demonstrate the anti-competitive effects of this alleged conspiracy. Summary judgment is granted for all defendants on plaintiffs' Count II claim, of a conspiracy to evade Article II (rather than a conspiracy to fix prices above ten percent which is subsumed **[*59]** in the surviving Count I) as a result of insufficient evidence.

b. *Conspiracy to Fix Terms and Conditions of Employment*

Similarly, to the extent that Count III of plaintiffs' complaint asserts, as a separate and distinct Sherman Act violation, a claim based on defendants' alleged conspiracy to fix various terms and conditions of models' employment, this claim also fails. Although it is difficult to make out exactly what claim Count III is asserting, it is clear that Count III does not purport to comprise a *per se* claim, and even alleges market power, a touchstone of a rule of reason claim. Therefore, as to this claim, plaintiffs have the burden of establishing the relevant market, and demonstrating the antitrust injury associated with the violation. However, as explained *supra,* plaintiffs fail to present any evidence to support a rule of reason claim. Therefore, to the extent that plaintiffs did not also voluntarily withdraw this claim at oral argument (Oral Arg. Tr. at 52:2-4) ("We'd be prepared, your Honor, not to proceed on Count 3 as a rule of reason claim in order to streamline the issues"), this claim is hereby dismissed as to all defendants. [21]

[*60] III. CONCLUSION

For the foregoing reasons, defendants' summary judgment motions are granted-in-part and denied-in-part. All of plaintiffs' claims against defendant Que are dismissed on the basis of insubstantial evidence to support an inference of Que's participation in any alleged conspiracies. Plaintiffs' Sherman Act claim, based on a conspiracy to fix client service fees, is dismissed against all defendants, on the basis of lack of standing. Further, plaintiffs' conspiracy to evade Article 11 claim is dismissed against all defendants, as it is either duplicative of plaintiffs' price-fixing claim, or insubstantially established pursuant to the rule of reason. Similarly, plaintiffs' claim of a conspiracy to fix the terms and conditions of models' employment, is dismissed as to all defendants for failure to substantiate the claim under the rule of reason. Finally, Plaintiffs' price-fixing models' commissions claim survives the motions to dismiss of all defendants other than Que. The Clerk is requested to close all motions made pursuant to *Rule 56*.

IT IS SO ORDERED.

March 29, 2004

Harold Baer, Jr.

U.S.D.J.

End of Document

[21] While this claim does not survive on its own, as discussed *supra,* evidence of agreements as to various terms and conditions of models' employment is admissible as probative of an agreement on models' commissions.

Flash Elecs. v. Universal Music

United States District Court for the Eastern District of New York

March 31, 2004, Decided

CV 01-979 (RJD)

Reporter

312 F. Supp. 2d 379 *; 2004 U.S. Dist. LEXIS 6018 **; 2004-1 Trade Cas. (CCH) P74,395

FLASH ELECTRONICS, INC. and EAST TEXAS DISTRIBUTING, INC., Plaintiffs, -against-UNIVERSAL MUSIC & VIDEO DISTRIBUTION CORP., UNIVERSAL STUDIOS HOME VIDEO, INC., INGRAM ENTERTAINMENT, L.L.C., V.P.D. IV, INC., V.P.D., INC. a/k/a VIDEO PRODUCTS DISTRIBUTORS, Defendants.

Subsequent History: Sanctions disallowed by, Partial summary judgment granted by Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp., 2010 U.S. Dist. LEXIS 135324 (E.D.N.Y., Dec. 15, 2010)

Disposition: **[**1]** Defendants' motion to dismiss all of plaintiffs' claims granted in part and denied in part.

Core Terms

videos, plaintiffs', contracts, distributors, allegations, competitors, relevant market, prices, retailers, monopolization, wholesale distributor, tortious interference, customers, monopoly, products, conspiracy, wholesale, movie, per se rule, manufacturer, terminated, courts, studios, motion to dismiss, anticompetitive, distributorship, price discrimination, interbrand, cases, rule of reason

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A court considering a Fed. R. Civ. P. 12(b)(6) motion must assess the legal feasibility of the complaint. The court must determine not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. In assessing the adequacy of the complaint, the court must take all of the allegations contained therein as true and draw all reasonable inferences in favor of the plaintiff. A court may dismiss a complaint under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Regulated Practices, Private Actions**

In the context of antitrust cases, the generous approach to pleading continues to apply. Indeed, especially in antitrust cases, where the inquiries a court must conduct are often extremely fact-intensive, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Despite this deferential standard, conclusory allegations which merely recite the litany of antitrust will not suffice. Moreover, it is inappropriate for the court to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN4[] **Vertical Restraints, Price Fixing**

Despite its broad language, the Sherman Act prohibits only contracts or agreements that unreasonably restrain trade. Courts analyze the legality of such agreements using one of two frameworks: either the per se approach, or the rule of reason. In general, there is a presumption against applying the per se rule. Courts should only apply the per se rule in limited circumstances when the agreement at issue is of the sort that has proven so manifestly anticompetitive in the past that because of its pernicious effect on competition and lack of any redeeming virtue is conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm it has caused or the business excuse for its use. Examples of per se unlawful conduct include horizontal and vertical price-fixing, and certain types of group boycotts. Absent these special circumstances, courts should conduct a rule of reason analysis and consider all of the circumstances of the case, such as the nature of the market and market participants involved, in determining whether the agreement at issue has an actual adverse effect on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

HN5[] **Vertical Restraints, Nonprice Restraints**

As a general matter, restrains imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints. An exclusive distribution arrangement, as it involves a vertical non-price restriction between a manufacturer and a distributor, is therefore typically analyzed under the rule of reason unless there is some evidence of price-fixing. This rule holds true even for "dual distribution" systems where the manufacturer supplies its product to wholesale distributors and also sells its product directly to retailers, thereby operating on two different market levels simultaneously.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Courts have refused to place exclusive distributorship agreements within the category of per se restraints not simply because they are vertical in nature, but because vertical restrictions on intrabrand competition often have the procompetitive effect of increasing interbrand competition in the relevant market. Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. Moreover, the severity of the intrabrand competitive restrictions are kept in check by the manufacturers themselves, because manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. Accordingly, manufacturers should be given wide latitude in determining the profile of its distributorships. Indeed, absent a showing of price-fixing or an anticompetitive effect on the market as a whole, run-of-the-mill exclusive distributorship agreements are presumptively legal. This presumption falls squarely in line with the general principle articulated by the United States Supreme Court at a very early stage in the development of ***antitrust law*** that a manufacturer is free to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Practices Governed by Per Se Rule, Boycotts**

The United States Supreme Court has warned against expanding the category of restraints classed as group boycotts, observing that courts should exercise great caution in extending per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. Precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] **Practices Governed by Per Se Rule, Boycotts**

The per se approach generally applies if a group boycott was not justified by plausible arguments that it was intended to enhance overall efficiency and make markets more competitive. A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their price-cutting competition by cutting his access to supplies.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN10[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Manufacturers who wish to create an exclusive distributorship must be allowed to communicate with those distributors who will be a part of the distribution scheme. Moreover, it is not even inappropriate, absent evidence of price-fixing, if the impetus for the exclusive distributorship came from the distributors, rather than the manufacturer. Vertical restrictions employed to enforce an exclusive distributorship arrangement, sometimes called "anti-bootlegging" provisions, are not per se unlawful and do not convert the arrangement into an impermissible horizontal boycott among distributors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Scope

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The decision to terminate a distributor in order to create an exclusive distributorship will be analyzed under the per se rule against price-fixing only if there is evidence of a further agreement on the price or price levels to be charged by the remaining dealers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

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

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

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order for a price-fixing claim to survive, it is essential that plaintiffs properly define a relevant market where the alleged anticompetitive effects are being felt. The alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand -- and it must be plausible. Dismissal pursuant to *Fed. R. Civ. P. 12(b)(6)* is therefore appropriate if a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to the cross-elasticity of demand. At the same time, courts must remember that market definition is a deeply fact-intensive inquiry, and thus courts should hesitate to grant motions to dismiss for failure to plead a relevant product market. In general, courts have granted dismissals for failure to allege a relevant market in cases that have involved (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] Per Se Rule & Rule of Reason, Sherman Act

To state a claim for a rule of reason violation under *15 U.S.C.S. § 1*, a plaintiff must allege that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Stated differently, the Sherman Act protects competition as a whole in the relevant market, not the individual competitors within that market. Furthermore, a plaintiff must also allege more than just an adverse effect on competition among different sellers of the same product ("intrabrand" competition). Rather, a plaintiff must demonstrate that the challenged actions diminish overall competition, and hence consumer welfare. A plaintiff can demonstrate an adverse effect on competition in one of two ways. Either it can show an actual adverse effect on competition, such as reduced output, or it can demonstrate adverse effect indirectly by establishing that the defendant had sufficient market power to cause an adverse effect on competition. If a plaintiff uses the latter method, however, they must allege more than just market power, but also that there are other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherently anticompetitive nature of defendant's behavior or the structure of the interbrand market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN14[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN15[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act prohibits three separate offenses: monopolization, attempted monopolization, and conspiracy to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN16[] **Monopolies & Monopolization, Actual Monopolization**

To state a claim for monopolization, plaintiffs must allege (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN17[] **Monopolies & Monopolization, Attempts to Monopolize**

To state a claim for attempted monopolization, plaintiffs must allege (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In determining whether there is a dangerous probability of success, courts must evaluate defendant's economic power in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN18[] **Monopolies & Monopolization, Conspiracy to Monopolize**

To state a claim for conspiracy to monopolize, plaintiffs must allege (1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

HN19[] **Sherman Act, Claims**

The United States Court of Appeals for the Second Circuit has specifically indicated that it will not entertain arguments based on a "shared monopoly" theory of liability.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN20[] **Robinson-Patman Act, Claims**

In order to state a claim of secondary-line price discrimination under *§ 2(a)* of the Robinson-Patman Act, plaintiffs must establish four facts: (1) that the seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition. A prohibited effect on competition may be inferred from evidence that an individual competitor suffered injury from a substantial price difference over time.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN21[] **Price Discrimination, Competitive Injuries**

Primary line price discrimination occurs where the seller's price discrimination harms other sellers. Secondary-line price discrimination occurs where the seller's price discrimination harms competition among the seller's customers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN22[] Robinson-Patman Act, Claims

Sections 2(d) and 2(e) of the Robinson-Patman Act prohibit indirect price discrimination in the form of advertising and other promotional allowances made available to purchasers on disproportionate terms.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN23[] Price Discrimination, Buyer Liability

In order for a buyer to be liable under § 2(f) of the Robinson-Patman Act for receiving an illegal price discrimination, the plaintiff must first show that the seller is liable under § 2(a) of the Act. Having adequately alleged a § 2(a) claim against the seller, the plaintiff must show that the buyer knowingly induced or received a discrimination in price which is prohibited. 15 U.S.C.S. § 13(f). The knowledge requirement may be satisfied by showing that the buyer had either actual knowledge, i.e., he or she must have known that the price in question was illegal, or constructive knowledge, i.e., he or she must have been reasonably cognizant of its illegality.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN24[] Business Torts, Fraud & Misrepresentation

Under New York law, to hold a defendant liable for fraud, a plaintiff must prove four elements: (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN25[] Heightened Pleading Requirements, Fraud Claims

Fraud actions are also subject to the heightened pleading requirements of Rule 9(b), which require that the circumstances constituting fraud or mistake be stated with particularity. Fed. R. Civ. P. 9(b). The elements of knowledge or intent, however, may be alleged generally. Fed. R. Civ. P. 9(b).

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN26[] **Pleadings, Heightened Pleading Requirements**

To satisfy *Fed. R. Civ. P. 9(b)*'s particularity requirement, a plaintiff's complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. Moreover, where multiple defendants are involved, the rule requires that the complaint allege facts that specify each defendant's connection to the fraud. The false representation need not have been made by the defendant personally. If he authorized and caused it to be made it is the same as though he made it himself. However, bare allegations that a defendant aided, abetted, assisted, connived with and acquiesced in the fraud are insufficient to state a cause of action.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN27[] **Contracts Law, Breach**

Under New York law, the elements of a tortious interference claim are: 1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of the contract; 3) defendant's intentional procurement of the third party's breach of contract; 4) actual breach of the contract, and 5) damages resulting from the breach. The plaintiff must allege each of these elements in a non-conclusory fashion in the complaint. If multiple contracts are at issue, the complaint must specify the particular contracts that have been interfered with by the defendant. The exact level of specificity, however, is not a settled matter. Nevertheless, it is clear that the plaintiff must present at least some specific facts which put the defendant on notice as to which contracts they are accused of interfering with.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN28[] **Contracts Law, Breach**

Where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN29[] **Intentional Interference, Elements**

There are more demanding requirements for proving interference with prospective contractual relations and contracts that are terminable at will. In such contracts, a defendant's status as a business competitor may excuse him from liability for tortious interference, so long as the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful. "Wrongful means" have been further defined as including physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure but not persuasion alone although it is knowingly directed at interference with the contract.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN30[] **Breach of Contract Actions, Elements of Contract Claims**

Under New York, California and Texas law, the essential elements of a breach of contract claim in federal court are: (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages. Such elements need not be pleaded extensively or individually; they need only constitute a short and plain statement showing that the pleader is entitled to relief.

Counsel: For Plaintiffs: Frederic B. Goodman, Esq., Marin Goodman, LLP, New York, NY.

For Universal Music & Video Distribution Corp. & Universal Studio Home Video, Inc., Defendants: Stuart N. Senator, Esq., Munger, Tolles & Olson, LLP, Los Angeles, CA.

For Ingram, Defendant: James K. Leader, New York, NY.

For Ingram, Defendant: John Calendar, Howrey, Simon, Arnold & White, LLP, Washington, D. **[**2]** C.

For V.P.D. IV, Inc., VPD, Inc., Defendants: Johnathan M. Johnson, Abid Qureshi, Robert Alan Johnson, Akin, Gump, Strauss, Hauer & Feld, LLP, New York, NY.

Judges: RAYMOND J. DEARIE, United States District Judge.

Opinion by: RAYMOND J. DEARIE

Opinion

[*382] **MEMORANDUM & ORDER**

DEARIE, District Judge.

This case focuses on allegedly anticompetitive conduct of a supplier and two distributors of home videos and digital video devices ("DVDs") in the United States. Plaintiffs Flash Electronics, Inc. ("Flash") and East Texas Distributing, Inc. ("ETD"), both wholesale distributors of videos and DVDs, claim that defendants Ingram Entertainment, L.L.C., Ingram Entertainment, Inc. (individually and collectively, "Ingram"), V.P.D. IV, Inc. and V.P.D., Inc. (individually and collectively, "VPD"), also wholesale distributors of videos and DVDs, have conspired with defendants Universal

Music & Video Corp. and Universal Studios Home Video, Inc. (collectively and individually, "Universal"), suppliers of videos and DVDs, to deny plaintiffs the right to distribute Universal videos and DVDs in violation of the antitrust laws. Plaintiffs **[**3]** claim that defendants' actions violated both *Sections 1and 2* of the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. §§ 1-2*, and the Robinson-Patman Act, *15 U.S.C. § 13*. Plaintiffs also assert state law causes of action for breach of contract, tortious interference with a contractual relationship, and fraud. Defendants bring this motion to dismiss all of plaintiffs' claims pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.* For the reasons discussed below, defendants' motion is granted in part and denied in part.

BACKGROUND

Plaintiffs are two of the six major wholesale distributors of home videos and DVDs in the United States. Competitors Ingram and VPD are also among the six major national video distributors still in business. Universal, along with Sony, Paramount, Twentieth Century Fox, Time Warner and Disney, are the six major movie production studios in the country. Each of them produces and markets home videos and DVDs of motion pictures and television shows. To distribute their product, these studios supply videos and DVDs to wholesale distributors, such as plaintiff, who, **[**4]** in turn, sell or license them to retail outlets in the "sell-through" [1] and rental home video and DVD markets. Universal also sells its product directly to certain larger retail chains.

Plaintiffs assert that in the years prior to 2000, defendants Ingram and VPD began to pressure Universal to make them the exclusive distributors of Universal videos and DVDs in the United States. Plaintiffs contend that in September 2000 Ingram, VPD and Universal began negotiations to effectuate this plan. According to plaintiffs, the defendants met several times, in person and by telephone, and discussed plans concerning this venture. Plaintiffs specifically mention one meeting that allegedly took place at the Broadmoor Hotel in Colorado Springs, Colorado from **[*383]** September 18, 2000 to September 20, 2000. Am. Compl. P 65.

Plaintiffs maintain that defendants eventually reached an agreement that gave Ingram **[**5]** and VPD exclusive rights to distribute Universal Videos in the rental market. According to the complaint, Universal also entered into an agreement with Valley Media, Inc. ("Valley"), another wholesale distributor, giving it the right to distribute Universal videos and DVDs in the "sell-through" market. [2] Plaintiffs contend that the agreements required the distributors "to give certain exclusive and favorable terms to Universal over all other film studios," resulting in more active promotion of Universal products than those of other studios -- an arrangement that plaintiffs analogize to "favored nations" treatment. Id. P 72. Furthermore, according to plaintiffs, Universal's agreements with Ingram and VPD prohibited the two distributors from selling Universal products to plaintiffs. Id. P 76(d).

Once the agreements were completed, defendants allegedly **[**6]** began taking steps to implement their plan. Prior to terminating its agreements with Flash and ETD, Universal asked plaintiffs for confidential customer information supposedly to "better evaluate its business in order to best support the plaintiffs with future promotions." Id. P 66. Plaintiffs maintain, however, that Universal then passed this information along to Ingram and VPD, who contacted these retailers and told them that Flash and ETD were now "unauthorized" to sell Universal videos and DVDs -- a statement that Flash and ETD maintain was, at the time, a misrepresentation because their agreements with Universal had not yet been terminated. Id. PP 73-74, 76(c), 76(f)-(g). Plaintiffs also claim that defendants exerted further pressure on retailers by "bribing" them not to do business with plaintiffs in exchange for free Universal videos and DVDs, and by "coercing" them to agree to buy Universal product from defendants alone, and to agree not to sell Universal product to plaintiffs. Id. P 76(a)-(b), 76(e). Furthermore, plaintiffs claim that defendants threatened to interfere with their supply of films produced by "Dreamworks SKG," another movie studio, if plaintiffs **[**7]** continued to sell Universal products. Id. P 76(i)-(j).

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[1] The "sell-through" market refers to videos and DVDs that are sold to customers of the retail outlets, as opposed to rented.

[2] Valley is not a defendant in this case. Plaintiffs allege upon information and belief that Ingram is in the process of purchasing Valley. Am. Compl. P 31.

In October 2000, Universal terminated its agreements with Flash and ETD. That same month, Ingram purchased a controlling interest in Major Video Concepts, which was, at the time, the second largest of the then eight national wholesale distributors. Plaintiffs allege that this transaction gave Ingram control over roughly 50% of the "video rental market channeled through distributors." Id. P 27. Plaintiffs also assert that VPD controls roughly 25% of the same market, giving the two companies a combined market share of 75%. Id. PP 28-29.

Plaintiffs contend that these agreements have had a profound effect on the wholesale distribution market for home videos and DVDs. According to plaintiffs, retailers prefer to buy videos and DVDs from wholesalers that can provide them with all of the product they require. Hence, those distributors who no longer can supply Universal videos and DVDs are at a distinct disadvantage. Id. PP 39-40. Plaintiffs assert that the effects are already being felt. According to plaintiffs, Valley has been eliminated from the wholesale video and DVD distribution market entirely, see id. **[*384]** P 32, **[**8]** [3] and Baker & Taylor, another wholesale distributor, has recently terminated several employees. Id. P 80. Moreover, plaintiffs assert that Ingram and VPD now possess a market share that allows them to inflate prices. By way of example, plaintiffs note that Universal submitted a June 2001 price quote to a Staten Island retailer for the film "Family Man" that was $ 10 above cost, whereas previously a comparable movie would have been quoted at roughly $ 1 above cost. Id. P 86.

Plaintiffs assert that the agreements between Universal, Ingram and VPD were calculated to eliminate competition in the video rental market and increase prices in violation of the antitrust laws. They claim that the defendants' agreements constitute a "group boycott" that is a per se violation of *Section **[**9]** 1 of the Sherman Act.* Additionally, plaintiffs contend that defendants have engaged in illegal "price-fixing," also a per se violation of *Section 1 of the Sherman Act.* Plaintiffs also claim that the agreements constitute a violation of *Section 1* under the "rule of reason." Furthermore, plaintiffs assert that the agreements threaten to create a monopoly in the video and DVD distribution market in violation of *Section 2 of the Sherman Act.* Plaintiffs also contend that defendants engaged in impermissible price discrimination under the *Robinson-Patman Act.* Finally, plaintiffs maintain that defendants' actions surrounding the termination of plaintiffs' written agreements with Universal support claims for breach of contract, tortious interference with a contractual relationship and fraud.

DISCUSSION

HN1[] A court considering a *Rule 12(b)(6)* motion must "assess the legal feasibility of the complaint." *Global Disc. Travel Servs., LLC. v. Trans World Airlines. Inc., 960 F. Supp. 701, 704 (S.D.N.Y. 1997)*. The court must determine "not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974).* **[**10]** In assessing the adequacy of the complaint, the court must take all of the allegations contained therein as true, *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*, and draw all reasonable inferences in favor of the plaintiff. *Todd v. Exxon Corp., 275 F.3d 191, 197 (2d Cir. 2001)*; *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997)*. A court may dismiss a complaint under *Rule 12(b)(6)* only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Todd, 275 F.3d at 197-98* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80* (1957)).

HN2[] In the context of antitrust cases, the Second Circuit has stated that the "generous approach to pleading outlined in Conley v. Gibson" continues to apply. *Furlong v. Long Island Coll. Hosp., 710 F.2d 922, 927 (2d Cir. 1983)*; *Hamilton Coll., 128 F.3d at 63*; see also *Todd, 275 F.3d at 198* (quoting *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir. 1977)* **[**11]** ("[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules.")). Indeed, especially in antitrust cases, where the inquiries a court must conduct are often extremely fact-intensive, "dismissals **[*385]** prior to giving the plaintiff ample opportunity for discovery should be

[3] Presumably plaintiffs are referring to Valley's presence in the video and DVD rental market, as they have alleged that Valley has the exclusive right to market Universal films in the "sell-through" market. Am. Compl. P 71.

granted very sparingly." Todd, 275 F.3d at 198 (quoting George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998)). Despite this deferential standard, "conclusory allegations which merely recite the litany of antitrust … will [not] suffice." Global Disc., 960 F. Supp. at 704 (quoting John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 163 (S.D.N.Y. 1991)); see also Furlong, 710 F.2d at 927 (conclusory allegations cannot "substitute for minimally sufficient factual allegations"). Moreover, it is inappropriate for the court to assume that the plaintiff can "prove facts that it has not alleged or that the defendants have violated antitrust laws in ways that have not been alleged." Electronics Communications Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 243 (2d Cir. 1997) **[**12]** (quoting Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

A. Section 1 of the Sherman Act

Section 1 of the Sherman Act prohibits **HN3**[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. **HN4**[] Despite its broad language, the Sherman Act prohibits only contracts or agreements that "*unreasonably* restrain trade." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998) (emphasis in original). Courts analyze the legality of such agreements using one of two frameworks: either the per se approach, or the "rule of reason." See Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 263 (2d Cir. 2001); CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 79 (2d Cir. 1999); Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537 (2d Cir. 1993). In general, there is a presumption against applying the per se rule. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); **[**13]** Bogan v. Hodgkins, 166 F.3d 509, 514 (2d Cir. 1999). Courts should only apply the per se rule in limited circumstances when the agreement at issue is of the sort that has proven so "manifestly anticompetitive" in the past that "because of [its] pernicious effect on competition and lack of any redeeming virtue [is] conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977) (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)); accord Bogan, 166 F.3d at 514. Examples of per se unlawful conduct include horizontal and vertical price-fixing, and certain types of group boycotts. See Capital Imaging, 996 F.2d at 542-43. Absent these special circumstances, courts should conduct a rule of reason analysis and consider "all of the circumstances of [the] case," such as the nature of the market and market participants involved, in determining **[**14]** whether the agreement at issue has an actual adverse effect on competition. GTE Sylvania, 433 U.S. at 49.

1. Per Se Violations ("Group Boycott" and "Price Fixing")

Plaintiffs first argue that the agreements between Universal, Ingram and VPD are a per se unlawful horizontal "group boycott" designed to exclude competitors, such as plaintiffs, from the video and DVD wholesale market. Defendants, on the other hand, maintain that the decision to terminate plaintiffs as distributors of Universal product represented **[*386]** nothing more than a completely legal, and rather unremarkable, effort on the part of Universal to restructure its distribution system to grant exclusive distributorships in the wholesale market to Ingram and VPD. Defendants contend that the agreements are therefore more properly characterized as vertical agreements, which are not analyzed under the per se rule absent evidence of price-fixing. Furthermore, defendants argue that their exclusive distributorship agreements with Ingram and VPD have a procompetitive effect on the market by allowing Universal to benefit from a more dedicated sales force which vigorously promotes its product, and in **[**15]** the process, spurs interbrand competition. Accordingly, defendants maintain that these arrangements cannot be subject to per se condemnation.

HN5[] As a general matter, "restrains imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." Sharp Electronics, 485 U.S. at 730; Electronics Communications, 129 F.3d at 243. An exclusive distribution arrangement, as it involves a vertical non-price restriction between a manufacturer and a distributor, is therefore typically analyzed under the rule of reason unless there is some evidence of price-fixing. Id.; Westman Comm'n Co. v. Hobart Int'l. Inc., 796 F.2d 1216, 1224-25 (10th Cir. 1986); see also Sharp

Electronics, 485 U.S. at 735-36 ("[A] vertical restraint is not illegal per se unless it includes some agreement on price."). This rule holds true even for "dual distribution" systems, like the one set up between Universal, Ingram and VPD, where the manufacturer supplies its product to wholesale distributors and also sells **[**16]** its product directly to retailers, thereby operating on two different market levels simultaneously. *Electronics Communications, 129 F.3d at 243*; *Copy-Data Sys., Inc. v. Toshiba Am., Inc., 663 F.2d 405, 408-09 (2d Cir. 1981)*; *Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 142 F. Supp. 2d 296, 302 (E.D.N.Y. 2001)*.

HN6[] Courts have refused to place exclusive distributorship agreements within the category of per se restraints not simply because they are vertical in nature, but because vertical restrictions on intrabrand competition often have the procompetitive effect of increasing interbrand competition in the relevant market. As the Supreme Court recognized in GTE Sylvania, "vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *GTE Sylvania, 433 U.S. at 54*. Moreover, the severity of the intrabrand competitive restrictions are kept in check by the manufacturers themselves, because "manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their **[**17]** products." *Id. at 56*; see also *Westman, 796 F.2d at 1226* ("The only real incentive a manufacturer has to restrict distribution of its product is to make its product more competitive."). Accordingly, manufacturers should be given "wide latitude in determining the profile of its distributorships." *Id. at 1225*. Indeed, the Second Circuit has stated that absent a showing of price-fixing or an anticompetitive effect on the market as a whole, run-of-the-mill exclusive distributorship agreements are "presumptively legal." *IDEXX Lab., 186 F.3d at 80*; *Electronics Communications, 129 F.3d at 245*. This presumption falls squarely in line with the general principle articulated by the Supreme Court at a very early stage in the development of ***antitrust law*** that a manufacturer is free "to exercise **[*387]** his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*.

Plaintiffs attempt to circumvent these principles by characterizing the agreements between the defendants as a horizontal group boycott. Essentially, **[**18]** plaintiffs argue that Ingram and VPD, who are horizontal competitors, conspired to eliminate their rivals and either pressured or enlisted the support of Universal to achieve this goal, all in an attempt to gain market share and increase prices. See Am. Compl. PP 55-58. Plaintiffs also allege that the three defendants had several conversations by telephone and met in mid-September 2000 in order to advance their conspiracy. See id. PP 64-65. Finally, plaintiffs make several allegations that defendants improperly interfered with plaintiffs' business relationships with their retail customers by spreading false information about plaintiffs' authority to carry Universal product before they were, in fact, terminated by Universal as distributors. See id. PP 73-74, 76(f)-(g). Plaintiffs cite several cases in support of their position in which courts applied the per se rule despite the fact that the conspiracy in question was not exclusively horizontal. See, e.g., *Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998)*; *Big Apple BMW, Inc. v. BMW of North Am., Inc., 974 F.2d 1358 (3d Cir. 1992)*; *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 **[**19]** (1966)*; *Klor's. Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*.

Yet even assuming that the events transpired as plaintiffs contend, an assumption the Court must make at this stage, the allegations in the complaint cannot sustain a group boycott claim meriting the application of the per se rule. ***HN7***[] The Supreme Court has warned against expanding "the category of restraints classed as group boycotts," observing that courts should exercise great caution in extending per se analysis "to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. The Second Circuit has echoed that caution, while noting that "the scope of the per se rule against group boycotts is a recognized source of confusion in ***antitrust law***." *Bogan, 166 F.3d at 515*. The Supreme Court has more recently stated that "precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors. **[**20]** " *NYNEX, 525 U.S. at 135*. Defendants argue, and at least one court in this Circuit has agreed, that only when there is evidence that an agreement is "attributable solely" to horizontal competitors, having been conceived without the input of a party higher up in the distribution chain, will the per se rule apply. *PepsiCo. Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243, 259 (S.D.N.Y. 2000)*.

Here, plaintiffs' allegations do not fit this entirely horizontal scenario. Rather, the allegations in the complaint seem to suggest that the alleged conspiracy was hatched by all three defendants. Indeed, plaintiffs suggest that Universal harbored improper motives even before Ingram and VPD approached it. The amended complaint alleges that Universal desired "to control distribution of videos and DVDs in the market place, gain an unfair advantage over Universal's competitors [and] fix prices." Am. Compl. P 54. Furthermore, plaintiffs allege that Universal entered into the agreements with Ingram and VPD "[to] reduce or eliminate competition at the distribution level" so that it could "raise prices of Universal product above the **[*388]** then current market level." Id. **[**21]** P 55. These allegations seem to suggest that the agreement was not "attributable solely" to horizontal competitors. See *PepsiCo. 114 F. Supp. 2d at 259*. However, it is at least possible to interpret the complaint as alleging a conspiracy first devised by Ingram and VPD, and then expanded to include Universal as a party necessary to effectuate the plan. As the Court must grant plaintiffs every favorable inference at the motion to dismiss stage, *Todd, 275 F.3d at 197*, it would be inappropriate to dismiss the claim on this ground. [4]

[22]** Nevertheless, plaintiffs' per se group boycott claim fails for a different reason -- there exists a compelling procompetitive reason for the agreements between Universal, Ingram and VPD. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*, the Supreme Court laid out some basic principles governing the application of the per se approach to boycott cases. Among the factors to consider, the Court noted that ***HN8***[] the per se approach generally applies if the boycott "[was] not justified by plausible arguments that [it was] intended to enhance overall efficiency and make markets more competitive." *Id. at 294*. The Court further counseled that "[a] plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Id. at 298*. The Supreme Court in NYNEX endorsed this same approach, approving of the Second Circuit's decision to allow the defendants to justify the boycott before it would apply the per se rule. See *NYNEX, 525 U.S. at 135.* **[**23]**

In this case, plaintiffs themselves admit that there is a procompetitive justification for the agreements among Universal, Ingram and VPD. The amended complaint states, "Universal's agreements with Ingram, VPD (and Valley (in the sell-through market only)) require distributors to give certain exclusive and favorable terms to Universal over all other film studios including a dedicated sales force for Universal product and requires [sic] these distributors to pay for promotions, advertising, mailer pages and brand managers which are costs customarily paid by the studios themselves ...." Am. Compl. P 72. Insisting on a sales force that promotes one manufacturer's product over another is exactly the sort of arrangement that generates interbrand competition that benefits the market. See, e.g., *Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501, 1514 (N.D. Ill. 1988)*. The existence of this procompetitive effect is enough to take this case out of the category of a per se unlawful group boycott and into the realm of rule of reason analysis. See *Bogan, 166 F.3d at 514* ("Absent a showing that a presumption of anticompetitive effect is appropriate, **[**24]** we apply the rule of reason.").

The cases cited by plaintiffs do not suggest a contrary result. *General Motors*, *Big Apple BMW*, *Klor's* and *Rossi* all involved **[*389]** manifestly anticompetitive behavior on the part of the defendants to eliminate a price-cutting competitor. As the Rossi court summarized, "the common principle we glean from [General Motors, Big Apple BMW and Klor's] is that ***HN9***[] a conspiracy is horizontal in nature when a number of competitor firms agree with each other and at least one of their common suppliers or manufacturers to eliminate their *price-cutting* competition by cutting his access to supplies." *Rossi, 156 F.3d at 462* (emphasis added). In applying this principle to the facts of that case, the Rossi court once again reiterated that the fact that defendants were "driving a price-cutting competitor out of business" was critical to its decision that application of the per se rule was appropriate. *Id. at 464*. Here, by contrast, plaintiffs have made no allegations that they were price-cutters. Accordingly, these cases do not support

[4] The Court does not read *PepsiCo* to require that a group boycott be exclusively horizontal in nature for the per se rule to apply. This interpretation would call into doubt several seminal group boycott cases, cited by plaintiffs, which applied the per se rule to boycotts involving parties on different levels of the distribution chain. See, e.g., *United States v. General Motors, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Rather, the Court reads PepsiCo to stand for the proposition that the boycott must *originate* among the horizontal competitors. To the extent that the defendants are arguing the former interpretation, the Court rejects that position.

their contention that the Court should apply the per se rule. Indeed, there **[**25]** is nothing in these cases that demonstrates to the Court that the alleged agreements between Universal, Ingram and VPD should be analyzed as anything other than a "presumptively legal" exclusive distributorship arrangement.

Finally, it is worth noting that plaintiffs' other allegations do not counsel in favor of applying the per se rule. For example, there is nothing inherently suspect about the alleged meeting between the defendants at the Broadmoor Hotel. ***HN10***[] Manufacturers who wish to create an exclusive distributorship must be allowed to communicate with those distributors who will be a part of the distribution scheme. See *Business Electronics, 485 U.S. at 726* (courts should not find evidence of an antitrust violation in "legitimate communication between a manufacturer and its distributors"). Moreover, it is not even inappropriate, absent evidence of price-fixing, if the impetus for the exclusive distributorship came from the distributors, rather than the manufacturer. See, e.g., *Electronics Communications, 129 F.3d at 245*. Finally, there is nothing inherently improper about defendants' alleged efforts "to prevent retailers and foreign distributors **[**26]** from selling Universal product to the plaintiffs." Am. Compl. P 76(e). Vertical restrictions employed to enforce an exclusive distributorship arrangement, sometimes called "anti-bootlegging" provisions, are not per se unlawful and do not convert the arrangement into an impermissible horizontal boycott among distributors. See *Sports Center, Inc. v. Riddell, Inc., 673 F.2d 786, 791 (5th Cir. 1982)*. For all of these reasons, even assuming the facts in the complaint are true, it would not be appropriate to apply the per se rule governing group boycotts to the agreements at issue in this case.

Plaintiffs also fail to allege facts to support a per se unlawful price-fixing claim. ***HN11***[] The decision to terminate a distributor in order to create an exclusive distributorship will be analyzed under the per se rule against price-fixing only if there is evidence of "a further agreement on the price or price levels to be charged by the remaining dealers." *Business Electronics, 485 U.S. at 726*. Plaintiffs have not adequately advanced such claims. Plaintiffs do make several conclusory allegations that defendants were engaged in "price-fixing." See, e. **[**27]** g., Am. Compl. P 53 ("Universal sought to … fix prices."), P 87 ("Defendants Ingram and VPD have acquiesced and/or agreed affirmatively and/or impliedly to fix, control, stabilize, maintain or raise prices."), P 90 ("Universal (as the seller) and Ingram/VPD (as buyers) agreed to fix, control, stabilize and/or raise the prices at which the buyers will resell Universal's product."). As already stated, "conclusory allegations which merely recite the litany of antitrust … **[*390]** will [not] suffice." *Global Disc., 960 F. Supp. at 704* (quoting *John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 163 (S.D.N.Y. 1991))*. The only factual allegations contained in the complaint that arguably relate to possible price-fixing is that the prices of Universal videos have risen. See Am. Compl. PP 76(h), 85, 86. Plaintiffs specifically allege, as an example, that a Staten Island retailer received a price quote from Ingram for the Universal picture "Family Man" at $ 10 above cost, whereas the rate for this type of film prior to the defendants' agreements would have been approximately $ 1 above cost. Id. P 86. However, alleging that prices have risen **[**28]** is not the same as alleging that there is a separate agreement on price levels between Universal, Ingram and VPD. As the Supreme Court noted in Business Electronics, virtually all vertical restraints "can be attacked as designed to allow existing dealers to charge higher prices." *Business Electronics, 485 U.S. at 728*. It was for this very reason that the Supreme Court required a showing of an additional agreement on price levels for the per se rule to apply. See id. (if all agreements that spawned price increases were per se illegal "manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk [antitrust damages]"). Plaintiffs have not alleged sufficient facts to establish that any such agreement existed. Accordingly, the Court finds no basis in the complaint to allow plaintiffs' *Section 1* claim to proceed under a theory of per se price-fixing.

2. *Rule of Reason*

The Court now focuses on whether the plaintiffs have adequately alleged a violation of *Section 1* under the rule of reason. Defendants assert that plaintiffs' allegations are insufficient for two reasons. First, they argue that plaintiffs have **[**29]** failed to adequately define a relevant market, without which it is impossible to assess any potential anticompetitive effects. Second, defendants maintain that, even if plaintiffs have sufficiently alleged a relevant market, the facts they have alleged do not establish that there has been any anticompetitive effect on the market as a whole. Rather, defendants assert that the only effect on the market that plaintiffs have alluded to is that the prices of Universal videos have risen. According to defendants, this establishes at most that the exclusive distributorship arrangement may have reduced *intrabrand* competition, as opposed to interbrand competition, which is what

antitrust law is designed to protect. Thus, defendants argue that absent any factual allegations in the complaint establishing that the agreements harmed interbrand competition, plaintiffs' rule of reason claim must be dismissed.

HN12[] In order for the claim to survive, it is essential that plaintiffs properly define a relevant market where the alleged anticompetitive effects are being felt. See *Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236, 264 (S.D.N.Y. 2000)*; *Global Disc., 960 F. Supp. at 704*; **[**30]** *Re-Alco Indus., Inc. v. Nat'l Ctr. For Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993)*. The alleged product market "must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand -- and it must be plausible." *Todd, 275 F.3d at 200* (internal quotation marks and citations omitted). [5] Dismissal pursuant **[*391]** to *Rule 12(b)(6)* is therefore appropriate "if a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to the cross-elasticity of demand." *Re-Alco, 812 F. Supp. at 391*; accord *Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 142 F. Supp. 2d 296, 303 (E.D.N.Y. 2001)*; *Carell, 104 F. Supp. 2d at 264*; *Global Disc., 960 F. Supp. at 705*. At the same time, courts must remember that "market definition is a deeply fact-intensive inquiry," and thus courts should "hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd, 275 F.3d at 199-200*; **[**31]** see also *PepsiCo, Inc. v. Coca-Cola Co., Inc., 1998 U.S. Dist. LEXIS 13440, No. 98 Civ. 3282, 1998 WL 547088, at *6 (S.D.N.Y. Aug. 27, 1998)* (because defining a relevant market involves a factual inquiry, "motions to dismiss in this context … may be granted only if the alleged market makes no economic sense under any set of facts") (internal quotation marks omitted). In general, courts have granted dismissals for failure to allege a relevant market in cases that have involved "(1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way." *Todd, 275 F.3d at 200*.

[32]** In this case, plaintiffs suggest several possible markets. Many of these fall into the first category of insufficient allegations outlined in Todd. For example, in their brief and at oral argument, plaintiffs attempted to argue that "[a] single movie" or "a single supplier's movies" can be a market. Pls.' Mem. of Law in Opp. at 20; Tr. of Oral Argument at 26-27. Plaintiffs assert that because each movie is a unique product, it has no adequate substitute, and therefore defendants are immune to the downward pressure on price caused by interbrand competition, which in a properly functioning market, would lead consumers to switch brands in response to an increase in price. By way of example, plaintiffs contend that if consumers wanted to see "Jaws" (a Universal movie) on video, they would not be content to rent "Piranha" (not a Universal movie) instead simply because they are both movies about killer fish. Am. Compl. P 23.

This is exactly the sort of argument courts have routinely rejected in the past. See, e.g., *Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 86-87 (2d Cir. 2000)* (finding that although a Yale education is undoubtedly unique, there are **[**33]** many colleges and universities that provide top quality education which plaintiffs could have selected); *Carell, 104 F. Supp. 2d at 264-66* (the make-up designs and other intellectual property from the musical "Cats," though unique, do not constitute their own market); *Theatre Party Assocs. Inc. v. Shubert Org., Inc., 695 F. Supp. 150, 154-55 (S.D.N.Y. 1988)* (finding no plausible explanation "why other forms of entertainment, namely other Broadway shows … are not adequate substitute products [for "Phantom of the Opera"]"); see also *Global Disc., 960 F. Supp. at 705* (finding that plaintiff's contention that a consumer "is 'locked into' Pepsi because she prefers the taste, or NBC because she prefers 'Friends,' 'Seinfeld,' and 'E.R.'" was unconvincing). That each movie is unique is undisputed. However, as these cases indicate, the simple fact that a particular product is unique does not mean that it is its own market. See *Carell, 104 F. Supp. 2d at* ***[*392]*** *265* (plaintiff must allege "a plausible basis for finding the [specific product] is a 'market unto [itself]'). "Jaws" is no more unique to movie enthusiasts than "Phantom **[**34]** of the Opera" is to theater patrons. Although a particular customer may have his heart set on renting "Jaws," it is highly likely that, if it is unavailable, he will select a different title, perhaps one that does not

[5] "Cross-elasticity of demand" refers to "the extent to which consumers will change their consumption of one product in response to a price change in another." *PepsiCo. Inc. v. Coca-Cola Co., Inc., 1998 U.S. Dist. LEXIs 13440, No. 98 Civ. 3282, 1998 WL 547088, at *5 (S.D.N.Y. Aug. 27, 1998)* (quoting *Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 469, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*).

even involve killer fish at all. Thus, the Court finds that plaintiffs have failed to support their contention that each Universal video constitutes a relevant market. [6] For similar reasons, the Court also rejects plaintiffs' attempts to define the relevant market as all movies produced by Universal. See *Carell, 104 F. Supp. 2d at 265* ("The law is clear that the distribution of a single brand, like the manufacture of a single brand, does not constitute a legally cognizable market."); accord *Global Disc., 960 F. Supp. at 705*; *Re-Alco, 812 F. Supp. at 391*.

[35]** Despite these failed attempts, the Court finds that plaintiffs' complaint, read broadly, does identify a relevant market. Although the complaint does not specifically mention a "relevant product market," or devote a particular section to defining its parameters, the complaint does reference "the rental and 'sell-through' home video and DVD markets in the United States," Am. Compl. P 19, "the wholesale distribution market for 'sell-through' and rental movie videos and DVDs in the United States," id. P 22, and "the video rental market channeled through wholesale distributors." Id. P 28. Taken together, these references do comprise a potentially viable relevant market, best summarized in paragraph 22 as "the wholesale distribution market for 'sell-through' and rental movie videos and DVDs in the United States." Id. P 22.

Identifying the contours of the relevant market, however, is only the first step of the process. Plaintiffs must also address why certain products are not adequate substitutes, and are thus not part of the relevant market. See, e.g., *Todd, 275 F.3d at 200* (complaint must address "interchangeability of use or the cross-elasticity of demand" **[**36]** to adequately allege a relevant market). As the complaint defines the relevant market as all videos and DVDs sold by wholesalers in the United States, defendants contend that plaintiffs, at a bare minimum, must discuss why the manufacturers (i.e., the studios) themselves are not contained within this market. Defendants argue that because the studios engage in direct marketing of their films, as well as marketing through distributors, plaintiffs must address why retail video shops would not buy their movies directly from the studios if the distributors raised their prices. According to defendants, the complaint fails to do this.

The court does not agree. Plaintiffs have alleged that "in order to save time and expense, retailers historically tend to purchase product from those wholesale distributors that are capable of supplying all product available through wholesale distribution as opposed to purchasing product piece-meal from different wholesale distributors." Am. Compl. P 39. Thus, plaintiffs have posited that retailers engage in a form of "one-stop shopping" in **[*393]** purchasing their videos, and that there are compelling business reasons for doing so. Although the complaint does not **[**37]** specifically indicate that it would be prohibitively expensive for a retailer to begin buying directly from a studio, plaintiffs have provided at least a "plausible" reason why retailers would not respond to an increase in the prices charged by wholesale distributors by switching to direct dealing with the studios. See *Todd, 275 F.3d at 200* (to survive a motion to dismiss, a plaintiff must provide a "plausible explanation as to why a market should be limited in a particular way"). [7]

[38]** In this respect, this case is similar to PepsiCo. In that case, PepsiCo accused Coca-Cola of actual or attempted monopolization of the fountain-dispensed soft-drink industry. See *PepsiCo, 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at *4*. In its complaint, PepsiCo defined the relevant product market "not [as] the market for soft-drinks, or fountain-dispensed soft drinks, but rather [as] the market for 'fountain-dispensed soft drinks *distributed through foodservice distributors.*" *1998 U.S. Dist. LEXIS 13440, [WL] at *9* (emphasis in original). In

[6] Plaintiffs' reliance on *United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962)* is misplaced. Although the Loew's Court affirmed that a copyrighted film is entitled to a presumption of uniqueness, that case focused on whether a court could infer the presence of market power from ownership of a particular copyright in analyzing the legality of "block-booking" practices -- a form of tying arrangement. See *id. at 48-50*. The case contains no general discussion of whether each film constitutes its own market. Hence, the Court sees no direct support in Loew's for plaintiffs' position.

[7] Moreover, it is worth noting that, although Universal markets its movies directly to major retail chains such as Blockbuster and Hollywood Video, see Pls.' Mem. of Law in Opp. at 21, there is no indication that Universal would sell its films directly to smaller retail outlets if it were approached. Indeed, it seems likely that the reason Universal employs a dual distribution system is so that marketing to smaller retailers, and the considerable time and effort that it takes, may be handled by intermediate distributors who have built up business relationships and networks with these smaller shops.

response to Coca-Cola's argument that PepsiCo had failed to allege a relevant market by limiting it in this way, the court found that "the complaint posits that the buyers in question have real efficiency-based reasons to take delivery of all of their supplies, including fountain syrup, from foodservice distributors; the complaint maintains that for these customers delivery through other means simply will not do." Id. So, too, in this case, plaintiffs have alleged an efficiency-based reason for looking to wholesale distributors to supply all of their videos. [8] Hence, this is not a case where the plaintiffs have entirely failed to explain why certain alternative **[**39]** sources of supply are not part of the relevant market. See *Beyer Farms, 142 F. Supp. 2d at 303-04*. In so finding, however, the Court expresses no opinion as to whether the market, as alleged by plaintiffs, is ultimately viable or not. Indeed, plaintiffs have a difficult task before them. Nevertheless, the Court's focus at this stage is on the complaint alone, and while plaintiffs' presentation on the issue is admittedly thin, the Court cannot say that they have failed to allege a relevant product market.

[40]** ***HN13***[] To state a claim for a rule of reason violation under *Section 1*, a plaintiff must also allege that "the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Tops Markets, Inc. v. Quality Markets. Inc., 142 F.3d 90, 96 (2d Cir. 1998)* (quoting **[*394]** *Capital Imaging, 996 F.2d at 543*); accord *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995)*. Stated differently, "the Sherman Act protects competition as a whole in the relevant market, not the individual competitors within that market ...." *Tops Markets, 142 F.3d at 96*. Furthermore, a plaintiff must also allege "more than just an adverse effect on competition among different sellers of the same product ('intrabrand' competition) ...." *K.M.B. Warehouse, 61 F.3d at 127*; *Electronics Communications, 129 F.3d at 245*. Rather, a plaintiff must demonstrate that the challenged actions "diminish overall competition, and hence consumer welfare." *K.M.B. Warehouse, 61 F.3d at 128* **[**41]** (quoting *Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1571, 1573* (llth Cir. 1983)). A plaintiff can demonstrate an adverse effect on competition in one of two ways. Either it can show "an actual adverse effect on competition, such as reduced output," or it can "demonstrate[] 'adverse effect' indirectly by establishing that [defendant] had sufficient market power to cause an adverse effect on competition." *Tops Markets, 142 F.3d at 96*. If a plaintiff uses the latter method, however, they must allege more than just market power, but also that "there ... [are] other grounds to believe that the defendant's behavior will harm competition market-wide, such as the inherently anticompetitive nature of defendant's behavior or the structure of the interbrand market." *K.M.B. Warehouse, 61 F.3d at 129*.

Here, defendants argue that plaintiffs have alleged only that the prices of Universal videos have increased, and therefore they have not alleged any harm to interbrand competition. The Court disagrees. Plaintiffs' complaint contains the following allegation, "the price affect [sic] that the defendants' actions have and will have **[**42]** on the video and DVD industry is corroborated by numerous video retailers, including those represented by the Pudget Sound Alliance, Video One Buying Group and New England Buying Group, who have acknowledged the detrimental affect [sic] on market prices resulting from the fact that the Universal agreements with Ingram, VPD and Valley has made the industry non-competitive." Am. Compl. P 85. This allegation does not specifically limit itself to the prices of Universal videos alone, but rather seems to indicate that the prices of all videos have been rising since the creation of the challenged agreements. Thus, plaintiffs have indeed alleged an actual injury to interbrand competition.

Nevertheless, even assuming that defendants are correct that only the prices of Universal videos are rising and that, as a result, the restrictions are strictly intrabrand, the Court is not convinced that such a trend could never give rise to an antitrust violation. Though undoubtedly more focused on protecting interbrand competition, antitrust laws are not entirely unconcerned with intrabrand restraints. As the Eleventh Circuit stated in Graphic Products:

[8] Defendants cite PepsiCo in support of their position, asserting that the court held that distribution of fountain-dispensed soft drinks by independent foodservice distributors was not a relevant market. However, defendants cite the court's decision concerning Coca-Cola's *summary judgment* motion. See *PepsiCo, 114 F. Supp. 2d at 247-58*. At that point, the court had before it sufficient evidence, elicited through discovery, to be able to evaluate the alleged relevant market and determine whether it was, indeed, viable. By contrast, at the motion to dismiss stage, the court felt unable to hold that the market was inadequately alleged. See *PepsiCo, 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at *12*.

> The argument … that the reduction **[**43]** or elimination of intrabrand competition is, by itself, never sufficient to show that a trade restraint is anticompetitive must rest, at bottom, on the view that intrabrand competition -- regardless of the circumstances -- is never a significant source of consumer welfare. This view is simply not supported by economic analysis, or by the cases. A seller with considerable market power in the interbrand market -- whether stemming from its dominant position in the market structure or from successful differentiation of its products -- will necessarily have some power over price. In that situation, intrabrand competition will be a significant source of consumer welfare **[*395]** because it alone can exert downward pressure on the retail price at which the good is sold.

Graphic Prods., 717 F.2d at 1572 n.20. In this case, plaintiffs have alleged that Ingram and VPD combined have a significant market share of 75% of the wholesale video and DVD distribution market, indicating substantial market power. See *K.M.B. Warehouse, 61 F.3d at 129* ("Market share may be used as a proxy for market power."). Moreover, plaintiffs have alleged that Ingram and VPD stand to **[**44]** gain an ascendent position in the wholesale video distribution market by virtue of their exclusive right to sell Universal videos. See Am. Compl.P 43 ("Without access to the supply of product from a major studio, such as Universal, a wholesale distributor will lose a substantial amount of its customers."). Thus, the structure of the interbrand market for wholesale videos may indeed be such that intrabrand competition is necessary to avert market-wide anticompetitive effects. See *Graphic Prods., 717 F.2d at 1572 n.20*.

Defendants contend that if prices of Universal videos go up, retailers either will decide to take advantage of the higher prices by purchasing more copies and marketing them to customers more aggressively in order to reap higher returns, or will simply elect to buy fewer copies of Universal films, and push lower-priced brands. See V.P.D. Reply Brief at 9. This may indeed be the case. Nevertheless, a court may dismiss a complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Todd, 275 F.3d at 197-98* (quoting *Conley, 355 U.S. at 45-46*). **[**45]** At this point in the litigation, there is at least a possibility that plaintiffs will be able to demonstrate a rule of reason violation. Accordingly, the Court must allow them to proceed with this claim.

B. Section 2 of the Sherman Act

Section 2 of the Sherman Act states in pertinent part:

> ***HN14***[] Every person who shall monopolize, or attempt to, monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. § 2. As is apparent from the language of the statute, *Section 2 of the Sherman Act* prohibits ***HN15***[] three separate offenses: monopolization, attempted monopolization, and conspiracy to monopolize. See *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. ***HN16***[] To state a claim for monopolization, plaintiffs must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic **[**46]** accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997)*. ***HN17***[] To state a claim for attempted monopolization, plaintiffs must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, 506 U.S. at 456*; *Tops Markets, 142 F.3d at 99-100*. In determining whether there is a "dangerous probability" of success, courts must evaluate "defendant's economic power in the relevant market." *Id. at 100*. Finally, ***HN18***[] to state a claim for conspiracy to monopolize, plaintiffs must allege "(1) concerted action, (2) overt acts in furtherance of the conspiracy, **[*396]** and (3) specific intent to monopolize." *Santana Prods., Inc. v. Sylvester & Assocs., Ltd. 121 F. Supp. 2d 729 (E.D.N.Y. 1999)*.

Plaintiffs maintain that they have alleged facts to support all three claims. In response, defendants first argue that plaintiffs' *Section 2* claims must be dismissed because **[**47]** they have failed to allege a relevant market for the same reasons expressed in defendants' challenge to their *Section 1* claims. As the Court has determined that plaintiffs' complaint sufficiently alleges a relevant market, this argument is unavailing. Nevertheless, defendants' alternative argument -- that the *Section 2* claims must be dismissed because they allege, at most, a "shared monopoly" between Ingram and VPD -- is persuasive. Defendants correctly point out that neither Universal, Ingram nor VPD individually can be considered to have monopoly power in the relevant market. Universal is only one of six major studios who supply movies to wholesale video distributors. [9] Plaintiffs allege that Ingram has a market share of roughly 50% of the wholesale video distribution market, while VPD has approximately a 25% market share. Am. Compl. PP 101-02. It is only when their market shares are combined to reach roughly 75% does the percentage approach a level that may give rise to an inference of market power necessary to sustain a *Section 2* claim. See *Tops Markets, 142 F.3d at 99* (quoting *Broadway Delivery Corp. v. United Parcel Serv. of America, Inc., 651 F.2d 122, 129 (2d Cir. 1981)* **[**48]** ("Sometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.")). Moreover, while not specifically mentioning the term "shared monopoly," a fair reading of the complaint indicates that plaintiffs' *Section 2* claims are framed in terms of a "shared monopoly." See Am. Compl. P 107 ("Upon information and belief, Ingram and VPD will soon control nearly all of the U.S. video rental market ...."). Accordingly, the success of plaintiffs' *Section 2* claims rises and falls on the viability of the "shared monopoly" theory.

[49]** The idea of a "shared monopoly" giving rise to *Section 2* liability repeatedly has been received with skepticism by courts who have squarely addressed the issue. See, e.g., *Santana Prods., 121 F. Supp. 2d at 737-38* (rejecting plaintiff's claim of conspiracy to form a shared monopoly); *Sun Dun, Inc. of Washington v. Coca-Cola Co., 740 F. Supp. 381 (D. Md. 1990)* (noting that the idea of a "shared monopoly" giving rise to *Section 2* liability is contrary to the legislative history of the Sherman Act which indicates that "the concept of 'monopoly' did not include 'shared monopolies' or 'oligopolies' at all, but rather the complete domination of a market by a *single* economic entity"); *Consol. Terminal Sys., Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D.N.Y. 1982)* (rejecting outright the argument that a "shared monopoly" can give rise to a *Section 2* violation). Thus, while some learned commentators **[*397]** have advanced the argument that *Section 2* may be invoked against "shared monopolies" in certain situations, see P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 810 (1996) (cited in *Santana Prods., 121 F. Supp. 2d at 737*), **[**50]** courts have yet to embrace this theory.

With respect to plaintiffs' claims of actual or attempted monopolization, ***HN19***[] the Second Circuit has specifically indicated that it will not entertain arguments based on a "shared monopoly" theory of liability. See *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc., 879 F.2d 1005 (2d Cir. 1989)* (stating that "the district court correctly concluded that the market shares of [defendants] could not be aggregated to establish an attempt to monopolize in violation of Sherman Act section 2, *15 U.S.C. § 2 (1982)*"); *Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 256 (S.D.N.Y. 1995)* (citing Hayden for the proposition that "allegations of a shared monopoly, i.e., that the defendants' combined market power constitutes monopolization or attempted monopolization of the relevant market … do not constitute a violation of *Section 2*"); see also *Consol. Terminal, 535 F. Supp. at 228-29* ("An oligopoly, or a shared monopoly, does not itself violate *§ 2 of the Sherman Act.* Rather, in order to sustain a charge of monopolization or attempted monopolization, a plaintiff must **[**51]** allege the necessary market domination of a particular defendant."). Hence, these claims must be dismissed.

The Second Circuit has not squarely addressed the question of whether a "shared monopoly" theory of liability is viable in the context of a claim of conspiracy to monopolize. See *Santana Prods., 121 F. Supp. 2d at 737*. Those courts that have considered this issue have expressed similar doubts as to its persuasiveness, but have stopped short of rejecting it entirely. The court in Sun Dun stated that a claim of conspiracy to form a shared monopoly may be viable "if the aim of the conspiracy is to form a single entity to possess the illegal market power." *Sun Dun, 740*

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[9] Plaintiffs' argument that Universal can be considered a monopolist because it controls 100% of Universal products is meritless. As the Fifth Circuit has stated, "obviously, every manufacturer has a natural monopoly over the distribution of its products. That monopoly, however, does not contravene the antitrust laws." *Riddell, 673 F.2d at 791* (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. Moreover, as previously explained, the relevant market in this case is not Universal products; it is "the wholesale distribution market for 'sell-through' and rental movie videos and DVDs in the United States." Am. Compl. P 22.

F. Supp. at 391-92. The court in Santana Products took a somewhat broader view, stating that "a claim for conspiracy to monopolize may also be stated where two or more competitors seek to allocate a market and exclude competitors, even if they do not form a single corporate entity." *Santana Prods., 121 F. Supp. 2d at 740 n.1*. In this case, plaintiffs have alleged that "upon information and belief, Ingram and VPD have entered into agreements not to compete **[**52]** with each other over certain large customer accounts." Am. Compl. P 105. Even if the Court were to adopt the broader view of Santana Products, alleging that Ingram and VPD agreed to divvy up a few accounts is not the same as alleging that they agreed to allocate the entire wholesale video and DVD distribution market amongst themselves. The allegations are therefore insufficient to allege a claim of conspiracy to form a "shared monopoly" even under the most permissive interpretation of the theory's viability. Accordingly, the Court dismisses this claim.

C. Robinson-Patman Act

Plaintiffs allege several claims under the Robinson-Patman Act. First, plaintiffs assert that Universal violated section 2(a) of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, by selling its product to plaintiffs' competitors at a lower price than it charged plaintiffs. Second, plaintiffs allege that Universal violated sections 2(d) and 2(e) of the Robinson-Patman Act, *15 U.S.C. §§ 13(d)* &*(e)*, by providing subsidies, incentives and other forms of preferential treatment to plaintiffs' competitors that were not made available to plaintiffs. Finally, plaintiffs **[**53]** claim that Ingram and VPD violated section 2(f) of the Robinson-Patman Act, *15 U.S.C. § 13(f)*, by knowingly **[*398]** inducing and receiving discriminatory prices on Universal product.

1. Section 2(a)

Plaintiffs' *section 2(a)* claim involves allegations of secondary-line price discrimination. [10] ***HN20***[] In order to state a claim of secondary-line price discrimination under *section 2(a)*, plaintiffs must establish four facts: "(1) that seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition." *George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 141 (2d Cir. 1998)*. A prohibited effect on competition may be inferred from evidence that an individual competitor suffered injury from "a substantial price difference over time." *Id. at 142* (discussing *FTC v. Morton Salt Co., 334 U.S. 37, 46-47, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948))*.

[54]** Defendants make several arguments that the pleadings are inadequate to state a price discrimination claim. While there is no question that the pleadings are thin with respect to the price discrimination claims; the Court finds that they ultimately survive. Defendants first assert that plaintiffs have not established "a clear link between the timing and location of any competition and the timing and location of the alleged price discrimination." *United Magazine Co. v. Murdoch Magazines Distribution, Inc., 146 F. Supp. 2d 385, 396 (S.D.N.Y. 2001)*. In Murdoch, the various competitors each had a distinct territory in which they operated. Because the plaintiffs lumped together all of the defendants in their allegations, it was unclear whether the plaintiffs did in fact compete with any particular defendant. Hence, the Court concluded that plaintiffs had to be more specific as to the timing and location of the alleged price discrimination in order to state a claim under the Robinson-Patman Act. In this case, it is clear that plaintiffs were competitors of Ingram and VPD in the national market for wholesale video distribution. Plaintiffs therefore need not be any more **[**55]** specific than they already have with respect to this point.

Defendants also argue that plaintiffs have not adequately alleged that the products at issue were of "like grade and quality." Defendants attempt to use plaintiffs' own theory of the case against them by asserting that if, as plaintiffs claim, each video is a unique product, plaintiffs must then allege that Universal charged different distributors

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[10] ***HN21***[] Primary line price discrimination occurs where the seller's price discrimination harms other sellers. Secondary-line price discrimination occurs where the seller's price discrimination harms competition among the seller's customers - in this case, the wholesale distributors. See *George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 141 n.2 (2d Cir. 1998)*

different prices for individual, specific movies. Plaintiffs instead have included only general allegations that Universal sold "its product" at lower prices to plaintiffs' competitors.

Although this is a clever argument, the Court has already rejected the notion that each video is a unique product. Moreover, it appears from the language "its product" that plaintiffs are alleging that *all* of the products Universal made available to wholesale distributors it sold to Ingram and VPD at lower prices. It seems indisputable that the "grade and quality" of the entire Universal video collection made available to one wholesale distributor is of the same grade and quality as the entirety made available to another wholesale distributor-indeed, **[*399]** it is the same collection of Universal videos. **[**56]** Accordingly, this argument fails.

Finally, defendants claim that plaintiffs have not adequately alleged that the purported price discrimination was "sustained and substantial." In Haug, the Court found that it was necessary for a complaint to allege a "substantial and sustained price differential" to survive a motion to dismiss. *Haug, 148 F.3d at 144*. However, the court did not find this requirement to be onerous. While the plaintiff in Haug "[did] not detail the amount and degree of the price discrimination," it did allege that it was "injured during the 4 years prior to its termination." *Haug, 148 F.3d at 144* (internal quotations omitted). Such a recitation was deemed "adequate to withstand *Fed.R.Civ.P. 12(b)(6)* dismissal." Ibid.

Plaintiffs allege that "for a period of several years, on more than two occasions and to more than one distributor, including but not necessarily limited to the period of approximately 1998-2000, Universal sold its product to wholesale distributors at a cheaper price than sold to the plaintiffs." Compl. P 141. The complaint also states that "plaintiffs' cost for Universal **[**57]** product was significantly higher than their competition due to Universal's unfair treatment." Compl. P 143. Such statements seem to describe price discrimination that is at least as "sustained and substantial" as that detailed in Haug, It is therefore sufficient to withstand a motion to dismiss.

2. Sections 2(d) and 2(e)

Sections 2(d)and 2(e) of the Robinson-Patman Act ***HN22***[] "prohibit indirect price discrimination in the form of advertising and other promotional allowances made available to purchasers on disproportionate terms." *Haug, 148 F.3d at 144*. Plaintiffs allege that Universal paid Ingram and VPD more money to advertise its product and offered them rebates and incentive programs that were not offered to plaintiffs, see Compl. PP 142-44. Defendants argue that plaintiffs have not specifically alleged that any benefit Universal provided to Ingram and VPD was not also made available to plaintiffs on the same terms. Plaintiffs simply may not have availed themselves of the benefits, qualified for volume discounts by purchasing enough product, or purchased the products that had the largest promotions, defendants suggest. Def. Universal's Memo of Law at 20. **[**58]** Citing Bouldis v. U.S. Suzuki Motor, defendants assert that a plaintiff who does not take advantage of such promotions or who fails to satisfy the requirements for obtaining these concessions cannot make out a price discrimination claim. *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1326 (6th Cir.1983)*.

Defendants are correct in their assertion of the law. [11] However, their characterization of plaintiffs' pleading is not entirely accurate. Plaintiffs have in fact stated with specificity that concessions made available to Ingram and VPD were not made available to them. In their description of the Universal rebate program in which they participated, for example, plaintiffs state that "if other distributors failed to achieve the goal for entitlement to the rebate, these distributors were afforded rebates *at times when plaintiffs were **[*400]** not."* Amend. Comp. P 142(b) (emphasis added). In the next paragraph, they describe being shut out of another program: "Universal also gave programs to plaintiffs' competitors in which if the competitors reached a certain level of sales they get a certain amount of money per tape. These so-called 'focus programs' were not given **[**59]** to the plaintiffs." Amend. Complaint P 142(c).

[11] But see *FTC v. Morton Salt Co., 334 U.S. 37, 92 L. Ed. 1196, 68 S. Ct. 822, 44 F.T.C. 1499 (1948)* (holding that quantity discounts that appear on the face of things to be "available" to all buyers may not functionally be available to many smaller buyers). Flash and FTD are arguably "smaller buyers" in comparison to Ingram and VPD, who according to plaintiffs' complaint, control approximately 50% and 25% of the market for wholesale distribution of video rentals. Amend. Comp. PP 27-28.

Lastly, they allege that "Universal gave a disproportionate amount of 'free goods' to plaintiffs' competitors." Amend. Comp. P142(e).

As the wording of each of these allegations suggests, these were programs and benefits that plaintiffs believed they were equally qualified for and entitled to, but which were not made available to them on an equal basis. Defendants present the possibility that plaintiffs were not entitled to these benefits; however, at the motion to dismiss stage, such factual **[**60]** arguments are inapposite. Plaintiffs simply need to satisfy the pleading requirements of alleging that these allowances and reimbursements were not made available to them on a "proportionally equal basis." *15 U.S.C. § 13(d)*; *O'Connell v. Citrus Bowl, 99 F.R.D. 117, *120 (E.D.N.Y.1983)*. Plaintiffs have satisfied this burden. As a result, this claim also survives the motion to dismiss.

3. Section 2(f)

HN23[] In order for a buyer such as Ingram or VPD to be liable under *section 2(f)* for receiving an illegal price discrimination, plaintiffs must first show that the seller is liable under *section 2(a)*. See *Great Atl. & Pac. Tea Co., Inc. v. FTC, 440 U.S. 69, 77, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*. Having adequately alleged a *section 2(a)* claim against Universal, plaintiffs must show that Ingram and VPD "knowingly [induced] or received a discrimination in price which is prohibited." *15 U.S.C. § 13(f)*. The knowledge requirement may be satisfied by showing that the buyer had "either actual knowledge, i.e., he or she must have known that the price in question was illegal, or constructive knowledge, i.e., he or **[**61]** she must have been reasonably cognizant of its illegality." *Hygrade Milk & Cream Co. v. Tropicana Prods., Inc., 1994 U.S. Dist. LEXIS 1091, No. 88 Civ. 2861, 1994 WL 38549, at *3 (S.D.N.Y. Feb. 4, 1994)* (citing *Automatic Canteen Co. v. FTC, 346 U.S. 61, 79-80, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953))*.

As to this claim, the language of the plaintiffs' complaint is admittedly thin, straying into the realm of conclusory statements that do little more than parrot the language of the statute. Plaintiffs only allege the following: "VPD and Ingram knowingly induced Universal and/or received a discrimination in price in violation of *15 U.S.C.A. Section 13*." Compl. P 146. Plaintiffs do not specifically state how the Court might infer knowledge of the price discrimination from Ingram and VPD's "trade experience" or other behavior. See *Automatic Canteen, 346 U.S. at 79-82*. Nevertheless, it is well settled that a court should dismiss a complaint under *Rule 12(b)(6)* only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Todd, 275 F.3d at 197-98*. Plaintiffs' **[**62]** claim does not appear so bare or meritless as to fail this minimal test. Indeed, when considering plaintiffs' 2(f) claim together with the totality of the complaint, it seems plausible to the Court that plaintiffs could adduce evidence of Ingram and VPD's knowing receipt of lower-priced videos from Universal. Plaintiffs' allegation earlier in the complaint that Ingram and VPD "jointly control in excess of 75% of the video rental market channeled through distributors" (Amend. Comp. P 29) certainly bespeaks a significant degree of "trade experience," **[*401]** and the allegation that "for a period of several years, defendants Ingram and VPD encouraged and applied pressure on Universal to make them exclusive distributors of Universal product in the U.S. rental market, at the exclusion of the Plaintiffs" suggests that Ingram and VPD acted intentionally to induce preferred status with Universal. Drawing all inferences in favor of the plaintiff, the Court concludes that these allegations collectively are sufficient for the *2(f)* claim to survive a motion to dismiss. [12]

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[12] Defendants also raise a series of other objections to plaintiffs'*2(f)* claim. First, they allege that plaintiffs do not mention them specifically by name in their allegations, instead referring to "wholesale distributors" and "plaintiffs' competitors." While it is true that plaintiffs do not refer to defendants by name in each of their allegations, plaintiffs do refer to them frequently enough throughout the section that a reader, especially a reader who was drawing inferences in favor of the plaintiff, could easily understand the defendants to be the subjects of the claims. Moreover, in plaintiffs' *2(f)* allegation in P 146, Ingram and VPD are mentioned specifically by name.

Next, defendants allege that plaintiffs cannot raise a *§ 2(f)* claim on the basis of a violation of *§ 2(d)* or *§ 2(e)*. While courts are split on whether a *§ 2(f)* claim can be derived from §§ *2(d)-(e)* violations (see *Murdoch, 2001 U.S. Dist. LEXIS 20878, 2001 WL 1607039 (S.D.N.Y.2001)*; but see *Intimate Bookshop, 88 F. Supp.2d 133 (S.D.N.Y.2000))*, such a charge is mooted by the fact that plaintiffs' have also successfully raised a *§ 2(a)* claim, from which a *§ 2(f)* claim can indisputably be derived.

[63]** *D. State Law Claims*

Plaintiffs also allege that defendants committed common law fraud and misrepresentation, tortious interference with business contracts, and breach of contract. Defendants assert that plaintiffs have failed to state claims in each of these areas.

I. Fraud and Misrepresentation

Plaintiffs allege that in an effort "to gain unfair advantage over its competitors and to assist Ingram, VPD and Valley to gain market share over plaintiffs," defendant Universal fraudulently induced plaintiffs to turn over confidential customer information. Amend. Compl. P 117. On August 28, 2000, Universal purportedly e-mailed plaintiffs requesting substantial information about plaintiffs' retail customers, including sales totals, units sold, gross and net revenues and returns. Amend. Comp. P 114. Universal told plaintiffs that it was soliciting such information for the purpose of "better understanding our business" and "to better evaluate our goal setting process so that we can set more accurate BPIs [i.e., percentage of Universal's business by the distributor] for you on our future promotions." Amend. Comp. P 115. The complaint alleges that this proffered purpose was **[**64]** false. Amend. Comp. P 116. The true purpose was to facilitate defendants Ingram and VPD in their goal of "weakening or eliminating Flash and ETD as wholesale distributors in the video and DVD market." Amend. Comp. P 120. Indeed, after plaintiffs relied on Universal's statement and provided the requested information to Universal, the complaint alleges that Ingram and VPD began contacting plaintiffs' customers, who were previously unknown to them, and solicited their business. Amend Comp. P 122. Defendants Ingram and VPD moreover informed plaintiffs' customers **[*402]** that plaintiffs were no longer authorized to supply Universal products even during a time when plaintiffs' contracts with Universal were still intact. Amend. Comp. PP 122-23. As a result of all of these actions by defendants, plaintiffs allege that they suffered loss of customers and damage to their reputation. Amend. Comp. PP 124-25.

Defendant Universal does not contest the sufficiency of this claim in their motion to dismiss. The more difficult question is whether plaintiffs have adequately stated a claim of fraud and misrepresentation against defendants Ingram and VPD. Ingram and VPD have contested the sufficiency of plaintiffs' **[**65]** fraud claims, arguing that plaintiffs have not alleged any facts indicating that either of them engaged in, induced or authorized the alleged fraud or misrepresentation.

HN24[🡅] Under New York law, to hold a defendant liable for fraud, a plaintiff must prove four elements: (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury. See *AUSA Life Ins. Co. v. Ernst and Young, 206 F.3d 202, 208 (2d Cir.2000)* (citing *Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996))*. ***HN25***[🡅] Fraud actions are also subject to the heightened pleading requirements of *Rule 9(b)*, which require that "the circumstances constituting fraud or mistake ... be stated with particularity." *Fed.R.Civ.P. 9(b)*. The elements of knowledge or intent, however, may be alleged generally. *Fed.R.Civ.P. 9(b)*.

HN26[🡅] To satisfy *Rule 9(b)*'s particularity requirement, a plaintiff's **[**66]** complaint must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir.1999)* (quoting *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir.1993))*. Moreover, where multiple defendants are involved, the rule requires that the complaint allege facts that specify each defendant's connection to the fraud. See *DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d*

Lastly, defendants assert that plaintiffs have not alleged that the purported price differentials granted to Ingram and VPD were not justified by Universal's need to meet the price of its competitors. While "meeting the competition's price" is admittedly an affirmative defense for sellers under *§§ 2(a), (d)and (e)*, it is irrelevant to a buyer's defense under *§ 2(f)* and particularly irrelevant at the motion to dismiss stage.

Cir.1987). It is well-settled that the false representation need not have been made by the defendant personally. "If he authorized and caused it to be made it is the same as though he made it himself." Voisin v. Providence Washington Insurance Co., 51 A.D. 553, 559, 65 N.Y.S. 333 (1st Dep't 1900), quoting Brackett v. Griswold, 112 N.Y. 454, 467, 20 N.E. 376 (3d Dep't 1889)). However, bare allegations that a defendant "aided, abetted, assisted, connived with and acquiesced in" the fraud are insufficient to state a cause of action. Halperin v. Lieberman, 271 A.D. 878, 66 N.Y.S.2d 78, 79 **[**67]** (2d Dep't 1946).

Again drawing all inferences in favor of the plaintiff, this Court finds that plaintiffs have satisfied the pleading requirements regarding Ingram and VPD, albeit barely. Plaintiffs have specified the statements they contend were fraudulent-namely the e-mails requesting customer information for helping plaintiffs with future promotions, identified Universal as the so-called "speaker," detailed that the statements were made via e-mail on August 28, 2000, and explained why the statements were fraudulent. Furthermore, plaintiffs go beyond bare allegations to describe Ingram and VPD's connection to the fraud, specifying how Ingram and VPD "conspired to elicit information from the plaintiffs about plaintiffs' customers **[*403]** and … used that information to steal plaintiffs' clients by using plaintiffs' customer information to contact and solicit plaintiffs' customers …." Amend. Comp. P 77(g). See also Amend. Comp. PP 117, 120-25. Such an allegation of a conspiracy between all three defendants and the subsequent use by Ingram and VPD of the fruits of Universal's statement suggest that Ingram and VPD prompted Universal to make the fraudulent statement in the first place. **[**68]** As a result, plaintiffs have satisfied their burden of pleading their fraud claim against Ingram and VPD with particularity, and the claim survives the motion to dismiss with respect to all three defendants.

2. Tortious Interference with a Contractual Relationship

Plaintiffs have also asserted a tortious interference claim against all three defendants. According to plaintiffs, defendants Ingram and VPD intentionally induced Universal to breach its dealer/supplier contracts with plaintiffs through two means: 1) by threatening that all wholesale distributors would go out of business due to an oversaturated distributors market if they were not granted exclusive distributorships, leaving Universal with no distributors for its products, and 2) through offers of special treatment if granted the exclusive distributorships. Additionally, all three defendants allegedly used "threats, bribery, defamation and/or coercion" to induce numerous retailer-customers of plaintiffs to terminate their relationships with plaintiffs. Amend. Comp. P 131. As a result, plaintiffs assert that their business contracts were damaged in excess of $ 30 million. Amend. Comp. PP 132-33. Defendants maintain **[**69]** that plaintiffs have failed to allege the requisite elements of a tortious interference claim, and therefore their claim should be dismissed.

HN27[] Under New York law, the elements of a tortious interference claim are: 1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of the contract; 3) defendant's intentional procurement of the third party's breach of contract; 4) actual breach of the contract, and 5) damages resulting from the breach. Trionic Assocs., Inc. v. Harris Corp., 27 F. Supp.2d 175, 184 (E.D.N.Y.1998), *aff'd, 198 F.3d 235 (2d Cir.1999)*; Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 646 N.Y.S.2d 76, 668 N.E.2d 1370, 1375 (N.Y.1996). Plaintiffs must allege each of these elements in a non-conclusory fashion in their complaint. World Wide Communs. v. Rozar, 1997 U.S. Dist. LEXIS 20596, No. 97 Civ. 1056, 1997 WL 795750, at *6 (S.D.N.Y. 1997). If multiple contracts are at issue, the complaint must specify the particular contracts that have been interfered with by defendants. See Campo v. 1st Nationwide Bank, 857 F. Supp. 264, 273 (E.D.N.Y. 1994); Quail Ridge Assoc. v. Chemical Bank, 162 A.D.2d 917, 558 N.Y.S.2d 655, 658 **[**70]** (3d Dept.), *appeal dismissed, 76 N.Y.2d 936, 563 N.Y.S.2d 64, 564 N.E.2d 674 (1990)*. The exact level of specificity, however, is not a settled matter. See World Wide Communs., 1997 U.S. Dist. LEXIS 20596, 1997 WL 795750 at *6-7 (holding that the absence of factual allegations as to the underlying contracts, such as the parties to the contracts, the terms of the contracts, and whether or not they were terminable at will, led the court to dismiss the tortious interference claim. However, the Court went on to state: "We do not mean to suggest that all of these facts are necessary given our liberal rules, see Fed.R.Civ.P. 8."). Nevertheless, it is clear that plaintiffs must present at least some specific facts which put defendants on notice as to which contracts they are accused of interfering with.

[*404] Perhaps the thorniest issue in a tortious interference claim is the question of what specifically constitutes improper interference. One begins the analysis by drawing a distinction between interference with existing contracts and interference with prospective contracts or contracts that are terminable at will. (See Restatement, Torts 2d, *§ 768* **[**71]** , for the proposition that contracts terminable at will are treated like prospective contractual relations.) It is much easier for a plaintiff to prove improper interference with existing contracts. Plaintiffs simply need to prove the above-stated five elements, and defendants are not afforded the excuse that they were acting as business competitors in procuring the breach. *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 N.Y.2d 183, 191, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980)*. Or as NBT Bancorp stated, ***HN28***[] "Where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior." *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614, 664 N.E.2d 492, 641 N.Y.S.2d 581, 585 (1996)*. [13]

[72]** ***HN29***[] There are "more demanding requirements," however, for proving interference with prospective contractual relations and contracts that are terminable at will. *Guard-Life, 50 N.Y.2d at 191*. In such contracts, a defendant's status as a "business competitor" may excuse him from liability for tortious interference, so long as the "interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful." *Guard-Life, 50 N.Y.2d at 191*. "Wrongful means" have been further defined as including "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" but not "persuasion alone although it is knowingly directed at interference with the contract." *Guard-Life, 50 N.Y.2d at 191*, *aff'd. by* *NBT Bancorp, 87 N.Y.2d 614, 624, 664 N.E.2d 492, 641 N.Y.S.2d 581*. Such a differentiation between interference with existing contracts and interference with prospective and terminable contracts has been justified as striking a balance between "respect for individual contract rights" and the "public benefit **[**73]** to be derived from unfettered competition." *Guard-Life, 50 N.Y.2d at 191*.

In applying the law to the facts of our case, we first assess plaintiffs' contracts with Universal and then plaintiffs' contracts with their retailer-customers.

a. Plaintiffs' contracts with Universal

Plaintiffs have generally alleged that all three defendants tortiously interfered **[*405]** with their dealer/supplier contracts with Universal. As a preliminary matter, this claim as brought against Universal must be dismissed. Indeed, as Universal has correctly asserted, there can be no liability for tortiously interfering with one's own contract. See *Koret, Inc. v. Christian Dior, S.A., 161 A.D.2d 156, 554 N.Y.S.2d 867 (1990)* (holding that only a stranger to a contract can be liable for tortious interference with that contract); *Kosson v. "Algaze", 203 A.D.2d 112, 610 N.Y.S.2d 227, 228 (1994)*, aff'd, *84 N.Y.2d 1019, 622 N.Y.S.2d 674, 646 N.E.2d 1101 (1995)*; *Mackie v. La Salle Indus., Inc., 92 A.D.2d 821, 460 N.Y.S.2d 313, 316 (1983)*.

However, plaintiffs' claims against Ingram and VPD survive. To begin, defendants do not dispute that **[**74]** plaintiffs had dealer/supplier contracts with Universal. (In passing, Ingram suggests that plaintiffs have pleaded insufficient factual allegations of the material terms of the contract; however, in light of PP 45, 47, 127 and 128 of the Amended Complaint, which detail aspects of plaintiffs' contract with Universal, the Court rejects this argument.) There is also no dispute that defendants Ingram and VPD knew of plaintiffs' contracts with Universal, or that there

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[13] The requirement stated in defendant Universal's brief that a plaintiff must prove that defendant acted with "exclusively malicious motivation" in procuring the breach of contract was implicitly overruled by the 1996 Guard-Life decision. While defendants cite a 1997 case in support of this proposition, *Elliott Assocs., L.P. v. Republic of Panama, 975 F. Supp. 332, 341 (S.D.N.Y. 1997)*, a closer examination of that case reveals that it only cites pre-1996 cases to support this notion. (e.g. *Wegman v. Dairylea Coop., Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728, 736 (4th Dep't 1975)*; *Sadowy v. Sony Corp. of America, 496 F. Supp. 1071, 1080 (S.D.N.Y.1980)*; *Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A., 179 A.D.2d 592, 579 N.Y.S.2d 353, 354 (1st Dep't 1992)*; *Benjamin Goldstein Productions, Ltd. v. Fish, 198 A.D.2d 137, 603 N.Y.S.2d 849, 851 (1st Dep't 1993)*. As a result, Elliot states the wrong proposition of law. The correct standard is stated above.

was a breach of such contracts. The crux of this claim is therefore whether or not defendants' alleged behavior rose to the level of "intentional interference" with the dealer/supplier contracts.

Plaintiffs' contracts with Universal appear to be contracts that are "terminable at will." See Amend. Comp. P 135, stating: "Paragraph "10" of the Universal/ETD contract provides that the contract may be terminated 'upon ten (10) days written notice.'" As a result, plaintiffs must show that defendants used "wrongful means" in bringing about Universal's breach. Plaintiffs have pled three different wrongful means in this regard: 1) Ingram and VPD's threats to Universal that all distributors would go out of business if they were **[**75]** not given exclusive distributorships, 2) offers of "unprecedented special treatment to Universal product," Amend. Comp. P 129, and 3) violations of the Sherman Act.

The former two means cited by plaintiff do not appear to rise to the level of "wrongful means." Indeed, offers of special treatment and forecasts of the distributor market's demise seem more on the level of "persuasion" than anything else. Universal could freely choose to accept or reject them as it wished. The latter means, however, does appear to be wrongful. To induce Universal's breach in order to further an anti-competitive conspiracy rises to the level of unlawful behavior that the tortious interference claim is designed to prevent. Since we have not dismissed all the of the antitrust claims above, the tortious interference claim can rest on this single allegation of improper means.

b. Plaintiffs' contracts with Retailer-Customers

Plaintiffs have also alleged that all three defendants tortiously interfered with their contracts with retailer-customers by coercing numerous customers to terminate their contracts with plaintiffs. Defendants respond that plaintiffs have not adequately specified which contracts **[**76]** were interfered with nor have they alleged critical elements such as whether the contracts were for a specified period of time or terminable at will. Moreover, notwithstanding the foregoing, defendants assert that plaintiffs have not alleged any tortious interference beyond the bare conclusory statement that defendants used "treats, bribery, defamation and/or coercion" to achieve their goals.

While plaintiffs have alleged a number of facts suggesting wrongful means under **[*406]** this claim, the Court finds that plaintiffs' failure to specify which contracts with retailer-customers were interfered with and whether or not those contracts were terminable at will warrants dismissal of this claim. While plaintiffs attempt in their brief to salvage the claim by specifying that it is "the retailers on plaintiffs' customer lists" who have been interfered with, even this level of specificity is inadequate. As World Wide Communications has held, "without pleading anything beyond the existence of 'contracts,' we cannot find that the interference alleged is wrongful or improper, and therefore tortious." *1997 U.S. Dist. LEXIS 20596, 1997 WL 795750, at *7* (internal citations omitted). The Court is provided with no **[**77]** information about the identity of any of these retailer-customers and is given no sense of how many of them terminated their contracts. Furthermore, plaintiffs' failure to specify whether the alleged agreements with retailers were guaranteed or terminable at will leaves the Court unable to determine which standard to apply when assessing defendants' behavior for tortious interference. Accordingly, the Court dismisses this allegation of tortious interference for lack of particularity.

3. Breach of Contract

Plaintiff ETD has also alleged a breach of contract claim against defendant Universal. According to ETD, paragraph 10 of its contract with Universal provides that their contract can be terminated only "upon ten (10) days written notice." Universal has never provided it with any written notice of termination, ETD alleges. All the same, Universal has refused to provide ETD with Universal product as their agreement requires, and has thereby breached their contract. As a result, ETD claims, it has suffered damage from having been unable to notify its retailer-customers in advance that it would be unable to fulfill their orders, attendant harm to its business reputation and the **[**78]** loss of a substantial number of current and future clients. Am. Compl. PP 124-25.

HN30[] Under New York, California and Texas law, the essential elements of a breach of contract claim in federal court are: (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages. *Harsco Corp. v. Segui, 91 F.3d 337, 348 (2d Cir.1996)*; *M.G.*

Chamberlain & Co. v. Kenneth R. Simpson, 343 P.2d 438, 445, 173 Cal.App.2d 263, 274 (1959); 2 Witkin, California Procedure, 1226, § 251 et seq.; *Prudential Sec., Inc. v. Haugland, 973 S.W.2d 394, 397 (Tex.App.--El Paso 1998, pet. denied)*; *Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex.App.--Houston [1st Dist.] 1997, no pet.)*; *McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex.App.--El Paso 1993, no writ)*. Such elements need not be pleaded extensively or individually; they need only constitute "a short and plain statement showing that the pleader is entitled to relief." *Campo v. 1st Nationwide Bank, 857 F. Supp. 264, 270*.

The Court finds that plaintiff has satisfied the **[**79]** pleading requirements with respect to this claim. It has adequately alleged the existence of a written contract, defendant's breach and damages. Defendant, to be sure, has raised three arguments in support of its motion to dismiss this claim: 1) that plaintiff cannot demonstrate that defendant's breach was the proximate cause of its injury, 2) that plaintiff's claim was a mandatory counterclaim to Universal's collection action against ETD in the Central District of California, and 3) that the only damages available to plaintiff are those which accrued during the 10-day notice period allegedly required by the contract. However, all three of these arguments concern the merits of plaintiff's claim and are therefore not **[*407]** properly addressed on a motion to dismiss. Accordingly, plaintiff's claim for breach of contract against Universal survives the motion to dismiss.

CONCLUSION

For the aforementioned reasons, the Court dismisses plaintiffs' claims under *Section 2 of the Sherman Act*, as well as plaintiffs' claims of per se illegal group boycott and price-fixing violations under *Section 1 of the Sherman Act*. However, plaintiffs have adequately alleged a rule of reason violation **[**80]** of *Section 1 of the Sherman Act*, as well as claims under *§§ 2(a), 2(d), 2(e)and 2(f)* of the Robinson-Patman Act. The Court also dismisses the tortious interference claims against Universal on all counts and against Ingram and VPD with respect to plaintiffs' contracts with retailer-customers, but not the claim against Ingram and VPD with respect to plaintiffs' contracts with Universal. Finally, the Court finds that plaintiffs have adequately pleaded a fraud and misrepresentation claim and a breach of contract claim.

SO ORDERED.

Dated: March 31, 2004

RAYMOND J. DEARIE

United States District Judge

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In re Scrap Metal Antitrust Litig.

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

March 31, 2004, Filed

CASE NO. 1:02CV0844

Reporter
2004 U.S. Dist. LEXIS 33482 *

IN RE: SCRAP METAL ANTITRUST LITIGATION

Prior History: In re Scrap Metal Antitrust Litig., 2002 U.S. Dist. LEXIS 28690 (N.D. Ohio, Nov. 7, 2002)

Core Terms

conspiracy, Plaintiffs', scrap, class certification, bids, class member, prices, class action, scrap metal, certification, Defendants', antitrust, price fixing, predominate, customers, damages, commonality, fraudulent concealment, allegations, calculation, Metals, courts, cases, alleged conspiracy, individual issues, concealed, conspired, member of the class, common issue, co-conspirators

Counsel: **[*1]** For Profile Grinding, Inc. on behalf of itself and all others similary situated, Plaintiff: Alfred Philip Levitt, LEAD ATTORNEY, Boies, Schiller & Flexner - Washington, Washington, DC; Alison E. Peck, LEAD ATTORNEY, Boies, Schiller & Flexner, Washington, DC; Bonny E. Sweeney, LEAD ATTORNEY, INVALID ADDRESS - Robbins Geller Rudman & Dowd, San Diego, San Diego, CA; Christopher M. Burke, LEAD ATTORNEY, Lerach Coughlin Stoia Geller Rudman & Robbins, San Diego, CA; David R. Scott, LEAD ATTORNEY, Scott & Scott - Colchester, Colchester, CT; Dennis Stewart, LEAD ATTORNEY, Milberg Weiss Bershad Hynes & Lerach, San Diego, CA; Jack Landskroner, LEAD ATTORNEY, Landskroner Law Firm, Beachwood, OH; James E. Miller, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah - Chester, Chester, CT; Karen M. Grenon, LEAD ATTORNEY, State of Connecticut Office of the Treasurer, Hartford, CT; Kimberly Horton Schultz, LEAD ATTORNEY, Boies, Schiller & Flexner, Hanover, NH; Richard B. Drubel, Jr., LEAD ATTORNEY, Boies, Schiller & Flexner, Hanover, NH; Steven M. Weiss, LEAD ATTORNEY, Cleveland, OH; Susan G. Taylor, LEAD ATTORNEY, Lerach Coughlin Stoia Geller Rudman & Robbins, San Diego, CA; William A. Isaacson, LEAD **[*2]** ATTORNEY, Boies, Schiller & Flexner - Washington, Washington, DC; Alan M. Medvick, Niekamp, Weisensell, Mutersbaugh & Mastrantonio, Akron, OH; Alfred G. Yates, Jr., Law Office of Alfred G. Yates, Jr., Pittsburgh, PA; Anne Owings Ford, Brecksville, OH; Brian J. Robbins, Robbins Arroyo, San Diego, CA; Christopher J. Niekamp, Akron, OH; Christopher C. Posteraro, Boies, Schiller & Flexner, Hanover, NH; Donald A. Broggi, Scott & Scott - New York, New York, NY; Frank J. Janecek, Jr., Robbins Geller Rudman & Dowd - San Diego, San Diego, CA; Jennifer A. Cundiff, Niekamp, Weisensell, Mutersbaugh & Mastrantonio, Akron, OH; John S. Clifford, Boies, Schiller & Flexner, INVALID ADDRESS, Hanover, NH; John R. Climaco, Climaco, Wilcox, Peca, Tarantino & Garofoli - Cleveland, Cleveland, OH; Marc H. Edelson, Doylestown, PA; Paul Grieco, Grieco Law LLC, Cleveland, OH; R. Bryant McCulley, Boies, Schiller & Flexner, Hanover, NH; Tanya S. Chutkan, Boies, Schiller & Flexner - Washington, Washington, DC; Wade T. Doerr, Niekamp, Weisensell, Mutersbaugh & Mastrantonio, Akron, OH; Walter W. Noss, Scott & Scott - Chagrin Falls, Cleveland Heights, OH; Dan L. Makee, McDonald Hopkins - Cleveland, Cleveland, OH; **[*3]** Edmund W. Searby, Cleveland, OH.

For Harry Rock & Associates, Inc., Defendant: Stanley M. Fisher, LEAD ATTORNEY, INVALID ADDRESS - Budish & Solomon, Beachwood, OH; Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH; Thomas R. Simmons, Tucker Ellis - Cleveland, Cleveland, OH.

For M. Weingold & Co., Inc., Defendant: Stanley M. Fisher, LEAD ATTORNEY, INVALID ADDRESS - Budish & Solomon, Beachwood, OH; Carolyn C. Russell, INVALID ADDRESS - Tucker Ellis & West, Cleveland, OH; Frank R. Osborne, Tucker Ellis & West, Cleveland, OH; Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH; Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Atlas-Lederer Company, Inc., Defendant: Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Columbia National Group, Inc., Columbia Iron & Metal Company, Defendants: Charles L. Freed, Thompson Hine & Flory LLP., Washington, DC; David J. Hooker, Thompson Hine, Cleveland, OH; Matthew D. Ridings, Thompson Hine - Cleveland, Cleveland, OH; Horatio G. Mihet, Liberty Counsel - Orlando, Orlando, FL; J. Philip Calabrese, Porter, Wright, Morris & Arthur - Cleveland, Cleveland, OH; Leslie W. Jacobs, Pepper Pike, OH.

For DeMilta **[*4]** Iron & Metal, Defendant: Joan E. Pettinelli, North Royalton, OH; William D. Beyer, Fadel & Beyer, Rocky River, OH.

For Bluestar Metal Recycling Co., Defendant: Clifford B. Altfeld, LEAD ATTORNEY, INVALID ADDRESS - Atlfeld & Battaile, Tucson, AZ; Edith I. Rudder, LEAD ATTORNEY, Leonard Felker Altfeld Greenberg, Tucson, AZ.

For Columbia Trading, Inc., Defendant: Leslie W. Jacobs, LEAD ATTORNEY, Pepper Pike, OH.

For Parkwood Iron & Metal, Inc., Defendant: Michael C. Hennenberg, LEAD ATTORNEY, Dinn Hochman & Potter, Cleveland, OH; Steven B. Potter, LEAD ATTORNEY, Dinn Hochman & Potter, Cleveland, OH.

For United States of America, Defendant/Intervenor: Richard T. Hamilton, Jr., LEAD ATTORNEY, Former Assistant U.S. Attorney, Northern District of Ohio.

For Bic Manufacturing, Inc., Movant: Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Stuart Simms, Michael Simms, Movants: Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Shiloh Industries, Inc., 3rd Party Plaintiff: Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Talan Products, Inc., 3rd Party Plaintiff: David M. Cuppage, McCarthy, Lebit, Crystal & Liffman, Cleveland, OH; Jennifer L. Gardner, **[*5]** INVALID ADDRESS-Dreyfuss Williams & Associates, Cleveland, OH; Scott D. Simpkins, Climaco, Wilcox, Peca, Tarantino & Garofoli - Cleveland, Cleveland, OH; Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH.

For Lincoln Electric Company, 3rd Party Plaintiff: Anne Owings Ford, Brecksville, OH; Christopher J. Niekamp, Akron, OH; Hugh M. Stanley, Jr., Tucker Ellis - Cleveland, Cleveland, OH; Walter W. Noss, Scott & Scott - Chagrin Falls, Cleveland Heights, OH.

For Loren Margolis, Interested Party: John Czarnecki, Spengler Nathanson - Toledo, Toledo, OH.

For Center Line Sheet Metal, Inc., Interested Party: Timothy A. Magee, LEAD ATTORNEY, Bowling Green, OH.

For Mercer Co., Interested Party: Stephen W. Funk, Roetzel & Andress - Akron, Akron, OH.

Judges: KATHLEEN O'MALLEY, UNITED STATES DISTRICT JUDGE.

Opinion by: KATHLEEN O'MALLEY

Opinion

MEMORANDUM OF OPINION AND ORDER

Plaintiffs, Profile Grinding, Inc. and Lincoln Electric Company ("Plaintiffs") seek certification of a litigation class of plaintiffs pursuant to *Fed. R. Civ. P. 23* (Doc. 203). Defendants, Bluestar Metal Recycling Co. ("Bluestar"), DeMilta Iron & Metal ("DeMilta"), Columbia Iron & Metal Company, and Columbia National Group, Inc. (collectively

"Columbia") oppose Plaintiffs' **[*6]** request (Docs. 248, 250 and 254, respectively.)[1] In connection with these filings, Plaintiffs also have filed a motion to exclude certain testimonial evidence proffered in support of Weingold and Rock's opposition to the motion for class certification. (Doc. 285). Upon consideration of Plaintiffs' motions and the oppositions thereto, for the reasons that follow, the Court hereby **GRANTS** both motions. The testimonial evidence that is the subject of Plaintiffs' motion to strike is hereby **STRICKEN**, and the Court declines to consider that evidence in evaluating the Plaintiffs' motion for class certification. Additionally, the Court hereby certifies a litigation class of plaintiffs, defined as follows:

> all persons or entities with scrap generating facilities located in Northeast Ohio and the surrounding counties, which is comprised of Ashtabula, Cuyahoga, Lake, Lorain, Medina, Stark and Summit counties, who sold ferrous or nonferrous industrial scrap metal to Defendants between December 1992 and March 2000. Excluded from the Class are Defendants, and their respective parents, subsidiaries and affiliates, as well as any governmental entities. Also excluded from the Class is any party, whether **[*7]** named or not, who is ultimately deemed to have participated in an illegal conspiracy.

I. Background[2]

Manufacturing processes for products with metal components generate both ferrous and nonferrous industrial scrap metal. This scrap metal can be resold to mills and foundries, which recycle the scrap into the manufacture of new metal products. Defendants operate businesses that buy the residual scrap from industrial and other customers and resell it to buyers in Ohio and other states. Generally, Defendants submit bids to generators of the scrap, in which they offer to purchase scrap generated by the customers for a given period of time, at a specified variance from the pricing for scrap set forth in various publications, such as *Iron Age* magazine.[3] If a bid is accepted, a contract is entered into at the bid price, for the bid period. Defendants then leave collection boxes with their contract partners, where the scrap is deposited for pick up. Once retrieved fromthe collection boxes, the scrap is weighed by Defendants and then resold to the mills, foundries and other buyers.

Plaintiffs allege that, beginning no later than December 1992, Defendants conspired to restrain trade, suppress **[*8]** and eliminate competition, and fix the price of scrap. Plaintiffs assert that Defendants furthered this conspiracy through a variety of unlawful and improper acts, including the following:

> (1) Participation in meetings and conversations to allocate customers and rig bids for the purchase of ferrous and nonferrous scrap metal;
>
> (2) Participation in meetings and conversations to set pricing for the purchase of scrap and exchange of documents establishing the agreed-to pricing for certain accounts;

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[1] While Defendants M. Weingold & Company and Jack Weingold (collectively "Weingold") and Harry Rock & Associates, Inc. ("Rock"), also initially opposed the Motion for Class Certification, they have informed the Court that they have withdrawn that opposition and, in fact, intend to join Plaintiffs in seeking approval of a class-wide settlement of claims against Weingold and Rock. While the DeMilta and Columbia Defendants did not file independent briefs in opposition to Plaintiffs' motion, they did file notices of joinder in the opposition filed by Weingold and Rock, a procedure the Court expressly allowed. Hence, while Weingold and Rock have withdrawn their own opposition, the Court will consider the substantive arguments in their opposition brief, as if asserted by DeMilta and Columbia. The remaining Defendants have not opposed Plaintiffs' motion.

[2] The facts contained in this section are taken from the Plaintiffs' Second Amended Consolidated Class Action Complaint ("Complaint")(Doc. 180), and are set forth here for purposes of aiding the Court in its understanding of the factual backdrop of this case. In its consideration of the Plaintiffs' class certification motion, the Court does not determine the truth of these alleged facts.

[3] Defendants vigorously argue that the prices set forth in the industry publications are those for <u>processed</u> scrap, not the unprocessed raw materials. The record unambiguously indicates, however, that the prices for unprocessed scrap bear some relationship to the quoted prices.

(3) Engaging in "quid pro quo" arrangements to compensate the pre-arranged losing bidder or companies that agreed to refrain from bidding, i.e., by agreeing to sell the losing bidder specified volumes of scrap at favorable pricing;
(4) Submitting rigged and collusive bids to Plaintiffs and class members;
(5) Intimidating other scrap dealers not to offer competitive bids;
(6) Maintaining the illegal conspiracy by directing their own employees not to compete for certain customers;
(7) Imposing financial penalties on co-conspirators that disobeyed customer allocation agreements and other rules of the cartel; and

(8) Concealing the conspiracy by holding meetings in secret and, upon information and belief, **[*9]** withholding information from government investigations.

Complaint, at ¶ 41. As examples of such anti-competitive conduct, Plaintiffs point to the following:

(1) An incident in 1993 where Weingold sought a contract to buy scrap from a customer and class member. The customer required three bids from prospective scrap purchasers. Weingold, through Jack Weingold, secretly met with the owners of Bay Metals, Inc. and colluded with Bay Metals, Inc. to submit a low and non-competitive bid. Through the bidding process, the conspirators fraudulently concealed the collusion and created the false impression that the bids were fair and competitive;
(2) In or about 1993, Atlas Lederer Company, Inc. employees were directed not to compete for a certain account because the account "belonged" to another scrap dealer;

(3) In or about 1995, a major stamping company and longtime Weingold customer put its scrap out to bid. At that time, Atlas Lederer Company, Inc. had a pending bid for the scrap. At Columbia National Group, Inc.'s direction, Atlas-Lederer Company, Inc. retracted its bid, allowing Weingold to retain the contract. In exchange for Atlas Lederer Company, Inc.'s retraction, Weingold then sold volumes **[*10]** of scrap to Columbia Trading, Inc.; and
(4) In or about 1996 Rock arranged for at least one other scrap dealer to submit a bid to make "Rock look good."

Complaint, at ¶ 42.

Plaintiffs also assert that the Defendants and other co-conspirators directed salespersons not to bid on certain accounts, placed phone calls to employees of other co-conspirators complaining that they were driving up the prices of scrap, and threatened non-conspirators with retaliation for bidding on the accounts of conspirators. According to Plaintiffs, the clear intent of these actions was to depress pricing to noncompetitive levels. Plaintiffs contend that, as a result of Defendants' unlawful conduct, Defendants intended to and did reduce and restrain price competition in the purchase of scrap, with the result that prices paid to Plaintiffs and class members were fixed, restrained, and maintained at artificially low levels.

In addition, Plaintiffs allege that Defendants fraudulently concealed their unlawful conspiracy from Plaintiffs and class members until March 2000. At that time, Plaintiffs learned that Bay Metals, Inc. had agreed to plead guilty to conspiracy with unnamed co-conspirators to rig bids and to allocate **[*11]** supplies of ferrous and nonferrous scrap from 1992 through 1999, in violation of *15 U.S.C. § 1*. Plaintiffs assert that they did not discover this secret activity until it was disclosed publicly by government attorneys. Defendants and their co-conspirators allegedly fraudulently concealed this conspiracy through:

(1) Secret meetings and telephone calls in which the prices, bids, and markets for scrap were discussed and agreed to;
(2) Allocating secretly among themselves sellers of scrap (including, among others, Plaintiffs) and/or contracts for the purchase of scrap;
(3) Creating a false and misleading appearance of competition for Plaintiffs and/or other class members;
(4) Instructing members of the conspiracy not to divulge the existence of the conspiracy to others not in the conspiracy;
(5) Limiting the anticompetitive, unlawful plan to a small number of people and key officials at each Defendant company and misrepresenting the reasons for unlawful conduct to their own employees;

> (6) Avoiding references in documents, or the creation of documents otherwise created in the ordinary course of Defendants' and the co-conspirators' businesses, regarding conduct which would constitute an antitrust violation **[*12]** or anticompetitive act, destroying documentary proof, and/or creating code words and code names in records to disguise the activities of the conspiracy.
> (7) Participating in secret meetings and conversations to monitor and enforce adherence to the agreed-upon prices, bids, and market shares; and
> (8) Falsely representing to sellers that prices were fair and competitive.

Complaint, at ¶ 48.

II. Discussion

The Plaintiffs allege in their Complaint that the Defendants and other co-conspirators engaged in a horizontal conspiracy to fix the price of scrap metal in violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. This case is before the Court upon the following motions: (1) Plaintiffs' motion to preclude testimonial evidence proffered by Rock and Weingold in opposition to the Plaintiffs' motion for class certification; (2) Plaintiffs' motion for class certification. The Court addresses each of these motions in turn.

A. Motion to Preclude Testimonial Evidence

Plaintiffs seek to strike the declarations of Gary Clayman, Joseph Curtin, John Lancaster, Bruce Safar and Jerry Negrelli, offered in opposition to Plaintiffs' motion for class certification by Rock and Weingold. Rock and Weingold rely on the proffered declarations **[*13]** to support their assertion that the diversity of the scrap metal industry precludes the possibility of common proof (and thus militates against class certification in this context). Plaintiffs contend that consideration of the declarations should be precluded because Defendants neither (1) identified any of the declarants as persons with knowledge in their initial disclosures pursuant to *Fed. R. Civ. P. 26*, nor (2) provided their identities in response to interrogatories specifically asking for the identification of such persons. Plaintiffs assert, moreover, that Defendants failed to comply with this Court's August 14, 2003 order directing them to identify all persons with information regarding Defendants' defenses, and to comply fully with their *Rule 26* disclosure obligations.

While Rock and Weingold initially opposed Plaintiffs' motion to strike, that opposition has since been withdrawn.[4] For this reason, and because the Court is unpersuaded by the proffered explanations for Defendants' failure to identify these witnesses earlier, Plaintiffs' motion to strike is**GRANTED**. Accordingly, the Court will consider the arguments made in the Rock and Weingold opposition brief without reference to or the support of the **[*14]** subject declarations.

B. Motion for Class Certification

The Plaintiffs request the Court to certify as a class

> all persons or entities with scrap generating facilities located in Northeast Ohio and the surrounding counties, which is comprised of Ashtabula, Cuyahoga, Lake, Lorain, Medina, Stark and Summit counties, who sold ferrous or nonferrous industrial scrap metal to Defendants between December 1992 and March 2000. Excluded from the class are Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any governmental entities.

Plaintiffs have the burden of proving that all of the requirements of *Fed. R. Civ. P. 23*, which governs certification of federal class actions, have been satisfied. *See* *Amchem Prods. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231,*

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[4] Despite having joined in Rock and Weingold's opposition to Plaintiffs' underlying motion for class certification, no defendant filed a notice of joinder in Rock and Weingold's opposition to the motion to strike.

138 L. Ed. 2d 689 (1997). In reviewing a motion for class certification, the court must accept the Plaintiffs' allegations as true. *See* Fears v. Wilhelmina Model Agency, Inc., 2003 U.S. Dist. LEXIS 11897, 2003 WL 21659373 at *1 (S.D.N.Y. Jul. 15, 2003), *citing* Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 661, n.15 (2d Cir. 1978). The pleadings, evidentiary records and affidavits may be used. *See* Fears, 2003 U.S. Dist. LEXIS 11897, 2003 WL 21659373, *1; Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982), *cert. denied*, *459 U.S. 838, 103 S. Ct. 86, 74 L. Ed. 2d 80 (1982)*. The court should take a flexible stance and, depending on the circumstances, may base its decision whether or not to certify a class action on the pleadings alone. *See* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)("[s]ometimes the issues are plain enough from the pleadings. . . and sometimes it may be necessary **[*15]** for the court to probe behind the pleadings. . . ."); In re Visa Check/MasterMoney Antitrust Litig. 192 F.R.D. 68, 79 (E.D.N.Y. 2000), *aff.*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917, 122 S. Ct. 2382, 153 L. Ed. 2d 201 (2002). A court does not have the authority to conduct a preliminary inquiry into the merits of a suit to determine whether it may be maintained as a class action.*See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974).

The Supreme Court has noted that Rule 23 is important in the private enforcement of antitrust actions. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972). When in doubt as to whether to certify a class action in the antitrust context, accordingly, the court should err in favor of doing so. *See* In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 303 (E.D. Mich. 2001).

To justify class certification, Plaintiffs must establish that they meet the requirements of both Fed. R. Civ. P. 23(a) and (b). Rule 23(a) contains four threshold requirements applicable to all class actions:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical . . . of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Amchem, 521 U.S. at 613 (quoting Fed. R. Civ. P. 23(a)(1-4)). "Once those conditions are satisfied, the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 23(b)." In re American Medical Sys., 75 F.3d 1069, 1079 (6th Cir. 1996). Plaintiffs seek class certification **[*16]** only pursuant to Fed. R. Civ. P. 23(b)(3), which provides for class certification if:

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b). The Court considers the requirements of Fed. R. Civ. P. 23(a) and (b) in turn.

1. *Fed. R. Civ. P. 23(a)(1)*: Numerosity

The first requirement of Fed. R. Civ. P. 23(a) is numerosity—specifically, that the class members in the action be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In this case, Plaintiffs allege that the proposed class numbers at least in the hundreds. No defendant has objected to the Court's finding the existence **[*17]** of this element and, in any case, the Plaintiffs clearly have satisfied this requirement.

"There is no strict numerical test for determining impracticability of joinder."American Medical Sys., 75 F.3d at 1079. Rather, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." General Tel. Co. v. EEOC, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980).

"When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone." *American Medical Sys., 75 F.3d at 1079*. The Sixth Circuit Court of Appeals has affirmed class certification in cases involving substantially fewer than 100 individuals. *See Haytcher v. ABS Industries, Inc., 1991 U.S. App. LEXIS 30643, 1991 WL 278981 at *1-2 (6th Cir. Dec. 27, 1991)* ("approximately 61 individuals");*Afro American Patrolmens League v. Duck, 503 F.2d 294, 298 (6th Cir. 1974)*(35 individuals).

Finally, Plaintiffs' approximate definition of the proposed class is sufficient for purposes of certification, and the precise size of the class can be determined at a later point in the litigation. *See In re Infant Formula Antitrust Litig., 1992 U.S. Dist. LEXIS 21981, 1992 WL 503464 (N.D. Fla. Jan. 13, 1992)*. With these principles in mind, the Court finds that the proposed class of several hundred is more than sufficient to satisfy the numerosity requirement of *Fed. R. Civ. P. 23(a)(1)*.

2. *Fed. R. Civ. P. 23(a)(2)*: Commonality

The second element, that of "commonality," requires that there be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. As with the numerosity requirement, Defendants have declined **[*18]** to object to this element, and the Court finds that the commonality requirement is satisfied.

The commonality test "is qualitative rather than quantitative[;] that is, there need be only a single issue common to all members of the class." *American Medical Sys., 75 F.3d at 1080*, *quoting* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, §3.10, at 3-47 (3d ed. 1992). *See also Sprague v. GMC, 133 F.3d 388, 397 (6th Cir. 1998)*, *cert. denied*, *524 U.S. 923, 118 S. Ct. 2312, 141 L. Ed. 2d 170 (1998)*. Thus, although individual differences in issues among putative class members are relevant to the commonality inquiry, such differences do not necessarily defeat commonality. *See Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988)*; *Senter v. General Motors Corp., 532 F.2d 511, 523-24 (6th Cir. 1976)*, *cert. denied*, *429 U.S. 870, 97 S. Ct. 182, 50 L. Ed. 2d 150 (1976)*.

The court must be mindful, however, of the purpose underlying the commonality requirement—that "the class-action device save[] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under *Rule 23*." *Califano v. Yamasaki, 442 U.S. 682, 701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. Thus, if questions of law or fact common to all of the class members are far outweighed by differences, then class certification should be denied. A conspiracy antitrust action, however, generally involves numerous common legal and factual issues, making class certification particularly appropriate in this context. *See Cumberland Farms, Inc. v. Browning-Ferris Indus., 120 F.R.D. 642, 647 (E.D. Pa. 1988)*.

Plaintiffs point to specific **[*19]** common questions of law and fact involved in the present case, including:

(1) Whether Defendants combined, agreed, or conspired to fix the price of scrap metal at artificially depressed levels;
(2) Whether Defendants combined, agreed, or conspired to allocate customers;
(3) The duration of the illegal combination, agreement, or conspiracy to fix the price of scrap metal;
(4) Whether the Defendants' activities have substantially affected interstate commerce;
(5) Whether, and to what extent, Defendants' conduct caused injury to the business or property of Plaintiffs and members of the class;
(6) The appropriate relief and/or measure of damages; and
(7) Whether Defendants actively sought to conceal the conspiracy.

As noted above, none of the Defendants has disagreed with Plaintiffs' characterization of these issues of fact and law, and none disagrees that the commonality element of *Rule 23(a)* can be satisfied in this case. Accordingly, the Court finds that this action contains common questions of law and fact, and the commonality element of *Fed. R. Civ. P. 23(a)* is satisfied.

3. *Fed. R. Civ. P. 23(a)(3)*: Typicality

A plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other **[*20]** class members, and if his or her claims are based on the same legal theory" as those of other class members. *American Medical Sys., 75 F.3d at 1082*, *quoting* *1 Newberg, supra*, § 3-13, at 3-76 (footnote omitted). The typicality requirement ensures that the representative plaintiffs' interests are aligned with those of the proposed class and thus that, in pursuing their own claims, the named plaintiffs also will advance the interests of the class members. *See id.* The Court finds that the Plaintiffs sufficiently have demonstrated that the named plaintiffs' claims are typical of the claims of the entire class.

Plaintiffs assert that all class members here seek to prove the same legal theory; i.e., Defendants conspired to fix the price of scrap metal at artificially low levels and, as a result, the Plaintiffs sustained injury. Although there may be differences among class members involving products purchased, methods of purchase, or the amount of damages suffered, the typicality element is not defeated by disparities in such factual issues. *See* *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 261 (D.D.C. 2002)*("[t]he typicality requirement does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members. . . ."). Moreover, **[*21]** where a conspiracy is involved, typicalityis not defeated simply because a named plaintiff has not dealt with each of the defendants. *See* *Sebo v. Rubenstein, 188 F.R.D. 310, 318 (N.D. Ill. 1999)*; *Emig v. American Tobacco Co., Inc., 184 F.R.D. 379, 386 (D. Kan. 1998)*.[5] The Court finds that, on balance, the Plaintiffs' claims are typical of those of the entire class, and the typicality element of *Fed. R. Civ. P. 23(a)(3)* is satisfied.

4. *Fed. R. Civ. P. 23(a)(4)*: Adequacy

The adequacy requirement ensures that the named representative plaintiffs "will fairly and adequately represent the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. The Sixth Circuit has articulated two criteria for determining adequacy of representation: "(1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *American Medical Sys., 75 F.3d at 1083*, *quoting* *Senter, 532 F.2d at 525*. Essentially, the adequacy requirement tests "the experience and ability of counsel for the plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1031 (6th Cir. 1977)*. "The adequate representation requirement overlaps with the typicality requirement because[,] in the absence of typical claims, the class representative has no incentive[] to pursue the claims of the other **[*22]** class members." *American Medical Sys., 75 F.3d at 1083*.

As discussed above, the Court already has found that the class representatives have claims typical of those of the class. In any event, a court will deny certification for failure to satisfy the adequacy prong only in rare situations. "[A]typicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy." *Hedges Enterprises, Inc. v. Continental Group, Inc., 81 F.R.D. 461, 466 (E.D. Pa. 1979)*; *see also* *Fears, 2003 U.S. Dist. LEXIS 11897, 2003 WL 21659373, at * 5*. Each class member here has an interest in establishing the liability of Defendants and the fact of resultant injury. Furthermore, Plaintiffs have alleged in the Complaint that the artificially low prices resulting from Defendants' conspiracy affected all those who sold scrap metal to Defendants during the relevant time period. There is no indication in the record of antagonism between the interests of the named plaintiffs and those of the class. Finally, the Plaintiffs are represented by competent counsel who have extensive experience in antitrust litigation and in class action representation. (Doc. 204, Exh. 26). All that has occurred in this case to date demonstrates that Plaintiffs and counsel are likely to prosecute this action vigorously.

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[5] Accordingly, the Court rejects the argument of defendant Bluestar (the only defendant to object to the satisfaction of either the typicality or adequacy requirements) that the class should be divided into subclasses based on whether a class member has dealt with each particular defendant. (Doc. 248, at 3). Bluestar's attempt to limit the scope of the class is appropriate to the damages inquiry, not to the liability class certification inquiry. Similarly, the fact that certain customers of Bluestar may have signed release documents as to Bluestar does not defeat the appropriateness of certification. Again, this fact is appropriate for consideration at the damages stage, since the releases may limit the amount of damages recoverable by certain class members, or may affect the percentage of damages potentially attributable to Bluestar.

Bluestar, the only defendant to object to the satisfaction **[*23]** of this element, argues that the fact that three named plaintiffs have withdrawn as proposed class representatives counsels against a finding of adequacy of representation, because the withdrawal suggests that overly aggressive counsel may have coerced some or all of the plaintiffs into serving as class representatives.[6] Bluestar provides no evidence, however, to support this conclusory assertion and, in the absence of such evidence, the Court will not find the named Plaintiffs to be inadequate representatives on this basis. In any event, a court may take action to modify or decertify a previously certified class, where subsequent developments warrant such action. *See* *Barney v. Holzer Clinic, 110 F.3d 1207, 1214 (6th Cir. 1997)*; *Fed. R. Civ. P. 23(c)(1)*(advisory committee notes to 1966 amendment). The Court concludes that the Plaintiffs have carried their burden of showing that the named representatives and their counsel will fairly and adequately represent the interests of the class in this case. Accordingly, the Court turns to examine the requirements of *Fed. R. Civ. P. 23(b)(3)* and the Defendants' objections to class certification.

5. *Rule 23(b)* Analysis: *Fed. R. Civ. P. 23(b)(3)*

Not only must the "four prerequisites [of *Rule 23(a)*] . . . *all* be met before a class can be certified," "the party seeking certification must also demonstrate **[*24]** that it falls within at least *one* of the subcategories of *Rule 23(b)*." *In re American Medical Sys., 75 F.3d 1069* (emphasis in original). Plaintiffs seek class certification under *Rule 23(b)(3)*, and the Court accordingly examines that subsection.[7]

Rule 23(b)(3) requires the court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. The plain language of the rule indicates that common issues need only predominate over, not outnumber, individual issues. *See* *In re School Asbestos Litigation, 789 F.2d 996, 1010 (3d Cir. 1986)*, *cert. denied*, *479 U.S. 852, 107 S. Ct. 182, 93 L. Ed. 2d 117 (1986)*("There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate. Resolution of common issues need not guarantee a conclusive finding on liability, . . . nor is it a disqualification that damages must be assessed on an individual basis."). Thus, common issues must be important to resolution of the dispute but need not be dispositive of the litigation. *See* *In re Toilet Seat Antitrust Litigation, 1976 U.S. Dist. LEXIS 14904, 1976 WL 1265 at * 4 (E.D. Mich. May 26, 1976)*. Antitrust price-fixing cases generally are considered appropriate for class action certification. *Robinson v. Texas Automobile Dealers Association*, 2003 WL 21756591 at *4 (E.D. Tex. Mar. 25, 2003)("antitrust price fixing cases are **[*25]** particularly suitable for class action treatment.")(quotation omitted).

a. Predominance of Common Questions

Plaintiffs bring this action under *Section 1 of the Sherman Act*, to which *Section 4 of the Clayton Act* applies. *See* *Cardizem CD, 200 F.R.D. at 300-01*; *Weber v. NFL, 112 F. Supp. 2d 667, 670 (N.D. Ohio 2000)*.[8] In order to be successful in their antitrust claim, the Plaintiffs must show (1) a violation of ***antitrust law*** (conspiracy); (2) direct injury from such violation (impact); and (3) damages that can be quantified with the requisite precision. *See* *Cardizem CD, 200 F.R.D. at 301*; *Jackshaw Pontiac, Inc. v. Cleveland Press Pub. Co., 102 F.R.D. 183, 194 (N.D. Ohio 1984)*. Additionally, in this case, since the Plaintiffs seek to toll the statute of limitations, the Plaintiffs must

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[6] The motion for withdrawal filed by Bic Manufacturing, Inc. and Talan Products, Inc.(Doc. 205) explains that these entities desired to withdraw as class representatives because of the enormous expense they were required to incur in representing the class. Plaintiff Shiloh Industries, Inc. indicated its desire to withdraw for similar reasons. (Doc. 179).

[7] Since the Plaintiffs do not seek class certification under any other subsection, the Court need not conduct a detailed analysis of those subsections here.

[8] Paragraph one of the Complaint refers to *Sections 4* and *16 of the Clayton Act*, *15 U.S.C. §§ 15*, *26*, while the Count I title refers to *15 U.S.C. §§ 1*, *15*.

prove that the Defendants undertook actions to fraudulently conceal their unlawful conduct and prevent Plaintiffs from discovering the conspiracy. Accordingly, in reviewing whether Plaintiffs have satisfied the requirements of *Fed. R. Civ. P. 23(b)(3)*, the Court must examine whether Plaintiffs may prove each of these elements through general, class-wide proof.

Defendants argue that individual issues predominate with respect to each element of Plaintiffs' claim. Specifically, Defendants assert that whether bids were rigged requires a separate inquiry into each generator's practice, the complex combination of services provided, types of scrap metals purchased, **[*26]** levels of contamination of scrap, levels of segregation, and volume and transportation costs. According to Defendants, such an individually-based inquiry would make it impossible to fix class-wide prices for the purchase of scrap metal from scrap generators. Further, Defendants claim that the allegations of a conspiracy to rig bids and to engage in threats and intimidation to restrain competition are complicated by vast differences in the geographic service area of each of the Defendants, the need to determine which scrap metal dealers in Northeast Ohio were part of the alleged conspiracy, and the fact that the guilty pleas on which Plaintiffs rely actually involve multiple conspiracies and six different time periods, none of which match the purported class period.

After careful consideration, the Court finds that the Defendants' arguments are not well taken. The Plaintiffs sufficiently have alleged facts demonstrating that common questions predominate over individual issues in this litigation. The Court examines the commonality of proof on each of the elements of the Plaintiffs' claim below.

(1) Antitrust Violation - Conspiracy

Plaintiffs allege that Defendants conspired to horizontally **[*27]** fix prices and allocate customers concerning the purchase of scrap metal, and thus that proof of the conspiracy will be an issue common to all class members. Defendants, on the other hand, vigorously assert that merely alleging a price fixing conspiracy is insufficient to demonstrate that the conspiracy allegations may be proven with common, generalized evidence. *See* *In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1039 (N.D. Miss. 1993)*("[A] mere charge of conspiracy does not mean that common questions predominate. . . . The suitability for *Rule 23* certification is, by design and necessity, a fact sensitive process for each case.").

Specifically, defendants claim that this is a case involving heterogeneous goods and services, where a variety of factors affect price, and each purported class member's claims must be analyzed on an individual basis, thus requiring a series of "mini-trials." *See* *Loeb Indus. v. Sumitomo Corp.(In re Copper Antitrust Litig.), 196 F.R.D. 348, 354 (W.D. Wisc. 2000)*. Defendants assert, moreover, that any allegations of bid-rigging or intimidation would require inquiry into individual issues, which could only be addressed with respect to the specific class members involved.

Defendants, however, misconstrue the nature of Plaintiffs' claims. Defendants attempt to separate Plaintiffs' allegations in order to portray them as involving multiple, **[*28]** individual conspiracies rather than one unified scheme. Plaintiffs allege more here than discrete rigged bids; rather, Plaintiffs allege that the bid rigging was a part of a larger conspiracy to depress scrap metal prices. Plaintiffs do not allege, moreover, intimidationby Defendants of particular class members, in which case individual examination of the allegations would be appropriate. Rather, Plaintiffs allege intimidation of other conspirators to prevent them from revealing or obstructing operation of the larger conspiracy. Finally, Plaintiffs do not allege that they were harmed individually by particular acts of "bid-rigging" or customer allocation. Plaintiffs contend, instead, that Defendants' overall conduct created an environment in which market prices could not fluctuate freely, and thus, despite individual differences in price and product, all Plaintiffs were harmed by the artificial depression of the "base price." This overarching conduct, rather than any one particular act, is the central focus of the Plaintiffs' claim.

Examination of the allegations of price fixing and market allocation will focus on the actions of the Defendants; thus, proof for these issues will not **[*29]** vary among class members. *See* *Vitamins Antitrust, 209 F.R.D. at 251*. Courts have found that the existence of a conspiracy is the predominant issue to consider in determining whether to allow certification of the class, even where significant individual issues also exist. *See* *In re NASDAQ Market-Makers*

Antitrust Litig., 169 F.R.D. 493, 518 (S.D.N.Y. 1996)("existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present. . . ."). Courts also have certified classes in cases where the industry, pricing structure, products, and transactions between defendants and their customers are complex, varied, fragmented, and diverse. *See* Vitamins Antitrust, 209 F.R.D. at 264, *citing* In re Commercial Tissue Prods., 183 F.R.D. 589 (N.D. Fla. 1998); In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268 (D. Minn. 1989).

Again, Plaintiffs have alleged a single conspiracy; Defendants may not recharacterize the Plaintiffs' allegations in order to garner support for their own arguments. *See* Vitamins Antitrust, 209 F.R.D. at 265. The fact that three separate guilty pleas have been entered in parallel proceedings does not compel the conclusion that separate conspiracies existed and that class action certification is, thus, inappropriate. Id. at 265, n. 16. Defendants appear to argue that, where the Plaintiffs' complaint involves more than mere allegations of price fixing, a court should not certify a class. Reference to multiple cases indicates, **[*30]** however, that courts have certified classes even where the defendants' alleged conduct involved multiple acts beyond "pure" price fixing. *See* DeLoach v. Philip Morris Cos., 206 F.R.D. 551, 552 (M.D.N.C. 2002)(defendants rigged bids at auction, submitted decreased purchase intentions to reduce the federal tobacco control and refused to purchase tobacco at auction in order to receive an artificially low discount from tobacco cooperatives). *See also* Vitamins Antitrust, 209 F.R.D. at 254 (class certified where defendants fixed the prices of numerous vitamins and allocated customers); Wirebound Boxes, 128 F.R.D. at 269 (class certified where defendants conspired to fix prices, allocate customers, and eliminate competition).

Defendants' argument concerning Plaintiffs' defined geographic area similarly is without merit. Plaintiffs' expert has analyzed the U.S. Census data, the location of Defendants' customers, and other documents from Defendants in order to determine the geographic area relevant to this action (Leitzinger Reply, ¶¶ 8-13) and, in their reply memorandum, Plaintiffs have clarified and redefined the geographic area involved. The revised area includes named counties in Northeast Ohio: Ashtabula, Cuyahoga, Lake, Lorain, Medina, Stark, and Summit. Plaintiffs' revised geographic area is sufficiently specific to allow **[*31]** Plaintiffs to address their antitrust allegations with common proof.[9] Accordingly, the Court finds that the allegations of antitrust violations and conspiracy present common issues of fact, which support the certification of a class action pursuant to Fed. R. Civ. P. 23(b)(3).

(2) Impact

Similarly, Plaintiffs' proposed evidence of impact—the fact of injury—presents common issues, which support the certification of a class action pursuant to Fed. R. Civ. P. 23(b)(3). In order to demonstrate impact at the class certification stage, Plaintiffs need not actually prove impact; rather, they need only show that they "intend to use generalized evidence[,] which is common to the class and will predominate over individualized issues." Vitamins Antitrust, 209 F.R.D. at 266. *See also* In re Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002)("Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class. . . ."). Courts have found that plaintiffs presented generalized evidence of impact in price fixing cases even where the allegations involved individual negotiations and varied purchase methods, as well as different amounts, prices, and types of products purchased.*See* Vitamins Antitrust, 209 F.R.D. at 266.

Defendants' arguments **[*32]** with respect to antitrust impact essentially mirror the arguments set forth with respect to the conspiracy prong. Defendants cite Windham v. American Brands, Inc., 565 F.2d 59, 68 (4th Cir. 1977), in support of the proposition that, where a commodity is heterogeneous or non-fungible, or where the chain of distribution is complex, the sale of different products at different prices necessitates an individual examination of each sale. In essence, Defendants claim that each plaintiff must demonstrate that it was specifically harmed by a failure to receive the appropriate price in a particular transaction. Finally, Defendants repeat their argument that a

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[9] Thus, the Court rejects defendant Bluestar's argument that the Plaintiffs' class definition is insufficiently specific. (Doc. 228, at 2-3).

variety of factors (including negligence or mismanagement on the part of scrap sellers) may have affected the price that sellers received for their scrap.

The Court rejects, however, the suggestion (particularly at this stage in the proceedings) that this case is too complicated to permit class-wide proof. First, Plaintiffs have presented case law indicating that, in price fixing cases, impact on all participants in the affected market may be presumed. *See, e.g., Vitamins Antitrust, 209 F.R.D. at 267*; *In re Potash Antitrust Litig., 159 F.R.D. 682, 695 (D. Minn. 1995)*. Moreover, at least one later case has suggested that *Windham* is outdated, since modern courts have a number of formulaic methods at their **[*33]** disposal for determining impact and damages, even in a complex case. *See DeLoach, 206 F.R.D. at 559*.

At any rate, even absent a presumption of impact, the Plaintiffs have presented sufficient evidence to survive a *Rule 23* inquiry. Plaintiffs have presented the declaration of their economic expert, Dr. Jeffrey J. Leitzinger, in support of their theory that the defendants' conspiracy caused a class-wide price depression inscrap metal. Although the Defendants disagree with Leitzinger's methods of analysis and conclusions, these issues are more appropriate for jury resolution. *See Vitamins Antitrust, 209 F.R.D. at 267*. At this stage in the proceedings, Plaintiffs need only identify a valid method for determining impact. *See id.* Dr. Leitzinger has explained in his original and reply declarations (1) the relevance and existence of product homogeneity (within product categories); (2) the presence of brokers, who tend to equalize the price of a grade of industrial scrap across the market; (3) the price transparency within the market; and (4) the low barriers to competition among market participants. This evidence is sufficient, at this stage, to indicate that the Plaintiffs' evidence of impact presents a common question for resolution by the Court.

(3) Damages [*34]

At this time, the Court's inquiry is limited to assessing whether methods are available to prove damages on a class-wide basis. *See In re Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995)*(must show only that damage methodologies are not "so insubstantial as to amount to no method at all."). In connection with class certification, the Court does not assess the class plaintiffs' damages or even determine the appropriate method for calculating such damages. Rather, courts focus on whether the computation of damages would be a "complex, highly individualized task" or a "mechanical task" that is "capable of mathematical or formula calculation." *Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 492-93 (E.D. Va. 1987)*.

Defendants argue that, even assuming that Plaintiffs could prove conspiracy and antitrust impact, a determination of damages suffered by each class member will require a highly individualized inquiry. Defendants assert that such separate calculations would be necessary because the disparities in services provided, type of scrap involved (whether homogeneous, mixed, high in moisture content, etc.) and geography would prevent any sort of uniform calculation.

Dr. Leitzinger asserts that a class-wide damage calculation is possible through application of a two-step process. First, an undercharge could be determined **[*35]** by computing, on an absolute or a percentage basis, the difference on a per unit basis between the amounts actually paid for industrial scrap and the amounts that would have been paid but for the conspiracy. Depending upon the facts as they develop in the merits portion of the case, undercharges might be calculated separately for different time periods or for different products. Second, Defendants' aggregate purchases from each member of the proposed class could be multiplied by the undercharge amounts.

The difficulty with this analysis lies, of course, in calculation of the difference in price caused by the conspiracy. According to Dr. Leitzinger, however, there are three widely accepted methodologies for estimating the prices that would have prevailed but for the alleged conspiracy: (1) a but-for benchmark based upon profit margins dealers earned and/or prices they paid pre-conspiracy and/or post-conspiracy; (2) a "yardstick approach" based upon profit margins dealers earned and/or prices they paid during the same time period as the alleged conspiracy in a "comparable" geographic market believed to be free of conspiracy; and (3) an econometric analysis designed to predict prices paid **[*36]** by dealers in the absence of the alleged conspiracy.

At this stage, the Court need not calculate the Plaintiffs' damages, nor even determine which of these calculation methods is preferable. *See Vitamins Antitrust, 209 F.R.D. at 267-68* ("[t]he Court will not assess weight to be given to parties' experts at this stage. It is enough that plaintiffs have made a threshold showing of how they intend to prove impact using generalized evidence on a class wide basis."). Plaintiffs have shown that there is a viable method for calculating class-wide damages. *See id. at 268*. Accordingly, the Court concludes that, despite the likely existence of individual damages issues, common damages issues will predominate in this case. *See id.*

(4) Fraudulent Concealment

In order to overcome the four-year statute of limitations set forth in *15 U.S.C. § 15b*, which would bar the Plaintiffs' claim for most of the class period, the Plaintiffs must demonstrate fraudulent concealment. Plaintiffs' proposed proof of this element also presents a common question for resolution on behalf of the class and supports class certification in this case.

Fraudulent concealment requires proof that (1) Defendants concealed the conduct that constituted the cause of action; (2) Plaintiffs failed **[*37]** to discover the operative facts that are the basis of the action within the limitations period; and (3) Plaintiffs used due diligence until discovery. *See Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*; *Alba v. Marietta Mem'l Hosp., 184 F.R.D. 280, 289 (S.D. Ohio 1998)*. The issue of fraudulent concealment by an antitrust defendant has been held to be a common question that can be resolved on behalf of all members of a class. *See Linerboard Antitrust, 305 F.3d 145, 160 (3d Cir. 2002)*, *cert. denied*, *538 U.S. 977, 123 S. Ct. 1786, 155 L. Ed. 2d 666 (2003)*; *Vitamins Antitrust, 209 F.R.D. at 269*.

Defendants argue that class-wide proof of fraudulent concealment is particularly inappropriate here, because the inquiry will focus primarily on the last two elements—that is, what each purported class member knew and when it knew it. Plaintiffs allege that they had no knowledge of the Defendants' conspiracy (nor should they, by the exercise of reasonable diligence, have had such knowledge) prior to March 2000, when defendant Bay Metals pleaded guilty to conspiracy. Defendants contend, however, that several of the Plaintiffs at least had heard rumors of price fixing prior to that date and that Lincoln Electric, in particular, had direct evidence of such anti-competitive activity. Issues of knowledge on behalf of some of these class members, defendants assert, will result in an extensive and particularized inquiry as to when each purported class member **[*38]** became aware of the allegedly anti-competitive conduct.

Individual determinations may be necessary as to a plaintiff's knowledge and diligence; however, these individual issues do not preclude class certification, because the key "inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did." *Linerboard Antitrust, 305 F.3d at 163*, *quoting In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 488 (W.D. Pa. 1999)*; *Vitamins Antitrust, 209 F.R.D. at 269*; 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, §4.26 at 4-104 (3d ed. 1992). The focus is on whether "defendants successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members . . . " *Linerboard Antitrust, 305 F.3d at 163*, *quoting Flat Glass, 191 F.R.D. at 488*. In determining whether the Plaintiffs' proof of fraudulent concealment presents a question common to the class, the fact of concealment is more important than the question of whether Plaintiffs suspected that prices were lower than they should have been or even whether Plaintiffs heard rumors of an alleged conspiracy.*See Linerboard Antitrust, 305 F.3d at 163* ("[k]ey questions will not revolve around whether Appellees knew that the prices paid were higher than they should have been or whether Appellees knew of the alleged conspiracy. . . ."). Accordingly, common issues are often found to "predominate" over individual **[*39]** issues in fraudulent concealment cases. *See Catfish Antitrust, 826 F. Supp. at 1044* ("[t]he court's finding that common issues would predominate over any individual considerations of fraudulent concealment is in accord with the great weight of authority. . . .").[10]

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[10] Additionally, the applicable due diligence standard is an objective one; thus, if a reasonably diligent plaintiff would not have discovered the conspiracy, then it does not matter whether a plaintiff in fact exercised reasonable diligence. *See Sterlin v. Biomune Sys., Inc., 154 F.3d 1191, 1202, n.20 (10th Cir. 1998)*.

Moreover, to the extent that Plaintiffs' case does involve individual factual determinations, mechanisms exist for handling such issues. If necessary, a trial may be bifurcated into liability and damages segments, with individual questions handled during the damages phase. *See* Linerboard Antitrust, 305 F.3d at 163; Vitamins Antitrust, 209 F.R.D. at 269; In re Industrial Diamonds Antitrust Litig., 167 F.R.D. 374, 385 (S.D.N.Y. 1996)(individualized issues considered when the court determines each class member's damages); Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 43 (S.D.N.Y. 1990)(individual issues on statute of limitations can be considered in separate determination of damages).

Whether or not Plaintiffs have established the elements necessary to prove fraudulent concealment by a preponderance of the evidence should be determined at a trial on the merits or through a well-developed summary judgment motion. *See* Vitamins Antitrust, 209 F.R.D. at 269. The Court finds, however, that at the class certification stage, common issues of fraudulent concealment predominate.

b. Superiority of Class Action

The Court finds that a class action is superior to any other type of adjudication for resolution of this matter. Defendants **[*40]** argue that class certification should be denied because it is not possible for this litigation to result in a manageable trial, where thousands of purported class members' particular circumstances and hundreds of thousands of scrap metal purchases by hundreds of dealers must be analyzed individually. The Court is not persuaded, however. Since the Court already has found that the issues involved in this case are overwhelmingly common to the class, there is no reason to conclude that litigation of this case through a class action procedure is too complex to be manageable.

This case is suitable for class action adjudication for the same reasons that courts have found such treatment appropriate in previous antitrust class actions. Courts have favored certification of a class of plaintiffs in the antitrust context, particularly where individual plaintiffs are unlikely to pursue their claims separately because the cost of an individual action outweighs the potential return for each plaintiff. *See Robinson*, 2003 WL 21756591 at * 6; Deloach, 206 F.R.D. at 567.[11] Where support for certification of a class of antitrust plaintiffs is doubtful, courts consistently have chosen to err in favor of certification. A court may review the appropriateness of such **[*41]** certification if trial later appears to be unmanageable. *See Robinson*, 2003 WL 21756591 at * 6; Deloach, 206 F.R.D. at 567.

In any event, denying class certification based only on manageability is disfavored, and any manageability problems in this case should not prohibit class certification. *See* In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001), *cert. denied*, 536 U.S. 917, 122 S. Ct. 2382, 153 L. Ed. 2d 201 (2002); *Robinson v. Texas Automobile Dealers Ass'n*, 2003 WL 21756591 at * 5. Again, any doubt should be resolved in favor of certification. *Robinson*, 2003 WL 21756591 at * 6.

III. Conclusion

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[11] *See also* In re Sugar Industry Antitrust Litig., 73 F.R.D. 322, 358 (E.D. Pa. 1976), which sets forth severally generally applicable reasons for certifying a class in the antitrust context:

> (1) the alleged economic injuries to many proposed class members are too minuscule to justify their independent commencement of actions; (2) the proliferation of lawsuits that otherwise would result from the alleged pervasive conspiracy absent class actions will be minimized; (3) duplicative efforts by the judiciary and the litigants will be eliminated; (4) duplicative litigation expenses and attorneys' fees will be prevented; (5) defendants will be relieved from the burden of defending numerous lawsuits geographically scattered throughout the nation; and (6) inconsistent judicial decisions will be avoided.

Id.

A court should not refuse to certify a class simply because problems may later arise. *Deloach, 206 F.R.D. at 568*. The Court has determined that Plaintiffs have satisfied the requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(3)*.

Accordingly, Plaintiffs' motions to preclude testimonial evidence and **[*42]** for class certification are **GRANTED**. The declarations of Gary Clayman, Joseph Curtin, John Lancaster, Bruce Safar and Jerry Negrelli are hereby excluded for purposes of this motion for class certification. The class is certified pursuant to *Rule 23(b)(3)* and is defined as follows:

> all persons or entities with scrap generating facilities located in Northeast Ohio and the surrounding counties, which is comprised of Ashtabula, Cuyahoga, Lake, Lorain, Medina, Stark and Summit counties, who sold ferrous or nonferrous industrial scrap metal to Defendants between December 1992 and March 2000. Excluded from the Class are Defendants, and their respective parents, subsidiaries and affiliates, as well as any governmental entities. Also excluded from the Class is any party, whether named or not, who is ultimately deemed to have participated in an illegal conspiracy.[12]

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley

JUDGE KATHLEEN O'MALLEY

UNITED STATES DISTRICT COURT

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[12] The Court has rephrased the language of the Plaintiffs' proposed Class, in order to avoid the appearance of any value judgment as to the ultimate liability of the Defendants to the Class, which would be inappropriate at this stage in the litigation.

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Morris Communs. Corp. v. PGA Tour, Inc.

United States Court of Appeals for the Eleventh Circuit

March 31, 2004, Decided ; March 31, 2004, Filed

Nos. 03-10226, 03-11502

Reporter

364 F.3d 1288 *; 2004 U.S. App. LEXIS 5915 **; 70 U.S.P.Q.2D (BNA) 1446 ***; 2004-1 Trade Cas. (CCH) P74,350; 32 Media L. Rep. 1513; 17 Fla. L. Weekly Fed. C 368

MORRIS COMMUNICATIONS CORP., a Georgia Corporation, Plaintiff-Appellant, versus PGA TOUR, INC., Defendant-Appellee.

Subsequent History: Rehearing, en banc, denied by *Morris Communs. Corp. v. PGA Tour, 107 Fed. Appx. 890, 2004 U.S. App. LEXIS 19644 (11th Cir., May 28, 2004)*

Motion granted by, US Supreme Court certiorari denied by *Morris Communs. Co., LLC v. PGA Tour, Inc., 543 U.S. 919, 125 S. Ct. 87, 160 L. Ed. 2d 203, 2004 U.S. LEXIS 6257 (U.S., Oct. 4, 2004)*

Prior History: [1]** Appeals from the United States District Court for the Middle District of Florida. D. C. Docket Nos. 00-01128 CV-J-20-HTS, 00-01128 CV-3-J-20HTS. Harvey E. Schlesinger, Judge.

Morris Communs. Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 2002 U.S. Dist. LEXIS 25854 (M.D. Fla., 2002)

Disposition: Affirmed.

Core Terms

scores, district court, golf, valid business, competitors, media, compiled, summary judgment, real-time, monopoly power, monopolization, free-riding, internet, relevant market, anti trust law, tournament, selling, business justification, golf course, organizations, credentialed, pretextual, antitrust, website

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo whether the district court correctly granted summary judgment, applying the same standard that governed the district court.

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

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Newly Discovered Evidence

HN2[] **Standards of Review, Abuse of Discretion**

An appellate court reviews whether the district court correctly denied a motion for relief under *Fed. R. Civ. P. 60* for abuse of discretion.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

To demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The offense of monopoly under *15 U.S.C.S. § 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Claims**

The first element of a *15 U.S.C.S. § 2* claim, monopoly power, is the power to control prices in or to exclude competition from the relevant market. The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. For a practice to be exclusionary, it must harm the competitive process and thereby harm consumers. Harm to one or more competitors will not suffice for a *§ 2* violation. The relevant inquiry is not whether a company's attempt to exclude adversely impacts competition, but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to constitute a Sherman Act violation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Two theories exist upon which to predicate a unilateral refusal to deal claim: (1) the intent test and (2) the essential facility test. Under the intent test, it is unlawful for a monopolist to maintain or extend its monopoly power by intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition. Under the essential facility test, a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market. A plaintiff asserting a refusal to deal claim has the burden of proving that the defendant controls an essential facility that cannot be practically or economically duplicated.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

In the absence of any purpose to create or maintain a monopoly, a company may deal or refuse to deal with whomever it pleases. Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

Unlawful monopoly power requires anticompetitive conduct, which is conduct without a legitimate business purpose that makes sense only because it eliminates competition. Likewise, refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. Once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Newly Discovered Evidence

HN10[] **Grounds for Relief from Final Judgment, Order or Proceeding, Newly Discovered Evidence**

Relief pursuant to *Fed. R. Civ. P. 60(b)(2)* is appropriate only if the moving party offers newly discovered evidence that could alter the outcome of the trial. An appellate court reviews a district court's decision for abuse of discretion. It is not enough that a grant of the motion might have been permissible or warranted.

Counsel: For Morris, Communications Corp, Appellant (03-10226-CC): Borucke, David Clark, Holland & Knight, LLP, Tampa, FL. Gabel, George D. Jr., Holland & Knight, LLP, Jacksonville, FL. Hoffman, Jerome W., Holland & Knight, Tallahassee, FL. Conner, Timothy J., Holland & Knight, LLP, Jacksonville, FL. Brannock, Steven L., HOLLAND & KNIGHT, TAMPA, FL.

For PGA Tour, Inc., Appellee (03-10226-CC): Mishkin, Jeffrey A., Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY. Riley, James M., Rogers, Towers, Bailey, Jones & Gay, Jacksonville, FL. Vermut, Richard Stuart, Rogers, Towers, Bailey, Jones & Gay, P.A., Jackson, FL. Russell, Cristine M., Rogers, Towers, Bailey, Jones & Gay, Jacksonville, FL.

For Newspaper Association of America, Amicus (03-10226-CC): Hart, Jonathan David, Dow, Lohnes & Albertson, Washington, DC.

Judges: Before EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges.

Opinion by: DUBINA

Opinion

[*1446]** **[*1290]** DUBINA, Circuit Judge:

Plaintiff-Appellant, Morris Communications Corp. ("Morris"), brought suit against Defendant-Appellee PGA TOUR, Inc. ("PGA"), alleging that PGA violated section 2 of the Sherman Act, codified at *15 U.S.C. § 2*, by monopolizing the markets for (1) the publication of compiled real-time golf scores on the internet, and (2) the sale, or syndication of those scores. In addition, Morris alleged that PGA further violated *section 2 of the Sherman Act* by refusing to deal with Morris. The district court granted summary judgment in favor of PGA because it found, *inter alia*, that PGA had a valid business justification for **[***1447]** its actions. For the reasons that follow, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

Morris is a media company that publishes print and electronic newspapers. PGA is the sponsor of a series of professional golf tournaments throughout North America **[**2]** known as the PGA Tour. In order to provide golf scores during its tournaments, PGA has developed a Real-Time Scoring System ("RTSS") that allows PGA to monitor the play around the entire golf course. RTSS is an elaborate electronic relay scoring system that relies on state-of-the-art computer technology and equipment as well as dozens of trained workers and volunteers.

RTSS works as follows. During a PGA golf tournament, volunteers known as walking scorers follow each group of golfers on the course and tabulate the scores of each player at the end of each hole **[*1291]** played. The scores are then collected by other volunteers, known as hole reporters, located at each of the eighteen greens on the golf course, who relay the scoring information to a remote production truck staffed by PGA personnel. The scores of all participating golfers are then processed at the remote production truck and transmitted to PGA's website, *www.pgatour.com*, as real-time golf scores, which are scores that are transmitted electronically nearly contemporaneously to their actual occurrence on the golf course. At the same time, the compiled scores are also transmitted to an on-site media center where members of the media **[**3]** are able to access the scores. The same information is also transmitted to various electronic leaderboards located throughout the golf course. As their name suggests, the leaderboards typically show only the top ten or fifteen players' scores.

The nature of a PGA golf tournament makes it impossible for one person to physically follow all the players at once. First, the average golf course spans approximately 150 acres and various golfers play numerous holes simultaneously. In addition, the PGA does not allow its invitees to use cell phones and hand-held devices on the course because such devices might disrupt play. Therefore, the only source of compiled golf scores for all tournament players is RTSS. Likewise, the only physical location at which to obtain compiled golf scores is the media center.

In order for media organizations to have access to the PGA media center, they must obtain free press credentials from PGA. To obtain these credentials, all media organizations must agree to follow PGA's terms and conditions, including PGA's On-Line Service Regulations ("OLSR"). The OLSR require media organizations to delay publication on their internet websites of scoring information obtained **[**4]** by RTSS until the earliest of (1) thirty minutes after the actual occurrence of the shot [1] **[**5]** or (2) such information has become legally available in the public domain, i.e. after the scores are posted on PGA's official website, *www.pgatour.com*. [2] In addition, the OLSR prohibit credentialed media organizations from selling, or syndicating, compiled scoring information obtained in the media center to non-credentialed third-party internet website publishers without first buying a license to do so from PGA. [3]

Morris contends that, as a result of the OLSR, PGA is the only entity able to publish and sell real-time golf scores. Thus, Morris continues, PGA has an unfair advantage in the publication and syndication **[*1292]** of the scores. PGA counters that it adopted the OLSR to preserve the value of its investment in creating **[***1448]** and developing RTSS and to promote the competitiveness of its own website.

Based on the allegedly illegal OLSR, Morris filed suit against PGA, asserting four antitrust claims: (1) monopolization of the internet markets, (2) unlawful refusal to deal, (3) monopoly leveraging, and (4) attempted monopolization of the internet markets. [4]

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> Prior to 1999, credentialed members of the media could view scores in the media center and then re-key them directly into their own computers for transmission to their company's Internet servers. The result was that competitors of pgatour.com, including Morris, were able to publish real-time scores on their web sites as fast as or possibly faster than pgatour.com. Beginning in January 1999, shortly after the PGA Tour entered into an exclusive syndication contract with USA Today, it instituted [OLSR] applicable to all credentialed media invitees. Around the same time, Morris began publishing scores from PGA Tour tournaments on its web sites and selling them to third parties, and Morris appears to have been the PGA Tour's only major competitor in the syndication market.

Morris Communications Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1274 (M.D. Fla. 2002). The version of the OLSR at issue here was instituted in January 2000.

2 PGA agreed that once the golf scores are posted on its website, they are in the public domain. *Id. at 1275 n.9*.

3 "No scoring information may be used by, sold, given, distributed or otherwise transferred to, any party other than the Credentialed Site in any manner whatsoever, without the prior written consent of PGA TOUR." [R. Vol. 1 at Tab 1, Exh. 4.]

[6]** *B. Procedural History*

After extensive pre-trial discovery, the parties filed cross-motions for summary judgment on each claim. The district court granted PGA's motion for summary judgment, finding that PGA had a valid business justification for its OLSR because the OLSR prevented Morris from free-riding on PGA's investment in its costly RTSS. Accordingly, the district court found that PGA had not violated the antitrust laws even if it operated a monopoly and refused to deal with Morris. [5]

[7]** Subsequent to the granting of summary judgment in favor of PGA, Morris filed a *Rule 60* motion for relief from judgment on the ground that, following the issuance of judgment in favor of PGA, PGA adopted new terms of service ("TOS") regarding *www.pgatour.com* in further violation of *§ 2 of the Sherman Act*. The new TOS prohibit anyone from using the information displayed on *www.pgatour.com* for a commercial purpose without first buying a license from PGA. The district court denied the motion, finding that the new TOS were beyond the scope of the instant lawsuit, which addressed only PGA's media credentialing regulations and the OLSR. Accordingly, the district court found that Morris's challenge to the new TOS would be more aptly addressed in a separate lawsuit.

Morris timely and separately appealed the adverse summary judgment and *Rule 60* orders. This court consolidated the two appeals.

II. STANDARDS OF REVIEW

HN1[] This court reviews *de novo* whether the district court correctly granted summary judgment in favor of PGA on all counts, applying the same standard that governed the district court. *Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321, 1325 (11th Cir. 2001).* **[**8]**

HN2[] This court reviews whether the district court correctly denied Morris's *Rule 60* motion for abuse of discretion. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 905 (11th Cir. 1998)*.

III. ANALYSIS

Before discussing the antitrust issues in this case, it is important to note what this case is *not* about. Contrary to the arguments of Morris and its *amici curiae*, this case is not about copyright law, [6] the Constitution, **[*1293]** the *First Amendment*, [7] or freedom of the press in news reporting. This case is a straight-forward antitrust case involving a

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[4] Morris also alleged violations of Florida Deceptive and Unfair Trade Practices Act, *Fla. Stat. Ann. § 501.201 et seq.*, and tortious interference with contract. Morris has not appealed the district court's grant of summary judgment in favor of PGA on these claims.

[5] The district court did not, however, find that PGA had unlawfully monopolized or refused to deal. To the contrary, the district court found that Morris failed to prove a *§ 2* claim of monopolization as a matter of law, *Morris Communications, 235 F. Supp. 2d at 1283*; that the media center was not an essential facility, *id. at 1285*; that PGA did not have unlawful intent to harm competition or a competitor, *id. at 1284*, and thus did not unlawfully refuse to deal with Morris, *id. at 1285-86*, engage in unlawful monopoly leveraging, *id. at 1286*, or unlawfully attempt to monopolize, *id.*

[6] The arguments of Morris and its amici, who are various media organizations, entities, and associations, focus largely on irrelevant copyright law and argue that facts, such as golf scores, and compilations of facts are generally not a proper subject for copyright protection. While this assertion is a correct statement of law, it has no bearing on whether the golf scores and compilation of golf scores are the proprietary product of PGA's RTSS. At oral argument, Morris conceded that this is not a copyright case.

product and a defendant's assertion of a valid business justification as its defense to anticompetitive actions, if any. Also important to note is that this case is being decided based upon the facts presented, not a hypothetical situation, no matter how probable its actualization. [8] **[**10]** Accordingly, the only real issue before us is whether PGA's restrictions and prohibitions regarding Morris's ability to *sell* compiled real-time golf **[***1449]** scores to third parties violates *§ 2 of the Sherman Act.* We do not address Morris's right of access to and internal dissemination of compiled **[**9]** real-time golf-scores, as permitted by the PGA. [9]

[11]** *A. Monopolization*

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Section 2 of the Sherman Act provides that ***HN4***[] "every person who shall monopolize, **[**12]** or attempt to monopolize, . . . any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . ." *15 U.S.C. § 2*. ***HN5***[] "The offense of monopoly under *§ 2 of the Sherman Act* has two elements: (1) the possession of monopoly power in the relevant **[*1294]** market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*.

HN6[] The first element, monopoly power, is the power to control prices in or to exclude competition from the relevant market. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956)*. The second element requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. *See United States v. Microsoft, 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (D.C. Cir. 2001)*. In order for a practice to be exclusionary, "it must harm the

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[7] In its argument for summary judgment in the district court, Morris stated that "this case is not a *First Amendment* case . . . it's an antitrust case." [R. Vol. 10 at pp. 8-9.]

[8] As the district court stated at the hearing on the cross-motions for summary judgment, "all that this court is interested in is the issues that you people bring to it. We're not making advisory opinions. And we don't change the facts. The facts are what the facts are. And what [we] rule on today may be a lot different than the case the two of you are involved in tomorrow." [R. Vol. 10 at p. 106.]

[9] At the hearing regarding the preliminary injunction, the district court asked counsel for PGA if PGA would permit "Morris . . . to disseminate this information to its companies, its various news companies, not charging them anything, just disseminating it"? Counsel for PGA responded:

> There's no problem because that to us is news coverage, and . . . we eagerly, eagerly invite and want the press to do their function, their normal function of gathering and disseminating the news, and because it's so important to us to have them do that, we told Morris a year ago that we would allow them in the media center to sit there and re-key right from there into their own website and any of their related companies as a matter of news coverage, they could have those real-time scores right away for free. . . . The problem comes in only when Morris wishes to go into another business, which they label the news syndication business. . . . It is not the business of gathering and disseminating news. It is the business of selling a commercially valuable product that we have developed and paid for and we ought to be the ones to sell that.

[R. Vol. 8 at pp. 34-36.]

[10] Morris challenges the district court's resolution of its monopolization and attempt to monopolize claims. For the purposes of this case, the elements of the two offenses differ in only one material respect: attempt to monopolize requires specific intent to achieve monopoly power. *See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993)* ***HN3***[] ("To demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."). Therefore, the attempt claim in this case is more difficult to maintain and prove. Because Morris does not withstand summary judgment on its monopolization claim, it cannot maintain its attempt claim. Accordingly, we decline to discuss the attempt claim further.

competitive **[**13]** *process* and thereby harm consumers." *Id.* "Harm to one or more *competitors* will not suffice" for a *§ 2* violation. *Id*.; *see also* *Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1562 (11th Cir. 1983)* ("The relevant inquiry is not whether [a company's] present attempt to exclude adversely impacts competition but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to constitute a [Sherman Act] violation.").

B. Refusal to Deal

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[14]** ***HN7***[] Two theories exist upon which to predicate a unilateral refusal to deal claim: (1) the intent test and (2) the essential facility test. *Mid-Texas Communications Sys., Inc. v. AT&T, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980)*. [12] Under the intent test, it is unlawful for a monopolist to maintain or extend its monopoly power by intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition. *See* *id. at 1388*; *see also* *Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684 (1927)*. **[***1450]**

Under the essential facility test, a company that has exclusive control over a facility essential to effective competition may not deny potential competitors access to that facility on reasonable terms and conditions if **[**15]** to do so would create or maintain monopoly power in the relevant market. *Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1285 (11th Cir. 2002)*, *cert. granted and judgment vacated on other grounds*, *540 U.S. 1147, 124 S. Ct. 1143, 157 L. Ed. 2d 1040 (2004)*; *MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983)*; *see also* *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872, 881 (2004)* ("The indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose."). The plaintiff has the burden of proving that the defendant controls an essential facility that cannot be practically or economically duplicated. *See* *Covad Communications, 299 F.3d at 1285*.

HN8[] In the absence of any purpose to create or maintain a monopoly, however, a **[*1295]** company may deal or refuse to deal with whomever it pleases. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601-02, 105 S. Ct. 2847, 2857, 86 L. Ed. 2d 467 (1985)* (quoting *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)).* **[**16]** Even a company with monopoly power has no general duty to cooperate with its business rivals and may refuse to deal with them if valid business reasons exist for such refusal. *See* *Mid-Texas Communications, 615 F.2d at 1388*.

Ordinarily, when determining whether a defendant has violated *§ 2 of the Sherman Act*, we first determine the relevant market and then decide whether the defendant possessed monopoly power in that market. In this case, however, we do not pursue such an inquiry because we agree with the district court that even if PGA possessed monopoly power in the relevant market, Morris's *§ 2* claims cannot prevail because PGA has a valid business justification for its actions. Therefore, even if PGA is monopolistic, and even if PGA refused to deal with Morris, it has not violated *§ 2 of the Sherman Act*.

C. Valid Business Justification as a Defense

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[11] Morris challenges the district court's resolution of its refusal to deal and monopoly leveraging claims. For purposes of this case, the elements of the two claims are sufficiently similar to warrant only one discussion. *See* *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872, 883 n.4 (2004)* ("Leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.").

[12] In *Bonner v. City of Prichard, 661 F.2d 1206, 1207-09 (11th Cir. 1981)* (en banc), this court adopted as binding precedent all Fifth Circuit decisions issued prior to October 1, 1981.

"The Sherman Act is . . . the 'Magna Carta of free enterprise,' but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." Verizon Communications, 124 S. Ct. at 883 (internal quotations **[**17]** omitted). To the contrary, "Section 2 of the Sherman Act . . . seeks merely to prevent *unlawful monopolization*" and unlawful refusals to deal. *Id.*

HN9[] Unlawful monopoly power requires anticompetitive conduct, which is "conduct without a legitimate business purpose that makes sense only because it eliminates competition." *Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 804 (8th Cir. 1987)*; **see also** , *LePage's Inc. v. 3M324 F.3d 141, 153-54 (3rd Cir. 2003)* (discussing *Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002)*, *cert. denied*, *537 U.S. 1148, 154 L. Ed. 2d 850, 123 S. Ct. 876 (2003))*. Likewise, refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition. *See Aspen Skiing, 472 U.S. at 604, 105 S. Ct. at 2858*; *see also NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S. Ct. 493, 499, 142 L. Ed. 2d 510 (1998)* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 2589, 125 L. Ed. 2d 168 (1993)),* **[**18]** for the proposition that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); *United States Football League v. National Football League, 842 F.2d 1335, 1360 (2d Cir. 1988)* (concluding that no *§ 2* liability existed where network's actions were based on desire "to obtain $ 736 million in rights fees, not to exclude competitors").

Once the defendant has met its burden to show its valid business justification, the burden shifts to the plaintiff to show that the proffered business justification is pretextual. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 1002 (11th Cir. 1993)*; *see also Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1212 (9th Cir. 1997)*.

In this case, PGA met its business justification burden by showing that it seeks to prevent Morris from "free-riding" on PGA's RTSS technology. *See Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55, 97 S. Ct. 2549, 2560, 53 L. Ed. 2d 568 (1977)* (stating that prevention of "free-riding" by competitors is a **[***1451]** legitimate business **[*1296]** purpose); **[**19]** *Consultants & Designers, 720 F.2d at 1559* (concluding that defendant "had a legitimate interest in protecting from opportunistic appropriation its investment in acquiring the information necessary to carry on its business"). To achieve its business purpose, PGA has refused to grant Morris access to PGA tournaments unless Morris agrees not to sell the product of PGA's proprietary RTSS - compiled real-time golf scores - to noncredentialed third-party internet publishers. Morris responds that it has a right to sell such product notwithstanding that RTSS was developed and paid for, and is operated by, PGA. [13] We disagree with Morris. The compiled real-time golf scores acquired through RTSS are not a product that Morris has a right to sell because they are a derivative product of RTSS, which PGA owns exclusively. [14] We agree with the district court that PGA "has a right to sell or license its product, championship golf, and its derivative product, [compiled] golf scores, on the Internet in the same way the [PGA] currently sells its rights to television broadcasting stations." *Morris Communication Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1282 (M.D. Fla. 2002).* **[**20]**

[21]** If Morris wishes to sell PGA's product, it must first purchase it from PGA. *See Consultants & Designers, 720 F.2d at 1559* (explaining that plaintiff did not have the right to abrogate defendant's property interest). *Section 2 of the Sherman Act* does not require PGA to *give* its product freely to its competitors. *See Seagood Trading Corp. v.*

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[13] Morris also argues that PGA is not allowed to put restrictions on the dissemination of the compiled golf scores once they reach the media center because PGA did not previously put any restrictions on their dissemination. This argument is unpersuasive. PGA has a right to control its property interest in its RTSS and the compiled golf scores, which are the product of RTSS, regardless of its past practices. As the district court stated: "what [PGA] say[s] the delay should be and what delay [PGA] can legally impose are two different things perhaps." [R. Vol. 10 at p. 104.] The lack of prior restrictions is merely indicative of PGA's symbiotic relationship with the media.

[14] Morris stated in the district court that it was "not disputing that [PGA] may have a property right." [R. Vol. 10 at p. 93.] As counsel for PGA stated at the hearing on the preliminary injunction: "without this elaborate, comprehensive system there wouldn't be real-time scores that Morris would like to sell to third parties. It just wouldn't be there because these don't exist in the air." [R. Vol. 8 at p. 31.]

Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991) (stating that it "is not a function of the antitrust laws" to equip plaintiffs with defendants' competitive advantages). PGA is willing to sell its product to its competitors, including Morris, thereby allowing credentialed media organizations like Morris to syndicate compiled real-time golf scores after paying a licensing fee to PGA. Accordingly, we conclude from the record that PGA has satisfied its burden to show a valid business justification.

D. Business Justification Is Not Pretextual

Because PGA has met its burden of showing that its asserted business justification is valid, the burden shifts to Morris to allege facts that support an inference that the proffered justification is merely pretextual, thereby establishing genuine issues of material **[**22]** fact. *U.S. Anchor Mfg., 7 F.3d at 1002*; *see also* *Image Technical Servs., 125 F.3d at 1212*. Morris argues that PGA's only justification for its refusal to deal with Morris on Morris's terms is economic and such sole motivation is not a valid business justification; thus, PGA's justification is pretextual. *See* *LePage's, 324 F.3d at 163* ("Defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of **[*1297]** business justification that is an acceptable defense to *§ 2* monopolization.").

Morris supports its argument with a series of cases which are fundamentally distinguishable from this case. In the cases upon which Morris relies, the plaintiffs alleging antitrust violations had created with their own work and efforts, or purchased with their own money, their *very own products* that defendants prohibited them from selling. *See, e.g.*, *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 485, 112 S. Ct. 2072, 2092, 119 L. Ed. 2d 265 (1992)* (plaintiffs "invest substantially . . . in parts inventory"); *Aspen Skiing, 472 U.S. at 587-88, 105 S. Ct. at 2850* **[**23]** (plaintiff developed and maintained its own competitive ski resort and ski packages); *Lorain Journal Co. v. United States, 342 U.S. 143, 149-50, 72 S. Ct. 181, 184-85, 96 L. Ed. 162 (1951)* (injured competitor trying to sell its radio air time for advertisements); *Int'l News Serv. v. Associated Press, 248 U.S. 215, 221, 39 S. Ct. 68, 69, 63 L. Ed. 211 (1918)* (plaintiff "gathers in all parts of the world, by means of various instrumentalities of its own, **[***1452]** by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers"); *LePage's, 324 F.3d at 144* (plaintiff selling its own transparent tape); *Microsoft Corp., 253 F.3d at 63* (injured competitors deterred from selling their own computers and browsers); *Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 854 (2d Cir. 1997)* (analyzing free-riding issues and noting that plaintiff did not free-ride because it used its own efforts to conduct business); *U.S. Anchor Mfg., 7 F.3d at 990* (plaintiff manufactures and supplies anchors); *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 187 (2d Cir. 1992)* **[**24]** (plaintiffs purchased product from defendants).

Morris refers to this distinction as PGA's "sweat of the brow" defense and correctly states that it is not a defense *in a copyright case*. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 359-60, 111 S. Ct. 1282, 1295, 113 L. Ed. 2d 358 (1991)* (concluding that "sweat of the brow" is no defense in a copyright case). [Appellant Br. at 53-55.] This well-established rule of copyright law is irrelevant, however, in this antitrust case. The "sweat of the brow" product, to which Morris (and the district court) refer, is no different than, for example, the interconnection services in *Verizon Communications, 124 S. Ct. at 876*, the job shoppers in *Consultants & Designers, 720 F.2d at 1555*, and the sports jackets in *Starter Sportswear, 964 F.2d at 187*.

Moreover, even if we overlook the fundamental and dispositive distinction between this case and the cases cited by Morris, the case law supports summary judgment in favor of PGA. *See* *Verizon Communications, 124 S. Ct. at 879* ("*Aspen Skiing* is at or near the outer boundary of *§ 2* liability"); **[**25]** *Aspen Skiing, 472 U.S. at 593-94, 105 S. Ct. at 2852-53* (defendant refused to accommodate and cooperate with plaintiff, refused to *sell* its product to plaintiff, and acted contrary to its own economic interests in order to eliminate plaintiff); *Otter Tail Power Co. v. United States, 410 U.S. 366, 370-72, 93 S. Ct. 1022, 1026-27, 35 L. Ed. 2d 359 (1973)* (defendant was already in the business of *selling* a service to certain customers and refused to *sell* the same service to certain other customers); *Lorain Journal, 342 U.S. at 148-49, 72 S. Ct. at 183-84* (defendant refused to *sell* to plaintiff in violation of the Sherman Act); *Starter Sportswear, 964 F.2d at 189-91* (holding, in a factually analogous case, that defendant had valid business justification for refusal to deal); *Fishman v. Estate of Wirtz, 807 F.2d 520, 562 (7th Cir. 1986)* (holding defendant liable under *§ 2* for refusing to *lease* Chicago Stadium to plaintiff).

[*1298] The relevant law supports our conclusion that Morris's argument is unavailing and does not show that PGA's business justification is pretextual. The prevention **[**26]** of free-riding, which is an inherently economic motivation, provides a valid business justification on the facts presented here. Accordingly, Morris has not raised any issues of material fact and summary judgment in favor of PGA was proper. *See Int'l Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231, 239-40 (2d Cir.)*, *cert. denied*, *429 U.S. 835, 50 L. Ed. 2d 100, 97 S. Ct. 101 (1976)* (stating that proof of a company's reasonable steps to preserve its business interests does not, without more, raise a genuine issue of material fact under *§ 2*).

E. Morris's Rule 60(b) motion

HN10[] Relief pursuant to *Rule 60(b)(2)* is appropriate only if the moving party offers newly discovered evidence that could alter the outcome of the trial. *See Wilson v. Thompson, 638 F.2d 801, 804 (11th Cir. 1981)*; *Fed. R. Civ. Pro. 60(b)(2)*. Because we review the district court's decision for abuse of discretion, "it is not enough that a grant of the motion might have been permissible or warranted." *Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977)*. After reviewing the record, we conclude that the district court **[**27]** did not err in finding that the new TOS evidence would have failed to alter the outcome of the trial in light of PGA's valid business justification for its regulations. Accordingly, we hold the district court did not abuse its discretion when it denied the *Rule 60* motion.

IV. CONCLUSION

Contrary to Morris's argument regarding copyright law, this case is not about copyright and the district court did not find the golf scores to be trade secrets. [15] The district court correctly found that a company - even a monopolist **[***1453]** company - that expends time and money to create a valuable product does not violate the antitrust laws when it declines to provide that product to its competitors for free. PGA has accommodated Morris at every step along the way, has agreed to sell its product to Morris, and has acted appropriately to protect its economic interests and investments. Yet Morris demands that it be given access to the product of PGA's proprietary RTSS, without compensating PGA, so that Morris can then sell that product to others for a fee. That is the classic example of "free-riding," the prevention of which, under ***antitrust law***, constitutes a legitimate pro-competitive reason **[**28]** for imposing a restriction. For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of PGA and the district court's order denying Morris's *Rule 60(b)* motion.

AFFIRMED.

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[15] "The [PGA]'s property right does not come from copyright law, as copyright law does not protect factual information, like golf scores." *Morris Communications, 235 F. Supp. 2d at 1281*.

Nobody in Particular Presents, Inc. v. Clear Channel Communs., Inc.

United States District Court for the District of Colorado

April 2, 2004, Decided ; April 2, 2004, Filed

Civil Action No. 01 N 1523 (BNB)

Reporter

311 F. Supp. 2d 1048 *; 2004 U.S. Dist. LEXIS 5665 **; 2004-1 Trade Cas. (CCH) P74,367

NOBODY IN PARTICULAR PRESENTS, INC., OGDEN RESURRECTION PROJECT, INC., SWANK MANAGEMENT, INC., and N.I.P.P., LLC, Plaintiffs, v. CLEAR CHANNEL COMMUNICATIONS, INC., SFX ENTERTAINMENT, INC., d/b/a CLEAR CHANNEL ENTERTAINMENT, CLEAR CHANNEL BROADCASTING INC., JACOR BROADCASTING OF COLORADO, INC., CITICASTERS CO., CITICASTERS LICENSES, INC., and TSUNAMI COMMUNICATIONS, INC., Defendants.

Disposition: Defendant, Clear Channel Communications', motion for summary judgment was DENIED. Defendants' motion for summary judgment was GRANTED in part and DENIED in part. Defendants' motion to exclude expert testimony was DENIED in part, and prior ruling was RESERVED in part. Defendants' motion to file a supplemental brief in support of their motion for summary judgment was DENIED.

Core Terms

concert, radio, promoters, rock, artists, advertising, radio station, air, Communications, subsidiaries, prices, relevant market, music, rock concert, tickets, competitors, Message, monopolization, argues, consumer, electronic mail, labels, Entertainment, barriers, stations, markets, market share, non-rock, alleges, sufficient evidence

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Pursuant to *Fed. R. Civ. P. 56(c)*, a court may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Entitlement as Matter of Law, Appropriateness**

A genuine issue of fact does not exist, and summary judgment is appropriate, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. If the nonmoving party's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. The court may consider only admissible evidence when ruling on a summary judgment motion. Additionally, the court, when ruling on a motion for summary judgment, must construe the facts in the light most favorable to the nonmoving party.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN3[] **Federal & State Interrelationships, Choice of Law**

Federal courts applying state law ascertain and apply the proper state law with the goal of insuring that the result obtained is the one that would have been obtained in state court. To determine which state's substantive law to apply, a federal court applies the choice of law provisions of the state in which the court sits.

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN4[] **Corporations, Subsidiary Corporations**

Absent allegations or evidence of "independent conduct" on the part of the parent, there is no basis upon which to hold a parent directly liable for the acts of a subsidiary. The question is what level of independent conduct is sufficient to hold a parent directly liable for anticompetitive effects occurring at the subsidiary level.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN5[] Antitrust & Trade Law, Sherman Act

A parent cannot be held liable for conspiring with its subsidiaries to engage in anticompetitive conduct under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, because the parent and subsidiaries are, for antitrust purposes, a single enterprise acting with a unity of purpose.

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN6[] Corporations, Subsidiary Corporations

Absent allegations or evidence of independent conduct on the part of the parent, there is no basis upon which to hold a parent directly liable for the acts of a subsidiary. Specifically, when a plaintiff alleges, as the only basis for liability against a parent, that the parent owns the subsidiary that engaged in wrongful conduct, such allegation is insufficient to hold a parent directly liable for the wrongful conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Torts > Vicarious Liability > Corporations > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

If a parent corporation, through its own employees and agents, is directing, controlling, and encouraging a wholly-owned subsidiary's anticompetitive conduct, the subsidiary dare not defy its sole shareholder's policies. To conclude that a parent can direct and require anticompetitive conduct of its subsidiaries, like any principal directing the conduct of an agent, and then escape antitrust liability by hiding behind its separate incorporation is counterintuitive. Furthermore, the United States Supreme Court has suggested that direct liability may exist for parent corporations under the Sherman Act, *15 U.S.C.S. § 1 et seq.* Additionally, lower courts have recognized that parent corporations can be held directly liable for independently participating in the antitrust violations of their subsidiaries.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Clayton Act

A parent corporation is not a competitor of another corporation merely because its subsidiary is. On the other hand, to interpret the Clayton Act as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a competitor within the meaning of § 8 would assume that Congress intended to permit such a simple and obvious means of avoidance as to render the statute meaningless, and would ignore the United States Supreme Court's admonition that the antitrust laws are aimed at substance rather than form. This reasoning holds equal force in determining liability under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, as each of these sections of antitrust laws shares the primary concern of preventing the undue aggregation of market power.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN9[] **Antitrust & Trade Law, Sherman Act**

Wrongful conduct may occur at the parent level resulting in anticompetitive effects reverberating at the subsidiary level. A parent may be directly liable for anticompetitive conduct at the subsidiary level when the parent sufficiently controls the subsidiary.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN10[] **Antitrust & Trade Law, Sherman Act**

A parent can be considered a competitor in a market where its subsidiary is a participant if, and only if, the parent sufficiently controls, dictates, or encourages the policies of the subsidiary. When the parent controls, directs, or encourages the subsidiary's anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

Torts > Vicarious Liability > Corporations > General Overview

HN11[] **Shareholder Duties & Liabilities, Piercing the Corporate Veil**

A corporation may be held liable for the acts of its subsidiary, and its corporate veil may be pierced, where the subsidiary is merely an alter ego of the principal.

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Fraud & Misrepresentation

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > General Overview

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Corporate Formalities

Business & Corporate Law > ... > Piercing the Corporate Veil > Alter Ego > Inadequate Capitalization

Business & Corporate Law > ... > Shareholder Duties & Liabilities > Piercing the Corporate Veil > Sham Corporations

Torts > Vicarious Liability > Corporations > Subsidiary Corporations

HN12[] **Alter Ego, Fraud & Misrepresentation**

A subsidiary is the alter ego of its parent when (1) there is such a unity of interest and lack of respect given to separate identity of parent and subsidiary that personalities and assets of parent and subsidiary are indistinct, and (2) adherence to the corporate fiction sanctions fraud, promotes injustice, or leads to an evasion of legal obligations. Among the specific factors used in determining whether the parent and subsidiary have maintained their separate identities are: (1) whether the subsidiary is operated as a separate entity; (2) whether parent and subsidiary have commingled funds; (3) whether the subsidiary has failed to maintain adequate minutes and records; (4) whether the parent owns and controls the subsidiary; (5) whether the subsidiary lacks corporate assets or is undercapitalized; (6) whether the subsidiary is used as a mere shell, instrumentality or conduit of the parent; (7) whether the parent and subsidiary have disregarded the legal formalities and failed to maintain an arms-length relationship, and (8) whether there has been a diversion of the subsidiary's assets for use by the parent.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

HN13[] **Relevant Market, Geographic Market Definition**

The first step in analyzing an antitrust claim is to determine the relevant product market in which the defendant is operating. In order to state a claim under ***antitrust law***, plaintiff must define this market. The relevant market consists of both a geographic market and a product market.

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN14[] **Market Definition, Relevant Market**

There is no subject matter in ***antitrust law*** more confusing than market definition. The concept of market definition itself oversimplifies the very complex interactions between a number of differently situated buyers and sellers, each of whom has different costs, needs, and substitutes. At its simplest, the relevant product market is that market which is relevant to the legal issue before the court. By defining the relevant market, the court strives to identify firms that compete with each other and the alleged anticompetitive conduct restraining trade in the market. The definition of the relevant market is a question of fact for the factfinder, and the plaintiff has the burden of proof on the issue.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN15[] **Regulated Practices, Market Definition**

A product market is composed of products reasonably interchangeable for the purposes for which they are produced. The definition of relevant market, therefore, turns on a determination of available substitutes. Available substitutes are demonstrated if, when prices are appreciably raised or volume appreciably curtailed for the product within the geographic area, supply from other sources can be expected to enter promptly enough or in large enough amounts to restore the old price and volume. Reasonable interchangeability, therefore, includes analysis of cross-elasticity of demand. Demand for a product is said to be "elastic" if an increase in the price causes less of the product to be purchased. There is said to be "cross-elasticity of demand" between two products if rising prices for product A cause consumers to switch to product B. The inference is that consumers readily substitute one product for the other and that the products, therefore, probably compete in the same market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

The identity of the relevant product to be studied to determine the market varies based on the level of commerce where the plaintiffs argue the defendants have monopolized competition. Within the universe of a product market, therefore, there may exist a submarket -- a portion of the product market that, for purposes of the specific antitrust case, is considered a separate market. Submarket analysis is par and parcel of the reasonable interchangeability test. Similarly, the identity of the relevant consumer for the purposes of determining market definition is not necessarily the end-user of the product, but, rather, is also determined based on the level of commerce effected by defendant's behavior.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Regulated Practices, Market Definition**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. The United States Supreme Court has clearly held that antitrust laws apply not only to restraints on output markets, but to input markets as well, including both labor and input commodities. Restraints on input markets fall under antitrust purview because they will eventually adversely affect end-consumers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN18[] **Monopolies & Monopolization, Actual Monopolization**

In an antitrust case, when evaluating many different instances of conduct by defendant, the conduct as a whole must always be analyzed, rather than compartmentalized, because it is the cumulative impact of the conduct on consumers which is the relevant inquiry in a monopolization claim.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN19[] **Regulated Practices, Market Definition**

Antitrust law was not enacted to protect a competitor who compounds his wrong by using his market power in an illegal market to restrain competition in another, legal market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN20[] **Regulated Practices, Market Definition**

The scope and definition of the market is determined by examining reasonable interchangeability, which includes the cross-elasticity of demand for a product, or whether consumers view product A as a substitute for product B. Economists determine cross-elasticity of demand by dividing the percent change in quantity demanded of product A by the corresponding percent change in price of product B.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN21[] **Regulated Practices, Market Definition**

In determining cross-elasticity of demand, an antitrust plaintiff may not limit a market to a select group of customers without identifying a difference in the product supplied to that group of customers. A different product market may be founded upon a distinction between products in degree as opposed to a distinction between products in kind. Within the universe of a product market, therefore, there may exist a submarket -- a portion of the product market that, for purposes of the specific antitrust case, is considered a separate market. The boundaries of an antitrust submarket are determined by examining practical indicia, such as (1) industry and public recognition of the submarket as a separate economic entity and (2) the product's unique and distinct uses, qualities, price, price sensitivity, production facilities, customers, and vendors.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN22[] **Regulated Practices, Market Definition**

In defining the scope of the market, a court also examines cross-elasticity of supply, which measures the responsiveness of producers to price increases. Even if consumers do not view product A as a substitute for product B, if producers of product A can readily shift their production facilities to produce product B in response to a price shift in product B, then the sales of both should be included in the relevant market.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN23[] **Market Definition, Relevant Market**

The lynchpin in determining the boundaries of the relevant market is the rule of reasonable interchangeability. The question, therefore, is whether reasonable interchangeability can be determined for antitrust purposes without economic analysis of cross-elasticity of demand. A plaintiff may, through sufficient evidence of other indicia of market definition, define a relevant market without economic study of cross-elasticity of demand, especially when economic analysis of cross-elasticity of demand is infeasible based on pricing data.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN24[] **Regulated Practices, Market Definition**

The scope of the market is usually a question of fact for the jury. In rare circumstances, however, insufficient evidence of market definition in the record may require the court to grant summary judgment against the plaintiff on the issue of market definition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN25[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Courts have recognized that tying may provide a way for a monopolist to hide activities that are illegal or disfavored by the law. A monopolist may seek to evade regulatory control in the tying product market by hiding the price in the tied product's price.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN26[] **Antitrust & Trade Law, Sherman Act**

Section 1 (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, states every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. § 1*. *Section 1* of the Sherman Act proscribes anticompetitive conduct as part of concerted action or a conspiracy; it does not apply to unilateral conduct. A tying arrangement exists when a seller conditions the purchase of a highly desirable product on the purchase of an additional product. Whenever a buyer consents to the tying arrangement by purchasing the tied product so as to obtain the tying product, concerted action occurs between buyer and seller so as to implicate *§ 1* of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN27[] **Tying Arrangements, Clayton Act**

Every refusal to sell two products separately does not amount to an illegal tying arrangement. If each product can be purchased separately in a competitive market, one seller's decision to sell both products in a single package does not impose an unreasonable restraint on the market for either product. If, however, the seller has significant market power in the market for one product and exploits its control over this "tying" market to force the buyer to purchase a different product in the "tied" market, which the buyer either did not want or would have purchased elsewhere, the tying arrangement violates 1 (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN28[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who, because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second such tying agreements may work significant restraints on competition in the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN29[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The tying seller may be working toward a monopoly position in the tied product, and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter the market. They must be prepared not only to match existing sellers in the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade regulations concerning prices in the tying product through clandestine transfer of the profit to the tied product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN30[] Price Fixing & Restraints of Trade, Tying Arrangements

When there is an unlawful tying arrangement, the consumer's freedom to select the best bargain the second market is impaired by his need to purchase the tying product and perhaps by an inability to evaluate the true cost of either product when they are available only as a package. Tying claims are analyzed under two different tests: (1) per se analysis, and (2) rule of reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN31[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule condemns practices that are devoid of redeeming competitive rationales. When a seller's share of the tying market is high, or when the seller offers a unique product that competitors are not able to offer, the United States Supreme Court has held that the likelihood that market power is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN32[] Tying Arrangements, Defenses

The elements of a per se violation are (1) two separate products; (2) a tie, or conditioning of the sale of one product on the sale of another; (3) sufficient economic power in the tying product market (rock radio air play), and (4) a substantial volume of commerce affected in the tied product market (rock concert promotions services). The plaintiff is not required to show anticompetitive effects in the tied market. Similarly, the court need not consider defendant's procompetitive justifications for the practice.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN33[] Price Fixing & Restraints of Trade, Tying Arrangements

In determining the validity of a tying arrangement, the court must first identify the two separate products that are the subject of the arrangement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN34[] Price Fixing & Restraints of Trade, Tying Arrangements

The test for determining whether two objects are separate products, as opposed to the same product, turns not on their function, but on the nature of any consumer demand for them.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN35[] Tying Arrangements, Per Se Rule

The second element of a per se tying claim is a tie, or conditioning of the sale of one product on the sale of another. The seller must force the buyer to purchase the tied product. To establish forcing, a plaintiff must show that: (1) he himself complied with the tying practice by purchasing the tying and tied product; or (2) although he did not make the purchase, other buyers agreed to the arrangement under threat of losing the tying product.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

HN36[] Summary Judgment, Evidentiary Considerations

A court may consider only admissible evidence when ruling on a summary judgment motion.

Computer & Internet Law > Internet Business > Licensing > Trademark Antitrust Issues

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN37[] Licensing, Trademark Antitrust Issues

There are several exceptions to the hearsay rule indicating that electronic mail messages from record labels are admissible. First, *Fed. R. Evid. 801(d)(2)(E)* provides that a statement is not hearsay if the statement is offered against a party, and the statement is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. This rule is not limited to criminal cases, but applies to civil antitrust case as well.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

HN38[] **Tying Arrangements, Clayton Act**

Because 1 (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, states, every conspiracy, in restraint of trade or commerce is declared to be illegal, *15 U.S.C.S. § 1*, and tying arrangements have been found to be illegal conspiracies under *§ 1*, the coconspirator exception to the hearsay rule may be properly applied to correspondence confirming a tying agreement if the other requirements of the exception are fulfilled. The coconspirator exception only allows admittance of statements in furtherance of a conspiracy if there is sufficient independent evidence, besides the statements, to establish the existence of the conspiracy.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Rule Components > General Overview

HN39[] **Types of Contracts, Oral Agreements**

A verbal act is not considered hearsay if it is a statement that bears on the rights of the parties to the statement. *Fed. R. of Evid. 801(c)* advisory committee note. Conversations as to the making and terms of an oral agreement may be presented into evidence because the proof of the words spoken is not made to establish their truth but to establish the fact that they were spoken.

Evidence > ... > Exceptions > State of Mind > General Overview

HN40[] **Exceptions, State of Mind**

See *Fed. R. of Evid. 803(3)*.

Evidence > ... > Exceptions > State of Mind > General Overview

HN41[] **Exceptions, State of Mind**

Under *Fed. R. of Evid. 803(3)*, written correspondence showing evidence of intention is admitted to prove the doing of the act intended.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN42[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In examining a tying claim, once the distinct products are identified, the question arises whether the consumer has sufficient choice to forgo the tying product altogether and, hence, the tied product, or whether the defendant has sufficient market power to force the consumer to purchase the tied product against his desire, based on defendant's control of the tying product. If the consumer has sufficient choice, no forcing is present, and the tying arrangement is perfectly lawful. This determination is made by focusing on market power in the tying product market. The existence of market power in the tying product market is ordinarily inferred from the seller's possession of a predominant share of the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN43[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The final element that a plaintiff must demonstrate in proving a tying claim is that a substantial volume of commerce has been affected in the tied product market. In demonstrating per se liability, however, this element is loosely applied because, once the defendant is found to have appreciable market power in the tying market, the ability to leverage this power to restrain trade in the tied market is presumed. This presumption arises because the foundational principle of per se liability is that some acts are so inherently anticompetitive that no examination of their impact on the market as a whole is required. No inquiry, therefore, need be made into the actual prevailing market conditions in the tied market. Instead, all that is required is that the restraint in the tied market caused by the tie affect a substantial volume of commerce, which in this context means only an amount greater than a de minimis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN44[] **Price Fixing & Restraints of Trade, Tying Arrangements**

If a plaintiff is unable to prevail on a theory of per se liability, a plaintiff can seek to prove a tying claim under a different analysis. In order to prevail in the absence of per se liability, a plaintiff has the burden of proving that the tying arrangement unreasonably restrains competition in the tied product market. This is known as "rule of reason" analysis. Rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition in the tied market. The arrangement must lead to an increase in the price charged to the consumer or a decrease in the quality of the tied product offered by the seller. The tied product market and defendant's market share, therefore, must be closely examined to prove tying under rule of reason analysis.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN45[] **Monopolies & Monopolization, Attempts to Monopolize**

Section 2 (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, makes it unlawful for a firm to "monopolize." *15 U.S.C.S. § 2*. In order to prove monopolization, a plaintiff must show (1) defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition of monopoly power, as opposed to growth as a result of a superior product, business acumen, or historic accident. While concerted conduct under *§ 1* of the Sherman Act is subject to sanction if it merely restrains trade, unilateral conduct under *§ 2* is subject to sanction only if it actually monopolizes.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN46[] **Sherman Act, Claims**

In order to prove a monopolization claim, the plaintiff must first define the relevant market. Second, in proving a monopolization claim, plaintiff must demonstrate that the defendant has monopoly power in the relevant market. While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. Monopoly power under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, requires something greater than market power under *§ 1* (*15 U.S.C.S. § 1*). Proof of monopoly power requires a showing of the power both to control prices and to exclude competition. Monopoly power may be inferred from a firm's possession of a dominant share of the relevant market, which is protected by entry barriers.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN47[] **Monopolies & Monopolization, Actual Monopolization**

While the United States Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share between 70% and 80%.

Antitrust & Trade Law > Clayton Act > Claims

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

HN48[] **Clayton Act, Claims**

In the United States Court of Appeals for the Tenth Circuit, four elements must be proven to establish an attempt to monopolize under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*: (1) relevant market, including both geographic and product market, in which the alleged attempt occurred; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such attempt. Additionally, any plaintiff seeking treble damages under § 4 of the Clayton Act must show antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN49[] **Sherman Act, Claims**

In order to satisfy the dangerous probability of success element on an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the plaintiff must show that there is a dangerous probability that defendant will achieve monopoly status as the result of the predatory conduct alleged by the plaintiff. It is not necessary for the defendant to already possess monopoly power in the target market. Factors to be considered in determining dangerous probability include (1) the defendant's ability to control prices or exclude competition, (2) defendant's market share, (3) the number and strength of other competitors, or whether defendant is a multimarket firm, (4) market trends, and (5) entry barriers. Where predatory pricing is alleged, the defendant's financial strength and ability to absorb losses are also relevant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN50[] **Monopolies & Monopolization, Attempts to Monopolize**

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, to demonstrate "market power," a plaintiff may show evidence of power to control prices or exclude competition. One measure of a firm's ability to monopolize is the persistence of a firm's ability to profitably charge monopoly prices. If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm does not possess the degree of market power required for attempted monopolization. To justify a finding that a defendant has the power to persistently control prices, entry barriers must be significant -- they must be capable of constraining the normal operation of the market so that the problem is unlikely to be self-correcting. If entry barriers exist, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. When evidence shows that a firm has in fact profitably done so, monopoly power exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN51[] Monopolies & Monopolization, Attempts to Monopolize

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, another factor indicative of a defendant's probability of success in monopolization is the defendant's ability to exclude competition and thereby control output. If the predator has control of market-wide output at the supply level, other firms cannot increase their output because they have no access to the necessary inputs to increase output. When a business firm is in a position to use its leverage over one industry in order to exclude or slow down the development of additional competitors in another industry, the business firm may have the power to exclude competition and, therefore, market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN52[] Monopolies & Monopolization, Attempts to Monopolize

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market. The plaintiff must show that there is a dangerous probability that the defendant's conduct will propel it from a non-monopolistic market share to a market share that is large enough to constitute a monopoly. The higher the firm's initial market share, the more likely it will eventually gain monopolistic control over the market. Market share is relevant but not conclusive as to the existence of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN53[] Monopolies & Monopolization, Attempts to Monopolize

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, a market share of 41% indicates that a firm has substantial economic power in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN54[] Monopolies & Monopolization, Attempts to Monopolize

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, market trends may demonstrate a probability of success in monopolization. Specifically, when the defendant's market share grows significantly in a short period of time, while the market share of its major competitors shrinks significantly in a short period of time, a probability of monopolization may exist.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Communications Law > Overview & Legal Concepts > Ownership > General Overview

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Patent Law > ... > Damages > Collateral Assessments > Costs

HN55[] Costs & Attorney Fees, Clayton Act

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, entry barriers are relevant to the analysis of market power because the significance of market power depends upon its durability. Entry barriers are particular characteristics of a market which impede entry by new firms into that market. They may include high capital costs or regulatory or legal requirements such as patents or licenses. Other examples include: (1) control over an essential or superior resource, (2) entrenched buyer preferences, and (3) high capital costs for new entrants. When significant and continuing barriers to entry are present, substantial market power can persist unimpeded.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Defenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN56[] Tying Arrangements, Defenses

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, entry barriers may be created by the defendant's conduct itself. For example, an organized boycott of the plaintiff's product may constitute an entry barrier that confirms the defendant's dangerous probability of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN57[] Monopolies & Monopolization, Attempts to Monopolize

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the number of competitors does not conclusively show a lack of entry barriers, however. Likewise, the fact that entry has occurred does not preclude the existence of significant entry barriers. If the output of the new entrant is insufficient to take significant business away from the predator, the entrant is unlikely to represent a challenge to the predator's market power.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN58[] Attempts to Monopolize, Elements

In the context of an attempt claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, after a plaintiff has defined the relevant market and shown a probability of success in monopolization, the third element that must be proven by plaintiff is the specific intent to monopolize. Specific intent to monopolize is a necessary element of an "attempt to monopolize" claim under *§ 2*. Improper exclusion is always deliberately intended.

Antitrust & Trade Law > Sherman Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

HN59[] **Sherman Act, Claims**

The final element of an attempted monopolization claim under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is proof that the defendant engages in anticompetitive conduct. Anticompetitive or exclusionary conduct under *§ 2* is conduct constituting an abnormal response to market opportunities. Such predatory practices are illegal if the conduct appears reasonably capable of contributing to the creation or maintenance of monopoly power, and the practices (1) do not constitute competition on the merits or (2) are more restrictive than reasonably necessary for competition. A defendant may avoid liability by showing a legitimate business justification for the conduct. If, however, the defendant adopts its policies and engages in certain conduct as part of a scheme of willful acquisition of monopoly power, it violates *§ 2* of the Sherman Act. Specifically, anticompetitive conduct is that conduct directed toward competitors and intended to injure competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN60[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

All business firms have a right to select their customers and associates and to refuse to deal with others. Additionally, there is no duty to cooperate with one's competitors. The antitrust laws protect competition but not individual competitors. The absence of a duty to cooperate, however, does not mean that the refusal to deal never gives rise to antitrust liability. After all, most rights are qualified. Under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, of the Sherman Act, the right of the business firm to exercise independent discretion as to the parties with whom it will deal is circumscribed when the firm intends the behavior to create or maintain a monopoly. Additionally, the behavior is anticompetitive when it injures competition in the market.

Antitrust & Trade Law > Sherman Act > General Overview

HN61[] Antitrust & Trade Law, Sherman Act

Under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, a business has the right to refuse to deal with whomever it likes as long as it does so independently, without conspiring with others. Under *§ 2* (*15 U.S.C.S. § 2*), however, independent action may form the basis of liability.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN62[] Antitrust & Trade Law, Sherman Act

Illegal tie-ins under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, may also qualify as anticompetitive conduct for *§ 2* (*15 U.S.C.S. § 2*) purposes.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN63[] Monopolies & Monopolization, Attempts to Monopolize

Predatory pricing may qualify as anticompetitive conduct under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, *15 U.S.C.S. § 1 et seq.* To be predatory, prices must be set below an appropriate measure of costs. Accordingly, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN64[] Sports, Football

Antitrust laws apply to restraints on competition in the non-unionized labor markets.

Antitrust & Trade Law > Sherman Act > General Overview

HN65[] Antitrust & Trade Law, Sherman Act

Antitrust laws are not concerned with conduct's effect on individual competitors, only its effect on competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN66[] **Monopolies & Monopolization, Actual Monopolization**

A firm's refusal to sell or provide its products and services to a competitor may rise to the level of an antitrust violation under the essential facilities doctrine, if the refusal is part of a vertical integration scheme calculated to drive a competitor out of business. To establish liability under the doctrine, a plaintiff must show (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) the denial of the use of the essential facility to a competitor; and (4) the feasibility of providing the facility. In order for an essential facilities claim to succeed, the defendant's power to exclude the plaintiff from such facility must amount to the power to eliminate meaningful competition in the downstream market. This power to eliminate competition must not be a momentary power, but must have relative permanence. Additionally, plaintiff must have evidence that some competitors have been refused access to the facility.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN67[] **Monopolies & Monopolization, Actual Monopolization**

In order to show control, a plaintiff must define the relevant market and show that the defendant has an actual monopoly in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN68[] **Monopolies & Monopolization, Actual Monopolization**

An essential facility is one that is essential to engage in meaningful competition in the market. An essential facility need not be one that is indispensable; it is sufficient if denial of its use inflicts a severe competitive handicap on market entrants.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN69[] **Monopolies & Monopolization, Actual Monopolization**

In order to prove an essential facilities claim, a plaintiff must secondly show that an alternative to the facility is not available, and the facility cannot be duplicated by plaintiff. The test is not whether it would be impossible to duplicate the facility but whether it would be economically infeasible. The point of the essential facilities doctrine is that a market entrant should not be forced simultaneously to enter a second market, with its own large capital requirements.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN70[] **Monopolies & Monopolization, Actual Monopolization**

To establish the third element of an essential facilities claim, a plaintiff must show that the defendant did not provide access to the facility on reasonable, non-discriminatory terms. There need not be an outright refusal to deal in order to determine that denial of an essential facility has occurred. To avoid liability, defendant must provide access to an essential facility upon such just and reasonable terms and regulations as will place every company upon nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Antitrust & Trade Law > Sherman Act > General Overview

HN71[] Antitrust & Trade Law, Sherman Act

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not restrict a trader from refusing to deal with another party, except in narrow circumstances.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN72[] Monopolies & Monopolization, Actual Monopolization

The final element of an essential facilities claim is defendant's feasibility of providing the facility. Feasibility of providing the facility can be demonstrated by showing that defendant provided the facility on non-discriminatory terms in the past, and no intermittent business reason has arisen to justify an inability to provide the facility.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN73[] Consumer Protection, Deceptive & Unfair Trade Practices

A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person disparages the goods, services, property, or business of another by false or misleading representation of fact. *Colo. Rev. Stat. § 6-1-105(1)(g)* . In order to show violation of the Colorado Antitrust Act, *Colo. Rev. Stat. § 6-4-105* (1999), a plaintiff must demonstrate that (1) defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury. Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. *Colo. Rev. Stat. § 6-1-105(2)*.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN74[] Sales (Article 2), Form, Formation & Readjustment

One who intentionally and improperly interferes with the performance of a contract between another and a third party by causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. In order to prove tortious interference with contract, a plaintiff must show: (1) a contract existed; (2) the defendant had knowledge of the contract; (3) the defendant interfered and induced the other party to breach the contract; and (4) the plaintiff was injured as a result. Most importantly, the interference must be intentional and improper.

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

Torts > ... > Commercial Interference > Contracts > General Overview

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

HN75[] **Employment Contracts, Breaches**

Even a contract terminable at will is entitled to some protection from tortious unwarranted interference.

Torts > ... > Commercial Interference > Contracts > General Overview

HN76[] **Commercial Interference, Contracts**

For liability to descend on defendants, the interference with the at-will contract must have been improper. Interference with a contract is not improper when it involves a matter of competition between the parties. More specifically, a defendant who intentionally causes a third person to breach a contract with the plaintiff does not engage in improper conduct if: (1) it concerns a matter of competition between the defendant and plaintiff; (2) the defendant does not employ wrongful means; (3) the action does not amount to an unlawful restraint of trade; and (4) the defendant's purpose is, at least in part, to advance its own interest. "Wrongful means" include physical violence, fraud, civil suits, and criminal prosecutions.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > General Overview

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN77[] **Entitlement as Matter of Law, Materiality of Facts**

A statement is not considered hearsay if the significance of the statement lies solely in the fact that it was made, not in the truth of its contents. *Fed. R. of Evid. 801(c)*.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN78[] **Intentional Interference, Elements**

Colorado has adopted the *Restatement (Second) of Torts §§ 766B*, *767* and *768* in determining whether a party is liable for intentional interference with prospective business advantage.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN79[] **Intentional Interference, Elements**

To establish a claim for tortious interference with prospective business relations under Colorado law, a plaintiff must show intentional and improper interference with another's prospective contractual relation. For liability to attach, defendant's intentional and improper interference must either induce or cause the third party not to enter into or continue relations. It is not necessary to prove an underlying contract. Rather, a continuing business or customary relationship, which includes a prospective quasi-contract, suffices to create rights against intentional interference.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN80[] **Intentional Interference, Elements**

To establish a claim for tortious interference with prospective business advantage, a plaintiff must show that defendant engaged in (1) improper conduct with (2) the intention to induce or cause a third party not to enter into or continue business relations with the plaintiff, and (3) defendant actually induced or caused such result.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN81[] **Intentional Interference, Elements**

Improper conduct is a necessary element of a claim for intentional interference with prospective business relations. There are seven factors a judge or jury should balance to determine whether a defendant's conduct is improper. These factors include: (a) the nature of the defendant's conduct, (b) the defendant's motive, (c) the plaintiff's interests interfered with, (d) the defendant's interests in interfering, (e) the social interests in protecting defendant's freedom of action and plaintiff's prospective business relations, (f) the proximity of the defendant's conduct to the interference, (g) the relations between the parties. The nature of some conduct, such as fraud and physical violence, is always improper, while other means, such as economic pressure, may be permissible under some circumstances and wrongful under others. Whether economic pressure is improper depends on the degree of coercion, the effects upon competition, and the appropriateness of the pressure as a means of accomplishing the defendant's objectives.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN82[] **Commercial Interference, Prospective Advantage**

A defendant does not engage in improper conduct, so as to be liable for intentional interference, if: (1) it concerns a matter of competition between the defendant and plaintiff; (2) the defendant does not employ wrongful means; (3) the action does not amount to an unlawful restraint of trade; and (4) the defendant's purpose is, at least in part, to advance its own interest. "Wrongful means" include physical violence, fraud, civil suits, and criminal prosecutions. "Wrongful means" do not include breach of the duty of good faith and competitive economic pressure.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN83[] **Legislation, Effect & Operation**

The second element of tortious interference with prospective business relations is that the improper conduct must be intentional. The situation may be one in which many persons are induced to act. Thus a boycott campaign may be intended to induce numerous persons to refuse business relations with the plaintiff.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN84[] **Intentional Interference, Elements**

The final element of tortious interference with prospective business relations is that the conduct of the defendant must cause the third party to refuse to enter business relations with the plaintiff. The question whether the actor's conduct caused the third person to refuse to enter relations with the plaintiff raises an issue of fact. The reasonableness of the claimed reaction of the third person to the actor's conduct is material evidence on this issue, but it is not conclusive. Thus the fact that only a fool would have been influenced by the defendant's conduct is evidence that may warrant a finding that the third person was not in fact influenced by it. On the other hand, if other evidence establishes that the actor did in fact induce the third person's conduct, the actor is liable even though the third person was foolish or otherwise unreasonable in permitting himself to be so influenced.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN85[] **Expert Witnesses, Daubert Standard**

According to Daubert, under Fed. R. Evid. 702, expert testimony is only admissible if it will assist the trier of fact and if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Counsel: **[**1]** For NOBODY IN PARTICULAR PRESENTS, INC., plaintiff: John Allen Francis, Davis, Graham & Stubbs LLP, United States District Court, Denver, CO USA. Walter L. Gerash, Gerash Law Firm, PC, Denver, CO USA.

For OGDEN RESURRECTION PROJECT, INC., SWANK MANAGEMENT, INC., N.I.P.P., LLC, plaintiffs: Dale R. Harris, Davis, Graham & Stubbs LLP, United States District Court, Denver, CO USA.

For CLEAR CHANNEL COMMUNICATIONS, INC., CLEAR CHANNEL BROADCASTING, INC., defendants: Sean Patrick Costello, Jones, Day, Reaves & Pogue, Cleveland, OH U.S.A. Bruce A. Featherstone, Matthew D. Collins, Featherstone DeSisto LLP, Denver, CO USA.

For SFX ENTERTAINMENT, INC. dba Clear Channel Entertainment, JACOR BROADCASTING OF COLORADO, INC., CITICASTERS CO., CITICASTERS LICENSES, INC., TSUNAMI COMMUNICATIONS, INC., defendants: Sean Patrick Costello, Jones, Day, Reaves & Pogue, Cleveland, OH U.S.A. Matthew D. Collins, Featherstone DeSisto LLP, Denver, CO USA.

Judges: EDWARD W. NOTTINGHAM, United States District Judge.

Opinion by: EDWARD W. NOTTINGHAM

Opinion

[*1055] ORDER AND MEMORANDUM OF DECISION

In this case, a concert promoter and its affiliates seek damages and an injunction for alleged antitrust violations **[**2]** and tortious conduct by its competitor. Plaintiffs Nobody In Particular Presents, Inc. ("NIPP"), Ogden Resurrection Project, Inc., Swank Management, Inc., and N.I.P.P., L.L.C., claim that Defendants Clear Channel Communications, Inc. ("Clear Channel Communications"), SFX Entertainment, Inc. d/b/a/ Clear Channel Entertainment, Inc. ("SFX/Clear Channel Entertainment"), Clear Channel Broadcasting, Inc., Jacor Broadcasting of Colorado, Inc. ("Jacor"), Citicasters Co., Citicasters Licenses, Inc., and Tsunami Communications, Inc. (collectively "Clear Channel") engage in anticompetitive conduct that violates (1) the Sherman Act, 15 U.S.C.A. §§ 1-2 (West 1997), (2) the Colorado Antitrust Act, Colo. Rev. Stat. § 6-4-105 (1999), (3) the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101 (1999), and (4) Colorado common law prohibiting tortious interference with contracts and prospective business relations. This matter is before the court on (1) "Defendants' Motion for Summary Judgment," filed October 7, 2002, (2) "Defendants' Motion for Summary Judgment," filed November 1, 2002, (3) "Combined Motion and Memorandum **[**3]** for Summary Judgment of Parent Defendant Clear Channel Communications, Inc., On All Claims," filed November 1, 2002, and (4) "Defendants' Motion to Exclude Expert Testimony," filed August 6, 2003. Jurisdiction is based on 28 U.S.C.A. §§ 1331,1337 (West 1993), and 15 U.S.C.A. § 15 (West 1997).

FACTS

I. Factual Background

A. The Parties

Plaintiff NIPP is a music concert promoter in the Denver, Colorado area. (First Am. Compl. & Jury Demand P3 [filed August 8, 2002] [hereinafter "Am. Compl."]; *admitted at* Defs.' Answer and Affirmative Defenses to Pls.' First Am. Compl. P3 [filed August 21, 2002] [hereinafter "Answer"].) Founded in 1987, it has been a fixture in the Denver music industry since that time. (*Id.*) NIPP has promoted music concerts by jazz, folk, rock, and blues artists, including Beck, Pearl Jam, Sarah McLachlan, and the Neville Brothers. (*Id.*) It has promoted music concerts at numerous music venues in Denver, including the Ogden Theater, the Bluebird Theater, the Denver Botanic Gardens Amphitheater, Red Rocks Amphitheater, the Gothic Theater, and the Pepsi Center. (Statement **[**4]** of Undisputed Material Facts P13 [filed November 1, 2002] [hereinafter "Statement of Undisputed Facts"]; *admitted at* Pls.' Resp. to Defs.' Statement of Undisputed Material Facts P13 [filed December 23, 2002] [hereinafter "Resp. to Statement of Undisputed Facts"].) NIPP controls concert-promotion access to the Ogden Theater, the Bluebird Theater, and the Denver Botanic Gardens Amphitheater. (*Id.* P13; *admitted in pertinent part at* Resp. to Statement of Undisputed Facts P13.) The parties dispute whether NIPP allows other concert promoters to use these venues. **[*1056]** (*Id.* P13; *disputed at* Resp. to Statement of Undisputed Facts P13.)

Clear Channel Communications, a Texas corporation and holding company, is one of the largest radio and entertainment conglomerates in the world. It owns significant holdings in radio, television, billboard advertising, concert venues, and the concert promotions industry, through its numerous wholly-owned subsidiaries. (Combined Mot. and Mem. for Summ. J. of Parent Def. Clear Channel Communications, Inc. on All Claims, Statement of Undisputed Material Facts P2 [filed December 23, 2002] [hereinafter "CCC Mot. for Summ. J."]; *admitted* **[**5]** *at* Pls.' Resp. to Undisputed Material Facts, Statement of Additional Disputed Facts, and Resp. to Mot. and Mem. for Summ. J. of Parent Def. Clear Channel Communications, Inc., Resp. to Undisputed Material Facts P2 [filed December 23, 2002] [hereinafter "Resp. to CCC Mot. for Summ. J."].) Clear Channel Communications' wholly-owned subsidiaries include defendants SFX/Clear Channel Entertainment and Jacor. Eight years ago, Clear Channel Communications was just one of numerous radio station owners, unknown to most people living outside of San Antonio, Texas, where the company is based. (CCC Mot. for Summ. J., Statement of Undisputed Material Facts P1; *admitted at* Resp. to CCC Mot. for Summ. J., Resp. to Undisputed Material Facts P1; Sarah Greene, *Clear Channel v. Competition Act of 2002: Is There A Clear End In Sight?,* 12 Depaul-LCA J. Art & Entm't L. 387, 402 [2002].) At that time, Clear Channel Communications owned 43 radio stations and 16 television stations through its subsidiaries. (*12 Depaul-LCA J. Art & Entm't L. at 402*.) After Congress enacted the Telecommunications Act of 1996, however, Clear Channel Communications began acquiring broadcast and entertainment companies **[**6]** at amazing speed. (*Id.*) Today, Clear Channel Communications consists of what was once seventy separate broadcast companies, owning 1200 radio stations, or 10% of the radio stations in the United States. (Defs.' Br. at 14.)

In May 1999, Clear Channel Communications entered the Denver radio market when it acquired Jacor. (Mem. in Supp. of Defs.' Mot. for Summ. J. at 15 [filed November 1, 2002] [hereinafter "Defs.' Br."]; Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. at 3 [filed December 23, 2002] [hereinafter "Pls.' Resp."].) As a result of this acquisition, Clear Channel Communications' subsidiaries now own and operate eight radio stations in Denver, the maximum allowed by the Federal Communications Commission ("FCC"). (Statement of Undisputed Facts P11; *admitted at* Resp. to Statement of Undisputed Facts P11.) These stations include five FM stations, KBCO, KBPI, KFMD, KRFX, and KTCL, and three AM stations, KHOA, KOA, and KTLK. (*Id.* P11; *admitted at* Resp. to Statement of Undisputed Facts P11.)

Additionally, as a result of the $ 4.4 billion dollar acquisition of SFX in 2000, SFX/Clear Channel Entertainment, Clear Channel Communications' national concert promotions **[**7]** division, is the largest concert producer and entertainment promoter in the nation. (Statement of Undisputed Facts P11; *admitted at* Resp. to Statement of Undisputed Facts P11; *12 Depaul-LCA J. Art & Entm't L. at 402*.) Additionally, Clear Channel Communications has a radio concert promotions division, previously known as Clear Channel Concerts, and now as Clear Channel Radio Festivals. (Statement of Undisputed Facts P11; *admitted at* Resp. to Statement of Undisputed Facts P11.) Both of these divisions operate in Denver. (*Id.* P11; *admitted at* Resp. to Statement of Undisputed Facts P11.) Clear Channel Communications also owns or has control over more than 100 music concert venues **[*1057]** nationwide. (*12 Depaul-LCA J. Art & Entm't L. 387, 402*.) SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals promote music concerts by jazz, folk, rock, and blues artists. It has promoted these music concerts at numerous music venues in Denver and has exclusive access to the Fillmore Auditorium in Denver. (*Id.* P11; *admitted at* Resp. to Statement of Undisputed Facts P11.)

The parties dispute the extent to which Clear Channel Communications participates **[**8]** in the operation of its subsidiaries, such as its radio stations and SFX/Clear Channel Entertainment. Clear Channel argues that Clear Channel Communications merely acts as a holding company, while NIPP asserts that Clear Channel Communications acts as an operating company, determining the strategy and culture for all subsidiaries. (CCC Mot. for Summ. J.; *disputed at* Resp. to CCC Mot. for Summ. J.)

B. Concert Promotion in Denver

Music concert promoters are in the business of planning and promoting music concerts for the ticket-purchasing public. Specifically, a concert promoter bids on a particular musician or band in order to obtain the right to promote the artist's concert. In bidding on an artist, the concert promoter must often deal with the artist's manager or record label, which, in the jargon of the industry, is the entity that produces and sells the artist's recordings. (Pls.' Resp., Exs. Vol. 2, Ex. 35 [Dep. of Sabrina Saunders at 44, 116-118], Ex. 30 [Dep. of Michael O'Connor at 425-427], Ex. 22 [Dep. of David Loncao at 37-40].) The concert promoter then arranges for the venue, ticketing, and advertising, among other things. Concert promoters advertise **[**9]** concerts using radio, television, the internet, newspapers, magazines, posters, and flyers. (Defs.' Br., Exs. Vol. 1, Ex. A-7 [Am. Compl. P21]; Am. Compl. P21.) If the concert generates little interest and few ticket sales, the promoter absorbs the loss. Conversely, if the concert is hugely successful, the promoter keeps the profits.

Some promoters promote concerts of all kinds of music, while others may promote, for example, only rock or jazz concerts. Similarly, many venues will accept concerts by artists of all kinds of music, while others will not. (Statement of Undisputed Facts P26; *admitted at* Resp. to Statement of Undisputed Facts P26.) Artist agents may represent both rock and non-rock artists, and record labels often produce recordings for both kinds of artists; however, some agents represent only rock artists, and record companies and talent agencies may have separate divisions that deal with only rock artists. (Statement of Undisputed Facts P27; *admitted in pertinent part* at Resp. to Statement of Undisputed Facts P27.)

There are a large number of music concert promoters in the Denver, Colorado area, compared to other cities of its size. (Defs.' Br., Exs. Vol. **[**10]** 2, Ex. A-19 [Dep. of David Kirby at 149-151].) In recent years, however, three music promoters have emerged as the main promoters in terms of revenue and the number of concerts promoted: Plaintiff NIPP, Defendants SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals, and House of Blues. (Defs.' Br., Exs. Vol. 1A, Ex. A-1 [Decl. of Gustavo Bamberger P50, Table 11]; Pls.' Resp., Exs. Vol. 1, Ex. 1 [Decl. of Owen Phillips, Table 5]; Statement of Undisputed Facts PP14-16; *admitted at* Resp. to Statement of Undisputed Facts PP14-16.)

From the late 1960's to the mid 1990's, Barry Fey and his company, Fey Concerts, were the leading concert promoters in Denver. (Defs.' Br., Exs. Vol. 1, Ex. A-13 [Dep. of Jesse Morreale at 57-58], Exs. Vol. 2, Ex. A-18 [Dep. of Douglas Kauffman **[*1058]** at 60], Ex. A-27 [Dep. of Christopher Swank at 248-250].) During that time, many individuals who have roles in the Denver concert promotion business today worked for Fey Concerts, including Jesse Morreale, Chuck Morris, Bill Bass, and Brent Fedrizzi. (*Id.,* Exs. Vol. 1, Ex. A-13 [Morreale Dep. at 64, 71].) In 1987, Doug Kauffman founded NIPP, which competed with **[**11]** Fey Concerts in the Denver market. (*Id.,* Exs. Vol. 2, Ex. A-18 [Kauffman Dep. at 53-54], Ex. A-27 [Swank Dep. at 249].) In August 1997, Fey sold his interest in Fey Concerts to Universal Concerts and retired, triggering a mass exodus of his employees and introducing more competition in the concert promotions industry. (*Id.,* Exs. Vol. 1, Ex. A-13 [Morreale Dep. at 95-100].) Morreale started the concert promotions company, Gess Presents; Chuck Morris started the company Bill Graham presents/Chuck Morris presents and hired Fedrizzi as a talent buyer; and Bass founded Bill Bass Concerts. (*Id.,* Exs. Vol. 1, Ex. A-13 [Morreale Dep. at 97], Exs. Vol. 2, A-16 [Dep. of Brent Fedrizzi at 10-15].)

In 1998, SFX, a national concert promotion company, acquired Bill Graham Presents and formed a partnership with Chuck Morris Presents. (*Id.,* Exs. Vol. 2, Ex. A-16 [Fedrizzi Dep. at 11-12].) In 1998, NIPP and Kauffman were joined by Jesse Morreale and Christopher Swank, who owned the Bluebird Theater. (*Id.,* Exs. Vol. 2, Ex. A-18 [Kauffman Dep. at 13-14].) In 1999, Clear Channel Communications acquired SFX and affiliated with Don Straussburg of the Fox Theater in Boulder. **[**12]** (Statement of Undisputed Facts P11; *admitted at* Resp. to Statement of Undisputed Facts P11, 16.) In 1999, House of Blues, another national concert promotion company, acquired Universal Concerts and, later, Bill Bass Concerts. (Defs.' Br. at 17.)

In 1999, according to NIPP, Clear Channel, NIPP, and House of Blues combined to hold 47% of the market share in revenue for all music concert promotion in Denver. (Pls.' Resp., Exs. Vol. 1, Ex. 1 [Phillips Decl., Table 5].) In 2001, according to NIPP, they combined to hold 76%. (*Id.,* Exs. Vol. 1, Ex. 1 [Phillips Decl., Table 5].) The parties dispute the exact market share held by each entity in all concert promotion in Denver. The following tables show the dispute of their market share for 1999 and 2001.

Plaintiff NIPP asserts the following breakdown of market share for all music concerts:

Year	Promoter	Revenue	Concerts	Concert Promo Market
1999	Clear Channel			.27%
	NIPP	$ 3,734,565	344	10.86%
	House of Blues			36.28%
2001	Clear Channel	$ 25,000,000		43.81%
	NIPP	$ 2,963,518	324	5.25%
	House of Blues	$ 14,127,205		26.67%

(*Id.,* Exs. Vol. I, Ex. **[**13]** 1 [Phillips Decl., Table 5]; Resp. to Statement of Undisputed Facts PP14-16.)

Defendant Clear Channel claims the following breakdown existed in 2001 for all music concerts:

Year	Promoter	Revenue	Concerts	Concert Promo Market
2001	Clear Channel	$ 19,886,613		40%
	NIPP	$ 3,888,000	369	4.1%
	House of Blues	$ 11,810,621		25.6%

[*1059] (Defs.' Br., Exs. Vol. 1A, Ex. A-1 [Bamberger Decl. P50, Table 11]; Statement of Undisputed Facts PP14-16.)

In the rock music concert market, NIPP claims that, in 1999, Clear Channel held a 0.45% market share, House of Blues held a 32.51% market share, and NIPP held a 16.89% market share. (Pls.' Resp., Ex. 1 [Phillips Decl., Table 5].) In 2001, according to NIPP, Clear Channel held a 50.48% share, House of Blues held an 18.85% share, and NIPP held an 8.2% share. (*Id.,* Ex. 1 [Phillips Decl., Table 5].)

Other promoters in the Denver market include Soda Jerk Presents, Alex Crothers, Eric Pirritt, Dan Steinberg, and Jason Coulter. (Statement of Undisputed Facts P16; *admitted at* Resp. to Statement of Undisputed Facts P16.) In 2001, however, these promoters, in the aggregate, made up less **[**14]** than one percent of the market. (Defs.' Br., Exs. Vol. 1A, Ex. 1 [Bamberger Decl., Table 11]; Resp. to Statement of Undisputed Facts P16.) Other promoters that made up more of the market in Denver in 2001, such as Concerts West and Jam Productions, promoted no concerts in Denver during 2002. (Pls.' Resp., Exs. Vol. 1, Ex. 2 [Morreale Decl. P31].)

C. Radio Denver

1. Play Lists

In the radio industry, stations usually have a particular music format. Different types of formats in radio include: country music formats, contemporary hit formats, adult contemporary formats, rock music formats, urban music formats, talk radio formats, jazz radio formats, and world music formats, among others. (Arbitron.) [1] Some rock music formats include Modern Rock, Active Rock, Alternative, and Classic Rock. (Arbitron.)

[15]** There are, at least, fifty radio stations in the Denver area. (Statement of Undisputed Facts P54; *admitted at* Resp. to Statement of Undisputed Facts P54.) Of these fifty, Clear Channel owns eight. (*Id.* P54; *admitted at* Resp. to Statement of Undisputed Facts P54.) Of the five FM stations owned by Clear Channel, four, KBPI, KBCO, KRFX, and KTCL, have a rock format according to Arbitron. (Arbitron.) The parties dispute the number of other stations that have a rock format in the Denver radio market because they dispute what qualifies as a rock format. (Statement of Undisputed Facts PP50-53; *disputed at* Resp. to Statement of Undisputed Facts PP50-53.) Additionally, the parties dispute whether radio stations can easily switch formats. (*Id.* PP55-56; *disputed at* Resp. to Statement of Undisputed Facts PP55-56.)

Radio stations create a play-list of songs based on the station's format, and the disc jockey must adhere to the play-list. How a station creates its play-list is disputed by the parties. Clear Channel argues that it makes its decisions about which songs to play based on the popularity of the song with its audience, according to polling data. (Defs.' Br., Exs. **[**16]** Vol. 1, Ex. 24 [Dep. of Michael O'Connor at 383-385]; Pls.' **[*1060]** Resp., Exs. Vol. 2, Ex. 24 [Dep. of Mark Mays at 91-93].) NIPP argues that, although polling data plays some role, Clear Channel also makes its decisions based on which concerts Clear Channel is or is not promoting, and which "indies" have paid Clear Channel the most money. (Pls.' Resp. at 18-24, 29-30, Exs. Vol. 2, Ex. 20 [Dep. of David Kirby at 129-132].)

"Indies," in the industry's jargon, are independent record promoters that represent record labels. (*Id.,* Exs. Vol. 2, Ex. 18 [Dep. of Theodore Guggenheim at 113-116], Exs. Vol. 3, Ex. 82 [Joint Statement of Current Issues in Radio].) The record labels pay the independent promoters, who, in turn, pay radio stations for "access." (*Id.,* Exs. Vol. 2, Ex. 36 [Dep. of Barbara Scull at 33-36], Ex. 22 [Dep. of David Loncao at 18-19].) "Access" allows the independent promoter to meet with the radio station and present marketing and polling data about the popularity of songs on the record label's albums. (*Id.,* Exs. Vol. 2, Ex. 24 [M. Mays Dep. at 92-93, 101].) Many commentators and NIPP view the independent record promotion market as a mechanism by which **[**17]** record labels pay for play of their songs, while simultaneously avoiding liability for "payola." (*Id.* at 30; *United States v. Goodman, 945 F.2d 125 [6th Cir. 1991]*.)

Payola, or paying radio stations for record spins, has been outlawed by federal law since the 1930's. *47 U.S.C.A. § 508 (West 2001 & Supp. 2003)*. Clear Channel receives millions of dollars from indies each year; however, it denies that indies' payments influence Clear Channel's decisions to add songs to its radio play lists. (*Id.,* Exs. Vol. 2, Ex. 24 [M. Mays Dep. at 93].) For record labels that are in the business of selling records, radio air play of their records and live concerts by their artists are essential to generate demand for the records themselves. (*Id,* Exs. Vol. 2, Ex. 36 [Scull Dep. at 29], Ex. 39 [Dep. of Todd Sievers at 129-130].) Accordingly, record labels and their indies are highly dependent on, and in regular contact with, radio stations concerning air play for their records. Similarly,

[1] Arbitron is an international marketing and research firm serving radio broadcasters, cable companies, advertisers, advertising agencies, and outdoor advertising companies. Arbitron's core business is measuring network and local market radio audiences across the United States. Both parties cite to Arbitron research in their briefs because Arbitron is the radio industry standard for polling data.

record labels are often in direct contact with concert promoters. (*Id.,* Exs. Vol. 2, Ex. 30 [O'Connor Dep. at 425-426], Ex. 35 [Saunders Dep. at 44-46, 116-117]. **[**18]**)

2. Advertising and Concert Promotions

Although radio stations receive income from independent promoters at the behest of record labels, radio stations derive most of their income from advertisers who pay for advertising spots. (*Id.* at 21-23, 44.) Radio stations with the largest audiences can command the highest advertising rates from advertisers. (Defs.' Br., Exs. Vol. 1A, Ex. A-3 [Aff. of Lee Larsen PP3-4].) When a promoter seeks to advertise a concert on radio, therefore, it competes with advertisers of other goods and services. (*Id.,* Exs. Vol. 3, Ex. A-61 [Dep. of Ashley McGhee at 10-12].)

What makes concert promoters different from a regular advertiser, however, is the potential benefit the radio station receives from advertising a concert of a popular artist. By advertising the concert, the radio generates more interest in the artist, which encourages listeners to listen to the radio to hear about the artist's concert and to hear the artist's songs. (*Id.,* Exs. Vol. 2, Ex. A-24 [O'Connor Dep. at 385-386].) Radio stations, therefore, often "promote" concerts for free, above and beyond the advertising time paid for by the concert promoter, by mentioning **[**19]** the concert on-air, holding ticket giveaways, and conducting interviews with artists. (*Id.,* Exs. Vol. 2, Ex. A-26 [Dep. of Bob Richards at 253-255, 275, 311-312].) Such free promotion greatly benefits the concert promoter, as well as the station, by generating publicity **[*1061]** and demand for the concert. (*Id.,* Exs. Vol. 2, Ex. A-26 [Richards Dep. at 255-256, 311-312].)

NIPP has purchased and continues to purchase advertising time on Clear Channel radio stations. (*Id.,* Exs. Vol. 1A, Ex. A-3 [Larsen Aff. P8, Attach. A.].) Clear Channel radio stations have also provided NIPP with free promotional support for its concerts in the past, though Clear Channel admits that they provide less now. (*Id.,* Exs. Vol. 1A, Ex. A-3 [Larsen Aff. P8, Attach. A.].) NIPP claims, however, that, since Clear Channel entered the concert promotion business, Clear Channel radio stations have withheld free promotional support from NIPP for its concerts. (Pls.' Resp. at 25-27.)

In 1999, NIPP only purchased radio advertising for approximately 8% of its concerts. (Statement of Undisputed Facts P38; *admitted in pertinent part at* Resp. to Statement of Undisputed Facts P38.) Although NIPP does **[**20]** not purchase radio advertising for all of its concerts, especially not for its low-budget productions, it almost always purchases radio advertising for its shows predicted to generate more than $ 10,000 in revenue. (Pls. Br., Exs. Vol. 1, Ex. 2 [Morreale Decl. PP13-14]; Resp. to Statement of Undisputed Facts P38.) In 1999, NIPP claims that more than 70% of its revenue came from concerts that relied on radio advertising. (Resp. to Statement of Undisputed Facts P38.)

In a market encompassing all Denver radio stations, Clear Channel's share of radio advertising revenue was 46.8% in 2000. (Statement of Undisputed Facts PP50; *admitted in pertinent part at* Resp. to Statement of Undisputed Facts P50.) In a market encompassing only rock-format radio stations, depending of which party's definition of rock-format is utilized, Clear Channel's market share in terms of advertising revenue may be as high as 87.3%. (Statement of Undisputed Facts PP50, 53; *admitted in pertinent part at* Resp. to Statement of Undisputed Facts P50, 53.)

D. Anti-Competitive Conduct

NIPP complains about several different kinds of conduct that, NIPP contends, violate federal and state antitrust laws **[**21]** and the common law.

1. Using Radio Air Play to Coerce Artists in Concert Promotions Decisions

NIPP complains that Clear Channel uses its position in rock-format radio to intimidate and coerce rock artists and their record labels into signing with SFX/Clear Channel Entertainment and Clear Channel Radio Festivals for promotion of the artists' concerts. (Pls.' Resp. 9-17.) Specifically, NIPP claims that rock artists and labels are afraid that Clear Channel radio stations will refuse to give artists' songs as many spins as Clear Channel would if the artist signed with SFX/Clear Channel Entertainment or Clear Channel Concerts/Clear Channel Radio Festivals. (*Id.)* According to NIPP, the dependency of record labels on radio for spins and the resultant promotion of records enables Clear Channel to wrongfully exploit this relationship with labels to book concerts. (*Id.,* Exs. Vol. 2, Ex. 30 [O'Connor Dep. at 425-426].)

NIPP cites testimony and messages from former Clear Channel employees and record label owners to support their position. One of the central figures in Clear Channel's radio operations in Denver is Michael O'Connor, the program director for KTCL and director **[**22]** of programming for all five Clear Channel FM stations in Denver. (*Id.,* Exs. Vol. 2, Ex. 29 [O'Connor Dep. at 356-358].) Ted Guggenheim, a former talent buyer for Clear Channel **[*1062]** Concerts/Clear Channel Radio Festivals, testified that record labels could have inferred from conversations with O'Connor that the label's artist would not get spins unless Clear Channel was allowed to promote the artist's concert. (*Id.,* Exs. Vol. 2, Ex. 18 [Guggenheim Dep. at 102].) Additionally, Sabrina Saunders, the music director at KTCL, testified that, when record labels made O'Connor unhappy, O'Connor punished labels by withholding spins of their artists' records. (*Id.,* Exs. Vol. 2, Ex. 35 [Saunders Dep. at 122, 133-134].)

Jason Martin, a representative of Roadrunner Records, testified that, in 2000, O'Connor threatened to pull Roadrunner's records off of Clear Channel stations when NIPP gave KXPK, KBPI's competition, the right to do promotional support for the "Tattoo the Earth Tour," which featured several Roadrunner artists. (*Id.,* Exs. Vol. 2, Ex. 23 [Dep. of Jason Martin at 112].) In order to dampen Clear Channel's wrath, Dave Lancao, another representative of Roadrunner Records, **[**23]** upon O'Connor's demand, sent an electronic message to the artist managers of Roadrunner's artists suggesting they avoid using NIPP as their concert promoter in Denver to avoid losing air play. (*Id.,* Exs. Vol. 2, Ex. 22 [Loncao Dep. at 82-83, 104, 146-147].)

In 1999-2000, Clear Channel refused to have any dealings with Reprise Records, and O'Connor sent electronic mail messages to the label stating, "we are out of business with your label;" "I have left instructions for KTCL to have NO relations with Reprise . . . I want nothing to do with Reprise Records;" and "you can all go f*ck yourselves as far as I'm concerned." (*Id.,* Exs. Vol. 3, Ex. 52 [Electronic Mail Message from O'Connor to Sievers of 3/28/2000], Ex. 53 [Electronic Mail Message from O'Connor to Sievers of 5/1/2000], Ex. 54 [Electronic Mail Message from O'Connor to Sievers of 5/1/2000].) In an effort to regain favor with Clear Channel, Reprise encouraged its band Orgy to allow SFX/Clear Channel Entertainment to promote the band's Denver concert. (*Id.,* Exs. Vol. 3, Ex. 55 [Letter from Sievers to Michael Papale of 6/27/2000], Ex. 55A [Letter from Sievers to Saunders of 8/22/2000], Ex. 43 [Electronic **[**24]** Mail Message from Sievers to Saunders of 8/25/2000], Ex. 43A [Electronic Mail Message from Sievers to O'Connor].) After the concert was booked, Reprise complained to O'Connor, "[We] can't help but feel taken advantage of with only 126 spins to date on KTCL; why did we do this show? It cost us $ 80 per spin!" (*Id.,* Exs. Vol. II., Ex. 44 [Electronic Mail Message from Sievers to O'Connor of 10/24/2000].)

In September 2000, Margie Weatherly, a record label representative, sent an electronic mail message to O'Connor asking for reasons that songs by one of her artists, Vast, were being played less on KTCL. (*Id.,* Exs. Vol. 3, Ex. 42 [Electronic Mail Message from Weatherly to O'Connor of 9/18/2000].) Instead of answering her question, O'Connor responded by asking Weatherly whether or not Vast was going to book its Denver Christmas show with SFX/Clear Channel Entertainment. (*Id.,* Exs. Vol. 3, Ex. 42 [Electronic Mail Message from O'Connor to Weatherly of 9/18/2000].) He concluded his message by stating, "[if] you will investigate these issues, I would love to have a conversation with you about 'where we stand.'" (*Id.,* Exs. Vol. 3, Ex. 42 [Electronic Mail Message **[**25]** from O'Connor to Weatherly of 9/18/2000].) The next day, Weatherly sent a message to O'Connor assuring him that the concert booking with SFX/Clear Channel Entertainment was being finalized and adding, "NOW LET'S SEE SOME SPINS, BABY!!!!!!!!!" (*Id..,* Exs. Vol. 3, Ex. 42 [Electronic Mail Message from Weatherly to O'Connor of 9/19/2000].) In the weeks prior to Weatherly's first message **[*1063]** to O'Connor, Vast's number of spins on KTML had dropped from twenty-three per week to six per week. After Weatherly confirmed the concert booking, KTCL increased the weekly spins for Vast to twenty. (*Id.,* Exs. Vol. 1, Ex. 8 [Decl. of Victoria Lovato, Ex. C].)

NIPP cites numerous other examples of such conduct. On September 27, 2001, the band "Puddle of Mudd" confirmed a concert booking with NIPP for a concert on November 12, 2001. (*Id.,* Exs. Vol. 1, Ex. 2 [Morreale Decl. PP37-38].) Data showing number of spins for Puddle of Mudd's songs show that for the three months preceding September 27, 2001, KBPI played the band's songs steadily more than twenty times per week. (*Id.,* Exs. Vol. 1, Ex. 2 [Morreale Decl. PP37-38], Ex. 8 [Lovato Decl., Ex. F].) The week ending September 23, 2002, KBPI **[**26]** played the band's songs 25 times; however, the week ending September 30, the spins dropped to eleven, and the following week to zero. (*Id.,* Exs. Vol. 1, Ex. 2 [Morreale Decl. PP37-38], Ex. 8 [Lovato Decl., Ex. F].) Thereafter, KBPI resumed playing the band's songs, but not at pre-September 27 levels. (*Id.,* Exs. Vol. 1, Ex. 2 [Morreale Decl. PP37-38], Ex. 8 [Lovato Decl., Ex. F].)

Clear Channel Communications has, to a certain extent, admitted this behavior in its own intra-company communications. In an electronic message to Clear Channel radio program directors in Denver, O'Connor urged them to encourage record labels' involvement with the labels' artists' bookings:

> I encourage you to communicate our new policy concerning artist promotion to labels in advance so they understand why we might potentially be in a position to ignore their artist's appearance in the Denver market. Quite simply, if a local promoter is unwilling or unable to properly compensate us for our . . . valuable audience reach, then we will be forced to ignore the show. Label will be in a better position to intervene [with artists] on your behalf if outside promoters resist this new policy **[**27]** and attempt to put you at a disadvantage.

(*Id.,* Exs. Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001].) In an electronic mail message to Tom Owens, the Vice President of Programming for Clear Channel Radio, O'Connor admitted:

> This is happening a lot in Denver . . . using threat of airplay to take shows away from another promoter in the market. Very VERY Dangerous. I know for a fact that an SFX talent buyer did what I described below despite my soft peddling of the issue. Am collecting letters of denial every time this comes up so that the radio side is covered. It has come up at least five times in the last 3 months.

(*Id.,* Exs. Vol. 3, Ex. 64 [Electronic Mail Message from O'Connor to Tom Owens of 3/26/2001].)

2. Refusing Promotional Support on Radio to NIPP Concerts

Additionally, NIPP argues that Clear Channel Communications denies free promotional support and advertising to concert promoters besides SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals. (*Id.*) According to NIPP, before **[**28]** Clear Channel entered the concert promotion business, it was customary for local concert promoters to have regular contact with radio program, music, and promotions directors, and the stations would usually give free promotional support, such as ticket giveaways and on-air mentions, for any concert in the same musical style as the radio station's format. (*Id.,* Exs. Vol. 2, Ex. 12 [Dep. of Michael DuCharme at 22-23], Ex. 21 [Dep. of Justin Levy at 89-90], **[*1064]** Ex. 31 [Dep. of at 200-202].) Now, Clear Channel allegedly gives preferential treatment to its concert promotion business and limits or denies the historical levels of support previously provided to other promoters. (*Id.,* Exs. Vol. 2, Ex. 12 [DuCharme Dep. at 23-30], Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001].)

Additionally, according to NIPP, no outside promoters are allowed contact with Clear Channel's radio program, music, and promotions directors. (*Id.* at 26.) As evidence of this policy, NIPP cites the following electronic mail message that O'Connor sent to all radio program, promotions, **[**29]** and music directors at Denver Clear Channel rock radio stations on June 19, 2001:

> This notice will serve as an update to our policy concerning dealing with outside promoters.
>
> 1. No program, promotion, or music director is to have direct contact with either House of Blues, Nobody in Particular Presents, or any other non-clearchannel concert entity.. (sic) This includes telephone, fax, and, especially, email conversations. . (sic) . . . There is to be no direct contact with any outside promoter for any reason whatsoever without my approval.

> 2. You are free to continue to have direct conversations with labels and SFX concerning concert promotion in the Denver market.
> 3. Effective immediately, there will be no "added value" attached to spot buys placed by concert promoters. You can negotiate NTR promotions or trade ticket giveaways, . . . but only after the promoter has placed a commercial buy on the station. . . . Airtime WILL NO LONGER be given for free under any circumstances without mine or Donnie's approval. This policy does not apply to SFX/Clear Channel Entertainment/our (sic) our local Radio Concert Division.
>
> 4. I encourage you to communicate our new policy concerning **[**30]** artist promotion to labels in advance so they understand why we might potentially be in a position to ignore their artist's appearance in the Denver market. . . . .

(*Id.,* Exs. Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001].) Clear Channel raised the price at which NIPP can purchase commercial advertising, and O'Connor and Richards sometimes instruct their staff at KBPI and KTCL to give no promotional support to NIPP. (*Id.,* Exs. Vol. 2, Ex. 12 [DuCharme Dep. at 23-30], Ex. 35 [Saunders Dep. at 57-58], Ex. 18 [Guggenheim Dep. at 120-121].)

NIPP cites a concert by the bands Styx and Bad Company in 2001, which was promoted by House of Blues. (*Id.* at 24.) When House of Blues decided to use KKHK (the "Hawk") to promote the show, Clear Channel wrote messages internally stating, "Let's crush the Hawk and HOB on this show . . . hope you will tow the line . . . do not give free impressions to this Hawk festival on any of your stations . . . avoid accepting advertising . . . let's get our f*ckstick out." (*Id.,* Exs. Vol. 3, Ex. 45 [Electronic Mail **[**31]** Message from O'Connor to Clear Channel Directors of 3/20/2001].) Additionally, O'Connor wrote, "we are not going to accept any advertising or promotional schedule for the HOB Styxx show . . . ." (*Id.,* Exs. Vol. 3, Ex. 76 [Electronic Mail Message from O'Connor to Clear Channel Radio Directors of 3/20/2001].)

3. Hiring NIPP's Media Director and Talent Buyer

NIPP complains about the manner in which Clear Channel hired NIPP's media **[*1065]** director and talent buyer, Michael DuCharme, in October 2000. (*Id.* at 27-28.) DuCharme worked at NIPP from August 1998 until October 2000. When Clear Channel hired DuCharme, he never returned to work at NIPP, but, instead, in the middle of the night, cleaned out his office, deleted files from his NIPP computer, and removed and destroyed various other files. (*Id.,* Exs. Vol. 2, Ex. 12 [DuCharme Dep. at 136-142], Ex. 28 [Morreale Dep. at 376-378], Ex. 31 [Ore Dep. at 156-157], Ex. 37 [Swank Dep. at 377-381], Ex. 38 [Dep. of Jerri Theil at 73-76].) Only after he had deleted and taken his files did DuCharme inform NIPP that he had been hired by Clear Channel Concerts/Clear Channel Radio Festivals. (*Id.,* Exs. Vol. 2, Ex. 12 **[**32]** [DuCharme Dep. at 136-137].) Additionally, DuCharme took many of NIPP's artist clients to Clear Channel. (*Id.,* Exs. Vol. 2, Ex. 28 [Morreale Dep. at 224-229].)

4. Other Conduct

Finally, NIPP briefly complains that Clear Channel engages in several other anti-competitive practices. First, NIPP claims that SFX/Clear Channel Entertainment sometimes bids significantly more to promote an artist's concert than the artist requests, driving up the costs to competing bidders and causing higher ticket prices for the consumer. (*Id.,* Exs. Vol. 1, Ex. 4 [Mickelson Decl. PP5-6, 10].) Specifically, NIPP points to evidence that Clear Channel charges monopolistic prices for rock concert tickets. (Defs.' Br., Ex. A-8 [Prelim. Economic Report of Phillips at 25-26].) According to NIPP's expert and available Pollstar data, in 2000, NIPP charged an average $ 13.32 per rock concert ticket, Clear Channel Concerts/Clear Channel Radio Festivals an average $ 18.10, SFX/Clear Channel Entertainment an average of $ 33.69, and House of Blues an average of $ 31.69. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips, Ex. E].) From 2000 to 2001, the average increase in price of rock **[**33]** concert tickets in the Denver area was 3.7%. Consistent with this average, NIPP raised the price of its rock concert tickets by 3.8% to $ 13.83. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) Similarly, in 2001, House of Blues raised its rock concert tickets by 2.2% to $ 32.40. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) Rock concerts promoted by Clear Channel Concerts/Clear Channel Radio Festivals experienced a 46.5% increase in ticket prices to $ 26.51 per ticket, and rock concerts promoted by SFX/Clear Channel Entertainment increased by 23.5% to $ 41.59 per ticket. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) NIPP argues that this pricing data is evidence of monopoly power.

Second, NIPP claims that Clear Channel has made numerous derogatory comments about NIPP to artists, their management, and record labels; these comments include statements that (1) NIPP does not pay its bills to radio stations for advertising, and (2) NIPP has made other misrepresentations to record labels and their artists. Third, according to NIPP, Clear Channel's practice of booking entire national tours of artists excludes **[**34]** other promoters from competing for their concerts in local markets. (*Id.,* Exs. Vol. 1, Ex. 4 [Mickelson Decl. PP10-11], Ex. 2 [Morreale Decl. P30].) Fourth, NIPP claims that Clear Channel's refusal to allow other promoters to book concerts at the Fillmore Auditorium in Denver and its preferential access to the Pepsi Center, Denver's sports arena, and the City Lights Pavilion, give Clear Channel an improper competitive advantage. (*Id.,* Exs. Vol. 1, Ex. 4 [Mickelson Decl. PP8].)

II. Procedural History

On August 6, 2001, NIPP filed a complaint in this court against Clear Channel **[*1066]** Communications, SFX/Clear Channel Entertainment, Clear Channel Radio, Inc., Clear Channel Broadcasting, Inc., KBCO, KBPI, KRFX, and KTCL. (Compl. & Jury Demand [filed August 6, 2001] [hereinafter "Compl."].) In its complaint, NIPP alleges that Clear Channel is liable for violation of *sections 1* and *2 of the Sherman Act*, *15 U.S.C.A. §§ 1-2 (West & Supp. 2003)*, for (1) monopolization, (2) attempted monopolization, (3) unlawful tying, and (4) withholding an essential facility. (Compl. PP59-89.) Additionally, NIPP argues that Clear Channel is liable for violation **[**35]** of the Colorado Antitrust Act, *Colo. Rev. Stat. § 6-4-105*, violation of the Colorado Consumer Protection Act, *Colo. Rev. Stat. § 6-1-101*, tortious interference with contractual relations, and tortious interference with prospective business relations. (Compl. PP90-121.) On October 5, 2001, defendants filed a motion to dismiss for lack of jurisdiction and other issues. (Mot. to Dismiss [filed October 5, 2001].) On July 19, 2002, the court denied defendants' motion to dismiss. (Courtroom Minutes from July 19, 2002.)

On August 8, 2002, NIPP filed its first amended complaint, wherein it added plaintiffs Ogden Resurrection Project, Swank Management, and NIPP, LLC, and defendants SFX, Jacor, Citicasters Co., Citicasters Licensing Co., and Tsunami Communications. (Am. Compl.) NIPP also dismissed its claims against KBCO, KBPI, KRFX, KTCL, and Clear Channel Radio. (*Id.*) NIPP did not alter the claims for relief in its amended complaint. (*Id.*) On August 21, 2002, defendants filed their Answer and affirmative defenses with the court. (Answer [Filed August 21, 2002].)

On October 7, 2002, defendants filed a motion for summary judgment **[**36]** without supporting materials. On November 1, 2002, defendants again filed a motion for summary judgment, but included supporting exhibits and memoranda. (Defs.' Mot. for Summ. J. [filed November 11, 2002].) In their motion, defendants make numerous arguments in support of dismissing the case. First, Clear Channel argues that NIPP has failed to state a claim under federal or state antitrust laws because (1) it has not properly defined the relevant market under ***antitrust law***; (2) NIPP cannot show monopoly power; and (3) NIPP has no evidence of instances of anti-competitive conduct on the part of Clear Channel Communications or its subsidiaries. (Defs.' Br. at 32-64.) Clear Channel further argues that NIPP's antitrust claims fail because (1) NIPP cannot prove a "tying arrangement," since a tying product does not exist, and (2) NIPP has no claim under the "Essential Facilities Doctrine" as radio stations are not an essential facility. (*Id.* at 75-82.) Additionally, Clear Channel asserts that, since NIPP has not demonstrated specific instances of tortious conduct directed toward NIPP, it cannot prove its claims for violation of the Colorado Consumer Protection Act, tortious interference **[**37]** with contract, or intentional interference with prospective business relations. (*Id.* at 83-86.)

On December 23, 2002, plaintiffs filed their response to defendants' motion for summary judgment. (Pls.' Resp.) Therein, NIPP argues that it has stated proper claims for relief under federal and state antitrust laws, the Colorado Consumer Protection Act, and the common law against tortious interference. Specifically, NIPP claims that (1) the markets of "rock concert promotions" and "rock radio stations" are definable, (2) Clear Channel has monopoly power in the rock radio market and has a dangerous probability of acquiring it in the rock concert promotions market, and (3) Clear Channel has engaged in anti-competitive conduct by threatening artists with loss of radio air play to gain leverage in the concert promotions industry. (Pls.' Resp. at 9-32, **[*1067]** 37-90.) Additionally, NIPP asserts that there is evidence of a tying arrangement, and radio stations are an essential facility for the promotion of rock concerts. (*Id.* at 91-100.) Finally, NIPP argues that it has produced admissible evidence to support its state claims for violation of the Colorado Consumer Protection Act, tortious interference **[**38]** with contract, and tortious interference with prospective business relations. (*Id.* at 101-106.)

On November 1, 2002, Defendant Clear Channel Communications, the parent company of all other defendants, also filed its own motion for summary judgment. (CCC Mot. for Summ. J.) In its motion, Clear Channel Communications argues that, although it is the parent company to the alleged wrongdoers in this case, it cannot be held liable for the alleged misconduct of its separately incorporated radio or concert promotion subsidiaries, because it is merely a shareholder in these entities and does not operate the radio stations or engage in concert promotions. (CCC Mot. for Summ. J. at 1, 6-12.) On December 23, 2002, NIPP filed its response to Clear Channel Communications motion for summary judgment. (Resp. to CCC Mot. for Summ. J.) In its response, NIPP argues that Clear Channel Communications is liable for its subsidiaries' wrongdoings both directly and as an alter ego of its subsidiary. (*Id.* at 6-22.)

On August 6, 2003, defendants filed a motion to exclude the testimony of NIPP's expert witness, Dr. Owen Phillips. (Defs.' Mot. to Exclude Expert Test. [filed August 6, 2003] [hereinafter **[**39]** "Mot. to Exclude Expert"].) On November 3, 2003, NIPP filed a response to this motion. (Pls.' Resp. in Opp'n to Defs.' Mot. to Exclude Expert Test. [filed November 3, 2003] [hereinafter "Resp. to Mot. to Exclude Expert"].) On December 19, 2003, Clear Channel Communications filed a reply in support of its motion to exclude. (Reply Mem. in Supp. of Defs.' Mot. to Exclude Expert Test. [filed December 19, 2003] [hereinafter "Reply in Supp. of Mot. to Dismiss"].) All motions having been fully briefed, the court may now appropriately rule upon them.

ANALYSIS

I. Legal Standard for Summary Judgment

HN1[] Pursuant to *rule 56(c) of the Federal Rules of Civil Procedure*, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *see* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)*; **[**40]** *Concrete Works, Inc. v. City & County of Denver, 36 F.3d 1513, 1517 (10th Cir. 1994)*. The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)*. "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc., 36 F.3d at 1518* (citing *Celotex Corp., 477 U.S. at 325, 106 S. Ct. at 2554*). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp., 477 U.S. at 324, 106 S. Ct. at 2553*; *see* *Fed. R. Civ. P. 56(e)*.

HN2[] A genuine issue of fact does not exist, and summary judgment is appropriate, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party. *Anderson, 477 U.S. at 248, 106* ***[*1068]*** *S. Ct. at 2510*. If the nonmoving party's evidence is merely **[**41]** colorable, or is not significantly probative, summary judgment may be granted. *Id. at 249, 2511*. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id. at 252, 2512*. The court may consider only admissible evidence when ruling on a summary judgment motion. *See* *World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1474 (10th Cir. 1985)*. Additionally, the court, when ruling on a motion for summary judgment, must construe the facts in the light most favorable to the nonmoving party. *Id.*

HN3[] Federal courts applying state law ascertain and apply the proper state law with the goal of insuring that the result obtained is the one that would have been obtained in state court. *Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618, 621 (10th Cir. 1995)* (citing *Allen v. Minnstar, Inc., 8 F.3d 1470, 1476 [10th Cir. 1993])*. To determine which state's substantive law to apply, a federal court applies the choice of law provisions of the state in which the court sits. **[**42]** *Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523, 1532 (10th Cir. 1996)* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 60 S. Ct. 1020, 1021-1022, 85 L. Ed. 1477 [1941])*. Under Colorado 'choice of law' law, Colorado law applies to this case because Colorado has the most significant relationship to plaintiffs' claims, considering that the allegedly tortious and anti-competitive behavior occurred in Colorado and all parties operated in Colorado at the time of the alleged tortious behavior. *First Nat'l Bank in Fort Collins v. Rostek, 182 Colo. 437, 514 P.2d 314, 320 (Colo. 1973)*; *ITT Specialty Risk Servs. v. Avis Rent A Car Sys., Inc., 985 P.2d 43, 47 (Colo. Ct. App. 1998)*.

II. Parent Clear Channel Communications' Motion for Summary Judgment

In its motion for summary judgment, Parent Clear Channel Communications asks the court to dismiss it as a defendant. (CCC Mot. for Summ. J.) According to Clear Channel Communications, it cannot be held directly liable or liable as an alter ego to its subsidiaries, SFX/Clear Channel Entertainment and Jacor, for the allegedly wrongful **[**43]** conduct at issue in this case. (*Id.* at 6-12.) The court addresses each argument in turn.

A. Direct Liability

First, Clear Channel Communications argues that it cannot be held directly liable for antitrust violations under the Sherman Act because it is a holding company and not a seller, supplier, participant, or competitor in any of the product and geographic markets relevant to this case. [2] (*Id.* at 6.) NIPP counters that Clear Channel Communications sufficiently participates in the behavior of SFX/Clear Channel Entertainment and Jacor to be directly liable under the Sherman Act, because Clear Channel Communications directs and encourages the anticompetitive conduct. (Resp. to CCC Mot. for Summ. J. at 4.) According to NIPP, Clear Channel Communications acts as an operating company, as opposed to a holding company, and can, therefore, be held directly liable. (*Id.*)

[44]** *HN4*[] Absent allegations or evidence of "independent conduct" on the part of the parent, there is no basis upon which to hold a **[*1069]** parent directly liable for the acts of a subsidiary. *Invamed, Inc. v. Barr Lab., 22 F. Supp.2d 210, 219 (S.D.N.Y. 1998)*; *Drinkwine v. Federated Publ'ns, Inc., 780 F.2d 735, 741 (9th Cir. 1986)*; *Gemco LatinoAmerica, Inc. v. Seiko Time Corp., 685 F. Supp. 400, 403 (S.D.N.Y. 1988)*; *Reynolds Metals Co. v. Columbia Gas Sys., Inc., 669 F. Supp. 744, 750 (E.D. Va. 1987)*. The question is what level of independent conduct is sufficient to hold a parent directly liable for anticompetitive effects occurring at the subsidiary level. Clear Channel Communications' apparent response to this question is that a parent must be an actual seller, competitor, or participant in the market before it can be held liable under the antitrust laws. (CCC Mot. for Summ. J. at 6.) Clear Channel Communications, however, never endeavors to define the terms "seller, competitor, or participant." It appears to take the position that a parent corporation must actually be a named party to a transaction in the market in order to qualify **[**45]** as a market participant.

NIPP counterargues that the terms "seller" and "participant" have a broader meaning under antitrust laws, encompassing parents who direct their subsidiary's behavior in a relevant market. NIPP bases its argument on the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 773-774, 104 S. Ct. 2731, 2743, 81 L. Ed. 2d 628 (1984)*. In *Copperweld,* the court held *HN5*[] that a parent cannot be held liable for conspiring with its subsidiaries to engage in anticompetitive conduct under *section 1 of the Sherman Act*, because the parent and subsidiaries are, for antitrust purposes, a single enterprise acting with a unity of purpose. *Id.* According to NIPP, therefore, a parent can be directly liable for a subsidiary's anticompetitive conduct when it

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[2] NIPP alleges that the relevant markets are the markets for rock radio and rock concerts in the Denver, Colorado metropolitan area.

directs and or chestrates such conduct, because parents and subsidiaries may be considered a single enterprise by the Sherman Act.

Clear Channel Communications claims, however, that no court has ever found a parent liable for the acts of a subsidiary under the antitrust laws, absent alter ego liability. In support of its argument, Clear Channel Communications cites cases holding **[**46]** that, ***HN6***[] absent allegations or evidence of independent conduct on the part of the parent, there is no basis upon which to hold a parent directly liable for the acts of a subsidiary. *Invamed, 22 F. Supp.2d at 219*; *Drinkwine, 780 F.2d at 741*; *Gemco LatinoAmerica, 685 F. Supp. at 403*; *Reynolds Metals, 669 F. Supp. at 750*. Specifically, when a plaintiff alleges, as the only basis for liability against a parent, that the parent owns the subsidiary that engaged in wrongful conduct, such allegation is insufficient to hold a parent directly liable for the wrongful conduct. *Id.* Clear Channel Communications' argument, however, misses the mark because, in contrast to the cases which it cites, independent conduct on the part of the parent has been alleged in this case, and the question is whether this independent conduct is sufficient under antitrust laws to implicate direct liability.

HN7[] If a parent corporation, through its own employees and agents, is directing, controlling, and encouraging a wholly-owned subsidiary's anticompetitive conduct, the subsidiary dare not defy its sole shareholder's policies. To conclude that a parent **[**47]** can direct and require anticompetitive conduct of its subsidiaries, like any principal directing the conduct of an agent, and then escape antitrust liability by hiding behind its separate incorporation is counterintuitive. Furthermore, the Supreme Court has suggested that direct liability may exist for parent corporations under the Sherman Act. *Copperweld, 467 U.S. at 777, 104 S. Ct. at 2744-2745* (stating in dicta that **[*1070]** "any anticompetitive activities of corporations and their wholly-owned subsidiaries meriting antitrust remedies may be policed adequately without resort to the intra-enterprise conspiracy doctrine. . . . The ***enterprise*** is fully subject to *§ 2 of the Sherman Act* . . . ."). Additionally, lower courts have recognized that parent corporations can be held directly liable for independently participating in the antitrust violations of their subsidiaries. *Reading Int'l, Inc. v. Oaktree Capital Mgmt., LLC, 317 F. Supp. 2d 301, 2003 U.S. Dist. LEXIS 22256, 2003 WL 22928728 (S.D.N.Y. December 10, 2003)* (slip copy); *Carl Hizel & Sons, Inc. v. Browning Ferris Indus., Inc., 590 F. Supp. 1201, 1202 (D. Colo. 1984)*.

In *Reading Int'l,* an independent movie theater sued **[**48]** two large, national movie houses, Loews and Regal Entertainment, which each owned large multiplexes in competition with plaintiff. Additionally, the plaintiff sued shareholders of these movie house companies, including Oaktree Capital Management ("Oaktree") that held 40% of the shares in Loews and 17% of Regal Entertainment. *Reading Int'l, 2003 U.S. Dist. LEXIS 22256, 2003 WL 22928728 at 4*. Defendants argued that Oaktree could not be held accountable under the Sherman Act, absent alter ego liability, because Oaktree was not a competitor in the relevant market. *Id.* The court in *Reading Int'l* rejected this argument. In reaching its conclusion, the court analogized the definition of competitor under the Sherman Act to the definition of competitor under the *Clayton Act*. Specifically, the court stated:

> ***HN8***[] 'A parent corporation is not a competitor of another corporation merely because its subsidiary is. On the other hand, to interpret [the Clayton Act] as meaning that the business activity of the subsidiary can never be considered in determining whether the parent is a competitor within the meaning of *section 8* would assume that Congress intended to permit such a simple and obvious means **[**49]** of avoidance as to render the statute meaningless, and would ignore the Supreme Court's admonition that the antitrust laws are 'aimed at substance rather than form.' This reasoning holds equal force in determining liability under *section 2* [of the Sherman Act], as each of these sections of antitrust laws shares the primary concern of preventing the undue aggregation of market power.

2003 U.S. Dist. LEXIS 22256, [WL] at 17 (quoting *U.S. v. Crocker Nat'l Corp., 656 F.2d 428 [9th Cir. 1981]* [reversed on other grounds]). The *Reading Int'l* court recognized that ***HN9***[] wrongful conduct may occur at the parent level resulting in anticompetitive effects reverberating at the subsidiary level. *Id.* The court, therefore, held that a parent may be directly liable for anticompetitive conduct at the subsidiary level when the parent sufficiently controls the subsidiary. *Id.*

This court finds the above analysis persuasive and holds that *HN10*[] a parent can be considered a competitor in a market where its subsidiary is a participant if, and only if, the parent sufficiently controls, dictates, or encourages the policies of the subsidiary. When the parent controls, directs, or encourages the subsidiary's **[**50]** anticompetitive conduct, the parent engages in sufficient independent conduct to be held directly liable as a single enterprise with the subsidiary under the Sherman Act. *Id.*; *Copperweld, 467 U.S. at 777, 104 S. Ct. at 2744-2745*.

Clear Channel Communications argues that NIPP has failed to sufficiently allege or demonstrate independent conduct on the part of Clear Channel Communications. Here, however, the allegations in the complaint and the contents of the record create a dispute of material fact as to whether Clear Channel Communication engaged in sufficient independent conduct to be deemed a competitor in the rock concert and rock radio markets at issue in **[*1071]** this case. In the amended complaint, NIPP specifically alleges as to Clear Channel Communications:

> This is an action for damages and injunctive relief arising out of the unlawful and anticompetitive practices of a major radio broadcasting and concert promotion conglomerate, Clear Channel Communications, Inc. -- by itself and through its various subsidiaries and affiliates -- to prevent NIPP and others from competing to offer concert promotions services in the Denver, Colorado metropolitan area . . . . **[**51]** . . . Upon information and belief, Clear Channel intends to continue and extend its anticompetitive, predatory and exclusionary conduct . . . . Clear Channel Communications states as follows, "We can now leverage our broadcasting assets to reach listeners who have an affinity for music to promote our live entertainment events and ultimately increase ticket revenue. . . . "Opportunities for synergies" among Clear Channel's various business divisions "are explosive and are in the very early innings."

(Am. Compl. PP1, 50.) Additionally, NIPP makes allegations concerning "Clear Channel," which collectively includes Clear Channel Communications:

> Clear Channel has repeatedly used its size and clout to coerce artists . . . to use Clear Channel to promote their concerts or else risk losing airplay or other on-air promotional support on radio stations owned or otherwise controlled by Clear Channel. . . . Clear Channel is leveraging its market power over certain dedicated formats of local FM radio . . . to unlawfully acquire, maintain and extend its market power over the local concert promotion business in the relevant market.

(Am. Compl. PP46-47.) These allegations **[**52]** clearly refer to Clear Channel Communications, as do others. Additionally, these main allegations focus on Clear Channel Communications' coordinated use of its different subsidiaries to increase the power of its subsidiaries and, hence, itself, in various markets. This allegation of coordinated action emanating from the parent is sufficient to state a claim against Clear Channel Communications for direct liability.

Furthermore, the record supports a finding that Clear Channel Communications directs and controls the policies and behavior of its subsidiaries. First, management of Clear Channel Communications sets the vision, strategy, and culture of all subsidiaries. (Resp. to CCC Mot. for Summ. J., Ex. 5 [M. Mays Dep. at 39, 85].) Mark Mays, President and Chief Operating Officer of Clear Channel Communications, and Randall Mays, Chief Financial Officer of Clear Channel Communications, testified that Clear Channel Communications operates its subsidiaries as divisions of the company, with each division, such as entertainment and radio, reporting up to Mark Mays at Clear Channel Communications. (*Id.,* Ex. 5 [M. Mays Dep. at 43-44], Ex. 6 [R. Mays Dep. at 26].) According to Randall **[**53]** Mays, written reports from Jacor on its radio operations in Denver are regularly required to be submitted to its parent company and ultimately Clear Channel Communications. (*Id.,* Ex. 6 [R. Mays Dep. at 38-39].)

Furthermore, Clear Channel Communications participates in the budgeting process for all subsidiaries and reviews subsidiaries' plans for achieving revenue. (*Id.,* Ex. 5 [M. Mays Dep. at 64].) Clear Channel Communications controls subsidiaries' budgets by writing most of the checks that the subsidiaries require so the divisions cannot spend money on capital acquisitions without consulting with Clear Channel Communications for funding. (*Id.,* Ex. 5 [M. Mays Dep. at 84-85].) Clear Channel Communications handles **[*1072]** the payroll for all of its subsidiaries' Denver radio employees. (*Id.,* Ex. 6 [R. Mays Dep. at 40].) Finally, according to Clear Channel's 10-K filings, Clear Channel Communications "routinely reviews staffing levels and operating costs . . . [and] advises local managers on broad policy matters and is responsible for long-range planning, allocating resources, and financial reporting, and controls." (*Id.,* Ex. 4 [10-K Filing at 100].)

Mark Mays **[**54]** further testified that Clear Channel Communications coordinates meetings between managers from the different subsidiaries "to try and encourage networking within the company . . . to try to get people to work better together." (*Id.,* Ex. 5 [M. Mays Dep. at 51].) Clear Channel Communications has gone so far as to create a Synergy Department to facilitate communication and cooperation between the different subsidiaries. (*Id.,* Ex. 5 [M. Mays Dep. at 51].) Additionally, Randall Mays testified that Clear Channel Communications takes advantage of synergies between radio and live entertainment by using radio stations to cross-promote live entertainment. (*Id.,* Ex. 6 [R. Mays Dep. at 125-126].) Because a reasonable jury could conclude, based on the evidence in the record, that Clear Channel Communications operates as an operating company, controlling and managing the conduct of its subsidiaries, rather than as a holding company, summary judgment is inappropriate on the issue of Clear Channel Communications' potential direct liability.

B. Alter Ego Liability

Even if Clear Channel Communications did not engage in sufficient independent conduct to be directly liable **[**55]** for alleged violations of the Sherman Act, NIPP has properly alleged and set forth sufficient evidence to create a triable issue of fact as to whether Clear Channel Communications may be held liable as an alter ego of its wholly-owned subsidiaries.

HN11[] A corporation may be held liable for the acts of its subsidiary, and its corporate veil may be pierced, where the subsidiary is merely an alter ego of the principal. [3] *Nat'l Labor Relations Board v. Greater Kansas City Roofing, 2 F.3d 1047, 1054 (10th Cir. 1993)*. ***HN12***[] A subsidiary is the alter ego of its parent when (1) there is such a unity of interest and lack of respect given to separate identity of parent and subsidiary that personalities and assets of parent and subsidiary are indistinct, and (2) adherence to the corporate fiction sanctions fraud, promotes injustice, or leads to an evasion of legal obligations. *Id.* Among the specific factors used in determining whether the parent and subsidiary have maintained their separate identities are: (1) whether the subsidiary is operated as a separate entity; (2) whether parent and subsidiary have commingled funds; (3) whether the subsidiary has failed to maintain adequate **[**56]** minutes and records; (4) whether the parent owns and controls the subsidiary; (5) whether the subsidiary lacks corporate assets or is undercapitalized; (6) whether the subsidiary is used as a mere shell, instrumentality or conduit of the parent; (7) whether the parent and subsidiary have disregarded the legal formalities and failed to maintain an arms-length relationship, and (8) whether there has been a diversion of the subsidiary's assets for use by the parent. *Id.* n.6.

Here, Clear Channel Communications first argues that NIPP has failed to plead **[*1073]** facts which, if established, would show that piercing the corporate veil is warranted. **[**57]** NIPP has, however, sufficiently plead facts pertaining to one or more of the forgoing factors. NIPP alleges in its complaint that Clear Channel Communications has used its subsidiaries to engage in legal misconduct for its own benefit. (Am. Compl. P1.) NIPP alleges that Clear Channel Communications wholly-owns its subsidiaries, SFX/Clear Channel Entertainment, Jacor, Clear Channel Concerts/Clear Channel Radio Festivals, Clear Channel Broadcasting, Citicasters Co., Citicasters Licenses, Inc., and Tsunami Communications, Inc. (Am. Compl. PP8-14.) Additionally, NIPP alleges that Clear Channel Communications controls its subsidiaries and treats its subsidiaries' assets as its own. (Am. Compl. P26.) Finally, NIPP alleges that Clear Channel Communications controls its subsidiaries' assets so as to leverage those assets to aid other subsidiaries in accomplishing illegal ends. (Am. Compl. P50.) Because these allegations bear on several factors necessary to prove alter ego liability, the court finds that NIPP's amended complaint is sufficient to set forth a claim for alter ego liability. *See* *Accordia Northeast, Inc. v. Thesseus Int'l Asset Fund, 205 F. Supp.2d 176, 181-182 (S.D.N.Y. 2002)*; **[**58]** *William E. Black Invs., Inc. v. Eric Envtl., Inc., 1998 U.S. Dist. LEXIS 9856, 1998 WL 801837 (N.D. Ill. 1998)*.

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[3] There is a lack of case law regarding whether state or federal alter ego common law is properly applied in federal antitrust cases. Because federal law and Colorado state law are very similar, the result would be the same whether federal or state law were applied. Accordingly, the court will apply federal law because the majority of the relevant claims fall under federal law.

Secondly, Clear Channel Communications argues that the record does not contain sufficient evidence proving alter ego liability for NIPP's claim to survive summary judgment. NIPP has, however, adduced sufficient evidence. As stated earlier, the record supports a finding that Clear Channel Communications directs and controls the policies and behavior of its subsidiaries with such a unity of interest and lack of respect given to separate identity of parent and subsidiary that personalities and assets of parent and subsidiary are indistinct. First, management of Clear Channel Communications sets the vision, strategy, and culture of all subsidiaries. (Resp. to CCC Mot. for Summ. J., Ex. 5 [M. Mays Dep. at 39, 85].) Mark Mays and Randall Mays testified that Clear Channel Communications operates its subsidiaries as divisions of the company, with each division, such as entertainment and radio, reporting up to Mark Mays at Clear Channel Communications. (Resp. to CCC Mot. for Summ. J., Ex. 5 [M. Mays Dep. at 43-44], Ex. 6 [R. Mays Dep. at 26].) Accordingly, there is evidence that Clear **[**59]** Channel Communications' subsidiaries are not operated as separate entities but are controlled by Clear Channel Communications. *Greater Kansas City Roofing, 2 F.3d at 1054 n.6*.

Second, Clear Channel Communications controls subsidiaries' budgets by writing most of the checks that the subsidiaries require so the divisions cannot spend money on capital acquisitions without consulting with Clear Channel Communications for funding. (*Id.,* Ex. 5 [M. Mays Dep. at 84-85].) Additionally, Clear Channel Communications handles the payroll for all of its subsidiaries' Denver radio employees. (*Id.,* Ex. 6 [R. Mays Dep. at 40].) Accordingly, a dispute of fact exists as to whether Clear Channel Communications and its subsidiaries commingle their funds and the subsidiaries lack corporate assets to manage their own business affairs. *Greater Kansas City Roofing, 2 F.3d at 1054 n.6*.

Additionally, written reports from Jacor on its radio operations in Denver are regularly required to be submitted to its parent company and ultimately Clear Channel Communications. (*Id.,* Ex. 6 [R. Mays Dep. at 38-39].) As stated earlier, Clear Channel Communications participates **[**60]** in the budgeting process for all subsidiaries and reviews subsidiaries' plans for achieving revenue. (*Id.,* Ex. 5 [M. Mays Dep. at **[*1074]** 64].) Clear Channel Communications "routinely reviews staffing levels and operating costs . . . [and] advises local managers on broad policy matters and is responsible for long-range planning, allocating resources, and financial reporting, and controls." (*Id.,* Ex. 4 [10-K Filing at 100].) Accordingly, evidence exists demonstrating that (1) the subsidiaries may be used as mere shells and instrumentalities of the Clear Channel Communications and (2) they have disregarded the legal formalities and failed to maintain an arms-length relationship. *Greater Kansas City Roofing, 2 F.3d at 1054 n.6*.

Finally, evidence demonstrates that a reasonable jury could conclude that Clear Channel Communications utilizes its separate subsidiaries for a common goal of inequitable, anticompetitive conduct. *Greater Kansas City Roofing, 2 F.3d at 1054*. Clear Channel Communications coordinates meetings between managers from the different subsidiaries. (*Id.,* Ex. 5 [M. Mays Dep. at 51].) Clear Channel Communications has created **[**61]** a Synergy Department. (*Id.,* Ex. 5 [M. Mays Dep. at 51].) And Clear Channel Communications takes advantage of synergies between radio and live entertainment by using radio stations to cross-promote live entertainment. (*Id.,* Ex. 6 [R. Mays Dep. at 125-126].) Based on the record before the court, NIPP has raised sufficient evidence and disputes of material fact regarding Clear Channel Communications' relationship with its subsidiaries to survive summary judgment on its claim for alter ego liability.

III. Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment seeks dismissal of plaintiffs' claims based on plaintiffs' alleged failure to provide sufficient evidence to support the elements of each claim. Specifically, defendants seek dismissal of plaintiffs' federal antitrust claims under the Sherman Act, plaintiffs' state antitrust claims under Colorado statute, and plaintiffs' other state law claims for tortious interference with contract, tortious interference with prospective business advantage, and violation of Colorado's Consumer Protection Act. The court addresses each of plaintiffs' claims in turn.

A. Antitrust

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[62]** Clear Channel argues that summary judgment should be granted as to all of NIPP's antitrust claims because NIPP can prove no set of facts showing that: (1) Clear Channel has imposed a tying arrangement on rock artists, requiring that artists choose Clear Channel for concert promotions if artists wish to "buy" radio air play for their records; (2) Clear Channel possesses monopoly power in the rock-concert promotions market; (3) Clear Channel has attempted to monopolize the rock-concert promotions market; and/or (4) Clear Channel has denied NIPP and other promoters access to radio promotions, which are an essential facility. (Defs.' Br. 1-4.) Conversely, NIPP claims that disputes of relevant fact permeate NIPP's antitrust action to such an extent that summary judgment is inappropriate. (Pls.' Resp. at 1.) Although NIPP's different antitrust claims require different elements of proof, proof of a relevant product market is required for all of NIPP's antitrust claims. Because all of NIPP's antitrust claims require examination of the threshold issue of relevant product market, the court first addresses this issue. **[*1075]** Thereafter, the court examines each of NIPP's antitrust claims individually.

[63]** ***1. Relevant Market Definition***

HN13[] The first step in analyzing an antitrust claim is to determine the relevant product market in which the defendant is operating. *Telecor Communications, Inc. v. S.W. Bell Tel. Co., 305 F.3d 1124, 1130 (10th Cir. 2002)*. In order to state a claim under ***antitrust law***, plaintiff must define this market. *Id.* The relevant market consists of both a geographic market and a product market. *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999)*; *Tarabishi v. McAlester Reg'l Hosp., 951 F.2d 1558, 1567 (10th Cir. 1991)*. Here, the parties concede that the relevant geographic market is the Denver metropolitan area. Accordingly, the scope of the product market is the only market issue in this case. *Telecor, 305 F.3d at 1130*.

NIPP has classified the relevant product markets as (1) the market for rock music concert promotions/tickets and (2) the market for advertising and promotional support on rock music radio. (Pls.' Resp. at 42-51, 52-60.) According to NIPP, these product markets are properly defined as relevant because Clear Channel's anticompetitive behavior has **[**64]** impacted various inputs, thereby affecting output in these markets. In the alternative, NIPP claims that a product market exists for all music concert promotion services, not just rock music. (*Id.* at 51-52.) Conversely, Clear Channel argues that NIPP has failed to define a relevant market because NIPP has provided no economic data to support its allegations. (Defs.' Br. at 33-35, 37-38.)

HN14[] There is no subject matter in ***antitrust law*** more confusing than market definition. *Telecor, 305 F.3d at 1130*. The concept of market definition itself oversimplifies the very complex interactions between a number of differently situated buyers and sellers, each of whom has different costs, needs, and substitutes. *Id. at 1131* (citing *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 [10th Cir. 1994])*. At its simplest, the relevant product market is that market which is relevant to the legal issue before the court. *Id. at 1130*. By defining the relevant market, the court strives to identify firms that compete with each other and the alleged anticompetitive conduct restraining trade in the market. *Id.* (citing *SCFC ILC, 36 F.3d at 966*). **[**65]** The definition of the relevant market is a question of fact for the factfinder, and the plaintiff has the burden of proof on the issue. *Id.*

More specifically, ***HN15***[] a product market is composed of products reasonably interchangeable for the purposes for which they are produced.*Id.* The definition of relevant market, therefore, turns on a determination of available substitutes. *Id.* Available substitutes are demonstrated if, when prices are appreciably raised or volume appreciably curtailed for the product within the geographic area, supply from other sources can be expected to enter promptly enough or in large enough amounts to restore the old price and volume. *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 966 [10th Cir. 1994])*. Reasonable interchangeability, therefore, includes analysis of cross-elasticity of demand. *Id. at 1131*. Demand for a product is said to be "elastic" if an increase in the price causes less of the product to be purchased. *See id.* There is said to be "cross-elasticity of demand" between two products if rising

[4] Because Colorado ***antitrust law*** mirrors federal ***antitrust law*** under the Sherman Act, the court will solely examine plaintiffs' claims under federal law as dispositive of plaintiffs' state law claims.

prices for product A cause consumers to switch to product B. *See* id. The inference is that consumers **[**66]** readily substitute one product for the other and that the products, therefore, probably compete in the same market.

a. Choosing the Relevant Market

At the outset, it is important to note that NIPP's allegations implicate numerous different **[*1076]** buyers and sellers, and, consequently, numerous different potentially relevant product markets. Accordingly, the first determination necessary in defining the market in this case is locating, in a meringue of transactions and exchanges, the sellers, the buyers, and the products at issue. Only after determining these broader issues can the court focus on the narrower issue of the scope of the product market based on reasonable interchangeability.

HN16[] The identity of the relevant product to be studied to determine the market varies based on the level of commerce where the plaintiffs argue the defendants have monopolized competition. *Telecor, 305 F.3d at 1132*. Within the universe of a product market, therefore, there may exist a submarket -- a portion of the product market that, for purposes of the specific antitrust case, is considered a separate market. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).* **[**67]** Submarket analysis is par and parcel of the reasonable interchangeability test. *White and White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)*. Similarly, the identity of the relevant consumer for the purposes of determining market definition is not necessarily the end-user of the product, but, rather, is also determined based on the level of commerce effected by defendant's behavior. *Telecor, 305 F.3d at 1132-1133*; *Full Draw, 182 F.3d at 753*; *see also* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-482, 112 S. Ct. 2072, 2090, 119 L. Ed. 2d 265 (1992)* (citations omitted).

For example, in *Telecor,* a telephone company, Telecor, accused a competitor, Southwestern Bell, of monopolizing the market for pay-telephone services. *Id. at 1132-1133*. Specifically, Telecor complained that Southwestern Bell had locked all owners of pay-telephone locations into punitive, long-term contracts with Southwestern Bell, so location owners could not allow other telephone **[**68]** companies to place their pay-telephones on the location owner's property. *Id. at 1133*. In seeking to define the relevant product market, Southwestern Bell argued that cellular telephones were a part of the relevant market because cellular telephones are reasonably interchangeable with pay phones by the end-consumers using telephones. *Id.* The Tenth Circuit rejected Southwestern Bell's proposed market definition and held that the relevant consumer for purposes of market definition was the location owner, who would not view cellular telephones as a reasonable substitute for pay-telephone contracts. *Id.* In essence, the court recognized that, because Southwestern Bell competed with Telecor for pay-telephone locations, the owners of those locations, not the end-users of telephones, constituted the relevant market, even though this market was only one component or input to the universe of end-consumers of telephones. *Id.* Specifically, the court stated:

> A monopolist may [not] act with impunity so long as end-use consumer prices are unaffected. . . . ***HN17***[] [The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. **[**69]** Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. . . . The Supreme Court has clearly held that antitrust laws apply not only to restraints on output markets, but to input markets as well, including both labor and input commodities. . . . [Restraints on input markets] fall under antitrust purview because **[*1077]** [they] will eventually adversely affect [end]-consumers.

Id. at 1133-1134, 1136 (quoting *Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235-236, 68 S. Ct. 996, 92 L. Ed. 1328 [1948]*; *Brown v. Pro Football, Inc., 311 U.S. App. D.C. 89, 50 F.3d 1041, 1061 [D.C. Cir. 1995])*.

Defining the relevant set of consumers is the first issue prescribed by the parties. In some of its antitrust claims, NIPP defines the relevant market as the market for the sale of rock music concert tickets, where the seller is the rock promoter and the ***buyer is the rock-concert going public.*** Clear Channel argues that the relevant markets for the monopolization **[**70]** and attempted monopolization claims are two specific input markets, (1) the market for all music concert promotional services, where the seller is the promoter and the ***buyer is the artist,*** and (2) the market for all advertising on all radio, where the seller is the radio station and the ***buyer is the advertiser.*** (Defs.' Br. at 36, 43-46.) Based on NIPP's allegations regarding the alleged anticompetitive conduct, several different markets are relevant, depending upon which claim the court is analyzing.

(1) The Market for Live Music Concerts (Monopolization and Attempted Monopolization Claims)

In NIPP's monopolization and attempted monopolization claims, NIPP alleges competitive injury in the end-use product market, which is the market for tickets to rock music concerts, where the seller is the music concert promoter and the buyer is the concert-going public. (Pls.' Resp. at 42-47.) NIPP alleges that Clear Channel's conduct injures competition in this market by denying Clear Channel's competitors access to several different inputs crucial to competition in the market for rock music concert ticket sales. (Exs. to Mem. in Supp. of Defs.' Mot. for Summ. J. **[**71]** , Ex. A-08 [Prelim. Economic Report of Owen R. Phillips, Ph.D. at 4].) NIPP describes these inputs as rock artists, rock radio advertising, rock radio promotional support, concert venues, and promotions employees. (*Id.,* Ex. A-08 [Prelim. Economic Report of Dr. Phillips at 4].) Specifically, NIPP argues that (1) Clear Channel manipulates artists into choosing Clear Channel concert promotion services by threatening loss of radio air play if the artist uses a competitor to promote a concert; (2) Clear Channel engages in predatory pricing by offering rock artists substantially higher amounts than sought by the artist, thereby significantly outbidding its promotions competitors and recouping its losses by charging ticket purchasers higher monopolistic prices; (3) Clear Channel denies its promotions competitors historical access to advertising, promotional support, and air play on its rock radio stations; and (4) Clear Channel uses predatory practices to steal NIPP's employees. (Pls.' Resp. at 80-90.) Because Clear Channel's anticompetitive conduct allegedly affects NIPP's access to these inputs, the separate product markets for these inputs are also implicated. These input markets **[**72]** include the market for promotional services, radio air play, advertising, and promotional support, which are addressed below.

Clear Channel argues that analysis of the output market is inappropriate because, absent harm in the separate input markets, there can be no harm in the output markets. (Defs.' Br. at 36.) According to Clear Channel, therefore, only the input markets should be analyzed. Clear Channel would analogize this case to *Telecor* where the court limited its analysis to the input market. *Telecor, 305 F.3d at 1132*. This case, however, is not analogous to *Telecor* because, in *Telecor,* the defendant's behavior affected only one market, a single input market, while, here, defendants' behavior is asserted to affect several **[*1078]** input markets, plus the downstream output market. *Id.*

HN18[] In an antitrust case, when evaluating many different instances of conduct by defendant, the conduct as a whole must always be analyzed, rather than compartmentalized, because it is the cumulative impact of the conduct on consumers which is the relevant inquiry in a monopolization claim. *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 1410, 8 L. Ed. 2d 777 (1962)*; **[**73]** *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp., 738 F.2d 1509, 1522 n.18 (10th Cir. 1984)* (affirmed in *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*); Philip E. Areeda, Roger D. Blair & Herbert Hovenkamp, ***Antitrust Law*** P310 (2d ed. 2000). Although compartmentalized examination of the separate input market would be proper if only one input were implicated, when many different instances of conduct allegedly affect different inputs and collectively injure competition in a downstream output market, the relevant market is the downstream market, which is the only level of commerce at which the behavior can be examined collectively.

Even if Clear Channel's conduct does not injure competition in each separate input market individually, its conduct in all of the input markets may injure competition in the downstream market collectively. *See Aspen Skiing, 738 F.2d at 1522 n.18*. Accordingly, the court believes that the first relevant market where the parties compete is the market for live music concert tickets, where the parties, among others, sell tickets, and concert attendees buy them. That is, it must examine the reasonable **[**74]** interchangeability of the rock concerts and non-rock concerts to the concert-going public in order to determine whether NIPP sets forth sufficient evidence to define the scope of the relevant market for the monopolization and attempted monopolization claims. [5]

[75]** ***(2) The Two Markets Relevant to the Tying Claim***

(a) The Market for Promotions Services

In NIPP's tying claims, NIPP asserts that Clear Channel manipulates rock artists into choosing Clear Channel's concert promotion services by implying that artists' songs will not receive air play on the rock radio stations that Clear Channel controls. (Pls.' Resp. at 91-92.) The first relevant product market stemming for the tying claim is the market for promotion services, where the promoter is the seller and the artist is the buyer. The rock artist chooses which promoter will promote the artist's concert based on the quality of the promoters' promotions skills and the amount the promoter bids on the artist. The artist may be considered the consumer of concert promotions services from the promoter, even though the money flows in **[*1079]** the opposite direction -- from the promoter to the artist. *See* *Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001)*.

In the *Todd* case, employees of oil companies sued the companies for conspiring to set wages below market price. *Todd, 275 F.3d at 202*. The employees alleged that this behavior amounted to price-fixing **[**76]** in violation of antitrust laws.*Id.* The companies argued that the employees had failed to properly define a relevant market because they failed to show that different types of employment services provided by the employees, such as accounting, lawyering, and engineering, were reasonably interchangeable to the companies, which were argued to be the buyers or consumers in the transaction. *Id.* The court rejected the companies' reasoning and held that the relevant product for purposes of defining the market was employment opportunities, not employment services. *Id.* The relevant question, therefore, was whether employment at different oil companies was reasonably interchangeable in the eyes of the consumer employee. *Id.* In this sense, the court considered the employees of oil companies as consumers "purchasing" employment opportunities from competing oil companies, despite the fact that oil companies paid for employee services, and not vice versa.*Id.*

Todd is analogous to this case. Because promoters, including plaintiffs and defendants, compete to promote artists' concerts, just as the oil companies competed to retain employees in *Todd,* artists may properly **[**77]** be viewed as consumers of promotion services in this case. Accordingly, to define the market, the court must examine promotions services reasonably interchangeable to rock artists, the relevant consumers.

(b) The Market for Radio Air Play

In NIPP's tying claims, NIPP's allegations concerning Clear Channel's threats to artists and their record labels to withhold radio air play implicates the radio market. (Pls.' Resp. at 52-53.) In such a market, the radio station is the seller of radio air play of an artist's songs. The troubling questions are whether consideration, so as to create a potential market, is exchanged for radio air play and, if so, whether such exchange can constitute a relevant market.

Clear Channel argues that there is no market for radio air play because the sale of such is illegal under federal law. (Defs.' Br. at 81-82.) Just because a practice is illegal, however, does not mean it does not occur. Based on the court's review of the record, NIPP has set forth sufficient evidence that, through covert use of "indies" and concert

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[5] Should the jury conclude that the relevant market is the output market for rock concert tickets, the jury will have to examine Clear Channel's control over inputs necessary for the production of concert tickets in order to evaluate the anticompetitive nature of Clear Channel's conduct. Because Clear Channel's alleged control over all of these inputs stems from its alleged control over rock radio stations, NIPP introduces evidence of Clear Channel's control over the rock radio market in the Denver metropolitan area. While such evidence will be useful, and perhaps necessary, to demonstrate Clear Channel's control over inputs and monopolistic leveraging to control the downstream market, it is unnecessary at the relevant market definition stage of the analysis of NIPP's monopolization and attempted monopolization claims. There is only one relevant market definition for NIPP's monopolization and attempted monopolization claims, despite the fact that numerous inputs are implicated. The rock radio market is implicated in NIPP's other antitrust claims, however.

promotion services contracts, Clear Channel may actually be selling air play. Accordingly, a reasonable jury may find that Clear **[**78]** Channel sells radio air play to artists, which constitutes a black market.

Does a black market qualify as a relevant market for antitrust purposes? Clear Channel argues that, because the sale of radio air play, also known as "payola," is illegal under federal law, it cannot constitute a relevant market. (*Id.*) Although no significant case law exists on this issue, this court is confident that ***HN19***[] ***antitrust law*** was not enacted to protect a competitor who compounds his wrong by using his market power in an illegal market to restrain competition in another, legal market. The court believes that a close reading of *Trans World Airlines, Inc. v. Am. Coupon Exch., Inc., 682 F. Supp. 1476 (C.D. Cal. 1988)*, (*aff'd in part, vacated in part on other grounds, 913 F.2d 676 [9th Cir. 1990])* supports this view. In *Trans World Airlines,* the counterclaimant sought to recover for antitrust injury in a market for the trade of frequent flyer awards. *Id. at 1487*. The court held that, because the airline industry had contractually **[*1080]** prohibited trade of frequent flyer awards, there was no legal, relevant market, despite the fact that counterclaimant traded in the **[**79]** market. *Id.* In effect, the court reasoned that plaintiff's trade in a black market should not be rewarded, and found that no legitimate product market existed because anticompetitive effects were alleged to have occurred in an illegitimate market. *Id.*

This case is distinguishable from*Trans World Airlines,* however. Here, plaintiffs allege that defendants, not plaintiffs, trade in a black market and utilize this trade to gain leverage in a legitimate, legal market. In contrast to the facts presented in *Trans World Airlines,* the alleged anticompetitive effects here occur in a legitimate market, not the black market. Furthermore, defendants seek protection from antitrust liability for their alleged sales in this black market based on the illegal nature of their own conduct. Although no case law exists on this subject, the court finds that, if a defendant's illegal conduct in an illegal market propels it to monopolistic control in a legal market, the defendant cannot escape the purview of ***antitrust law*** by hiding behind the illegality of the market over which it exerts control. Just as this court is confident that antitrust laws do not protect competitors in a black market **[**80]** from anticompetitive effects in that market, the court is equally convinced that a black market can be considered a relevant market for antitrust purposes when the behavior in the black market is alleged to have anticompetitive effects in a legitimate, legal product market. Accordingly, the court must examine reasonable interchangeability of rock radio air play with non-rock radio air play to the rock artist.

(3) The Market for Rock Radio Advertising and Promotional Support (Essential Facilities Claim)

In its essential facilities claim, NIPP seeks to define the relevant market as rock radio advertising and promotional support, where the seller is the rock radio station and the consumer is the concert promoter. Clear Channel, in turn, argues that the relevant market is all radio advertising, or even all media advertising, where the seller is the radio station or the media company and the consumer is any advertiser, not just a concert promoter. (Defs.' Br. at 43-49.) The parties do not dispute that the market for advertising serves as the appropriate area of inquiry in regards to NIPP's essential facilities claim. Accordingly, the court must examine whether NIPP has produced **[**81]** sufficient evidence to support the scope of its proposed market definition.

b. Defining the Boundaries of the Chosen Market

Having determined the potential market areas, the court must now define the scope of these potential markets. The parties vigorously dispute the scope of the relevant markets. NIPP claims that all of the markets should be defined in terms of rock music. (Pls.' Resp. at 42-60, 92-95.) More specifically, to NIPP, the relevant markets are rock concert tickets, rock music promotions services, rock radio air play, and rock radio advertising and promotional support. Clear Channel counters that all of the markets should be defined in terms of all music, not just rock. (Defs.' Br. at 39-49.) To Clear Channel, therefore, the relevant markets are all music concert tickets, all music concert promotions, all radio air play, and all radio advertising and promotional support. Clear Channel further argues that NIPP has no economic data to support its proposed narrow markets and that this failure is fatal to NIPP's antitrust claims. (*Id.* at 32-35.)

As stated earlier, ***HN20***[] the scope and definition of the market is determined by examining **[*1081]** reasonable interchangeability, **[**82]** which includes the cross-elasticity of demand for a product, or whether consumers view product A as a substitute for product B. *Telecor, 305 F.3d at 1131*. Economists determine cross-elasticity of demand by dividing the percent change in quantity demanded of product A by the corresponding percent change in price of product B. Dictionary of Marketing Terms (2003). If the calculation yields a positive number, products A and B are reasonable substitutes for consumers. *Id.*

HN21[] In determining cross-elasticity of demand, an antitrust plaintiff may not limit a market to a select group of customers without identifying a difference in the product supplied to that group of customers. *T. Harris Young & Assoc., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 824 (11th Cir. 1991)*. A different product market may be founded upon a distinction between products in degree as opposed to a distinction between products in kind. *Int'l Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249-250, 79 S. Ct. 245, 249, 3 L. Ed. 2d 270 (1959)*. Within the universe of a product market, therefore, there may exist a submarket -- a portion of the product market **[**83]** that, for purposes of the specific antitrust case, is considered a separate market. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 (1962)* (citing *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-595, 1 L. Ed. 2d 1057, 57 S. Ct. 872, 877 [1957])*. The boundaries of an antitrust submarket are determined by examining practical indicia, such as (1) industry and public recognition of the submarket as a separate economic entity and (2) the product's unique and distinct uses, qualities, price, price sensitivity, production facilities, customers, and vendors. *Id.; Lantec, Inc. v. Novell, Inc., 146 F. Supp.2d 1140, 1148 (D. Utah 2001)*, (*aff'd, 306 F.3d 1003 [10th Cir. 2002])*.

For example, in *International Boxing Club,* the Supreme Court found that the promotion of championship, professional boxing contests was a product market distinct from the promotion of all boxing or all professional boxing contests, despite the fact that most of the inputs for both services were the same. *Int'l Boxing Club, 358 U.S. at 249-250, 79 S. Ct. at 249*. Specifically, the court noted **[**84]** that although all boxing contests include one ring, two boxers, one referee, the same rules, and an audience, championship boxing was a separate market because of its distinctive uses, qualities, and price. *Id. at 250, 79 S. Ct. at 250*. The fact that two products may involve many of the same inputs, therefore, is not determinative of the definition of the relevant product market. *Id.*

HN22[] In defining the scope of the market, the court also examines cross-elasticity of supply, which measures the responsiveness of producers to price increases. *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1436 (9th Cir. 1995)*. Even if consumers do not view product A as a substitute for product B, if producers of product A can readily shift their production facilities to produce product B in response to a price shift in product B, then the sales of both should be included in the relevant market. *Id.* For example, in *Rebel Oil,* the court found that full-service and self-service gasoline were in the same market even though consumers did not view them as interchangeable, because full-service gasoline stations could easily convert their facilities to **[**85]** self-service stations if self-service stations raised their prices to monopolistic levels. *Id.*

Clear Channel argues that all of NIPP's proposed market definitions fail as a matter of law because NIPP's expert, Dr. Owen Phillips, did not calculate cross-elasticity of demand for any of the proposed markets in his expert reports. (Reply in **[*1082]** Supp. of Defs.' Mot. for Summ. J. at 18 [filed January 24, 2003] [hereinafter "Defs.' Reply"].) Clear Channel asserts that a relevant market cannot be defined without the use of economic criteria through a formal study of cross-elasticity of demand. (*Id.*) Although NIPP concedes that Dr. Phillips did not undertake a formal economic study, NIPP argues that market definition can and must be proven through other practical indicia besides cross-elasticity of demand because calculations of cross-elasticity of demand are difficult when analyzing the entertainment industry. (Pls.' Resp. to Mot. to Exclude Expert at 11-12.) Specifically, Dr. Phillips claims that calculating cross-elasticity of demand in this case was not possible because price shifts above 5% over an extended period of time are necessary in order to accurately measure cross-elasticity **[**86]** of demand. (*Id.,* Ex. A [Second Decl. of Owen Phillips PP5-6].)

HN23[] The lynchpin in determining the boundaries of the relevant market is "the rule of reasonable interchangeability." *United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 394-395, 76 S. Ct. 994, 1007, 100 L. Ed. 1264 (1956)*. The question, therefore, is whether reasonable interchangeability can be determined for antitrust purposes without economic analysis of cross-elasticity of demand. Although the Tenth Circuit has not addressed this specific issue, *Lantec, 146 F. Supp.2d at 1148*, the court finds that a plaintiff may, through sufficient evidence of other indicia of market definition, define a relevant market without economic study of cross-elasticity of demand, especially when economic analysis of cross-elasticity of demand is infeasible based on pricing data. *Bacchus Indus., Inc., v. Arvin Indus., Inc., 939 F.2d 887 (10th Cir. 1991)* (holding that the plaintiff properly defined the relevant market by presenting lay testimony concerning distinctive uses and qualities of product); *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)* **[**87]** (holding that, since the test for reasonable interchangeability includes factual inquiry into the commercial realities faced by consumers, and price, use, and qualities of the product, plaintiff's failure to prove various factors was fatal to its claim); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993)* (stating that "reliable measures of supply and demand elasticities provide the most accurate estimates of relevant markets. However, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data. In the case of product market definition, these factors may include . . . distinctive uses, characteristics, . . . industry [recognition] . . ., consumers['] [perceptions], . . . and price . . . ."); *Satellite Television & Assoc. Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351 (4th Cir. 1983)* (holding that, since the test for reasonable interchangeability includes consumers' perceptions, plaintiff's failure to prove such was fatal to its claim); *Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Assoc., 273 F. Supp.2d 933 (S.D. Ohio 2003)* **[**88]** (holding that when the relevant product is not fungible, failure to examine cross-elasticity of demand is not fatal to claim as long as plaintiff presents evidence of distinctive price, use, and qualities); *Indep. Ink, Inc. v. Trident, Inc., 210 F. Supp.2d 1155, 1170-1171 (C.D. Cal. 2002)* (holding that in order to prove relevant market definition, plaintiff must proffer market data and figures, ***or*** other relevant material adequately describing the nature, cost, usage, or other features of competing products); *Lantec, Inc. v. Novell, Inc., 146 F. Supp.2d 1140, 1148 (D. Utah 2001)*, (*aff'd, 306 F.3d 1003 [10th Cir. 2002])* (holding that the absence of expert testimony on cross-elasticity of demand was not, *per se,* fatal to the plaintiff's antitrust claims, but that, because **[*1083]** plaintiff failed to present sufficient evidence of factors delineated in *Brown Shoe* and *Eastman Kodak,* judgment as a matter of law was appropriate); *Brooks Fiber Communications of Tucson, Inc. v. GST Tucson Lightwave, Inc., 992 F. Supp. 1124 (D. Ariz. 1997)* (holding that relevant market may be narrowed, despite cross-elasticity **[**89]** of demand, to account for identifiable submarkets); *Maris Distrib. Co. v. Anheuser-Busch, Inc., 2000 U.S. Dist. LEXIS 21001, 2000 WL 33403622 (M.D. Fla. 2000)* (holding that triable issue of fact existed as to determination of market definition, despite the fact that plaintiff failed to calculate cross-elasticity of demand). With these broad principles in mind, the court examines plaintiffs' evidence to determine if it is sufficient to sustain a jury verdict on the issue of market definition, despite NIPP's failure to calculate cross-elasticity of demand. *Id. at 1435*.

(1) Market for Rock Music Concerts (Monopolization and Attempted Monopolization Claims)

HN24[] The scope of the market is usually a question of fact for the jury. *Telecor, 305 F.3d at 1131* (citing *Westman Comm'n Co. v. Hobart Int'l Inc., 796 F.2d 1216, 1220 [10th Cir. 1986])*. In rare circumstances, however, insufficient evidence of market definition in the record may require the court to grant summary judgment against the plaintiff on the issue of market definition. NIPP argues that the relevant product is solely rock concert tickets because the concert-going public does not view rock concert **[**90]** tickets as reasonably interchangeable with non-rock concert tickets, such as tickets to classical music performances or concerts by country artists. (Pls.' Resp. at 45-51.) Alternatively, NIPP argues that the relevant market is the market for all live music concerts. (Pls.' Resp. at 51-52.)

As previously noted, the boundaries of an antitrust market may be determined by examining practical indicia, such as (1) industry and public recognition of the submarket as a separate economic entity, and (2) the product's unique and distinct uses, qualities, price, price sensitivity, production facilities, customers, and vendors. *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524*; *Lantec, 146 F. Supp.2d at 1148*. NIPP's expert witness, Dr. Owen Phillips, while failing to perform economic tests for cross-elasticity of demand, has investigated other practical indicia that tend to delineate a relevant market, as set forth in *Brown.* Accordingly, Dr. Phillips' conclusions based on his investigation, if found credible by the jury, are sufficient to support a jury's definition of the market as rock concert ticket sales.

First, Dr. Phillips assimilated data supporting **[**91]** the assertion that the industry and the public view rock concerts as a separate and distinct market from non-rock concerts. Dr. Phillips cites industry reporters and publications, such as Billboard, Radio and Records, and Arbitron, as distinguishing between rock music and non-rock music in their reporting. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 17].) Additionally, Dr. Phillips' cites consumer polls indicating that music tastes vary greatly by demographic, and concert-goers tend not to view country or classical concerts as substitutes for rock concerts, or country or classical radio stations as substitutes for rock radio stations. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 14].)

Second, Dr. Phillips set forth evidence that rock concerts have uses and qualities distinctive from non-rock concerts. Although both rock and non-rock concerts are used by the end-consumer for entertainment value, a rock music afficionado, does not get the same use out of a country music concert as a rock music concert, if one believes Dr. Phillips' testimony on consumer preferences. (*Id.,* Ex. 1 [Phillips' **[*1084]** Decl. at 14].) Just as Dr. Phillips' observations concerning consumer preferences indicate that **[**92]** rock concerts have a distinctive customer base, common sense supports NIPP's assertion that consumers do not view non-rock concerts as substitutes for rock concerts.

Clear Channel argues that rock concerts do not have distinct qualities from non-rock concerts because all concerts involve similar venues, similar ticket services, similar vending, and similar advertising. (Defs.' Br. at 36.) Although rock concerts may involve the same venues, ticketing services, and vending companies as utilized in non-rock concerts, Dr. Phillips' demonstrates that rock concerts most certainly do not involve the same advertising and promotional inputs. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 6]). Testimony by numerous industry insiders demonstrates that the promotional inputs for rock concerts include rock radio and print advertising, rock radio promotional support, and rock radio air play. (Pls.' Resp., Ex. 2 [Morreale Decl. P19], Ex. 4 [Mickelson Decl. P3], Ex. 20 [Kirby Dep. at 51-52], Ex. 21 [Levy Dep. at 157], Ex. 22 [Loncao Dep. at 33-36].) For rock concerts, all promotional support through radio advertising and air play must be directed to a specific demographic, the listener that **[**93]** typically enjoys rock music. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 6]). Advertising in newspapers and media directed toward individuals over forty years of age, while appropriate for promoting country music or oldies artists, does not substitute as sufficient promotion for rock concerts. Accordingly, NIPP has provided sufficient evidence that rock concerts have distinct uses and inputs, namely distinct radio support.

Third, Dr. Phillips cites evidence of distinct price and of pricing patterns for rock concerts. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 44]; Defs.' Br., Ex. A-8 [Prelim. Economics Report of Owen R. Phillips, Ph.D. at 25-26].) Dr. Phillips sets forth average ticket prices for both rock, rock-pop, and all music concerts. (Pls.' Resp., Ex. 1 [PPhillips' Decl., Tables 6-7 at 41-44].) Based on Dr. Phillips' analysis of consumer and industry perceptions, a review of all of the testimony from members of the industry, and Dr. Phillips' review and analysis of pricing data, NIPP has set forth evidence of the practical indicia necessary to define the relevant market as ***tickets for rock music concerts.***

Alternatively, a reasonable jury could surely find that NIPP **[**94]** has set forth evidence of practical indicia showing a distinct market for ***all live music concerts.*** First, the music concert industry recognizes itself as distinct from other non-live performances, and it tracks its own sales through industry agencies such as BillBoard and Pollstar. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 16].) Dr. Phillips' states, based on his review of lay testimony and industry publications, that live music concerts have distinct qualities not shared by other live events or recorded events, including interaction with the crowd, specific lighting, a different noise level, a distinct length of event, distinct concessions, and a distinct atmosphere. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 16].) The music concert industry has production facilities and vendors which are different from other entertainment industries, such as the sports industry or movie industry. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 16].) Additionally, NIPP states that the prices for live music concert tickets are distinct from price of movie tickets or tickets to sporting events. (Pls.' Resp., Ex. 1 [Phillips' Decl. at 16].) Clear Channel does not dispute any of NIPP's common sense **[**95]** assertions, as practical indicia of an independent relevant market for live music concerts. Accordingly, NIPP has set forth sufficient evidence **[*1085]** for a jury to find a relevant market for all live music concerts.

As stated earlier, besides practical indicia, cross-elasticity of supply is another tool to define the relevant market. In evaluating cross-elasticity of supply, the question raised is whether a monopolistic increase in the price of rock concert tickets would cause other non-rock promoters to enter the market and provide rock concert tickets at lower prices. There are several reasons why supply elasticity does not exist the market for rock concert tickets and the market for all live music concert tickets. First, in the Denver geographic market, access to inputs for production of rock concerts has allegedly been restricted by a single competitor, Clear Channel. Allegedly, Clear Channel has restricted access to artists, radio promotional support, radio advertising, and radio air play, by utilizing its control of rock radio stations in Denver. Allegedly, this single competitor has increased the cost for these inputs to a point where no competitor could enter the market for rock **[**96]** concert tickets and provide tickets at lower prices than the competitor who has control of the cost of these inputs.

NIPP has provided relevant evidence that these restricted inputs create a supply-side barrier to entry for other promoters. *Full Draw, 182 F.3d at 756* (holding that anticompetitive conduct itself may amount to a significant entry barrier). Absent purchasing several rock radio stations in the Denver market, these promoters cannot obtain cheaper access to artists, radio advertising, radio promotional support, and radio air play, so as to enable them to keep ticket prices at a competitive level in the wake of monopolistic ticket pricing by Clear Channel. NIPP has provided sufficient evidence that the cost of acquiring a radio station or obtaining a radio license is a significant barrier to entry, which has arguably become necessary to compete successfully in the Denver geographic market. *Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 971* (holding that licensing requirements can present a substantial barrier to entry); (Pls.' Resp. at 74.) Accordingly, because a country music promoter cannot easily acquire a rock radio station, NIPP has presented sufficient evidence **[**97]** that a country music promoter could not easily enter into the rock concert promotions services business and compete successfully for rock artists. Cross-elasticity of supply and practical indicia, therefore, support NIPP's allegations of relevant market.

(2) The Two Markets Relevant to the Tying Claim

(a) Market for Rock Promotional Services

As stated earlier, in NIPP's tying claim, NIPP alleges that Clear Channel covertly manipulates artists, their agents, and their record labels into choosing SFX/Clear Channel Entertainment or Clear Channel Concerts/Clear Channel Radio Festivals promotional services by threatening to withhold air play of the artists' songs. In the market for promotional services, the artist, his agent, and his record label are the buyers and the promoter is the seller. Whether or not rock concert promotion services and country concert promotion services are separate service markets can only be determined after a factual inquiry into the commercial realities faced by artists and their management, who are the relevant consumers in this case. *Eastman Kodak, 504 U.S. at 481-482, 112 S. Ct. at 2090*. The same questions involved in **[**98]** finding a submarket for rock concerts, such as the relevant uses, qualities, and prices of the product, therefore, arise in the context of attempting to define the concert promotions service market. *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524*; *Lantec, 146 F. Supp.2d at 1148*.

[*1086] The record before the court demonstrates that NIPP has utterly failed to define by economic data or lay testimony a relevant market for rock concert promotions services where the consumers are artists and their management. NIPP has set forth no information whatsoever about the transactions that occur between artists and promoters. NIPP has provided no information concerning the qualities or uses of the services received by artists from the promoter, such as monetary payment, backstage catering, specific types of advertising, or other negotiated consideration. Furthermore, NIPP has provided no polling data or other consumer information concerning what artists and their management perceive to be the differences in promotion services offered by various promoters. Finally, NIPP has provided no information on bids provided to rock or non-rock artists or any other pricing information **[**99]** relevant to this submarket. NIPP has failed, as a matter of law, to adduce sufficient evidence for a jury to define the market for concert promotional services where the artist, his manager, and his record label are the consumer, and the promoter is the seller. Accordingly, there is insufficient evidence to prove one of the two markets relevant to NIPP's tying claim.

(b) The Market for Rock Radio Air Play

In its tying claim, NIPP seeks to define a relevant market as rock radio air play of songs, where the relevant seller is the rock radio station and the consumer is the rock artist. Whether or not rock radio air play is distinct from non-rock radio air play can only be determined after a factual inquiry into the commercial realities faced by the consumer. *Eastman Kodak., 504 U.S. at 481-482, 112 S. Ct. at 2090*. Here, NIPP has set forth sufficient evidence of practical indicia of qualities, prices, and uses to survive summary judgment on the market definition of rock radio air play for both its tying claim. *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524*; *Lantec, 146 F. Supp.2d at 1148*.

First, NIPP provides data supporting **[**100]** the assertion that the radio industry and the public view rock radio stations as distinct from non-rock radio stations. Radio stations classify and categorize themselves based on the specific format of music played by the station, whether it be rock, country, jazz, or oldies. (Pls.' Resp., Ex. 1 [Phillips Decl. at 7].) This categorization permeates all of a radio station's promotional literature, whether the literature is directed at listening audiences or potential advertisers. Similarly, companies that research and report on radio industry trends, such as Arbitron and Duncan's, categorize radio stations based on the format of music they play. (*Id.,* Ex. 1 [Phillips Decl. at 7].) Radio industry data shows that the public views rock radio as distinct from non-rock radio. As shown by "duplicate cume" data compiled by the radio industry, listeners of rock radio stations usually only switch between other rock radio stations when listening to the radio. [6] (*Id.,* Ex. 1 [Phillips Decl. at 14, 37].)

[101]** Because the industry and the public view rock radio as a distinct commodity, artists also view rock radio air play as a distinct commodity. When a rock radio station advertises its rock format categorization, the radio station attracts a particular demographic of listener, a younger individual who prefers listening to rock music. (*Id.,* Ex. 1 [Phillips Decl. at 14].) The rock radio station does not attract an **[*1087]** older listener who hates rock music. Undoubtedly, an artist desires his or her songs to be played on a station that will attract the types of listeners who enjoy the style of music that the artist plays. (Pls. Resp., Ex. 1 [Phillips Decl. at 6].) Accordingly, a rock artist will not view air play of his or her songs on a country format station as a substitute for air play on a rock station. (*Id.,* Ex. 1 [Phillips Decl. at 6].)

Secondly, NIPP sets forth evidence that rock radio has distinctive uses and qualities from non-rock radio. NIPP has demonstrated that rock radio reaches a specifically defined demographic of listeners, which non-rock radio does not reach. (Pls. Resp., Ex. 1 [Phillips Decl. at 3-4, 5-7].) This distinction is quite important to the artist who **[**102]** wants his or her type of music to reach the demographic of consumer who is most likely to enjoy it. Finally, play list data from self-described rock radio stations shows that rock radio stations play the same songs from the same artists more often than not. (*Id.,* Ex. 1 [Phillips Decl. at 37].) Accordingly, a different type of music is played on rock radio stations. Although Clear Channel makes a compelling argument that non-rock stations play many of the same songs as rock stations, NIPP's evidence that non-rock stations play rock songs more infrequently than non-rock songs creates a dispute of fact that it best resolved by the jury. (Defs.' Br. at 47-48; *disputed at* Pls.' Resp., Ex. 1 [Phillips Decl. at 37].)

The third practical indicia of relevant, separate market is distinct pricing. Dr. Phillips, NIPP's expert, does not set forth any information regarding the alleged cost to artists to obtain air play on the radio. Although NIPP suggests in its briefing that indies make payments to radio stations, such a statement does not amount to evidence of pricing which suggests a separate market for rock radio air play. Nevertheless, this omission is not fatal to NIPP's position **[**103]** at the summary judgment stage. ***HN25***[] Courts have recognized that tying may provide a way for a monopolist to hide activities that are illegal or disfavored by the law. *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 476 (3d Cir. 1992)* (citing *Fortner Enters v. United States Steel Corp., 394 U.S. 495, 513, 89 S. Ct. 1252, 1263, 22 L. Ed. 2d 495 [1969])*. A monopolist may seek to evade regulatory control in the tying product market by hiding the price in the tied product's price. *Id.* Here, NIPP alleges that Clear Channel evades regulations prohibiting payola by incorporating payola into the concert promotions services contracts with artists. Because Clear Channel allegedly hides payola pricing information, there is no price information for the market for radio air play.

A final tool that may be useful in defining the scope of the relevant market is cross-elasticity of supply. *Rebel Oil Co., 51 F.3d at 1436*. Even if artists do not view non-rock radio air play as a substitute for rock radio air play, if producers of non-rock radio can readily shift their production facilities to produce rock radio in response to **[**104]** a price shift in rock radio air play, then the sales of both should be included in the relevant market. *Id.* Construing the facts in the light most favorable to NIPP, producers of non-rock radio in the Denver area market cannot easily shift to rock radio due to barriers to entry. NIPP cites barriers to entry into the rock radio industry in the Denver market, including the high cost of switching formats, customer goodwill and name recognition, and Clear Channel's large

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[6] "Duplicate cume" data is a term of art used by the radio industry for data showing how often radio listeners switch between stations and which stations the listeners choose when switching.

size nationwide. (*Id.,* Ex. 1 [Phillips Decl. at 8-9].); *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, 63 F.3d 1540, 1555*. Additionally, NIPP notes that the Denver market is so saturated with rock radio stations that it cannot support another rock radio station. (*Id.*) Based on evidence **[*1088]** of barriers to entry, sufficient dispute of material fact regarding cross-elasticity of supply exists so that summary judgment on rock radio air play market definition is inappropriate. Accordingly, the lack of price information on the market for radio air play is not fatal to the definition. Disputes of fact concerning the availability of pricing information make summary judgment inappropriate.

(3) The Market for Rock Radio* [**105] *Advertising and Promotional Support (Essential Facilities Claim)

In its essential facilities claim, NIPP seeks to define the relevant market as rock radio advertising and promotional support, where the seller is the rock radio station and the consumer is the concert promoter. Whether or not rock radio advertising and promotional support is a distinct product from all radio advertising can only be determined after a factual inquiry into the commercial realities faced by the consumer. *Eastman Kodak, 504 U.S. at 481-482, 112 S. Ct. at 2090*. Here, NIPP has set forth sufficient evidence of practical indicia of qualities, prices, and uses to survive summary judgment on the market definition of rock radio advertising and promotional support for its essential facilities claim. *Brown Shoe, 370 U.S. at 325, 82 S. Ct. at 1524*; *Lantec, 146 F. Supp.2d at 1148*.

First, as set forth above, NIPP provides data supporting the assertion that the public views rock radio stations as distinct from non-rock radio stations. NIPP has also cited testimony by Clear Channel showing that the radio industry views advertising and promotional support for concert **[**106]** promoters as distinct from advertising for other advertisers. Michael O'Connor of Clear Channel Radio in Denver specifically states that radio stations gain valuable consideration when they advertise and provide promotional support for concerts because listeners tune in more regularly to obtain information on the concert of their favorite artist. (Defs.' Br., Exs. Vol. 2, Ex. A-24 [O'Connor Dep. at 385-386].) Additionally, electronic mail messages sent by Clear Channel personnel to record labels and artist managers demonstrate that radio stations highly value the right to engage in certain types of promotional support, such as having radio studio appearances of artists. (Pls.' Resp., Exs. Vol. 3, Ex. 67[Electronic Mail Messages between O'Connor and Spivak of 8/23/2001], Ex. 68 [Electronic Mail Messages between O'Connor, Scott Arbough, and Sabrina Saunders of 11/13/2001-11/14/2001].) Accordingly, NIPP has set forth sufficient evidence that advertising and promotional support for concerts is a distinct product from advertising for general consumer goods.

Secondly, NIPP sets forth evidence that rock radio advertising and promotional support has uses and qualities distinct from **[**107]** non-rock radio advertising and promotional support. When a rock radio station advertises its rock format categorization, the radio station attracts a particular demographic of listener, a younger individual who prefers listening to rock music. (*Id.,* Ex. 1 [Phillips Decl. at 14].) The rock radio station does not attract a listener who hates rock music. Undoubtedly, a promoter prefers to advertise and promote a rock concert on a station that will attract the type of listeners who enjoy rock music. (Pls. Resp., Ex. 1 [Phillips Decl. at 6].) Accordingly, a rock concert promoter will not view advertising and promotional support for a rock concert on a country format station as a substitute for advertising and promotional support on a rock radio station. (*Id.,* Ex. 1 [Phillips Decl. at 6].)

Clear Channel argues that the relevant inquiry is not whether a rock concert promoter views advertising on a pop radio station as a reasonable substitute for advertising **[*1089]** on a rock radio station; instead, the relevant inquiry is whether an advertiser of any product views advertising on a pop radio station as a substitute for advertising on a rock radio station. (Defs.' Br. at 44.) According **[**108]** to Clear Channel, advertisers may view these as reasonable substitutes because the stations may reach the same age group demographic of consumers. Although this argument has merit as to commercial advertisers, it also highlights why advertising and promotional support for concert promoters may be defined as a distinct product market from advertising for other businesses. When purchasing advertising spots on radio, advertisers of products and services seek to reach a particular age or other demographic of consumers, some of whom may like their product. When purchasing advertising and seeking promotional support for a rock concert, however, rock concert promoters seek to reach an audience who enjoys rock music, regardless of age or other demographic information. Radio advertising and promotional support for a concert puts the promoter directly in touch with his consumer, at the very instant the consumer is enjoying the product sold by the promoter, rock music. Advertising rock concerts on other non-rock format stations does not provide this reach. (Pls.' Resp., Ex. 2 [Morreale Decl. PP16-19], Ex. 4 [Mickelson Decl. P3], Ex. 22 [Loncao Dep. at 35-36], Ex. 39 [Sievers Dep. 101-102]. **[**109]**) Similarly, advertising in newspapers or magazines, or on television stations, even if these forms of media are targeted to rock audiences, do not carry the advertisement for a concert to an end-consumer who necessarily is enjoying at that moment the very product advertised. (*Id.,* Ex. 92 [Electronic Mail Message Between Clear Channel Personnel regarding the Value of Radio Promotion Compared to Print Promotion].)

Third, NIPP provides evidence of distinct prices involved in advertising and promotional support of rock concerts as compared to general advertising. (*Id.,* Ex. 90 [Synopsis of Promotional Support Value Provided to U2 by KTCL].) NIPP demonstrates the value obtained by the promoter for promotional support which offsets the cost of the advertising, a pricing adjustment which does not occur in regular advertising.

A final tool that may be useful in defining the scope of the relevant market is cross-elasticity of supply. *Rebel Oil Co., 51 F.3d at 1436*. Even if rock concert promoters do not view non-rock radio advertising and promotional support as a substitute for rock radio advertising and promotional support, if producers of non-rock radio can readily **[**110]** shift their production facilities to produce rock radio in response to a price shift in rock radio advertising, then the sales of both should be included in the relevant market. *Id.* Construing the facts in the light most favorable to NIPP, producers of non-rock radio in the Denver area market cannot easily shift to rock radio due to barriers to entry. NIPP cites barriers to entry into the rock radio industry in the Denver market, including the high cost of switching formats, customer goodwill and name recognition, and Clear Channel's large size nationwide. (*Id.,* Ex. 1 [Phillips Decl. at 8-9].); *Multistate Legal Studies, 63 F.3d at 1555*. Additionally, NIPP notes that the Denver market is so saturated with rock radio stations that it cannot support another rock radio station. Based on evidence of barriers to entry, and practical indicia of distinct markets, sufficient disputes of material fact regarding market definition exist so that summary judgment on the rock radio advertising and promotional market definition is inappropriate.

(4) Rock vs. Non-Rock Generally

Clear Channel argues that NIPP's proposed relevant markets fail as a matter of **[*1090]** law **[**111]** because the markets are too narrow, and a jury will have no evidentiary basis to distinguish between rock and non-rock. (Defs.' Br. at 43.) NIPP, however, has demonstrated sufficient evidence for a reasonable jury to find that the relevant market definitions in this case are properly categorized in terms of rock music. Although these markets are narrowly drawn submarkets, such narrow markets are appropriate when commercial realities faced by the consumer dictate this stricture. Other courts have found sufficient evidence to support narrow submarkets for antitrust purposes in similar circumstances. *Eastman Kodak, 504 U.S. at 481-482, 112 S. Ct. at 2090* (holding that a market for purchase and repair of Kodak photography equipment exists separately from market for purchase of all photography equipment); *Full Draw, 182 F.3d at 756* (holding that archery-only trade shows may be a separate market from gun shows that include archery); *Olin Corp. v. FTC, 986 F.2d 1295, 1304 (9th Cir. 1993)*, (*cert. denied, 510 U.S. 1110, 114 S. Ct. 1051, 127 L. Ed. 2d 373 [1994])* (holding that dry sanitizer swimming pool products are in a **[**112]** separate market from liquid pool bleach); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc., 891 F.2d 1127, 1142 (4th Cir. 1989)*, (*rev'd on other grounds, 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 [1990])* (finding that billboard advertising is a separate market from other advertising); *Flip Side Prods., Inc. v. Jam Prods., Inc., 843 F.2d 1024, 1032 (7th Cir. 1988)*, (*cert. denied, 488 U.S. 909, 109 S. Ct. 261, 102 L. Ed. 2d 249 [1988])* (finding that "the relevant market in this case was the promotion of arena level concerts in the Chicago metropolitan area"); *Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp., 849 F.2d 1336 (11th Cir. 1987)* (holding that yellow pages advertising is in separate market from other advertising); *Danny Kresky Enters. Corp. v. Magid, 716 F.2d 206, 208 (3d Cir. 1983)* (reinstating jury verdict for plaintiff who had alleged antitrust violations in connection with "the promotion of 'black-oriented' concerts in Pittsburgh").

Additionally, Clear Channel argues that those markets that NIPP's attempts to delineate markets based on **[**113]** a distinction between rock and non-rock artists or music fail because NIPP has provided no criteria to aid the jury in determining why some artists and radio stations are defined as rock, while others are considered pop. (Defs.' Br. at 39.) Although Clear Channel concedes that distinguishing between country and rock may not be difficult for a jury, it more specifically argues that, because NIPP cannot properly justify why certain fringe artists, such as Jewel and Sheryl Crow, fall into the rock or non-rock category, any market definition that makes distinctions on this basis is flawed and erroneous. (*Id.* at 41.)

While the court is mindful of the difficulty of categorizing certain fringe artists, such as the Neville Brothers and the Cowboy Junkies, such difficulty does not justify a holding that no submarket for rock, therefore, exists. Just as "customers know a department store when they see it," customers know a rock concert when they hear it, as will the jury. *Bon-Ton Stores v. May Dep't Stores Co., 881 F. Supp. 860, 870*. That the outer edge of a market's boundaries are a disputed does not mean the market is legally flawed for purposes of a motion for summary judgment. Market boundaries **[**114]** of necessity may be imprecise. ***Antitrust Law*** Developments (Fifth) at 525. Therefore, the question of boundaries is most properly answered by the jury.

Finally, Clear Channel argues that plaintiffs' expert's distinction between rock and non-rock fails because it is based solely on his subjective judgments. (Defs.' Br. at 39-40.) Plaintiffs' expert, however, cites many reports from the radio industry **[*1091]** and from SFX/Clear Channel Entertainment itself as evidence to aid the jury in determining what qualifies as rock music for purposes of the rock concert promotions and rock radio industries. (Defs.' Br., Ex. A-8 [Prelim. Phillips' Report at 40-47].) Because the expert utilized industry materials in defining rock music, this distinction is not subjective, and the expert's opinions are sufficiently grounded to be admissible.

Furthermore, because Clear Channel's derives its alleged market power in the rock concert promotions industry based on its control of "rock radio," an alleged source of advertising, promotional, and air play inputs for rock concert promotions, definitions of rock according to the radio industry are extremely relevant to any jury's inquiry into the definition of rock **[**115]** music in this case. After all, NIPP alleges that the rock radio industry and the rock concert promotions industry have a symbiotic relationship, both affecting what consumers of concerts consider to be rock or non-rock music. Accordingly, the music defined as rock and played by rock radio stations in Denver is extremely relevant to defining the scope of the "rock" market in this case. At the summary judgment stage, therefore, the court cannot hold as a matter of law that there is insufficient evidence in the record for the jury to properly distinguish between rock and non-rock music. Having evaluated the sufficiency of NIPP's evidence of relevant market definition, the court turns to NIPP's individual claims for relief under the Sherman Act.

2. Section 1 of the Sherman Act: Tying

NIPP claims that Clear Channel has violated *section 1 of the Sherman Act* by conditioning air-play of an artist's songs and promotional support for the artist's concerts on the artist's use of SFX/Clear Channel Entertainment or Clear Channel Concerts/Clear Channel Radio Festivals for the artist's concert-promotions needs in the Denver market. (Pls.' Resp. at 91.) NIPP argues that this conditioning **[**116]** creates an illegal tying arrangement. ***HN26***[] *Section 1 of the Sherman Act* states, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ." *15 U.S.C.A. § 1 (West 1997 & Supp. 2003)*. *Section 1 of the Sherman Act* proscribes anticompetitive conduct as part of concerted action or a conspiracy; it does not apply to unilateral conduct. *Systemcare, Inc. v. Wang Lab. Corp., 117 F.3d 1137, 1139-1140 (10th Cir. 1997)*. A tying arrangement exists when a seller conditions the purchase of a highly desirable product on the purchase of an additional product. *Id.* Whenever a buyer consents to the tying arrangement by purchasing the tied product so as to obtain the tying product, concerted action occurs between buyer and seller so as to implicate *section 1 of the Sherman Act*. *Systemcare, 117 F.3d at 1139-1140*. Here, NIPP argues that Clear Channel conditions the "sale" of air play to artists (tying product) on the artist's purchase of Clear Channel's concert promotion services (tied product).

HN27[] Every refusal to sell two products separately does not amount **[**117]** to an illegal tying arrangement. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11-12, 104 S. Ct. 1551, 1558, 80 L. Ed. 2d 2 (1984)*. If each product can be purchased separately in a competitive market, one seller's decision to sell both products in a single package does not impose an unreasonable restraint on the market for either product. *Id. at 11-12, 104 S. Ct. at 1558*. If, however, the seller has significant market power in the market for one product and exploits its control over this "tying" market to force the buyer to purchase a different product in the "tied" market, which the buyer either did not want or would have purchased elsewhere, the tying **[*1092]** arrangement violates *section 1 of the Sherman Act*. *Id. at 12, 104 S. Ct. at 1558*.

> ***HN28***[] The fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who, because of their preference for the seller's brand of the first are artificially forced to make **[**118]** a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second . . . such tying agreements may work significant restraints on competition in the tied product. ***HN29***[] The tying seller may be working toward a monopoly position in the tied product, and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter the market. They must be prepared not only to match existing sellers in the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade [regulations] concerning [prices] in the tying product through clandestine transfer **[**119]** of the profit to the tied product.

Id. at 12, 104 S. Ct. at 1558 n.19 (citing *Fortner I, 394 U.S. at 512-514, 89 S. Ct. at 1263-1264* [J. White, *dissenting*]). ***HN30***[] When there is an unlawful tying arrangement, the consumer's freedom to select the best bargain the second market is impaired by his need to purchase the tying product and perhaps by an inability to evaluate the true cost of either product when they are available only as a package. *Id. at 14, 104 S. Ct. at 1560*. Tying claims are analyzed under two different tests: (1) *per se* analysis, and (2) rule of reason analysis. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 512-513 (3d Cir. 1998)*. Here, NIPP sets forth sufficient evidence and disputes of material fact regarding NIPP's *per se* tying claim to survive summary judgment. NIPP's tying claim based on rule of reason analysis, however, fails as a matter of law because of its failure to define one of the two relevant markets.

a. Per Se Liability

HN31[] The *per se* rule condemns practices that are devoid of redeeming competitive rationales. *SCFC ILC, 36 F.3d at 963.* **[**120]** When a seller's share of the tying market is high, or when the seller offers a unique product that competitors are not able to offer, the Supreme Court has held that the likelihood that market power is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. *Jefferson Parish, 466 U.S. at 17, 104 S. Ct. at 1560-1561*. Based on the record, NIPP has sufficiently demonstrated that Clear Channel's share of the rock radio market is sufficiently high to justify *per se* analysis in this case. Dr. Phillips, NIPP's expert witness, defined the scope of the rock radio air play market (tying market) based on play list data, "duplicate cume" data, and radio station and industry materials. Based on his calculations, Clear Channel controls four of the six rock radio stations in the Denver area, or 66.6%. [7] (Defs.' Br., **[*1093]** Ex. A-8 [Prelim. Economic Report of Phillips at 18]; Pls.' Resp., Ex. 1 [Phillips Decl. at 15].) If the number of listeners is considered, as reflected in advertising revenue for the rock radio stations and Arbitron data, Clear Channel controls 73% of the rock radio air play market. (Pls.' Resp. at 58, **[**121]** Ex. 1 [Phillips Decl. at 14].) Additionally, Clear Channel allegedly controls a unique product, radio, for which there are arguably high entry barriers. Construing this data in the light most favorable to NIPP, Clear Channel's alleged market share of the rock radio industry is sufficient to justify *per se* analysis of NIPP's tying claim.

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[7] In April 2002, Dr. Phillips found that Seven rock radio stations constitute the rock radio market in Denver: KBPI (CC), KRFX (CC), KTCL (CC), KBCO (CC), KALC (Emmis), KXPK (Emmis), and KKHK (Tribune). Since then, however, KXPK has exited the rock radio market. KKHK ("the Hawk") has changed its name and ownership but maintains its rock format. It is now KQMT ("the Mountain").

HN32[] The elements of a *per se* violation are: (1) two separate products; (2) a tie, or conditioning of the sale of one product on the sale of another; (3) sufficient economic power in the tying product market (rock radio air play), and (4) a substantial volume of commerce affected in the tied product **[**122]** market (rock concert promotions services). *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc., 63 F.3d 1540, 1546 (10th Cir. 1995)*. Plaintiff is not required to show anticompetitive effects in the tied market. *Law v. Nat'l Collegiate Athletic Assoc., 134 F.3d 1010, 1016 (10th Cir. 1998)*. Similarly, the court need not consider defendant's procompetitive justifications for the practice. *Id.* Here, NIPP has demonstrated sufficient evidence of the *per se* elements to create disputes of material fact, making summary judgment on the *per se* tying claim inappropriate.

(1) Two Separate Products

HN33[] In determining the validity of a tying arrangement, the court must first identify the two separate products that are the subject of the arrangement. *Jefferson Parish, 466 U.S. at 15, 104 S. Ct. at 1560*. Here, NIPP claims that Clear Channel forces artists and their management to purchase rock concert promotional services from Clear Channel in order to purchase rock radio air play of the artists' songs and promotional support for the artists' concerts. To NIPP, therefore, the tying product is **[**123]** rock radio air play and promotional support, and the tied product is rock concert promotional support services.

Apparently conceding that concert promotional services provided to artists are a product, Clear Channel argues that there is no tying product because radio air play and promotional support are not sold, but are freely given. (Defs.' Br. at 80-82.) As stated earlier in this order, however, NIPP has provided evidence that radio air play is sold to artists through "indies," and perhaps through the tying arrangement itself. Additionally, as stated earlier in this opinion, NIPP has set forth sufficient evidence that radio stations receive an amount of consideration when providing air play and promotional support, indicative of an actual product. Accordingly, there is a legitimate dispute of fact whether air play and promotional support are actually sold, and, therefore, could potentially be considered products.

HN34[] The test for determining whether two objects are separate products, as opposed to the same product, turns not on their function, but on the nature of any consumer demand for them. *Multistate Legal Studies, 63 F.3d at 1547*. Here, NIPP has shown that the **[**124]** demand for rock radio air play and radio promotional support, as evidenced through the existence of "indies," **[*1094]** exists separately from the demand for concert promotional services, just as it did prior to the time that Clear Channel entered the concert promotions market. At the summary judgment stage, the court cannot say, as a matter of law, that NIPP will not be able to adduce sufficient evidence at trial to prove the existence of two products.

(2) Tie

HN35[] The second element of a *per se* tying claim is a tie, or conditioning of the sale of one product on the sale of another. *Multistate Legal Studies, 63 F.3d at 1547*. The seller must force the buyer to purchase the tied product. *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 887 (10th Cir. 1997)*. To establish forcing, a plaintiff must show that: (1) he himself complied with the tying practice by purchasing the tying and tied product; ***or*** (2) although he did not make the purchase, other buyers agreed to the arrangement under threat of losing the tying product. *Systemcare, 117 F.3d at 1140*. Clear Channel argues that NIPP provides no evidence **[**125]** that any buyer agreed to this arrangement under threat of losing air play. (Defs.' Br. at 80.) More specifically, Clear Channel argues that NIPP has produced no artist who will testify that he or she felt forced to utilize Clear Channel's promotional services in order to prevent losing air play. (*Id.*)

Although no artists have stepped forward to testify against Clear Channel, a fact that may be equally indicative of their fear of losing air play and promotional support as not, NIPP has provided evidence of at least four record labels and/or agents agreeing to the tying arrangement under threat of losing air play and/or promotional support. First, NIPP cites electronic mail messages passed between a director at Reprise Records, Todd Sievers, and Michael O'Connor at Clear Channel. (Pls.' Resp. Exs. Vol. 3, Exs. 52-55A [Electronic Mail Messages and Letters between O'Connor and Sievers of 3/2000-6/2000].) In these messages, Sievers arguably agrees to allow Clear Channel Concerts/Clear Channel Radio Festivals to promote the band Orgy's concert in the Denver market in order to prevent loss of air play for Orgy songs and other Reprise artists' songs. During his deposition, Sievers admitted **[**126]** agreeing to this tying arrangement. (*Id.,* Exs. Vol. 3, Ex. 55A [Sievers Dep. at 73].) Similarly, other electronic messages show instances where artists, their agents, or their record labels agreed to use Clear Channel Concerts/Clear Channel Radio Festivals or SFX/Clear Channel Entertainment in order to ensure that they received air play and promotional support. (*Id.,* Exs, Vol. 3, Exs. 42, 58, 64 [Electronic Mail Messages and Letters between Clear Channel Personnel and Various Artists' Agents and Record Labels].) Although Clear Channel argues that these artists were mistaken about Clear Channel's willingness to withhold air play, NIPP has provided these documents containing party-opponent admissions creating a dispute of material fact as to whether this was the case. Furthermore, NIPP provides several admissions by O'Connor himself that, if artists and their management desire air play and effective promotional support for their concerts from Clear Channel radio stations, they must choose Clear Channel for their concert promotions needs. (*Id.,* Exs., Vol. 3, Exs. 71-72, 75 [O'Connor statements].)

Clear Channel counters that all of the above-mentioned evidence is inadmissible **[**127]** and, therefore, cannot be used to create a dispute of material fact on summary judgment. (Defs.' Br. at 65.) Clear Channel is correct that ***HN36***[] the court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, 756 F.2d at 1474*. All of the electronic **[*1095]** mail messages from O'Connor and other Clear Channel personnel, such as Bob Richards and Sabrina Saunders, are admissible under *Federal Rule of Evidence 801(d)(2)*. *Fed. R. of Evid. 801(d)(2)(C)-(D)* provides that a statement is not hearsay if made by a party-opponent or its agent and offered against the party, if the agent is an employee who is authorized to engage in the type of correspondence at issue. Here, because the electronic mail messages were written by Clear Channel personnel who are authorized to engage in this type of correspondence with record labels, the messages are admissible for the purposes of summary judgment and at trial. A more difficult question concerns the correspondence drafted and sent by record labels, which confirm the labels and artists' consent to the tying arrangement. Because the parties **[**128]** do not significantly address the issue, the court is left to its own devices.

Based on a review of the Federal Rules of Evidence, the court finds ***HN37***[] several exceptions to the hearsay rule indicating that the electronic mail messages from record labels are admissible. First, *Rule 801(d)(2)(E)* provides that a statement is not hearsay if the statement is offered against a party, and the statement is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. This rule is not limited to criminal cases, but applies to civil antitrust case as well. *World of Sleep, 756 F.2d at 1474*. ***HN38***[] Because *section 1 of the Sherman Act* states, "every . . . conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . .," *15 U.S.C.A. § 1*, and tying arrangements have been found to be illegal conspiracies under *section 1*, the coconspirator exception to the hearsay rule may be properly applied to correspondence confirming a tying agreement if the other requirements of the exception are fulfilled. The coconspirator exception only allows admittance of statements in furtherance of a conspiracy if there is sufficient independent **[**129]** evidence, besides the statements, to establish the existence of the conspiracy. *World of Sleep, 756 F.2d at 1474*; *State of New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1073 (2d Cir. 1988)*. Here, there is other evidence of the conspiracy besides the messages written by record labels. The other evidence includes testimony from witnesses, such as Sievers, the messages written by Clear Channel personnel, and the play list data for songs. Accordingly, this exception likely applies to the electronic mail messages written by record labels and artists' management.

Even if the coconspirator exception is inapplicable, the evidence itself is very likely not hearsay. ***HN39***[] A verbal act is not considered hearsay if it is a statement that bears on the rights of the parties to the statement. *Fed. R. of Evid. 801(c)* advisory committee note. Conversations as to the making and terms of an oral agreement may be presented into evidence because the proof of the words spoken is not made to establish their truth but to establish the fact that they were spoken. *First Nat'l Bankshares of Beloit, Inc. v. Geisel, 853 F. Supp. 1344, 1355 (D. Kan. 1994)* **[**130]** (citing *Creaghe v. Iowa Home Mut. Cas. Co., 323 F.2d 981, 984-985 [10th Cir. 1963])*. Here, because the electronic mail messages show record labels agreeing to a tying arrangement, and because the agreement itself is the relevant act for stating a tying claim under *section 1 of the Sherman Act*, the electronic mail messages are not hearsay but are verbal acts under the Federal Rules of Evidence.

Finally, assuming the statements were hearsay, the state of mind exception to the hearsay rule provides:

> HN40[] the following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . [a] statement **[*1096]** of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

Fed. R. of Evid. 803(3). **HN41**[] Under this rule, written correspondence showing evidence of intention is admitted to prove the doing of the act intended. *Id.* advisory committee notes. Here, to the extent the electronic mail messages from **[**131]** the record labels show the intention of the labels to commit their artists to Clear Channel concert promotions, the electronic mail messages are admissible under the state of mind exception. Any statements of the record labels' beliefs as to why they chose to commit their artists may not be admitted under the exception, however, because it is a statement of belief. *Fed. R. of Evid. 803(3)*. Accordingly, based on review of the hearsay rule and its exceptions, the electronic mail messages set forth by NIPP are admissible as evidence of a "tie."

As stated earlier, Clear Channel also argues that there is no evidence of a "tie" because radio air play and radio promotional support are freely given away by radio stations and not purchased. Once again, NIPP has set forth evidence that radio air play is bought and sold through the use of "indies." Furthermore, to the extent that NIPP has provided no evidence of the cost of radio air play, NIPP has shown that the price of a bundled product may reflect both the costs of the tied product and the tying product. In this situation, when customers purchase the bundled product, customers are purchasing the tying product, **[**132]** even if it is touted as being free. *Multistate Legal Studies, 63 F.3d at 1548* (citing *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co., 833 F.2d 606, 610 [6th Cir. 1987])*. Here, because NIPP alleges that the cost of acquiring radio air play is implicit in the artist's choice to use Clear Channel's concert promotions services, the fact that radio air play independently costs nothing is irrelevant. Additionally, NIPP has presented evidence that consideration is exchanged in transactions for radio promotional support, because both the radio station and the promoter benefit from the transaction. (Defs.' Br., Exs. Vol. 2, Ex. A-24 [O'Connor Dep. at 385-386].) Because the evidence demonstrates that radio air play and radio promotional support are exchanged for consideration, the court finds that NIPP has set forth sufficient evidence of a "tie" to create a dispute of material fact. Summary judgment on this issue, therefore, is inappropriate.

(3) Market Power in Tying Product Market

HN42[] In examining a tying claim, once the distinct products are identified, the question arises whether the consumer has sufficient choice to forgo the tying product **[**133]** altogether and, hence, the tied product, or whether the defendant has sufficient market power to force the consumer to purchase the tied product against his desire, based on defendant's control of the tying product. *Jefferson Parish, 466 U.S. at 24-25, 104 S. Ct. at 1565*. If the consumer has sufficient choice, no forcing is present, and the tying arrangement is perfectly lawful. *Id., 466 U.S. at 25, 104 S. Ct. at 1565*. This determination is made by focusing on market power in the tying product market. The existence of market power in the tying product market is ordinarily inferred from the seller's possession of a predominant share of the market. *Eastman Kodak, 504 U.S. at 464, 112 S. Ct. at 2081* (citations omitted). NIPP claims that Clear Channel controls the market for rock radio air play, the tying market, in Denver, based on the number of rock stations it owns and the percentage of rock radio advertising it controls.

[*1097] NIPP has adequately shown that Clear Channel's share of the rock radio market is sufficiently high to fulfill this element of a tying claim. Dr. Phillips, NIPP's expert witness, defined the scope of the rock radio **[**134]** air play market (tying market) based on play list data, duplicate cume data, and radio station and industry materials. Based on his calculations, Clear Channel controls four of the six rock radio stations in the Denver area, or 66.6%. (Defs.' Br., Ex. A-8 [Prelim. Economic Report of Phillips at 18]; Pls.' Resp., Ex. 1 [Phillips Decl. at 15].) If the number of listeners is considered, as reflected in advertising revenue for the rock radio stations and Arbitron data, Clear Channel controls 73% of the rock radio air play market. (Pls.' Resp. at 58, Ex. 1 [Phillips Decl. at 14].) Construing this data in the light most favorable to NIPP, Clear Channel's alleged market share of the rock radio industry is, therefore, sufficient to demonstrate market power in proving a *per se* tying claim.

(4) Substantial Volume Affected in Tied Product Market

HN43[] The final element that a plaintiff must demonstrate in proving a tying claim is that a substantial volume of commerce has been affected in the tied product market. *Multistate Legal Studies, 63 F.3d at 1546*. In demonstrating *per se* liability, however, this element is loosely applied because, once the defendant **[**135]** is found to have appreciable market power in the tying market, the ability to leverage this power to restrain trade in the tied market is presumed. *Brokerage Concepts, 140 F.3d at 511*. This presumption arises because the foundational principle of *per se* liability is that some acts are so inherently anticompetitive that no examination of their impact on the market as a whole is required. *Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421, 1425 (9th Cir. 1995)* (citing *Fortner I, 394 U.S. at 501, 89 S. Ct. at 1258*). No inquiry, therefore, need be made into the actual prevailing market conditions in the tied market. *DiGidyne Corp. v. Data Gen'l Corp., 734 F.2d 1336, 1347 (9th Cir. 1984)*. Instead, all that is required is that the restraint in the tied market caused by the tie affect a substantial volume of commerce, which in this context means only an amount greater than a *de minimis. Id.*

Clear Channel has not addressed this issue in its briefing on summary judgment, and the court, therefore, will not dispose of NIPP's tying claim based on this element on summary judgment. Accordingly, sufficient disputes of material **[**136]** fact exist as to NIPP's *per se* tying claim that Clear Channel's motion for summary judgment on NIPP's *per se* tying claim is denied.

b. Rule of Reason Analysis

HN44[] If a plaintiff is unable to prevail on a theory of *per se* liability, a plaintiff can seek to prove a tying claim under a different analysis. In order to prevail in the absence of *per se* liability, a plaintiff has the burden of proving that the tying arrangement unreasonably restrains competition in the tied product market. *Jefferson Parish, 466 U.S. at 29, 104 S. Ct. at 1567*. This is known as "rule of reason" analysis. *Tarabishi, 951 F.2d at 1571*. Rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition in the tied market. *Law, 134 F.3d at 1016-1017*. The arrangement must lead to an increase in the price charged to the consumer or a decrease in the quality of the tied product offered by the seller. *Jefferson Parish, 466 U.S. at 31, 104 S. Ct. at 1568 n.52*. The tied product market and defendant's market share, therefore, must be closely examined to prove **[**137]** tying under rule of reason analysis.

As stated earlier, NIPP has set forth no evidence of the tied product market (the **[*1098]** tied product market here is the market for the sale of concert promotions services to artists by concert promoters). NIPP has provided no information concerning pricing of the tied product or market share of various concert promoters. Specifically, there is no evidence of what payment is made to artists in exchange for the right to promote their concerts, or what value artists confer on promoters when choosing their promotions services. More importantly, NIPP has not provided information on which promoters hold the lion's share of prominent artist contracts. While this information may be reflected to a certain extent in the end-use market for ticket sales, NIPP has not sufficiently set forth evidence on the input market to prove a tying claim under rule of reason analysis.

3. Section 2 of the Sherman Act: Monopolization

NIPP alleges that Clear Channel has monopolized the market for rock-concert tickets in the Denver metropolitan area by engaging in anticompetitive conduct such as predatory pricing, tying, and preventing its competitors from using radio **[**138]** for promotions. *HN45*[] *Section 2 of the Sherman Act* makes it unlawful for a firm to "monopolize." *15 U.S.C.A. § 2 (West 1997 & Supp. 2003)*. In order to prove monopolization, a plaintiff must show (1) defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition of monopoly power, as opposed to growth as a result of a superior product, business acumen, or historic accident. *Reazin, 899 F.2d at 973*; *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. While concerted conduct under *section 1 of the Sherman Act* is subject to sanction if it merely restrains trade, unilateral conduct under *section 2* is subject to sanction only if it actually monopolizes. *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 541 (9th Cir. 1991)*.

As stated earlier, *HN46*[] in order to prove a monopolization claim, plaintiff must first define the relevant market. NIPP has set forth sufficient evidence for a jury to conclude that the relevant market for purposes of NIPP's monopolization and attempted monopolization claims is the market for rock concerts. Second, in **[**139]** proving a monopolization claim, plaintiff must demonstrate that the defendant has monopoly power in the relevant market. While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge. *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 51 (D.C. Cir. 2001)*. Monopoly power under *section 2 of the Sherman Act* requires something greater than market power under *section 1*. *Eastman Kodak, 504 U.S. at 481, 112 S. Ct. at 2090* (citations omitted). Proof of monopoly power requires a showing of the power ***both*** to control prices and to exclude competition. *United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *Tarabishi, 951 F.2d at 1567*. Monopoly power may be inferred from a firm's possession of a dominant share of the relevant market, which is protected by entry barriers. *Microsoft, 253 F.3d at 51*.

Here, although NIPP has set forth some evidence that Clear Channel has charged supercompetitive prices and excluded competition by limiting access to certain inputs, such as **[**140]** artists, rock radio air play and rock radio promotional support, Clear Channel's alleged market share does not currently rise to the level necessary to indicate monopoly power. According to NIPP, as of the commencement of this lawsuit Clear Channel held a 50.48% share of the rock concert market. While this figure is impressive, it is not monopolistic. ***HN47***[] "While the Supreme Court has refused to specify a minimum market share **[*1099]** necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share between 70% and 80%." *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18. (10th Cir. 1989)*. Based on Clear Channel's market share, therefore, the court finds that NIPP cannot prove its monopolization claim. Accordingly, Clear Channel's motion for summary judgment is granted as to NIPP's monopolization claim under *section 2 of the Sherman Act*.

4. Section 2 of the Sherman Act: Attempted Monopolization

HN48[] In the Tenth Circuit, four elements must be proven to establish an attempt to monopolize under *section 2 of the Sherman Act*: (1) relevant market, including both geographic and product market, in which the **[**141]** alleged attempt occurred; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such attempt. *Colo. Interstate Gas, 885 F.2d at 693*. Additionally, any plaintiff seeking treble damages under *section 4 of the Clayton Act* must show antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*. Here, plaintiffs have already demonstrated sufficient evidence that the relevant market is the market for rock concerts. Plaintiffs must, therefore, have sufficient evidence of the other three elements for a reasonable jury to find Clear Channel liable for attempted monopolization under *section 2 of the Sherman Act*.

a. Probability of Success in Monopolization: Market Power

HN49[] In order to satisfy the dangerous probability of success element on an attempt claim, the plaintiff must show that there is a dangerous probability that defendant will achieve monopoly status as the result of the predatory conduct alleged by the plaintiff. *Colo. Interstate Gas, 885 F.2d at 693*. Because we are talking **[**142]** about probabilities, it is not necessary for the defendant to already possess monopoly power in the target market. *Multistate Legal Studies, 63 F.3d at 1554*. Factors to be considered in determining dangerous probability include (1) the defendant's ability to control prices ***or*** exclude competition, (2) defendant's market share, (3) the number and strength of other competitors, or whether defendant is a multimarket firm, (4) market trends, and (5) entry barriers. *Full Draw, 182 F.3d at 756* (citing *Bacchus Indus., 939 F.2d at 894*). Where predatory pricing is alleged, the defendant's financial strength and ability to absorb losses are also relevant. *Multistate Legal Studies, 63 F.3d at 1554* (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2589*). The court addresses each consideration, in turn.

(1) Raise Prices or Exclude Competition

HN50[] To demonstrate 'market power,' a plaintiff may show evidence of power to control prices ***or*** exclude competition. *Reazin, 899 F.2d at 966*. NIPP has demonstrated that Clear Channel may have the ability to control prices and/or **[**143]** exclude competition. One measure of a firm's ability to monopolize is the ***persistence*** of a firm's ability to profitably charge monopoly prices. *Colo. Interstate Gas, 885 F.2d at 695*. If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm does not possess the degree of market power required for attempted monopolization. *Id. at 693*. To justify a finding that a defendant has the power to persistently control prices, entry barriers must be significant -- they must be capable of constraining the normal operation of the market so that the problem is unlikely to be **[*1100]** self-correcting. *Rebel Oil Co., 51 F.3d at 1439*. If entry barriers exist, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. *Microsoft, 253 F.3d at 51*. When evidence shows that a firm has in fact profitably done so, monopoly power exists. *Id. at 51*.

NIPP points to testimony and expert analysis in the record showing that barriers to entering the rock concert industry are significant. To NIPP, these barriers to entry include relationships **[**144]** with rock industry insiders, including rock artists, Clear Channel's ownership of rock radio stations and commensurate access to rock radio promotional support and rock radio air play, Clear Channel's ownership of venues in Denver and nationwide, Clear Channel's accumulated customer goodwill, Clear Channel's large, national size, and Clear Channel's significant capital. (Pls.' Resp. at 69.) Potentially, a reasonable jury could find that such barriers are capable of constraining the normal operation of the rock concert market, allowing Clear Channel to charge monopoly prices persistently. *Multistate Legal Studies, 63 F.3d at 1555*.

Secondly, NIPP asserts that Clear Channel has actually charged prices above the competitive level. The ability to raise prices above the industry average while increasing market share demonstrates entry barriers and a potential ability to control prices. Dr. Phillips, NIPP's expert, points to pricing patterns that demonstrate that Clear Channel has raised ticket prices high above the industry average and increased its market share simultaneously. (Defs.' Br., Ex. A-8 [Prelim. Economic Report of Phillips at 25-26].) According to NIPP's expert **[**145]** and available Pollstar data, from 2000 to 2001 the average increase in the price of rock concert tickets in the Denver area was 3.7%. (Defs.' Br., Ex. A-8 [Prelim. Economic Report of Phillips at 25-26].) Consistent with this average, NIPP raised the price of its rock concert tickets by 3.8%. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) Similarly, in 2001, House of Blues raised its rock concert tickets by 2.2%. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) Clear Channel rock concert ticket prices, however, increased at a rate high above the industry average. Rock concerts promoted by Clear Channel Concerts/Clear Channel Radio Festivals experienced a 46.5% increase, and rock concerts promoted by SFX/Clear Channel Entertainment increased by 23.5%. (*Id.,* Ex. A-8 [Prelim. Economic Report of Phillips at 25, Ex. E].) Despite these above market average price increases, Clear Channel still increased its market share, according to Dr. Phillips, from .27% to 43.81%. (Pls.' Resp., Exs. Vol. I, Ex. 1 [Phillips Decl., Table 5].)

Clear Channel argues that this data is invalid and should not be considered by the court because it does **[**146]** not take into account the quality of the artist being promoted, and the concomitant greater costs to the promoter to produce the concert. (Defs.' Br. at 58-59.) As pointed out by Clear Channel, the more popular the rock artist, the more the concert promoter is forced to bid on the right to promote the artists concert. (*Id.*) Higher bidding results in higher costs to the concert promoter and, hence, a higher ticket price. (*Id.*) Clear Channel, therefore, argues that NIPP's pricing data is of no use in proving attempted monopolistic pricing because the data does not consider the costs incurred by Clear Channel, as opposed to NIPP or House of Blues. (*Id.*) Monopoly power is "the ability to profitably raise price above marginal cost." (*Id.* at 59.)

To the extent that NIPP argues that Clear Channel's prices are above industry average based on a comparison between average ticket prices charged in a given year by Clear Channel versus average **[*1101]** ticket prices charged by other promoters, Clear Channel is correct that NIPP's failure to consider the different costs born by Clear Channel is fatal to NIPP's argument. If Clear Channel promotes all of the most expensive, top artists, Clear **[**147]** Channel's ticket prices will be higher than tickets sold by other promoters, and this price difference does not indicate monopolistic pricing or conduct.

To the extent, however, that NIPP attempts to show that Clear Channel's prices are above industry average based on a comparison between the percentage increase in prices charged by Clear Channel versus the percentage increase in prices charged by other promoters, NIPP's failure to consider the different costs is not detrimental to their argument for two reasons. First, in 1999, SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals arguably promoted rock artists of equal or greater quality in the eyes of consumers than the rock artists they promoted in 2001. (Defs.' Br., Ex. A-01 [List of Concerts and Promoters from 1995-2001].) In

1999, SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals solely promoted the Rolling Stones, Limp Bizkit, and Bonnie Raitt, three arguably top quality performers. (*Id.,* Ex. A-01 [List of Concerts at 53, 57, 60].) In 2001, they promoted some rock performers that are arguably equally popular, such as U2 and Bob Dylan, but also **[**148]** some arguably less popular performers, such as Echo and the Bunnymen and Dark Star Orchestra. (*Id.,* Ex. A-01 [List of Concerts at 83, 90, 95, 98].) Assuming Clear Channel promotes artists of equal popularity and, hence, quality every year, a dispute of a material fact which increases Clear Channel's costs, this does not explain why Clear Channel Concert's costs may have risen by 45%, while everyone else's rose by approximately 3%. It does not appear that the popularity of artists promoted by Clear Channel corresponds to a 45% increase in price.

Second, the fact that NIPP's expert did not consider Clear Channel's costs in attempting to show monopolistic pricing is not fatal to NIPP's claim because NIPP claims that Clear Channel creates its own higher costs by upbidding the costs of artists in order to eliminate competition. (Pls.' Resp., Exs. Vol. 1, Ex. 4 [Mickelson Decl. PP5-6, 10].) If Clear Channel engages in this predatory bidding in order to raise costs and drive competition from the market, as alleged by NIPP, evidence of Clear Channel's higher costs does not necessarily show that Clear Channel's increase in ticket practices is unrelated to monopolistic activity. Although **[**149]** ticket prices vary according to the public's perception of the quality of the artist, the ticket prices also vary based on the amount of money the promoter is willing to bid on the artist. Because costs of artists are disputably manipulated by Clear Channel, NIPP need not necessarily include costs to demonstrate monopolistic pricing. Thus, material disputes of fact exist as to Clear Channel's ability to control prices in the rock concert market.

HN51[] Another factor indicative of a defendant's probability of success in monopolization is the defendant's ability to exclude competition and thereby control output. *Reazin, 899 F.2d at 966*. If the predator has control of market-wide output at the supply level, other firms cannot increase their output because they have no access to the necessary inputs to increase output. *Id.* When a business firm is in a position to use its leverage over one industry in order to exclude or slow down the development of additional competitors in another industry, the business firm may have the power to exclude competition and, therefore, market power. *Reazin, 899 F.2d at 970*; *Full Draw, 182 F.3d at 757*.

[*1102] Here, **[**150]** as stated earlier, NIPP has effectively demonstrated that Clear Channel's control of the rock radio industry in Denver gives it the ability to limit other promoters' access to rock artists and rock radio promotional support, two inputs that are disputably necessary for the output of rock concerts. NIPP has cited electronic mail messages from O'Connor and others showing Clear Channel's ability and willingness to deny radio promotional support to other promoters and to manipulate artists with threats of lost air play. (Pls.' Resp., Exs. Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001], Ex. 55 [Letter from Sievers to Michael Papale of 6/27/2000], Ex. 55A [Letter from Sievers to Saunders of 8/22/2000], Ex. 43 [Electronic Mail Message from Sievers to Saunders of 8/25/2000], Ex. 43A [Electronic Mail Message from Sievers to O'Connor].) Accordingly, a dispute of material fact exists as to whether Clear Channel has the ability to control output and exclude competition in the rock concert market.

(2) Market Share

HN52[] The likelihood of successful monopolization is **[**151]** typically evaluated by examining the defendant's share of the relevant market. *Colo. Interstate Gas, 885 F.2d at 693*. The plaintiff must show that there is a dangerous probability that the defendant's conduct will propel it from a non-monopolistic market share to a market share that is large enough to constitute a monopoly. *Id. at 693*. The higher the firm's initial market share, the more likely it will eventually gain monopolistic control over the market. *Id. at 694*. Market share is relevant but not conclusive as to the existence of market power. *Reazin, 899 F.2d at 966*.

Here, NIPP has set forth evidence that Clear Channel holds a 50.48% share of the market for rock concerts. (Pls.' Resp., Exs. Vol. I, Ex. 1 [Phillips Decl., Table 5].) ***HN53***[] A market share of 41% indicates that a firm has substantial economic power in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels. *Colo. Interstate Gas, 885 F.2d at 694*; see also *Rebel Oil, 51 F.3d at 1438* (holding that a market share of 44% is sufficient as a matter of law to support a finding **[**152]** of market power, if entry barriers are high and competitors are unable to expand their output in response to supercompetitive pricing). Accordingly, Clear Channel's market share, construed in the light most favorable to NIPP, supports NIPP's claim for attempted monopolization.

(3) Defendants' Resources & Competitors

NIPP has produced evidence that Clear Channel is a multimarket firm with significant market power in other cities across the United States and significant resources to absorb short term losses. NIPP has also shown that, as of December 31, 2001, Clear Channel controlled more than 100 venues for live entertainment performances in the country and accounted for 70% of concert ticket revenue in the United States. (Pls.' Resp., Exs Vol. 3., Ex. 78 [Clear Channel 2001 Annual Report], Exs. Vol. 4, Ex. 87 [Clear Channel 2001 Shareholder's Report].) Based on the record, it is clear that Clear Channel has significant economies of scale in its chosen industries.

Clear Channel's sheer size dwarfs all other concert promoters in the Denver area. Although SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals have a large number of competitors **[**153]** in the Denver metropolitan market, few of these competitors have a fraction of the market **[*1103]** share or financial strength of Clear Channel. Additionally, unlike Clear Channel, these competitors own no rock radio stations, further hindering their access to inputs readily available to SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals for the production of rock concerts. Based on a review of the record, therefore, the court concludes that Clear Channel's financial strength, multimarket domination, and competitors in the Denver market support NIPP's claim for attempted monopolization.

(4) Market Trends

HN54[] Market trends may demonstrate a probability of success in monopolization. Specifically, when the defendant's market share grows significantly in a short period of time, while the market share of its major competitors shrinks significantly in a short period of time, a probability of monopolization may exist. *Multistate Legal Studies, 63 F.3d at 1554-1555*. Here, NIPP has set forth evidence that Clear Channel's share of revenue in the rock concert market rose from .45% in 1999 to over 50.48% in 2001. [8] (Pls.' Resp., Exs. Vol. **[**154]** 1, Ex. 1 [Phillips Decl., Table 5].) Additionally, NIPP and House of Blues' market shares shrunk during that time period. (*Id.,* Exs. Vol. 1, Ex. 1 [Phillips Decl., Table 5].) That Clear Channel entered the marketplace and immediately propelled itself to this high market share supports NIPP's claim for attempted monopolization.

(5) Entry Barriers

HN55[] Entry barriers are relevant to the analysis of market power because the significance of market power depends upon its durability. *Reazin, 899 F.2d at 968*. Entry barriers are particular characteristics of a market which impede entry by new firms into that market. *Id.* They may include high capital costs or regulatory or legal requirements such as patents or licenses. *Id.* Other examples include: (1) control over an essential or superior resource, (2) entrenched buyer preferences, **[**155]** and (3) high capital costs for new entrants.*Id.* When significant and continuing barriers to entry are present, substantial market power can persist unimpeded. *Id.*

NIPP claims that the barriers to entry include (1) Clear Channel's ownership of rock radio stations and commensurate access to rock radio promotional support and air play, (2) relationships with rock industry insiders, including rock artists, (3) Clear Channel's ownership of venues in Denver and nationwide, (4) Clear Channel's accumulated customer goodwill, (5) Clear Channel's large, national size, and (5) Clear Channel's significant capital. (Pls.' Resp. at 69.) Importantly, NIPP emphasizes the difficulty for any promoter to obtain a rock radio station due to the significant cost of purchasing a station and the licensing requirements to operate a station. (*Id.*) A reasonable jury could find that such barriers are capable of constraining the normal operation of the rock concert market. *Multistate Legal Studies, 63 F.3d at 1555*.

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[8] NIPP calculates Clear Channel's share of the rock concert market in 1999 by examining the shares of Clear Channel, Jacor Communications, and SFX combined.

HN56[] Entry barriers may also be created by the defendant's conduct itself. *Full Draw, 182 F.3d at 756*. For example, an organized boycott of the plaintiff's **[**156]** product may constitute an entry barrier that confirms the defendant's dangerous probability of monopolization. *Id.* Similarly, here, according to NIPP, Clear Channel has allegedly utilized an illegal tying arrangement to limit other promoters' access to artists. This limited access to artists is a legitimate entry barrier, if proven.

[*1104] Clear Channel argues that the high numbers of concert promoters in the Denver area demonstrate that significant entry barriers do not exist in the relevant market. (Defs.' Br. at 53.) HN57[] The number of competitors does not conclusively show a lack of entry barriers, however. *Rebel Oil Co., 51 F.3d at 1440*. Likewise, the fact that entry has occurred does not preclude the existence of significant entry barriers. *Id. at 1440*. If the output of the new entrant is insufficient to take significant business away from the predator, the entrant is unlikely to represent a challenge to the predator's market power. *Id.* Indeed, the important inquiry regarding competitors is whether any competitors approach Clear Channel's financial strength in the relevant market. *Reazin, 899 F.2d at 971*.

Based on a review of the **[**157]** record, the court concludes that no promoters approach the financial strength or current market share of Clear Channel. As evidence of significant entry and competition in the rock concert market, Clear Channel states that the following promoters entered the rock concert industry in 2001: Alex Crothers, Eric Pirritt, Jason Colter, Soda Jerk Presents, Concerts West, and Jam Productions. (Defs.' Br. at 53.) Of these six promoters, however, four, Crothers, Pirritt, Colter, and Soda Jerk, combined to grab a mere .7% of the market. (Pls.' Resp., Exs. Vol. 1, Ex. 1 [Phillips Decl., Table 6].) Although Concerts West posted a 4.63% market share in 2001, it has since completely exited the Denver market. (*Id.* at 71, Exs. Vol. 1., Ex. 2 [Morreale Decl. P31].) Similarly, while Jam Productions held a 14.91% market share in 2001, this share was due solely to a single concert, the Eagles Concert that opened Invesco Field at Mile High, and Jam exited the market immediately thereafter. (*Id.* at 71, Exs. Vol. 1, Ex. 4 [Mickelson Decl. P13].) Whether the brief entry and hurried exit of Concerts West and Jam Productions demonstrates additional entry barriers or the opposite is a question **[**158]** of fact for the jury. The sole remaining promoters that booked over $ 250,000 in 2001 are NIPP, House of Blues, and Clear Channel, and, since 1999, Clear Channel's share of the rock concert market has increased, while that of NIPP and House of Blues has decreased. (*Id.,* Exs. Vol. 1, Ex. 1 [Phillips' Decl., Table 5].)

Finally, Clear Channel argues that the entry barriers alleged by NIPP exist for entering the concert market as a whole but not for entering the rock concert market specifically. (Defs.' Br. at 51, 54.) According to Clear Channel, therefore, NIPP has failed to demonstrate any barriers to entry into the rock concert market. (*Id.*) While some of the entry barriers set forth by NIPP pertain to the concert market as a whole, many of the alleged barriers apply solely to the rock concert market. For example, ownership of a rock radio station, and the commensurate access to rock artists and rock radio promotional support, is not a barrier to entering the country music concert market, but only the rock concert market. Similarly, relationships with rock industry insiders and artists is an entry barrier to the rock concert market and not the general concert market.

Furthermore, **[**159]** just because a barrier to entry exists for entry into the all music concert market does not mean it cannot also be a barrier to entry for the rock concert market. Specifically, that Clear Channel owns numerous venues nationwide is a deterrent for newcomers' entry into the rock concert market, just as it is a deterrent to entry into the general concert market. The same holds true for Clear Channel's financial strength. Clear Channel's economies of scale make entry into the rock concert market difficult because of Clear Channel's hold on rock radio. Thus, NIPP has demonstrated sufficient **[*1105]** disputes of material fact as to entry barriers to support its claim for attempted monopolization. Accordingly, plaintiff has satisfied its burden on summary judgment to show Clear Channel's probability of success in monopolization.

b. Specific Intent

HN58[] After a plaintiff has defined the relevant market and shown a probability of success in monopolization, the third element that must be proven by plaintiff is the specific intent to monopolize. *Colo. Interstate Gas Co., 885 F.2d at 693*. Specific intent to monopolize is a necessary element of an "attempt to monopolize" claim under **[**160]** *section 2*. *Aspen Skiing, 472 U.S. at 601, 105 S. Ct. at 2857*. Improper exclusion is always deliberately intended. *Id. at 601, 105 S. Ct. at 2856*.

Here, NIPP has set forth sufficient evidence of improper exclusion, as demonstrated throughout this order, to create a question of fact regarding Clear Channel's specific intent. Additionally, electronic mail messages between Michael O'Connor and Clear Channel personnel indicate that Clear Channel had the specific intent to deny radio promotional support and advertising to other promoters, despite the fact that providing the support would have financially benefitted the radio stations. (Pls.' Resp., Exs. Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001].) Clear Channel's decision against its own financial interest demonstrates an intent to monopolize because Clear Channel would rather injure its competitors reap monopoly profits in the long run than gain benefits in the short run. Similarly, electronic mail messages between O'Connor and record label personnel create a dispute of fact as to whether **[**161]** Clear Channel had the specific intent to manipulate artists with threat withholding radio air play. (*Id.,* Exs. Vol. 3, Ex. 55 [Letter from Sievers to Michael Papale of 6/27/2000], Ex. 55A [Letter from Sievers to Saunders of 8/22/2000], Ex. 43 [Electronic Mail Message from Sievers to Saunders of 8/25/2000], Ex. 43A [Electronic Mail Message from Sievers to O'Connor].)

c. Anticompetitive Conduct

HN59[] The final element of an attempted monopolization claim is proof that the defendant engages in anticompetitive conduct. *Colo. Interstate Gas Co., 885 F.2d at 693*. Anticompetitive or exclusionary conduct under *section 2* is "conduct constituting an abnormal response to market opportunities." *Multistate Legal Studies, 63 F.3d at 1550*. Such predatory practices are illegal if the conduct appears reasonably capable of contributing to the creation or maintenance of monopoly power, ***and*** the practices (1) do not constitute competition on the merits ***or*** (2) are more restrictive than reasonably necessary for competition. *Id.* A defendant may avoid liability by showing a legitimate business justification for the conduct. *Id.* **[**162]** If, however, the defendant adopts its policies and engages in certain conduct as part of a scheme of willful acquisition of monopoly power, it violates *section 2* of the Sherman Act. *Eastman Kodak, 504 U.S. at 483, 112 S. Ct. at 2090* (citations omitted). Specifically, "[anticompetitive] conduct [is that conduct] directed toward competitors and . . . intended to injure competition." *Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1353 (Fed. Cir. 1999)*.

NIPP alleges several different instances of anticompetitive conduct by Clear Channel and argues that this conduct, taken as a whole, demonstrates attempted monopolization. (Pls.' Resp. at 80-81.) First, NIPP alleges that Clear Channel withholds rock radio advertising and promotional support to its promoter competitors and the artists the promoters seek to **[*1106]** promote. (*Id.* at 86.) Secondly, NIPP claims that Clear Channel uses its power over the rock radio market in Denver as leverage to gain control over the rock concert business by baiting artists with radio air play and promotional support in order to get their promotion business. (*Id.* at 83.) Third, NIPP alleges that Clear Channel engages in **[**163]** predatory pricing by intentionally bidding for artists at a rate high above the market rate in order to eliminate other promoters who do not have the financial strength to bear such costs; Clear Channel then allegedly passes these costs on the to the end-use rock concert ticket purchasers by charging monopolistic prices for concert tickets. (*Id.* at 89.) Finally, NIPP claims that Clear Channel has utilized wrongful means to steal NIPP's employees. (*Id.* at 81.) The court addresses each argument, in turn.

(1) Denial of Radio Advertising and Promotional Support

First, NIPP complains that Clear Channel's refusal to provide equal rock radio advertising and radio promotional support for other promoters is anticompetitive conduct. (*Id.* at 86.) NIPP presents evidence that, for rock concert promoters, rock radio advertising enables promoters to reach the exact end-consumer who prefers music by rock artists, during a moment in time when the end-consumer is enjoying listening to the very musical product that concert tickets also provide. Advertising on other format stations does not provide this reach. (Pls.' Resp., Ex. 2 [Morreale Decl. PP16-19], Ex. 4 [Mickelson Decl. **[**164]** P3], Ex. 22 [Loncao Dep. at 35-36], Ex. 39 [Sievers Dep. 101-102].) Similarly, advertising in newspapers or magazines, or on television stations, even if these forms of media are targeted to rock audiences, do not carry the advertisement for a concert to an end-consumer who necessarily is enjoying at that moment the very product advertised. According to NIPP, therefore, Clear Channels' refusal to provide this advertising and promotional support is anticompetitive conduct.

Clear Channel makes several counterarguments to this proposition. First, Clear Channel argues that its radio stations do not have to accept paid advertising from promoters because the antitrust laws do not compel a company to do business with competitors. (Defs.' Br. at 66.) ***HN60***[] All business firms have a right to select their customers and associates and to refuse to deal with others. *Aspen Skiing, 472 U.S. at 601, 105 S. Ct. at 2856*. Additionally, there is no duty to cooperate with one's competitors. *Id. at 601, 105 S. Ct. at 2856*. [9] The antitrust laws protect competition but not individual competitors. *Intergraph, 195 F.3d at 1354*. The absence of a duty to cooperate, **[**165]** however, does not mean that the refusal to deal never gives rise to antitrust liability. *Aspen Skiing, 472 U.S. at 601, 105 S. Ct. at 2856*. After all, most rights are qualified. *Id.* Under *section 2 of the Sherman Act*, the right of the business firm to exercise independent discretion as to the parties with whom it will deal is circumscribed when the firm intends the behavior to create or maintain a monopoly. *Id.* Additionally, the behavior is anticompetitive when it injures competition in the market. *Intergraph, 195 F.3d at 1360*.

Here, NIPP has presented sufficient evidence that Clear Channel's refusal **[**166]** to accept paid advertising is founded upon an **[*1107]** intention to create monopoly power for itself in the rock concert promotions market. As shown earlier in electronic mail messages, Michael O'Connor asked his station personnel to refuse advertising for promoters competing with SFX/Clear Channel Entertainment and/or Radio Festivals. This refusal to deal may not be in the commercial best interest of Clear Channel's radio stations because, as O'Connor himself testified, providing radio advertising and radio promotional support benefits the radio stations. (Defs.' Br., Exs. Vol. 2, Ex. A-24 [O'Connor Dep. at 385-386].) Assuming that the refusal to deal is not in the best commercial interests of the radio stations, an inference could be made that the refusal supports other, more sinister motives, such as the creation of a monopoly. Additionally, Clear Channel's refusal to deal, as defined in O'Connor's electronic mail message to Clear Channel personnel, is not a refusal to deal with an individual competitor, but a refusal to deal with all competitors in the rock concert promotions market. Finally, NIPP has demonstrated evidence of marketwide injury by showing an increase in ticket prices and **[**167]** a decreasing market share for all of Clear Channel's competitors in the rock concert market, not just a single, individual competitor.

Second, Clear Channel argues that Clear Channel does not have to offer its competitors free radio promotional support because "no case has held that . . . the provision of special or privileged treatment to a legal adversary can be compelled on a refusal to deal antitrust premise. (Defs.' Br. at 73 [citing *Intergraph, 195 F.3d at 1358*].) According to Clear Channel, it has the right to refuse to offer its free promotional services to other promoters as part of its independent discretion. (*Id.*) Free promotional support is not special treatment because the radio stations have historically provided it to all promoters; it is not special but a typical exchange that occurs in the business. This refusal is, arguably, in the worst interest of Clear Channel radio stations, which demonstrates an intent to monopolize. Additionally, what Clear Channel characterizes as free promotional support could equally be characterized as an exchange of consideration, since both the radio stations and the promoters benefit form promotional support. The **[**168]** fact that Clear Channel labels the promotional support as free, therefore, does not affect the analysis for antitrust purposes.

In support of its position that Clear Channel is not required to give its competitors access to radio advertising and promotional support, Clear Channel cites the *Intergraph* case for the proposition that its behavior is not anticompetitive. (Defs.' Br. at 65-68.) Clear Channel's reliance on *Intergraph* is misplaced, however. In *Intergraph,* Intergraph, a manufacturer of computer modems, which purchased computer microprocessors for its modems from Intel, sued Intel for patent infringement. *Intergraph, 195 F.3d at 1350*. In retaliation for filing suit, Intel refused special benefits to Intergraph which Intergraph alone had previously enjoyed when purchasing Intel microprocessors, such as pre-release products and allocation of new products. *Id. at 1351*. Thereafter, Intergraph sued Intel for violation of the Sherman Act based on Intel's refusal to provide these benefits. *Id.*

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[9] ***HN61***[] Under *section 1 of the Sherman Act*, a business has the right to refuse to deal with whomever it likes as long as it does so independently, without conspiring with others. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*. Under *section 2*, however, independent action may form the basis of liability.

Although the Court of Appeals for the Federal Circuit ruled in Intel's favor, it did not do so, as alleged by Clear Channel, because a company **[**169]** has no duty to deal under antitrust laws. *Id.* Rather, the court found that Intel's refusal to deal was not anticompetitive conduct because Intel and Intergraph were not competitors in any market. *Id. at 1356*. Furthermore, the court found Intel's behavior was not anticompetitive because it only injured Intergraph **[*1108]** individually, as opposed to injuring an entire market. *Id.* Specifically, the court noted, "[anticompetitive] conduct [is only that conduct] directed toward competitors and . . . intended to injure competition." *Id. at 1353*. Additionally, the court noted that Intel's market strength was due to its superior product, not to the allegedly wrongful conduct of withholding benefits to Intergraph. *Id.*

Here, in contrast, Clear Channel's refusal to deal is directed against all competitors and, arguably, injures competition. Furthermore, NIPP claims that Clear Channel's refusal to deal is conduct that will impel Clear Channel to monopoly control over the market. *Intergraph* does not lead to the conclusion that Clear Channel's behavior is proper under the Sherman Act. Rather, it compels a trial on the issue of anticompetitive conduct **[**170]** in this case.

(2) Tying

NIPP alleges that Clear Channel has conditioned air play of rock artists' songs on their use of Clear Channel rock concert promotional services and that this "tie" amounts to anticompetitive conduct. (Pls.' Resp. at 83.) ***HN62***[] Illegal tie-ins under *section 1 of the Sherman Act* may also qualify as anticompetitive conduct for *section 2* purposes. *Multistate Legal Studies, 63 F.3d at 1550*. As stated earlier in this order, disputes of material fact exist as to whether Clear Channel engages in tying arrangements with record labels and artists. Accordingly, questions of fact exist as to whether Clear Channel engages in anticompetitive conduct under the Sherman Act.

(3) Predatory Pricing

Third, NIPP alleges that Clear Channel engages in predatory pricing by intentionally bidding for artists at a rate high above the market rate in order to eliminate other promoters who do not have the financial strength to bear such costs; Clear Channel then allegedly passes these costs on the to the end-use rock concert ticket purchasers by charging monopolistic prices for concert tickets. (Pls.' Resp. at 89.) ***HN63***[] Predatory pricing may qualify as anticompetitive **[**171]** conduct under *section 2* of the Sherman Act. *Multistate Legal Studies, 63 F.3d at 1550*. To be predatory, prices must be set below an appropriate measure of costs. *Id. at 1548-1549* (citing *Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587*). Accordingly, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. *Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587*.

The second prerequisite to holding a competitor liable under *section 2 of the Sherman Act* for predatory pricing is a dangerous probability of the rival's recouping its losses by charging supercompetitive, monopolistic prices. *Id. at 224, 113 S. Ct. at 2588*. Recoupment is the ultimate object of an unlawful predatory pricing scheme. *Id.* Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. *Id.* Where evidence indicates that a firm has in fact profitably charged monopolistic prices, the existence of monopoly power is clear. *Microsoft, 253 F.3d at 51.* **[**172]**

Here, NIPP has alleged that Clear Channel engages in a predatory pricing scheme by upbidding costs for artists, driving other promoters out of the market, and recouping its high costs by charging monopolistic prices to the end ticket purchaser. Although NIPP has presented evidence of allegedly monopolistic prices of end-use tickets, NIPP has not demonstrated predatory pricing in terms of the amounts paid in bids for the right to promote artists. NIPP has solely cited an interview from the Bill Moyers Show on **[*1109]** PBS as evidence that Clear Channel is upbidding the costs for artists. This is not sufficient to prove to a reasonable jury that Clear Channel consistently raises costs above market price by upbidding on artists. Because the price of artists is the price allegedly manipulated by Clear Channel, NIPP is required to introduce evidence of Clear Channel bidding above cost in order to state a claim for predatory pricing. *Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587*. Because NIPP has failed to do so, NIPP cannot prove predatory pricing as anticompetitive conduct.

(4) Stealing Employees

Finally, NIPP alleges that Clear Channel engages in anticompetitive **[**173]** behavior in the market for concert promotion employees. ***HN64***[] Antitrust laws apply to restraints on competition in the non-unionized labor markets. *Brown v. Pro Football, Inc., 311 U.S. App. D.C. 89, 50 F.3d 1041, 1054 (D.C. Cir. 1995)* (citing *Radovich v. NFL, 352 U.S. 445, 449-452, 77 S. Ct. 390, 392-394, 1 L. Ed. 2d 456 [1957])*. Accordingly, if Clear Channel engages in conduct that injures competition in the labor market, the conduct is anticompetitive and grounds for liability under *section 2 of the Sherman Act*.

Here, NIPP cites one incident, when Clear Channel lured an NIPP employee, Michael DuCharme, NIPP's media director and part-time talent buyer, away from NIPP to work for Clear Channel. (Pls.' Resp. at 27-28.) Specifically, NIPP complains that, after Clear Channel had secretly hired DuCharme, DuCharme and others entered NIPP's offices at night and removed and destroyed various files. (*Id.* at 28.) Additionally, NIPP alleges that DuCharme took NIPP business to Clear Channel. (*Id.*) To NIPP, this behavior constitutes anticompetitive conduct.

Although NIPP may feel betrayed by DuCharme and Clear Channel's actions, these actions encapsulated **[**174]** in a single event do not amount to anticompetitive conduct. Importantly, ***HN65***[] antitrust laws are not concerned with conduct's effect on individual competitors, only its effect on competition. *Reazin, 899 F.2d at 960*. This single event is not alleged to have injured competition in the concert promotion labor market. Rather, it involved a single employee and effected a single competitor, NIPP. Because the conduct amounts to a single isolated event, which had no effect on competition in any market, Clear Channel's hiring of DuCharme cannot form the basis for an attempted monopolization claim under *section 2 of the Sherman Act*.

Despite NIPP's failure to demonstrate anticompetitive conduct through Clear Channel's employment practices or predatory pricing alone, the individual aspects or events of a defendant's conduct viewed in isolation need not be supported by sufficient evidence to amount to a *section 2* violation for liability to exist. *Aspen Highlands, 738 F.2d at 1522 n.18*; 2 Phillip E. Areeda, Roger D. Blair & Herbert Hovenkamp, ***Antitrust Law*** P310, at 147 (2d ed. 2000). Rather, it is enough that the incidents taken together as a whole create sufficient **[**175]** evidence of attempted monopolization. *Id.* Based on a review of the entire record of alleged anticompetitive conduct, taken as a whole, the court concludes that NIPP has demonstrated sufficient evidence of attempted monopolization that a reasonable jury could find in favor of NIPP. Accordingly, summary judgment for Clear Channel on this claim is inappropriate.

5. Section 2 of the Sherman Act: Essential Facility

NIPP's final antitrust claim arises under section 2 of the Sherman Act for violation of the essential facilities doctrine. **[*1110]** NIPP claims that Clear Channel violated the essential facilities doctrine by denying rock radio advertising and promotional support to other non-Clear Channel promoters' for their rock concerts. (Pls.' Resp. at 96-100.) As stated earlier, a business firm is generally free to choose the parties with whom it will deal, in the absence of any purpose to create or maintain a monopoly or competitive injury. *Aspen Skiing, 472 U.S. at 601, 105 S. Ct. at 2856*. ***HN66***[] A firm's refusal to sell or provide its products and services to a competitor, however, may rise to the level of an antitrust violation under the essential facilities doctrine, **[**176]** if the refusal is part of a vertical integration scheme calculated to drive a competitor out of business. *McKenzie v. Mercy Hosp. of Independence, Kansas, 854 F.2d 365, 368-369 (10th Cir. 1988)*, (*superseded on other grounds, Systemcare, 117 F.3d at 1137*). To establish liability under the doctrine, a plaintiff must show: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the facility; (3) the denial of the use of the essential facility to a competitor; and (4) the feasibility of providing the facility. *Id. at 369*. In order for an essential facilities claim to succeed, the defendant's power to exclude the plaintiff from such facility must amount to the power to eliminate meaningful competition in the downstream market. *Alaska Airlines, 948 F.2d at 544*. This power to eliminate competition must not be a momentary power, but must have relative permanence. *Id. at 544 n.11*. Additionally, plaintiff must have evidence that some competitors have been refused access to the facility. *Id. at 545*.

a. Control of an Essential Facility By a Monopolist

First, **[**177]** NIPP has set forth sufficient evidence to create a dispute of fact as to whether Clear Channel controls an essential facility in the form of rock radio in Denver. ***HN67***[] In order to show control, a plaintiff must define the relevant market and show that the defendant has an actual monopoly in that market. *Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 494 (4th Cir. 1996)*; *McKenzie, 854 F.2d at 369*. As stated earlier, NIPP has defined a relevant market for rock radio advertising and promotional support in Denver. Dr. Phillips, NIPP's expert witness, defined the scope of the rock radio advertising and promotional support market based on play list data, "duplicate cume" data, and radio station and industry materials.

Additionally, NIPP has demonstrated that Clear Channel may have monopoly power in this market. Monopoly power may be inferred from a firm's possession of a dominant share of the relevant market, which is protected by entry barriers. *Microsoft, 253 F.3d at 51*. Based on Dr. Phillips' calculations, Clear Channel controls at least four of the six rock radio stations in the Denver area, or 66.6%. (Defs.' Br., Ex. A-8 [Prelim. Economic **[**178]** Report of Phillips at 18]; Pls.' Resp., Ex. 1 [Phillips Decl. at 15].) If the number of listeners is considered, as reflected in advertising revenue for the rock radio stations and Arbitron data, Clear Channel controls 73% of the rock radio advertising and promotional support market. (Pls.' Resp. at 58, Ex. 1 [Phillips Decl. at 14].) A market share of 70% demonstrates monopoly power. *Colo. Interstate Gas, 885 F.2d at 694 n.18*. Similarly, NIPP has alleged significant entry barriers in the rock radio market, including license requirements, high capital requirements, and significant customer goodwill. (Pls.' Resp. at 69.); *Reazin, 899 F.2d at 968*. Construing this data in the light most favorable to NIPP, Clear Channel's alleged market share of the rock radio industry demonstrates monopoly power in that market.

[*1111] The next issue is whether Clear Channel's monopoly power relates to a resource that is an essential facility for rock concert promotion. ***HN68***[] An essential facility is one that is essential to engage in meaningful competition in the market. *McKenzie, 854 F.2d at 369*. An essential facility need not be one that is indispensable; it **[**179]** is sufficient if denial of its use inflicts a severe competitive handicap on market entrants. *Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir. 1987)*.

NIPP argues that rock radio advertising and promotional support is essential to meaningfully compete in the rock concert market. Clear Channel make several counter-arguments. First, Clear Channel argues that other radio stations or forms of media, such as newspapers, magazines, and television, are just as effective as rock radio for advertising and promotional support. (Defs.' Br. at 76-77.) According to Clear Channel, therefore, rock radio is not essential to compete in the rock concert market. (*Id.*) Concerning this issue, NIPP presents evidence that, for rock concert promoters, rock radio advertising enables promoters to reach the exact end-consumer who prefers music by rock artists, during a moment in time when the end-consumer is enjoying listening to the very musical product that rock concert tickets also provide. According to testimony, advertising on other non-rock format stations does not provide this reach. (Pls.' Resp., Ex. 2 [Morreale Decl. PP16-19], Ex. 4 [Mickelson Decl. P3], Ex. 22 [Loncao **[**180]** Dep. at 35-36], Ex. 39 [Sievers Dep. 101-102].) Similarly, advertising in newspapers or magazines, or on television stations, even if these forms of media are targeted to rock audiences, do not carry the advertisement for a concert to an end-consumer who necessarily is enjoying at that moment the very product advertised. NIPP's evidence creates a genuine dispute of material fact as to whether rock radio advertising and promotional support differs enough from other advertising to create a distinct essential facility.

Secondly, Clear Channel argues that rock radio is not an essential facility to NIPP because NIPP did not utilize any rock radio advertising or promotional support for 73% of its concerts in 2001. (Defs.' Br. at 77 [citing Phillips' Rebuttal to Supp. Expert Report at A-11].) NIPP counters that, although rock radio advertising and promotional support is not essential for use on rock concerts that gross under $ 10,000, as many of the artists are not well-known, it is essential to for concerts that gross over $ 10,000. (Pls.' Resp. at 99.) According to NIPP, such advertising and promotional support is essential to meaningfully compete because concerts that gross over **[**181]** $ 10,000 account for the lion's share of NIPP's revenue. (*Id.*) Specifically, the 46 shows where NIPP used rock radio advertising and/or promotional support accounted for 73% of NIPP's gross ticket revenue in 2001. (Defs.' Br., Exs. Vol. 1, Ex. A-11 [Rebuttal to Supp. Expert Report of Gustavo E. Bamberger at 7].) Because the bulk of NIPP's revenue comes from rock concerts utilizing rock radio advertising and promotional support, NIPP has demonstrated sufficient disputes of fact as to whether rock radio is essential to meaningfully compete in the rock concert industry.

b. Competitor's Inability to Reasonably Duplicate Facility

HN69[] In order to prove an essential facilities claim, a plaintiff must secondly show that an alternative to the facility is not available, and the facility cannot be duplicated by plaintiff. *City of Chanute, Kansas v. Williams Natural Gas Co., 955 F.2d 641, 648 (10th Cir. 1992)*, (*overruled on other grounds, Systemcare, 117 F.3d at 1137*) (citing *Twin Labs, Inc. v. Wieder Health & Fitness, 900 F.2d 566, 568 [2d Cir.* **[*1112]** *1990])*. The test is not whether it would be impossible to duplicate the facility but **[**182]** whether it would be economically infeasible. *Fishman, 807 F.2d at 540*. The point of the essential facilities doctrine is that a market entrant should not be forced simultaneously to enter a second market, with its own large capital requirements. *Id.* Here, NIPP claims that rock concert promoters cannot feasibly enter the rock radio market because of the expense of acquiring a rock radio station and the strict FCC licensing requirements. The expense of purchasing and operating radio station shows that the essential facility cannot be duplicated.

c. Denial of Use of Facility to Competitor

HN70[] To establish the third element of an essential facilities claim, a plaintiff must show that the defendant did not provide access to the facility on reasonable, non-discriminatory terms. *City of Chanute, 955 F.2d at 648*. There need not be an outright refusal to deal in order to determine that denial of an essential facility has occurred. *Delaware & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 179-180 (2d Cir. 1990)*. To avoid liability, defendant must provide access to an essential facility "upon such just and reasonable terms and **[**183]** regulations as will . . . place every . . . company upon nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Id.* (citing *United States v. Terminal R.R. Ass'n, 224 U.S. 383, 411, 32 S. Ct. 507, 516, 56 L. Ed. 810 [1912])*.

Clear Channel argues that no denial has occurred because Clear Channel still permits NIPP to purchase advertising time and provides rock radio promotional support for NIPP's concerts. (Defs.' Br. at 78-79.) Although Clear Channel still allows some advertising and promotional support, NIPP sets forth evidence that Clear Channel has significantly raised the price of obtaining these services. According to NIPP's expert, Dr. Phillips, in 1999 NIPP received $ 48 worth of radio support for every $ 1 spent on radio advertising. (Defs.' Br., Exs. Vol. 1, Ex. A-11 [Rebuttal to Supp. Expert Report of Gustavo Bamberger].) In 2001, however, NIPP claims that NIPP received $ 9 worth of radio promotional support for every $ 1 spent on radio advertising. (*Id.,* Exs. Vol. 1, Ex. A-11 [Rebuttal to Supp. Expert Report of Gustavo Bamberger].)

Additionally, Clear Channel has informed its own **[**184]** personnel and record labels that outside promoters are discriminated against for radio time when compared to SFX/Clear Channel Entertainment and Clear Channel Concerts/Clear Channel Radio Festivals. (Pls.' Resp., Exs. Vol. 3, Ex. 41 [Electronic Mail Message from O'Connor to All Denver Clear Channel Radio Program Directors, Music Directors, and Promotions Directors of 6/19/2001], Ex. 75 [Electronic Mail Message from O'Connor to Clear Channel personnel of 7/11/2001], Ex. 94 [HOB Memoranda re: Stone Temple Pilots of 10/24/2000],.) Finally, NIPP presents evidence that Clear Channel has avoided giving NIPP promotional support on certain occasions for allegedly pretextual reasons. (Pls.' Resp., Exs. Vol. 4, Ex. 110 [Electronic Mail Messages Between Clear Channel and NIPP of 07/03/2001].) NIPP's evidence creates a dispute of material fact as to whether Clear Channel has denied other promoters access to rock radio advertising and promotional support on a discriminatory basis.

Clear Channel argues that a recent Supreme Court case, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, defeats NIPP's antitrust **[**185]** claim under the essential facilities doctrine. (Mot. by Defs. for Leave to **[*1113]** File Supplemental Briefs In Supp. of Mot. for Summ. J. Based on Recent Supreme Court Authority [filed February 20, 2004] [hereinafter "Mot. to File Supplement"].) In *Verizon,* the Supreme Court, in holding that a class of plaintiffs had no valid antitrust claim under the essential facilities doctrine, stated that "where access exists, the [essential facilities] doctrine serves no purpose." *Verizon, 124 S. Ct. at 881, 157 L. Ed. 2d 823*. According to Clear Channel, therefore, because NIPP still has access to paid advertising and a *de minimis* amount of unpaid promotional support, NIPP cannot invoke the essential facilities doctrine. (Mot. to File Supplement.)

However, a closer look at*Verizon* demonstrates that the case actually supports NIPP's claim under the essential facilities doctrine. In *Verizon,* a class of AT&T telephone customers sued Verizon under *section 2 of the Sherman Act* for failing to fill orders from AT&T for service on Verizon's network, as required under the Telecommunications Act of 1996. *Id. at 877*. Prior to the 1996 Act, Verizon was not **[**186]** required to give its competitors access to its local network and did not do so. *Id. at 876-877*. At the time of the filing of the lawsuit, the Federal Communications Commission had the day before disciplined and fined Verizon for failing to fill orders from AT&T and other LECs, as compelled by the 1996 Act. *Id. at 877*. The complaint alleged that Verizon's refusal to fill orders was a wrongful refusal to deal and denial of an essential facility. *Id. at 878*.

In analyzing the case, the Supreme Court first noted that ***HN71***[] the Sherman Act does not restrict a trader from refusing to deal with another party, except in narrow circumstances, such as those in the *Aspen Skiing* case. *Id. at 879* (citing *Aspen Skiing, 472 U.S. at 601, 105 S. Ct. at 2847*). The Court then distinguished the *Verizon* case from *Aspen Skiing* on the following basis.

First, the Court contrasted *Verizon* with *Aspen Skiing,* noting that Verizon had not engaged in a course of dealing with its rivals, and its prior conduct, therefore, did not shed light on whether its motivation in refusing to deal was prompted by competitive zeal or anticompetitive **[**187]** malice. *Id. at 880*. Additionally, in contrast to *Aspen Skiing,* the product offered by Verizon to its rivals was not offered to other customers. *Id.* Rather, it was only offered because of the force of statute. *Id.* The Supreme Court, in analyzing an essential facilities case, therefore, focused on the monopolistic intent of the defendant. In *Aspen Skiing,* the plaintiff prevailed because the defendant (1) refused to provide a product that it had in the past, despite the fact that defendant would benefit financially from the transaction, and (2) chose to thereby sacrifice short-term gains in hopes of making long term monopolistic profits. *Id at 879-880*. In *Verizon,* the plaintiffs failed because there was no evidence of monopolistic intent since no course of dealing profitable to *Verizon* had ever occurred; therefore, Verizon's conduct did not suggest a willingness to forsake short-term profits to achieve an anticompetitive end. *Id.* Here, NIPP alleges that Clear Channel provided advertising and concert promotional support in the past because concert promotions benefit the radio station as well as the promoter. Furthermore, NIPP claims that Clear Channel **[**188]** now refuses this support and sacrifices short-term gains in hopes of destroying other promoters and reaping long-term monopolistic profits. Clearly, the conduct alleged in this case bears striking resemblance to the refusal to deal in*Aspen Skiing,* conduct that the Supreme Court states is proscribed by the Sherman Act.

[*1114] Importantly, as well, although the Supreme Court in *Verizon* stated that the essential facilities doctrine serves no purpose when access to the facility exists, this statement was an explanation of why an "essential facilities claim should be denied where a state or federal agency has effective power to compel sharing and regulate its scopes and terms." *Id. at 881*. Because the Federal Communications Commission was compelling access to Verizon's network, plaintiffs could not bring a claim for denial of an essential facility under the Sherman Act. Here, no government agency is compelling Clear Channel to allow access to it airwaves. Rather, Clear Channel may freely restrict access and had done so already without hindrance of federal or state law. ***Antitrust law*** is the only mechanism by which Clear Channel's behavior may be policed. Accordingly, this court finds **[**189]** that Clear Channel's behavior does fall into the limited category of cases where refusal to deal implicates the Sherman Act.

d. Feasibility of Providing Facility

HN72[] The final element of an essential facilities claim is defendant's feasibility of providing the facility. Feasibility of providing the facility can be demonstrated by showing that defendant provided the facility on non-discriminatory terms in the past, and no intermittent business reason has arisen to justify an inability to provide the facility. *Delaware & Hudson Ry., 902 F.2d at 179*. Here, NIPP has demonstrated sufficient evidence that it is feasible for Clear Channel to provide rock radio advertising and promotional support to other promoters. Clear Channel has provided non-discriminatory access to rock radio in the past. Furthermore, as stated earlier, O'Connor admits that providing promotional support to concert promoters usually benefits the radio stations. Accordingly, no business justification on the radio side has arisen for refusing to provide promoters with access to advertising and promotional support. Accordingly, NIPP has demonstrated sufficient evidence of a viable claim for violation **[**190]**

of *section 2 of the Sherman Act* under the essential facilities doctrine. Summary judgment on this claim, therefore, is inappropriate.

B. Consumer Protection Act

Besides its state antitrust claims, NIPP makes three claims under state law. First, NIPP claims that Clear Channel violated Colorado's Consumer Protection Act ("CCPA"), *Colo. Rev. Stat. § 6-1-105*, by disparaging NIPP to its record label and artist customers. Specifically, NIPP claims that personnel at KBCO informed John Hiatt's manager that KBCO would not promote John Hiatt because NIPP does not pay its bills to KBCO for advertising time. (Pls.' Resp. at 102.) Additionally, NIPP alleges that Michael O'Connor of Clear Channel Radio informed the senior vice president of Roadrunner Records that NIPP did not contact KBPI in attempts to get KBPI to promote the Tattoo the Earth Tour, despite the fact that NIPP did do so. (*Id.*)

HN73[] A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person "disparages the goods, services, property, or business of another by false or misleading representation of fact." *Colo. Rev. Stat. § 6-1-105(1)(g)* **[**191]** . In order to show violation of the CCPA, plaintiff must demonstrate that (1) defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally **[*1115]** protected interest; and (5) the challenged practice caused the plaintiff's injury. *Hall v. Walter, 969 P.2d 224, 235 (Colo. 1998)*. Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. *Colo. Rev. Stat. § 6-1-105(2)*.

Although NIPP has arguably met the first three factors in proving a claim, NIPP has utterly failed to show any injury to NIPP's reputation or business. NIPP has adduced no testimony that any record label or artist changed its opinion of NIPP or decided not to do business with NIPP as a result of the alleged representations. NIPP has only provided the self-serving deposition testimony of Douglas Kauffman **[**192]** that record labels, artists, and their managers generally would likely lose faith in NIPP based on these representations. (Pls.' Resp., Ex. 19 [Kauffman Dep. at 177-178].) Accordingly, Clear Channel's motion for summary judgment is granted as to NIPP's claim for violation of the Colorado Consumer Protection Act.

C. Tortious Interference with Contractual Relations

NIPP's second state law claim, other than antitrust, is a claim for tortious interference with contractual relations. ***HN74***[] One who intentionally and improperly interferes with the performance of a contract between another and a third party by causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. *Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207, 210 (Colo. 1984)* (quoting *Restatement (Second) of Torts § 766* [1977]). In order to prove tortious interference with contract, a plaintiff must show: (1) a contract existed; (2) the defendant had knowledge of the contract; (3) the defendant interfered **[**193]** and induced the other party to breach the contract; and (4) the plaintiff was injured as a result. *Westfield Dev. Co. v. Rifle Inv. Assoc., 786 P.2d 1112, 1117 (Colo. 1990)* (en banc). Most importantly, the interference must be intentional and improper. *Amoco Oil Co. v. Ervin, 908 P.2d 493, 501 (Colo. 1996)* (en banc) (citing *Restatement (Second) of Torts § 767 cmt. a*).

Here, first, NIPP alleges that Clear Channel interfered with NIPP's at-will employment contract with Michael DuCharme by hiring DuCharme away from NIPP. (Pls.' Resp. at 103.) Clear Channel counters that NIPP has failed to state a claim in relation to DuCharme's employment because DuCharme's employment was at-will, and Clear Channel did not cause DuCharme to *breach* any contract. (Defs.' Br. at 84.) Contrary to Clear Channel's argument, ***HN75***[] "even a contract terminable at will is entitled to some protection from tortious unwarranted interference." *Zappa v. Seiver, 706 P.2d 440, 442 (Colo. Ct. App. 1985)*. Nevertheless, as stated earlier, ***HN76***[] for liability to descend on defendants, the interference with the at-will contract must have been improper. **[**194]** *Ervin, 908 P.2d at 501*. Interference with a contract is not improper when it involves a matter of competition between the parties. More specifically, a defendant who intentionally causes a third person to breach a contract with the plaintiff does not engage in improper conduct if: (1) it concerns a matter of competition between the defendant and plaintiff; (2) the defendant does not employ wrongful means; (3) the action does not amount to an unlawful restraint of trade; and (4) the defendant's purpose is, at least in part, to advance its own interest. *Ervin, 908 P.2d at 501* (citing *Restatement (Second) of Torts § 768*). 'Wrongful means' include physical violence, fraud, civil suits, and criminal prosecutions. **[*1116]** *Ervin, 908 P.2d at 502* (citing *Restatement [Second] of Torts § 768 cmt. e*).

Here, Clear Channel's behavior in luring DuCharme away from NIPP to work for Clear Channel was not improper. First, the interference concerns a matter of competition between NIPP and Clear Channel because NIPP and Clear Channel compete for concert promotions employees who have significant **[**195]** contacts in the music industry. Secondly, even if DuCharme snuck into the NIPP offices at night and removed various files improperly, NIPP has set forth no evidence that Clear Channel directed this behavior or utilized any other wrongful means in hiring DuCharme. Thirdly, hiring one employee away from a competitor does not amount to a restraint of trade because it does not injure competition, as explained earlier in this order. Finally, Clear Channel's purpose was to advance its own interest because DuCharme has many contacts in the music industry that might be utilized by Clear Channel. Accordingly, Clear Channel's motion for summary judgment is granted as to NIPP's tortious interference claim based on DuCharme's departure from NIPP.

NIPP secondly alleges that Clear Channel tortiously interfered with NIPP's contract with the band Lennon for Lennon to play at the Bluebird Theatre in February 2002. (Pls.' Resp. at 103.) Specifically, Jeffrey Pringle, the owner of the record label and management company Next Level Records, declares that he negotiated a contract with NIPP on behalf of Lennon, a band managed by Pringle, for promotion of a Denver concert in February 2002. (Pls.' Resp. **[**196]** , Ex. 6 [Decl. of Jeffrey Pringle P5].) Pringle further declares that, after confirmation of the concert, Lennon's record label, Arista Records, demanded that Pringle cancel Lennon's concert with NIPP to avoid losing radio air play for Lennon on KBPI, because Clear Channel had eliminated air play for other Arista artists booking with NIPP, like Adema. (*Id.,* Ex. 6 [Pringle Decl. PP6-7].) Pringle complied with Arista's request. (*Id.,* Ex. 6 [Pringle Decl. P7].)

Clear Channel counters that Pringle's declaration is inadmissible, because it is hearsay, and, therefore, cannot be used to create a dispute of material fact on summary judgment. Clear Channel is correct that the court may consider only admissible evidence when ruling on a summary judgment motion. *See* *World of Sleep, 756 F.2d at 1474*. ***HN77***[] A statement is not considered hearsay, however, if the significance of the statement lies solely in the fact that it was made, not in the truth of its contents. *Fed. R. of Evid. 801(c)* advisory committee note. Here, the statements made by Arista may be offered to show that Arista caused Pringle to breach the contract, because the statements **[**197]** are being offered to show that Arista made such statements to Pringle. The statements cannot be offered to show, however, that Clear Channel took air play away from Adema. NIPP, however, provides a declaration from Victoria Lovato with radio air play data attached from KBPI for Adema during the relevant time period. (Pls.' Resp., Ex. 8 [Decl. of Victoria Lovato, Ex. J].) This data confirms that Adema's air play was eliminated by Clear Channel after Adema signed with NIPP for a concert. Because portions of Pringle's testimony and radio air play data are admissible, NIPP has provided sufficient evidence to support its factual assertions.

More problematic, however, is whether NIPP's factual assertions regarding the Lennon concert are sufficient to support a claim for tortious interference with contract. As stated earlier, in order to prove tortious interference with contract, a plaintiff must show: (1) a contract existed; (2) the defendant had knowledge **[*1117]** of the contract; (3) the defendant interfered and induced the other party to breach the contract; and (4) the plaintiff was injured as a result. *Westfield Dev. Co., 786 P.2d at 1117*. Most importantly, the interference **[**198]** must be intentional and improper.*Id.* Here, assuming there was a contract, NIPP has presented no evidence that Clear Channel knew about the contract between Lennon and NIPP. In fact, Arista and Pringle's behavior seems to have been driven by a desire to prevent Clear Channel from learning about the contract between Lennon and NIPP. Because NIPP provides no evidence that Clear Channel had knowledge of the contract, an essential element of the claim, NIPP's claim for tortious interference with contract based on the Lennon contract fails. [10] Accordingly, Clear Channel's motion for summary judgment on that claim is granted.

[199]** ***D. Tortious Interference with Prospective Business Relations***

Clear Channel's final state law claim is for tortious interference with prospective business relations. ***HN78***[] Colorado has adopted the *Restatement (Second) of Torts §§ 766B, 767and 768* in determining whether a party is liable for intentional interference with prospective business advantage. *Ervin, 908 P.2d at 500-501* (citing *Restatement [Second] of Torts §§ 766B-768* [1979]); *Wasalco, Inc. v. El Paso County, 689 P.2d 730, 732 (Colo. Ct. App. 1984)*; *Dolton v. Capital Fed. Sav. & Loan Ass'n, 642 P.2d 21, 23 (Colo. Ct. App. 1981)*. ***HN79***[] To establish a claim for tortious interference with prospective business relations under Colorado law, a plaintiff must show ***intentional and improper*** interference with another's prospective contractual relation. *Dolton, 642 P.2d at 23* (citing *Restatement [Second] of Torts § 766B*) (emphasis added). For liability to attach, defendant's intentional and improper interference must either ***induce or cause*** **[**200]** the third party not to enter into or continue relations. *Wasalco, Inc., 689 P.2d at 732* (citing *Restatement [Second] of Torts § 766B*) (emphasis added). It is not necessary to prove an underlying contract. *Plaza Esteban v. La Casa Nino, Inc., 738 P.2d 410, 412 (Colo. Ct. App. 1987)*, (*rev'd on other grounds, 762 P.2d 669 [Colo. 1988]*). Rather, a continuing business or customary relationship, which includes a prospective quasi-contract, suffices to create rights against intentional interference. *Restatement (Second) of Torts § 766B cmt. c* (emphasis added).

NIPP points to several different incidents as evidence of tortious interference with prospective business relations. (Pls.' Resp., Ex. 2 [Morreale Decl. PP34-39].) Specifically, NIPP claims that Clear Channel tortiously interfered with NIPP's relationship with the bands Cold, Eve 6, the Toadies, and Puddle of Mudd, and the talent agencies The Agency Group, Evolution Talent, and Chaotica. (*Id.,* Ex. 2 [Morreale Decl. PP34-39].) NIPP's arguments related to Cold, the Toadies, and Puddle of Mudd fail **[**201]** because NIPP provides no admissible evidence that these bands discontinued relations with NIPP on account of Clear Channel or at all. NIPP's arguments related to the talent agencies also fail because NIPP provides no evidence that it has a customary relationship with these agencies, of the type that is protected against tortious interference. NIPP's only remaining evidence of intentional interference with prospective **[*1118]** business relationships is its experience with the band Eve 6.

In his declaration, Morreale of NIPP states that, on June 21, 2000, NIPP, in competition with Clear Channel, submitted a bid to promote Eve 6 for a July 14th concert in Denver. (*Id.,* Ex. 2 [Morreale Decl. P35].) Thereafter, Ken Fermaglich of the Agency Group, which represented Eve 6, informed Morreale that Eve 6 would have to use Clear Channel to avoid loss of air play. (*Id.,* Ex. 2 [Morreale Decl. P35].) Subsequently, the Agency Group awarded the Eve 6 concert to SFX/Clear Channel Entertainment. (*Id.,* Ex. 2 [Morreale Decl. P35].) Clear Channel argues that this evidence is inadmissible hearsay.

The court disagrees for two reasons. First, a statement is not considered hearsay if the significance **[**202]** of the statement lies solely in the fact that it was made, not in the truth of its contents. *Fed. R. of Evid. 801(c)* advisory committee note. Here, the statements made by Fermaglich may be offered to show that Fermaglich refused NIPP's bid based on a fear of losing air play. The statements cannot be offered to show, however, that Clear Channel took air play away from any other artists in retaliation for their failure to utilize Clear Channel promotions services. NIPP, however, provides a declaration from Victoria Lovato with radio air play data attached, which arguably demonstrates Clear Channel's practice of pulling radio air play for artists signing with NIPP. (Pls.' Resp., Ex. 8

[10] NIPP provides other alleged examples of interference with contract. (Pls.' Resp., Ex. 84 [Chart of Alleged Interference].) However, the chart set forth by NIPP contains merely conclusory allegations about interference and does not point to admissible evidence proving the elements of the claim. Accordingly, NIPP cannot use the chart to support its tortious interference claim with contract or with prospective business relations.

[Decl. of Victoria Lovato, Ex. J].) Because portions of Fermaglich's statement and radio air play data are admissible, NIPP has provided sufficient evidence to support its factual assertions. [11]

[203]** More problematic is whether NIPP's factual assertions, if true, are sufficient to state a claim for tortious interference with prospective business relations. As stated earlier, ***HN80***[] to establish a claim for tortious interference with prospective business advantage, a plaintiff must show that defendant engaged in (1) improper conduct with (2) the intention to induce or cause a third party not to enter into or continue business relations with the plaintiff, and (3) defendant actually induced or caused such result. *Dolton, 642 P.2d at 23* (citing *Restatement [Second] of Torts § 766B*) (emphasis added).

First, NIPP provides sufficient evidence that Clear Channel engaged in improper conduct. ***HN81***[] Improper conduct is a necessary element of a claim for intentional interference with prospective business relations. *Dolton, 642 P.2d at 23*. *Restatement (Second) of Torts § 767* sets forth seven factors a judge or jury should balance to determine whether a defendant's conduct is improper. *Ervin, 908 P.2d at 500* (citing *Restatement (Second) of Torts § 767* **[**204]**). These factors include:

> (a) the nature of the defendant's conduct,
>
> (b) the defendant's motive,
>
> (c) the plaintiff's interests interfered with,
>
> **[*1119]** (d) the defendant's interests in interfering,
>
> (e) the social interests in protecting defendant's freedom of action and plaintiff's prospective business relations,
>
> (f) the proximity of the defendant's conduct to the interference,
>
> (g) the relations between the parties.

Id. The nature of some conduct, such as fraud and physical violence, is always improper, while other means, such as economic pressure, may be permissible under some circumstances and wrongful under others. *Id.* Whether economic pressure is improper depends on the degree of coercion, the effects upon competition, and the appropriateness of the pressure as a means of accomplishing the defendant's objectives. *Id.*

Here, the conduct is arguably improper for several reasons. First, Clear Channel's behavior, if proven to be an illegal tying arrangement, may be anticompetitive economic pressure and violative of the antitrust laws. Additionally, Clear Channel's conduct in denying air play to artists using NIPP may be inappropriate if it's a means of avoiding **[**205]** payola laws. Accordingly, whether Clear Channel's conduct may be considered improper depends largely on NIPP's success in proving its antitrust claims at trial. NIPP's allegations of improper conduct, therefore, survive summary judgment.

HN82[] A defendant does not engage in improper conduct, so as to be liable for intentional interference, if: (1) it concerns a matter of competition between the defendant and plaintiff; (2) the defendant does not employ wrongful means; (3) the action does not amount to an unlawful restraint of trade; and (4) the defendant's purpose is, at least

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[11] Additionally, the state of mind exception to the hearsay rule provides:

> the following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

Fed. R. of Evid. 803(3). Here, the alleged statement from Fermaglich shows his intention to commit Eve 6 to Clear Channel due to fear of losing air play and is admissible to show this intention. His statement is not admissible, however to prove that Clear Channel ceased air play for those artists choosing other concert promoters.

in part, to advance its own interest. *Ervin, 908 P.2d at 501* (citing *Restatement (Second) of Torts § 768*). 'Wrongful means' include physical violence, fraud, civil suits, and criminal prosecutions. *Ervin, 908 P.2d at 502* (citing *Restatement [Second] of Torts § 768 cmt. e*). 'Wrongful means' do not include breach of the duty of good faith and competitive economic pressure. *Id. at 502-503*. At this stage in the litigation, Clear Channel does not qualify for this competitor's privilege because its **[**206]** conduct may involve wrongful means if Clear Channel is circumscribing the payola laws, and Clear Channel's actions may amount to a restraint on trade if the conduct amounts to an illegal tying arrangement.

HN83[] The second element of tortious interference with prospective business relations is that the improper conduct must be intentional. NIPP provides sufficient evidence that Clear Channel intends its manipulation of air play to interfere with NIPP and other promoters' prospective business relations with artists. It is not necessary that NIPP show that Clear Channel intended to specifically interfere with the Eve 6 booking, as long as NIPP can show that Clear Channel generally desired to interfere with NIPP's bookings as a whole. "The situation may be one in which many persons are induced to act. Thus a boycott campaign may be intended to induce numerous persons to [refuse business relations] with the plaintiff." *Restatement (Second) of Torts § 767 cmt. q*. Here, NIPP has presented sufficient evidence of a pattern and practice of behavior by Clear Channel whereby Clear Channel lessens radio air play for artists booking with NIPP. Furthermore, NIPP **[**207]** has introduced evidence of electronic mail messages, written by Clear Channel employees, which demonstrate that Clear Channel intends to manipulate artists' promotion decisions and interfere with competitors by withholding air play. Accordingly, NIPP has created a dispute of material fact as to whether Clear Channel intended to interfere with NIPP's prospective relation with Eve 6.

[*1120] ***HN84***[] The final element of tortious interference with prospective business relations is that the conduct of the defendant must cause the third party to refuse to enter business relations with the plaintiff. The question whether the actor's conduct caused the third person to refuse to enter relations with the plaintiff raises an issue of fact. *Restatement (Second) of Torts § 767 cmt. o*. The reasonableness of the claimed reaction of the third person to the actor's conduct is material evidence on this issue, but it is not conclusive. *Id.* Thus the fact that only a fool would have been influenced by the defendant's conduct is evidence that may warrant a finding that the third person was not in fact influenced by it. *Id.* On the other hand, if other evidence establishes that **[**208]** the actor did in fact induce the third person's conduct, the actor is liable even though the third person was foolish or otherwise unreasonable in permitting himself to be so influenced. *Id.* Here, Fermaglich admitted that he was induced and influenced by his perception of Clear Channel's conduct. Accordingly, NIPP provides sufficient evidence to create a dispute of material fact as to whether Clear Channel caused Eve 6 to avoid business relations with NIPP. Based on the forgoing, Clear Channel's motion for summary judgment is denied as to NIPP's claim for tortious interference with prospective business relations with Eve 6.

IV. Defendants' Motion to Exclude Expert Testimony

Defendants argue that the opinion of Dr. Phillips, plaintiffs' expert, should be excluded under *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. (Mot. to Exclude Expert.) ***HN85***[] According to *Daubert,* under *Federal Rule of Evidence 702*, expert testimony is only admissible if it will assist the trier of fact and if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product **[**209]** of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Lantec, 306 F.3d at 1025*. Specifically, defendants argues that Dr. Phillips' testimony concerning market definition and damages is not based on sufficient scientific knowledge or criteria to be reliable or admissible under *Daubert.* (*Id.* at 2-5, 9-27.)

As to the market definition, defendants claim that Dr. Phillips failed to utilize economic criteria in making a distinction between rock and non-rock artists. (*Id.* at 9-14.) Furthermore, defendants claim that, not only did Dr. Phillips fail to calculate cross-elasticity of demand, but he also relied on his subjective opinions regarding music, a subject in which he has no expertise. (*Id.*) As explained earlier in this order, calculation of cross-elasticity of demand is not always necessary to define a relevant market. Although Dr. Phillips did not calculate cross-elasticity of demand, he did rely on other economic data, including industry materials, pricing data, and public recognition of the market, all of which have been held relevant to determining the scope of a market. Additionally, **[**210]** Dr. Phillips does not base his opinion on his subjective beliefs but on his research of industry materials regarding the industry's categorization of rock music. Because Dr. Phillips relies on sufficient data and applies that data to define the market, his opinion is sufficiently reliable for admission on the issue of market definition under*Daubert.* The court elects to refrain from ruling on defendants' motion as to the admissibility of Dr. Phillips' opinion on damages at this time, since decision is not relevant to the summary judgment motion.

V. Conclusion

Based on the foregoing, it is therefore

ORDERED as follows:

[*1121] 1. Defendant Parent Clear Channel Communications' motion for summary judgment (# 130 & 163) is DENIED.

2. Defendants' motion for summary judgment (# 158) is GRANTED in part and DENIED in part. It is GRANTED as to plaintiff's claims for (1) monopolization under the Sherman Act, *15 U.S.C.A. § 2*, (2) monopolization under the Colorado Antitrust Act, *Colo. Rev. Stat. § 6-4-105*, (3) violation of the Colorado Consumer Protection Act, *Colo. Rev. Stat. § 6-1-101*, and (4) tortious **[**211]** interference with contract. Defendants' motion is DENIED in all other respects. At the appropriate date, the clerk will enter judgment in favor of the defendants and against plaintiffs, dismissing their claims with prejudice.

3. Defendants' motion to exclude expert testimony (# 223) is DENIED in part, and RULING IS RESERVED in part. It is DENIED as it pertains to the expert's testimony on liability issues in the case. RULING IS RESERVED as to the damages issues in the case, which will be addressed at a later date by the court.

4. Defendants' motion to file a supplemental brief in support of their motion for summary judgment (# 239) is DENIED.

5. The court will hold a Final Pretrial Conference commencing at 4:00 o'clock p.m. on April 30, 2004 in Courtroom 14, Alfred A. Arraj United States Courthouse, Denver, Colorado. In preparing for and participating in the conference, the parties and counsel will follow the Instructions for Preparation and Submission of Final Pretrial Order, a copy of which is attached

Dated this 2 day of April, 2004.

BY THE COURT:

s/

EDWARD W. NOTTINGHAM

United States District Judge

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In re Vitamins Antitrust Litig.

United States District Court for the District of Columbia

April 8, 2004, Decided

Misc. No. 99-197 (TFH), MDL No. 1285

Reporter

320 F. Supp. 2d 1 *; 2004 U.S. Dist. LEXIS 14693 **; 2004-2 Trade Cas. (CCH) P74,522

IN RE: VITAMINS ANTITRUST LITIGATION; This Document Relates To: ALL ACTIONS

Subsequent History: [1]**

Later proceeding at *In re Vitamins Antitrust Litig., 321 F. Supp. 2d 94, 2004 U.S. Dist. LEXIS 10652 (D.D.C., May 25, 2004)*

Prior History: *In re Vitamins Antitrust Litig. v. BASF AG, 2004 U.S. Dist. LEXIS 6869 (D.D.C., Apr. 5, 2004)*

Disposition: Defendants DuCoa, Bioproducts and Chinook's Motions for Summary Judgment denied. Defendant UCB's Motion for Summary Judgment granted. Order dated March 9, 2004 vacated.

Core Terms

conspiracy, choline, vitamin, all-vitamins, chloride, prices, producers, manufacture, Plaintiffs', parties, cases, products, Defendants', Chemicals, markets, premix, antitrust, summary judgment motion, summary judgment, guilty plea, customers, selling, price fixing, interdependence, motions, join, procompetitive, cartel, Memorandum, allocate

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Supporting Materials, Discovery Materials**

Summary judgment shall be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. *Fed. R. Civ. P. 56(c)*. When analyzing this evidence, the court must view the underlying facts in the light most favorable to the party opposing the motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Implausible Claims

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Antitrust & Trade Law, Sherman Act**

In the civil antitrust context, in order to survive summary judgment, litigants must establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused the plaintiffs to suffer a cognizable injury. This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Second, the issue of fact must be genuine. In the language of *Fed. R. Civ. P. 56(e)*, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. If the factual context renders the respondents' claim implausible -- if the claim is one that simply makes no economic sense -- the respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

In the civil antitrust summary judgment context, in the face of economic factors dictating that the nonmoving party's theory is irrational, that party must submit evidence to establish that the theory remains practical and genuine despite economic evidence to the contrary. The limits ***antitrust law*** places on the range of permissible inferences from ambiguous evidence dictate that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

In the civil antitrust context, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a genuine issue for trial exists within the meaning of *Fed. R. Civ. P. 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

The requirement that the plaintiffs' claims make economic sense does not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The only demand is that the nonmoving party's inferences be reasonable in order to reach the jury.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The elements to define what constitutes a conspiracy are: (1) the defendants must have had knowledge of a conspiracy, (2) the defendants must have intended to join the conspiracy, and (3) by joining the conspiracy, the defendants were interdependent upon one another in that their respective benefit depended on the success of the venture.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In order to establish the requisite knowledge of a conspiracy, the plaintiffs must prove that each defendant was united in a common unlawful goal or purpose, or knew of the conspiracy's general scope and purpose.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

Although the plaintiffs must show that each defendant had knowledge of an agreement as to the overall conspiracy, they need not show (1) evidence of a formal agreement, or (2) knowledge, on behalf of the defendant, of every detail of the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Although the plaintiffs must establish a common goal, it is not necessary to provide direct evidence of a conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Knowledge alone is not sufficient to prove that any particular defendant intended to join a conspiracy. Although mere knowledge of another similarly motivated conspiracy or an overlap in personnel do not prove one overall agreement, there may be an intent to join an overall, conspiracy if the common purpose of a single enterprise motivates each participant and each act. A party progresses from mere knowledge of an endeavor to intent to join it when there is informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy. The intent that must be shown in a conspiracy case is the intent to advance the unlawful purpose of the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

"Fairly minimal" evidence is needed in order to establish interdependency between various branches of a common conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

The court must view the evidence from the standpoint of each defendant to determine liability in a conspiracy case.

Counsel: For ALLEN'S HATCHERY, INC., Plaintiff: Kenneth L. Adams, LEAD ATTORNEY, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, DC.

For PERRIGO COMPANY, Plaintiff: Richard Alan Arnold, LEAD ATTORNEY, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW & SPECTOR, PA, Miami, FL.

For AMER HOME PROD CORP, Plaintiff: William James Bachman, LEAD ATTORNEY, WILLIAMS & CONNOLLY, Washington, DC.

For TRAVIS CRANE, Plaintiff: Dallas D. Ball, LEAD ATTORNEY, Ballentine, SC.

For JUDY GREENE, Plaintiff: Gordon Ball, LEAD ATTORNEY, Knoxville, TN.

For PERDUE FARMS INCORPORATED, Plaintiff: David H. Bamberger, LEAD ATTORNEY, Edward Smith Scheideman, PIPER RUDNICK LLP, Washington, DC.

For CHITWOOD & HARLEY, Plaintiff: Philip Dean Bartz, LEAD ATTORNEY, MCKENNA, **[**2]** LONG & ALDRIDGE & NORMAN, L.L.P., Washington, DC.

For PFFJ, INC., Plaintiff: Timothy J. Becker, [*2] LEAD ATTORNEY, ZIMMERMAN REED, P.L.L.P., Minneapolis, MN.

For KELLOGG COMPANY, Plaintiff: Joseph W. Bell, Peter F. Burns, Daniel S. Mason, Sara M. Scott, LEAD ATTORNEYS, ZELLE, HOFMANN, VOELBEL, MASON & GETTE, L.L.P., San Francisco, CA.

For TURKEY STORE CO, Plaintiff: Andrew S. Birrell, LEAD ATTORNEY, Minneapolis, MN.

For BASIC DRUGS INC, Plaintiff: Kevin A. Bowman, LEAD ATTORNEY, SEBALY, SHILLITO & DYER, Dayton, OH.

For SOUTH-CENTRAL PRODUCTS, INC., Plaintiff: Terri Chadick, LEAD ATTORNEY, CONNER & WINTERS, P.L.L.C., Fayetteville, AR.

For BIG GAIN INC, Plaintiff: Phillip A. Cole, LEAD ATTORNEY, LOMMEN, NELSON, COLE & STAGEBERG, P.A., Minneapolis, MN.

For AAA EGG FARM, Plaintiff: Craig C. Corbitt, LEAD ATTORNEY, ZELLE, HOFMANN, VOELBEL, MASON & GETTE, L.L.P., San Francisco, CA.

For INDIRECT PURCHASER CLASS/COX PLAINTIFFS, Plaintiff: M. Stephen Dampier, P. Dean Waite, Jr., LEAD ATTORNEYS, THE SHARBROUGH LAW FIRM, PC, Stephen L. KlimjacK, Steven A. Marino, LEAD ATTORNEYS, JACKSON, TAYLOR, MARTINO & HEDGE, John W. Sharbrough, III, LEAD ATTORNEY, **[**3]** Mobile, AL.

For CLASS PLAINTIFFS, Plaintiff: Michael James Flannery, LEAD ATTORNEY, THE DAVID DANIS[*3] LAW FIRM, P.C., St. Louis, MO.

For ANILE PHARMACY, INC, Plaintiff: M. Eric Frankovitch, LEAD ATTORNEY, FRANKOVITCH, ANETAKIS, COLANTONIO & SIMON, Steven M. Recht, LEAD ATTORNEY, RECHT LAW OFFICES, Weirton, WV.

For COCA-COLA COMPANY, Plaintiff: Lee Allen Freeman, LEAD ATTORNEY, FREEMAN, FREEMAN & SALZMAN, P.C., Chicago, IL.

For ALABAMA MEDICAID AGENCY, Plaintiff: Charles A. Graddick, LEAD ATTORNEY, SIMS, GRADDICK & DODSON, P.C., Mobile, AL.

For THE PROCTER GAMBLE COMPANY, Plaintiff: Robert II Heuck, LEAD ATTORNEY, WAITE, SCHNEIDER, BAYLESS & CHESLEY, Cincinnati, OH.

For HORMEL FOODS CORP, Plaintiff: Eric Sean Jackson, LEAD ATTORNEY, ROBINS, KAPLAN, MILLER & CIRESI, L.L.P., Washington, DC.

For AGRIBRANDS INTERNATIONAL, INC., Plaintiff: John F. Kinney, FREEMAN, FREEMAN & SALZMAN, PC, Chicago, IL.

For DIRECT ACTION PLTFS, Plaintiff: Richard J. Leveridge, LEAD ATTORNEY, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, DC.

For MIDWESTERN PET FOODS, INC., Plaintiff: Roberta D. Liebenberg, LEAD ATTORNEY, FINE, KAPLAN & BLACK, Philadelphia, **[**4]** PA.

For PHARMACIA CORPORATION, Plaintiff: Bradley Stuart Lui, LEAD ATTORNEY, MORRISON & FOERSTER, [*4] LLP, Washington, DC.

For HUDSPETH & TILTON, Plaintiff: Elaine Metlin, LEAD ATTORNEY, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, DC.

For SKW TEXTURANT SYSTEMS MANUFACTURING, Plaintiff: Frank Panopoulos, LEAD ATTORNEY, WHITE & CASE, L.L.P., Washington, DC.

For CLASS PLAINTIFFS, Plaintiff: Brian A. Ratner, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC, Washington, DC.

For DEL MESA FARMS, INC., Plaintiff: John Justin Rosenthal, LEAD ATTORNEY, HOWREY SIMON ARNOLD & WHITE, LLP, Washington, DC.

For HILL'S PET NUTRITION, INC., Plaintiff: Gerald G. Saltarelli, LEAD ATTORNEY, BUTLER RUBIN SALTARELLI & BOYD, Chicago, IL.

For AG MARK INC, Plaintiff: Jonathan David Schiller, LEAD ATTORNEY, BOIES, SCHILLER & FLEXNER, LLP, Washington, DC.

For BAYER CORPORATION, Plaintiff: John Edward Schmidtlein, LEAD ATTORNEY, WILLIAMS & CONNOLLY, Washington, DC.

For FEEDSTUFFS PROCESSING COMPANY, Plaintiff: Steven 0. Sidener, LEAD ATTORNEY, GOLD BENNETT & CERA LLP, San Francisco, CA.

For A. L. GILBERT, Plaintiff: Bruce H. Simon, LEAD ATTORNEY, COHEN, **[**5]** WEISS AND SIMON, LLP, New York, NY.

For INDIRECT PURCHASE CLASS/COX PLAINTIFFS, Plaintiff: Mary Elizabeth[*5] Snow, LEAD ATTORNEY, THE SHARBROUGH LAW FIRM, PC, Mobile, AL.

For LL MURPHREY, Plaintiff: Trawick H. Stubbs, Jr., LEAD ATTORNEY, STUBBS & PERDUE, PA, New Bern, CA.

For LEAD PLAINTIFFS, Plaintiff: Jodi Trulove, LEAD ATTORNEY, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, DC.

For TITAN SUPPLY INC, Plaintiff: Steven E. Uhr, LEAD ATTORNEY, ROBINS, KAPLAN, MILLER & CIRESI, Minneapolis, MN.

For PUBLIX SUPERMARKETS, INCORPORATION, Plaintiff: Joseph Michael Vanek, LEAD ATTORNEY, DAAR, FISHER, KANARIS & VANEK, P.C., Chicago, IL.

For D & D FARMS, INC., Plaintiff: Michael Orth Ware, LEAD ATTORNEY, Mayer, Brown, Rowe & Maw LLP, New York, NY.

For CENEX HARVEST STATE COOPERATIVES, Plaintiff: K. Craig Wildfang, LEAD ATTORNEY, ROBINS, KAPLAN, MILLER & CIRESI, Minneapolis, MN.

For NUTRA BLEND, LLC, Plaintiff: C. Brooks Wood, LEAD ATTORNEY, MORRISON & HECKLER, LLP, Kansas City, MO.

For TAKEDA VITAMIN & FOOD USA, INC., Defendant: Cathy M. Armstrong, LEAD ATTORNEY, THORP REED & ARMSTRONG, LLP, Wheeling, WV.

For CHINOOK GROUP INC, **[**6]** Defendant: Donald I. Baker, LEAD ATTORNEY, BAKER & MILLER, PLLC, Washington, DC.

For MITSUI & CO., LTD., Defendant: [*6] David M. Balabanian, LEAD ATTORNEY, BINGHAM MCCUTCHEN LLP, Holly A. House, LEAD ATTORNEY, MCCUTCHEN DOYLE BROWN & ENENEER, San Francisco, CA.

For TAKEDA AMERICA INC, Defendant: David Alan Balto, LEAD ATTORNEY, WHITE & CASE, L.L.P., Washington, DC.

For VITACHEM COMPANY, Defendant: Erin R. Brewster, LEAD ATTORNEY, MACCORKLE LAVENDER & CASEY, PLLC, Charleston, WV.

For UCB SA, Defendant: David Robert Cashdan, LEAD ATTORNEY, CASHDAN, GOLDEN & KANE, P.L.L.C., Andrew Martin McCormack, LEAD ATTORNEY, KING & SPALDING, Washington, DC.

For REILLY INDUSTRIES, INC., Defendant: Jeffrey Bossert Clark, Karen Natalie Walker, LEAD ATTORNEYS, KIRKLAND & ELLIS LLP, Washington, DC.

For DAIICHI FINE CHEMICALS, INC., Defendant: Michael L. Denger, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, LLP, Washington, DC.

For GIVAUDAN-ROURE FLAVORS, INC., Defendant: Jacqueline Ray Denning, LEAD ATTORNEY, ARNOLD & PORTER, Washington, DC.

For DEGUSSA AG, Defendant: John Clayton Everett, Jr., LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, DC.

For **[**7]** LEAD DEFENDANTS, Defendant: Tyrone C. Fahner, LEAD ATTORNEY, MAYER, BROWN & PLATT, Chicago, IL.

For BASF AKTIENGESELLSCHAFT, [*7] Defendant: Stephen Fishbein, LEAD ATTORNEY, SHEARMAN & STERLING, New York, NY.

For EISAI CO., LTD. , Defendant: Stacey R. Friedman, LEAD ATTORNEY, SULLIVAN & CROMWELL, D. Stuart Meiklejohn, LEAD ATTORNEY, New York, NY.

For CHINOOK GROUP INC, Defendant: Alice M. Goldwire Glass, LEAD ATTORNEY Lyme, NH.

For VERNON WALDEN, INC., Defendant: Steven W. Gold, LEAD ATTORNEY, MINTZ & GOLD, L.L.P., New York, NY.

For BASF AG, Defendant: Jonathan Lee Greenblatt, LEAD ATTORNEY, SHEARMAN & STERLING, Washington, DC.

For LONZA A.G., Defendant: Catherine J. Hertzig, Jonathan Shiffman, LEAD ATTORNEYS, MAYER, BROWN, ROWE & MAW, New York, NY.

For REILLY CHEMICALS, S.A., Defendant: Geoffrey Smith Irwin, LEAD ATTORNEY, JONES DAY, Washington, DC.

For BIOPRODUCTS, INC., Defendant: Charles E. Jarrett, LEAD ATTORNEY, BAKER & HOSTETLER, Cleveland, OH.

For NOVUS INTERNATIONAL, INC., Defendant: E. Perry Johnson, Jeffrey S. Russell, LEAD ATTORNEYS, BRYAN CAVE, LLP, St. Louis, MO.

For E.I. DUPONT DE NEMOURS AND COMPANY, Defendant: Stephanie **[**8]** L. Karfias, Bethany G. Lukitsch, James H. Walsh, LEAD ATTORNEYS, MCGUIRE WOODS, LLP, Richmond, VA.

For SUMITOMO CHEMICAL AMERICA, [*8] INC., Defendant: Gregory A. Kasper, Melanie H. Stein, Aidan Synnott, LEAD ATTORNEYS, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, NY.

For MITSUI & CO., LTD., Defendant: Sutton Keany, LEAD ATTORNEY, PILLSBURY & WINTHROP, LLP, New York, NY.

For KUNO SOMMER, Defendant: John Worth Kern, IV, LEAD ATTORNEY, JANIS, SCHUELKE & WECHSLER, Washington, DC.

For F HOFFMAN-LA ROCHE, INC., Defendant: Suzanne E. Kerrigan, LEAD ATTORNEY, DAVIS, POLK & WARDWELL, Lawrence Portnoy, LEAD ATTORNEY, DAVID, POLK & WARDWELL, New York, NY.

For DEGUSSA HULS CORPORATION, Defendant: Donald C. Klawiter, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, DC.

For DEGUSSA-HULS AG, Defendant: Thomas John Lang, LEAD ATTORNEY, MORGAN, LEWIS & BOCKIUS, L.L.P., Washington, DC.

For RHONE-POULENC ANIMAL NUTRITION INC, Defendant: Christopher J. Lovrien, LEAD ATTORNEY, JONES DAY, Washington, DC.

For RHONE-POULENC AG COMPANY, INC., Defendant: John M. Majoras, LEAD ATTORNEY, JONES, DAY, REAVIS & POGUE, Cleveland, OH.

For UCB CHEMICALS **[**9]** CORP, Defendant: Ann Marie Malekzadeh, Kerri L. Ruttenberg, LEAD ATTORNEYS, KING & SPALDING, Washington, DC.

For LEAD DEFENDANTS, Defendant: [*9] George T. Manning, LEAD ATTORNEY, JONES, DAY, REAVIS & POGUE, Atlanta, GA.

For BASF CORPORATION, Defendant: Andrew S. Marovitz, Britt Miller, LEAD ATTORNEYS, MAYER, BROWN & PLATT, Chicago, IL.

For THOMAS SIGLER, Defendant: John F. McCaffrey, LEAD ATTORNEY, MCLAUGHLIN & MCCAFFREY, L.L.P., Cleveland, OH.

For MITSUI & COMPANY, INCORPORATED (USA), Defendant: Aileen Meyer, LEAD ATTORNEY, PILLSBURY WINTHROP, LLP, Washington, DC.

For CHINOOK GROUP LTD, Defendant: W. Todd Miller, LEAD ATTORNEY, BAKER & MILLER PLLC, Waashington, DC.

For LEAD DEFENDANTS, Defendant: Bruce L. Montgomery, LEAD ATTORNEY, ARNOLD & PORTER, Scott William Muller, LEAD ATTORNEY, DAVIS, POLK & WARDWELL, Washington, DC.

For TANABE, U.S.A., INC., Defendant: William L. Monts, III, LEAD ATTORNEY, HOGAN & HARTSON, L.L.P., Washington, DC.

For LONZA INC., Defendant: Thomas M. Mueller, LEAD ATTORNEY, MAYER, BROWN, ROWE & MAW, New York, NY.

For HOECHST MARION ROUSSEL S.A., Defendant: Mary-Helen Perry, LEAD ATTORNEY, JONES DAY, Washington, **[**10]** DC.

For EISAI CO., LTD., Defendant: Margaret Kolodny Pfeiffer, LEAD ATTORNEY, SULLIVAN & CROMWELL, LLP, Washington, DC.

For MERCK KGAA, Defendant: [*10] Fred W. Reinke, LEAD ATTORNEY, CLIFFORD CHANCE US, LLP, Washington, DC.

For TANABE, U.S.A., INC., Defendant: Mark Riera, LEAD ATTORNEY, SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP, Los Angeles, CA.

For NEPERA INC, Defendant: Colby Arnn Smith, LEAD ATTORNEY, DEBEVOISE & PLIMPTON LLP, Washington, DC.

For E.I. DUPONT DE NEMOURS AND COMPANY, Defendant: George J Terwilliger, LEAD ATTORNEY, WHITE & CASE, L.L.P., Washington, DC.

For LONZA INC., Defendant: Michael Logon Ware, LEAD ATTORNEY, San Francisco, CA.

For STATE PLAINTIFFS/GIRAL, Movant: Jeffrey Andrew Bartos, LEAD ATTORNEY, GUERRIERI, EDMOND & CLAYMAN, Washington, DC.

For CALIFORNIA INDIRECT PURCHASER/GARDNER-ROSSI COMPANY PLAINTIFFS, Movant: Eric B. Fastiff, LEAD ATTORNEY, LEIFF, CABRASER, HEIMANN & BERNSTEIN, LLP, San Francisco, CA.

For FEDERAL REPUBLIC OF GERMANY, THE, Movant: Peter Heidenberger, LEAD ATTORNEY, Chevy Chase, MD.

For AGRI-KING, Movant: James P. McCarthy, LEAD ATTORNEY, LINDQUIST vENNUM, P.L.L.P., Mark Alan Jacobson, **[**11]** LINDQUIST & VENNUM, P.L.L.P., Minneapolis, MN.

For RITCHIE SMITH FEEDS, INC., Movant: Michael G. Lenett, LEAD ATTORNEY, THE CUNEO LAW GROUP, P.C., Washington, [*11] DC.

For CANADA, Movant: John Peter Relman, LEAD ATTORNEY, RELMAN & ASSOCIATES, Washington, DC.

For CALIFORNIA INDIRECT PURCHASER/GARDNER- ROSSI COMPANY PLAINTIFFS, Movant: Guido Saveri, LEAD ATTORNEY, SAVERI & SAVERI, PC, San Francisco, CA.

For METHIONINE, Movant: Paul R. Toskier, LEAD ATTORNEY, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, L.L.P., Washington, DC.

For GENERAL MILLS, INC., Intervenor: Garrett Berry Magens Duarte, LEAD ATTORNEY, COLLIER SHANNON SCOTT, PLLC, Washington, DC.

For ARCHER DANIELS MIDLAND COMPANY, Intervenor: Steven R. Kuney, LEAD ATTORNEY, WILLIAMS & CONNOLLY, Washington, DC.

For AGRIBRANDS INTERNATIONAL, INC., Intervenor: Robert Kenly Webster, LEAD ATTORNEY, Washington, DC.

For ASSOCIATED MILK PRODUCERS, INC., Claimant: William W. Kocher, LEAD ATTORNEY, Columbus, OH.

For BECKETT APROTHECARY, Claimant: Philip A. Steinberg, LEAD ATTORNEY, Bala Cynwyd, PA,

For STEPHEN J. POLLAK, Special Master: Stephen John Pollak, LEAD ATTORNEY, SHEA & GARDNER, Washington, **[**12]** DC.

For BASF AG, Defendant: Richard Schwed, LEAD ATTORNEY, SHEARMAN & STERLING, New York, NY.

COMMISSION OF THE EUROPEAN COMMUNITIES, Amicus: Gerald Zingone, [*12] LEAD ATTORNEY, THELAN REID & PRIEST, LLC, Washington, DC.

Judges: Thomas F. Hogan, Chief Judge.

Opinion by: Thomas F. Hogan

Opinion

[*3] ORDER

Pending before the Court is E.I. DuPont de Nemours & Company's Motion to Amend the Court's March 9, 2004 Memorandum Opinion Re: Defendants' Motion for Summary Judgment on the Issue of an All-Vitamins Conspiracy and Vacate the Order as to DuPont [# 4611]. The Court has carefully considered the motion as well as the opposition submitted by Publix and Meijer. For the reasons stated in the Amended Memorandum Opinion Re: Defendants' Motions for Summary Judgment on the Issue of an "All-Vitamins Conspiracy" issued April 8, 2004 [# 4619], it is hereby

ORDERED that the motion is **GRANTED.** It is further

ORDERED that the Order dated March 9, 2004 [# 4606] is **VACATED.** A new **[*4]** Order is issued contemporaneously herewith.

SO ORDERED.

April 8, 2004

AMENDED MEMORANDUM [13] OPINION**

Re: Defendants' Motions for Summary Judgment on the Issue of an "All-Vitamins Conspiracy"

Pending before the Court are five defendants' motions [1] **[**14]** for summary judgment seeking judgment on the issue of the scope of the conspiracy pursuant to *Fed. R. Civ. P. 56*. Upon careful consideration of the parties' briefs, arguments presented, and the entire record herein, the Court denies for certain Defendants and grants for one Defendant motions for summary judgment on Plaintiffs' "all-vitamins conspiracy" claim. [2]

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[1] Originally, the various defendants filed twenty-one (21) motions for summary judgment concerning the scope of the all-vitamins conspiracy. Many of these motions became moot as a result of settlement. The following defendants' motions remain at issue before the Court with respect to the direct action cases which are scheduled to be remanded:

[# 11:] Bioproducts, Inc. ("Bioproducts")

[# 13:] DuCon, DCV, Inc., DuCoa ("DuCoa")

[# 16:] Chinook Group Limited and Chinook Group, Inc. ("Chinook")

[# 17:] UCB S.A., UCB, Inc., and UCB Chemicals Corporation ("UCB")

The defendant parties to this motion will collectively be referred to as "Defendants" or "choline Defendants." The individual defendant parties will be referred to as the names indicated in parenthesis above. The plaintiffs will be referred to as "Plaintiffs."

The number listed before each defendant's name above refers to the August 14, 2002 list of dispositive motions from Dickstein, Shapiro, Morin & Oshinsky, LLP. There are additional motions concerning the all-vitamins conspiracy that will be addressed at a later date. These affect the so-called "indirect purchaser cases" which are on a separate scheduling track.

[2] This opinion amends the Memorandum Opinion re: Defendants' Motions for Summary Judgment on the Issue of an "All-Vitamins Conspiracy" issued March 9, 2004. Specifically, the Court removes the holding as to E.I. DuPont de Nemours and Company ("DuPont") having granted Dupont's Motion to Amend the March 9, 2004 Memorandum Opinion.

[15] I. BACKGROUND**

This case stands at the heels of one of the largest criminal antitrust investigations ever undertaken by the United States Department of Justice. To date, the Antitrust division of the Department of Justice has prosecuted 30 cases and gathered well over $ 875 million in criminal fines relating to the international vitamins cartel. [3] This vitamins cartel enacted one **[*5]** of the most elaborate and wide-spread conspiracies ever prosecuted by the United States Department of Justice. [4]

The case before this Court is equally formidable. As of a few months ago, the consolidated action before the Court involved 55 separate multiparty lawsuits from 32 different federal courts. The enormity and complexity of this case can be seen through the fact that over 1,000 **[**16]** opinions and rulings have been issued by the Court in this case. Furthermore, well over 100 law firms participated in the preparation of over 10,000 separate filings that have been lodged in this matter to date. This opinion addresses five of the motions that have been filed in this case.

Plaintiffs allege that Defendants, along with their co-conspirators, conspired to artificially inflate the price of certain vitamins and vitamin products, allocate shares of the vitamin market, predetermine sales volume in the vitamin industry, eliminate competition from non-co-conspirators, limit supply, and allocate specific customers among themselves and their co-conspirators in the following vitamin markets: Vitamin A, Vitamin B1 (Thiamine), Vitamin B2 (Ribloflavin), Vitamin B3 (Niacin), Vitamin B4 (Choline Chloride), Vitamin B5 (CalPan), Vitamin B6 (Pyridoxine), Vitamin B9 (Folic Acid), Vitamin B12, Vitamin C, Vitamin D, Vitamin E, Vitamin H (Biotin), Astaxanthin, Beta Carotene, Canthaxonthin, Apocarotenal, and vitamin premix, in violation of *Section 1 of the Sherman Act*. See, e.g., Second Am. Compl. for Antitrust Violations, Blue Seal Feeds, Inc., et al., v. BASF A.G. **[**17]** , et al., PP 1, 121-135. This alleged conspiracy between the sellers of the various vitamins listed above is referred to as the all-vitamins conspiracy. The issue before the Court is the viability of Plaintiffs' alleged all-vitamins conspiracy.

As mentioned above, the procedural history in this case is quite extensive, and a brief review of the pertinent parties and pleadings affecting this motion is warrented. On or shortly before August 6, 2002, various Defendants filed forty-nine (49) motions with the court, while various Plaintiffs filed two dispositive motions. Of the forty-nine dispositive defense motions, twenty-two related to "scope of the conspiracy" defenses. Of those twenty-two motions, sixteen of them specifically addressed Plaintiffs' alleged all-vitamins conspiracy.

On November 21, 2002, the Court heard oral argument on the all-vitamins conspiracy motions. Since that time, many individual cases have been resolved. The all-vitamins conspiracy motions that remain pending are # 11, # 13, # 16, and # 17 (as numbered in the chart submitted by Dickstein, Shapiro, Morin & Oshinsky, LLP under cover of its

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On August 6, 2002, DuPont filed a Motion for Partial Summary Judgment on the Issue of an All Vitamins Conspiracy in ten individual cases. At the time the March 9, 2004 Memorandum Opinion was issued, DuPont had settled with each of the plaintiffs against whom it had moved for summary judgment. DuPont failed, however, to inform the Court of the status of its motion. In the Proposed Agenda for February 18, 2004 Status Conference, DuPont's all-vitamins conspiracy motion was listed in section G as one of the "Dispositive Motions Before the Court that the Parties Agree Should Be Decided Prior to Remand." Furthermore, at the February 18, 2004 status conference, which DuPont's counsel chose not to attend, counsel for parties other than DuPont specifically addressed section G of the agenda confirming which listed motions had been mooted. See Tr. of Feb. 18, 2004 Status Conference at 25-27.

The Court is loath to consider the number of hours and judicial resources that were wasted in deciding a motion, the moot status of which counsel neglected to timely inform the Court. In the interests of justice, however, the holding as to DuPont must be removed from this Memorandum Opinion in light of the settlements that had taken place before the original Memorandum Opinion was issued.

[3] Press Release, United States Department of Justice, Former DuCoa Executive Charged With Price Fixing on Choline Chloride (June 4, 2003); 1999 USDOJ Antitrust Div. Ann. Rep. at 7.

[4] 1999 USDOJ Antitrust Div. Ann. Rep. at 6.

August 14, 2002 letter to the Court). These motions were filed by the **[**18]** following Defendants, respectively: Bioproducts, DuCoa and DCV, Chinook, and UCB.

Two separate moving papers have been filed on behalf of each Defendant: first, Defendants collectively filed Certain Defendants' Joint Memorandum of Law in Support of Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claim ("Defs.' Mem."); second, each Defendant filed an individual motion and reply brief on their own behalf. [5] **[**19]** Plaintiffs submitted **[*6]** two primary documents in opposition to Defendants' motions for summary judgment: first, Certain Plaintiffs' Joint Opposition to Certain Defendants' Joint Memorandum of Law in Support of Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claims (the "PJO"); second, Plaintiffs' Joint Counterstatement of Facts in Opposition to Defendants' Motions for Summary Judgment Regarding the Fact and Scope of the Conspiracy, Fraudulent Concealment, and Subsidiary Liability (the "PJC"). Plaintiffs also filed individual opposition papers against specific Defendants. [6]

Two groups of cases remain. Some cases against Defendants will be remanded to their original jurisdictions, while others will remain in this Court for trial. [7] The following is a breakdown of the remaining cases pending against each Defendant:

Bioproducts: (1) Class action plaintiffs' [8] cases to tried in Minnesota [9]
(2) Direct action plaintiffs' [10] cases to be remanded
DuCoa: (1) Direct action plaintiffs' cases to be remanded
Chinook: (1) Class action plaintiffs' cases to be tried in Minnesota

(2) Direct action plaintiffs' cases to be **[**20]** remanded
UCB: (1) Hill's Pet Nutrition cases to be remanded

All parties agree that the instant motion is to be decided before these cases are remanded to their original filing jurisdictions.

1. The Defendants

a. UCB

There are three UCB defendants: UCB, S.A.; UCB, Inc.; and UCB Chemicals Corporation. UCB, S.A. is a Belgium-based company that produces and sells prescription pharmaceuticals, high **[**21]** performance film and packaging

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[5] As indicated in the Plaintiffs' spreadsheet, enclosed under August 14, 2002 Letter from Richard Leveridge to the Court Re: In Re Vitamins Antitrust Litigation, the following are the individual dispositive motions filed by the choline Defendants: # 11 Bioproducts Incorporated's Motion For Summary Judgment on Plaintiffs' "All-Vitamins" Conspiracy Claim; # 13 DuCoa, L.P.'s and DCV, Inc.'s Motion for Summary Judgment on "All-Vitamins" Conspiracy Claim; # 16 Chinook Group Limited and Chinook Group, Inc.'s Motion for Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claim; # 17 Defendants UCB S.A., UCB, Inc. and UCB Chemicals Corporation's Motion for Summary Judgment on Plaintiffs' All Vitamins Conspiracy Claim.

[6] Those opposition papers are as follows: # 11 Plaintiffs' Joint Counter-Statement of Facts in Opposition to Defendants Bioproducts, Inc.'s and Thomas Sigler's Motions for Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claim; # 13 Opposition to Defendants Ducoa, L.P. and DCV Inc.'s Motion for Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claim; # 16 Plaintiffs' Memorandum of Law in Opposition to Defendants Chinook Group Ltd. and Chinook Group, Inc. Motion for Summary Judgment on Plaintiffs' All-Vitamins Conspiracy Claim.

[7] See, Proposed Agenda for February 18, 2004 Status Conference.

[8] Co-lead counsel for the class plaintiffs is Boies, Schiller and Flexner, LLP; Cohen, Milstein, Hausfeld and Toll, PLLC; and Susman Godfrey, LLP.

[9] A settlement in principle has been reached in this matter. See, Proposed Agenda for February 18, 2004 Status Conference, Ex. C.

[10] Dickstein, Shapiro, Morin & Oshinksy represents the "direct action Tysons, et al. plaintiffs" (hereinafter referred to as the "DSMO plaintiffs"). DSMO has also acted as plaintiffs' liaison counsel for the purposes of the motions presented.

materials, and specialty chemical products. The Chemical Sector of UCB, S.A., which is involved in the production and sale of specialty chemical products, manufactures and sells choline chloride. UCB, Inc. is a subsidiary of UCB, S.A. located in the United **[*7]** States, and UCB, Inc. is a holding company that offers support services to its subsidiaries. UCB, Inc. never manufactured or sold choline chloride. UCB Chemicals Corporation is a subsidiary of UCB, Inc. and is also located in the United States. UCB Chemicals Corporation manufactures and markets specialty chemicals. UCB Chemicals Corporation did not manufacture choline chloride during any of the conspiracy periods but did sell choline from 1999-2001. UCB Mem. in Support Mot. Summ. J. ("UCB Mem.") at 3-5.

UCB asserts that it did not manufacture or sell any vitamins other than choline chloride during the alleged conspiracy period, and did not participate in the markets for any of the non-choline vitamins during the conspiracy period. Id.

b. DuCoa/DCV

There are two DuCoa defendants: DuCoa, L.P. and DCV, Inc. In December 1986, E.I. DuPont De Nemours and Company ("DuPont") [11] and ConAgra **[**22]** formed DuCon, a general partnership joint venture, in order to manufacture choline chloride. DuPont Statement of Undisputed Material Facts In Supp. Mot. For Partial Summ.J. On All-Vitamins Conspiracy P 4. DuCon changed its name to DuCoa on October 1, 1991. Id. at P 5. On December 31, 1992, DuCoa was converted to a limited partnership with DuPont and ConAgra as limited partners and DCV, Inc., a newly formed Delaware corporation, as the general partner. Id. Among the fourteen different partnerships organized under the umbrella of DCV, Inc., only DuCoa was involved in the manufacture and sale of choline chloride. Plaintiffs contest the accuracy of DuCoa's formation in that an insufficient record was provided by DuCoa in support thereof. Pls.' Opp'n. to Defs.' Statement of Facts Which Precludes Entry of Summ. J. on DuCoa, L.P. and DCV Inc.'s Mot. Summ. J. at 7.

[23]** DuCoa (originally as DuCon) began manufacturing choline chloride in approximately December 1987. DuCoa manufactured choline chloride from December 1987 through June 1, 2001. DuPont Statement of Undisputed Material Facts in Supp. Mot. Partial Summ. J. at P 5-6. On June 1, 2001, DuCoa's choline business was sold as part of a package of businesses to Balchem. Id. In 1995, DuCoa began buying and reselling various "Vitamins" [12] and blending and selling premix. Id. at P 6.

[24]** *c. Bioproducts*

There is one Bioproducts Defendant: Bioproducts, Inc. Bioproducts is a wholly-owned subsidiary of Mitsui [13] located in **[*8]** Fairlawn, Ohio. Bioproducts manufactured choline and vitamin premixes. Pls.' Joint Counterstatement of Facts in Opp'n to Defs.' Mots. Summ. J. ("PJC") P 38. Bioproducts manufactured and sold feed-grade choline chloride during the conspiracy periods alleged by Plaintiffs. Bioproducts' Mem. Supp. Mot. Summ. J. at 2. Bioproducts maintains that it did not manufacture or sell any vitamins other than choline chloride during the conspiracy periods alleged by Plaintiffs. Id.

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[11] E.I. DuPont De Nemours and Company is a world-wide "science company" that "delivers science-based solutions in markets such as food and nutrition, health care, apparel, home and construction, electronics and transportation." DuPont Statement of Undisputed Material Facts In Supp. Mot. For Partial Summ. J. On All-Vitamins Conspiracy P 2. DuPont is headquartered in Wilmington, Delaware. Id.

[12] Defendants have used the term "Vitamins" to describe all the vitamins in which they have been alleged to have conspired, minus Vitamin B4 (choline chloride). See, e.g., UCB's Mem. Supp. Mot. Summ. J. at 2. where UCB states:

> Plaintiffs in the above-captioned actions continue to allege that [UCB] participated in a single, all-vitamins conspiracy to fix the prices of and/or allocate the markets for Vitamins A, B1 (Thiamine), B2 (Ribloflavin), B3 (Niacin), B5 (CalPan), B6 (Pyridoxine), B9 (Folic Acid), B12, C, D, E, H (Biotin), Beta Carotene, Astaxanthin, Canthaxonthin, Apocarotenal, and premix (collectively "Vitamins"), as well as choline chloride …

[13] Mitsui & Co. USA, Inc. of New York and Mitsui & Co., Ltd. of Japan, one of the largest trading conglomerates of commodities in the world, are the parent corporations of Bioproducts. PJC at P 37.

D. Chinook

There are two Chinook defendants: Chinook Group Limited and Chinook Group, Inc. Chinook Group Limited is a corporation organized under the laws of Ontario, Canada, with its principal **[**25]** place of business in Sombra, Ontario. Chinook Mot. Summ. J. Ex. A (Aff. of Dean Lacy). Chinook Group, Inc. is a Minnesota corporation that is wholly-owned by its Canadian parent, Chinook Group Limited. Chinook Mot. Summ. J. on All-Vitamins Conspiracy at 2.

Chinook Group Limited manufactures and sells choline chloride which is produced at its plants in Canada. Chinook Group, Inc. provided a "toll" manufacturing service to Chinook Group Limited (formerly known as Chinook Group) from 1988 through 1998, converting aqueous choline chloride into dry choline chloride. Id.

Neither Chinook Group Limited nor Chinook Group, Inc. manufactured or sold any vitamin product, nor any products that could be used as ingredients in any vitamin product, other than choline chloride. Id.

2. The Product

Defendants are all manufacturers of choline chloride, also known as Vitamin B4, more commonly known as "choline." Choline is a nutritional supplement used primarily in animal feed. Choline is synthesized from three chemical products: trimethylamines, ethylene oxide, and hydrochloric acid. During the relevant time period, all of the choline chloride manufacturers made at least one of the raw **[**26]** materials needed to manufacture choline. Pls.' Mem. Opp'n. UCB's Mot. Summ. J. at 5.

Defendants differentiate choline from other vitamins because choline (1) is produced through a process using largely different raw materials than other vitamins, and (2) there are no substitutes for choline (and, conversely, choline is not a substitute for any other vitamin). Defendants have even defined the term "Vitamins" so as not to include choline chloride. See, e.g., UCB's Mem. Supp. Mot. Summ. J. at 2. Plaintiffs argue that this "arbitrary" definition has been devised solely "to support [Defendants'] motions to sever choline from the rest of the conspiracy." Pls.' Mem. Opp'n. UCB's Mot. Summ. J. at 5.

3. The Alleged "Ringleaders"

a. BASF

BASF Atkiengesellschaft, or BASF AG ("BASF"), is a corporation organized and existing under the laws of Germany. BASF's principal place of business is in Ludwigshafen, Germany. BASF Agreed Statement of Facts (Fed. Ct. Canada) (Sept. 17, 1999). Among other things, BASF is involved in the production and/or sale of oil and gas, bulk chemicals, plastics, high performance chemical products, plant protection products, and pharmaceuticals. BASF AG's **[**27]** Fine Chemicals Division produces and sells vitamins. At one time, BASF was the second largest supplier of bulk vitamins and carotenoids in the world. PJC at P 7. From at least 1992 through 1995, BASF was one of the principal European manufacturers and marketers of choline chloride. BASF Agreed Statement of Facts (Fed. Ct. Canada) (Sept. 17, 1999). **[*9]** BASF is no longer a defendant in any active litigation as BASF has settled all claims with Plaintiffs.

b. F. Hoffman-LaRoche Ltd

F. Hoffman-LaRoche Ltd ("Roche"), headquartered in Basel, Switzerland, is one of the largest pharmaceutical and health groups in the world. PJC at P 1. At the time of the European Commission decision against Roche (Nov. 21, 2001), Roche was the largest vitamin producer in the world, controlling approximately 50% of the overall market. ECF P 77. Roche's vitamin operations account for approximately 8% of the corporation's overall gross income. PJC P4.

c. Coordination of Activities

Although BASF and Roche are no longer parties to the instant motion, both are critical to Plaintiffs' case. Plaintiffs theorize that both BASF and Roche controlled the choline conspiracy. See, e.g., Pls.' Slide **[**28]** Ex. at 19 ("Roche and BASF were joint leaders and instigators of the collusive arrangements affecting the common range of vitamin products they produced …." (quoting ECF P712)).

BASF acknowledged to both Canadian and European authorities its "pre-eminent role" in the global agreements. PJC at P 344; BASF Agreed Statement of Facts (Fed. Ct. Canada (Sept. 17, 1999)). BASF provided several documents to the EC indicating its intent to fix prices and allocate market shares in the choline chloride market. See, e.g., BASF AG 0033336-55; BASF AG 003361-62; BASF AG 0033449-75; BASF AG 0033477-79; BASF AG 0033480-33564; BASF AG 0033580-613. The documents also indicate BASF's coordination of conspiracy activities with Defendants. Id.

The only direct link that Plaintiffs provide establishing Roche's connection to the conspiracy is a document produced by BASF. [14] **[**29]** BASF AG 0025648-49. [15] The European Commission found that Roche was the "prime mover and main beneficiary of the complex of collusive arrangements." ECF P 568. The Commissions' findings, however, do not specifically address choline. [16]

A secondary argument setting forth Roche's involvement in the choline conspiracy is Roche's economic incentives. In addition to manufacturing and selling many vitamin products, Roche is also a buyer and reseller of choline chloride, primarily in the form of premix. Premix is a blend of vitamins sold as a separate product. Most animal feed is purchased in the form of premix. Choline is a component in 25% of Roche animal feed premix and therefore affects the level at which Roche sets its premix **[**30]** prices. PJC P 63.

Plaintiffs' theorizes that Roche helped coordinate the effort to raise choline prices because higher choline prices helped Roche justify higher premix prices to their customers. Additionally, Plaintiffs assert **[*10]** that Roche was able to "marginalize" other premix competitors by "charging higher prices and limiting access to key vitamins." Pls.' Slide Ex. at 34. Plaintiffs attempt to establish, at times without direct evidence of meetings between these two co-conspirators and Defendants, that the "dominant positions" of BASF and Roche gave each the incentive to control several markets. This theory holds that the higher the price of choline, the more "reasonable" the prices of other vitamins look to BASF and Roche's customers. See, e.g., Pls.' Slide Ex. at 19.

4. The Choline Conspiracy

For purposes of the instant motion, Defendants do not contest liability with respect to a choline chloride conspiracy. Each Defendants' formal acceptance of responsibility for the choline conspiracy varies as follows:

> *UCB:* UCB has ***not*** pleaded guilty.
>
> *DuCoa:* DuCoa has pleaded guilty to price fixing and customer and market allocation in the choline **[**31]** industry. [17] **[**32]**

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[14] Other evidence is cited for the proposition that "BASF served as Roche's proxy for choline chloride." Pls.' Slide Ex. at 31, 53, 54.

[15] This document is a BASF memorandum memorializing an August 12, 1993 meeting between BASF and Roche. The purpose of the meeting was to "find out whether there [was] a possibility of … cooperation [between BASF and Roche] with [choline chloride]."

[16] The Commission found certain companies, including BASF and Roche, to have illegally fixed prices and allocated shares in the markets for vitamins A, E, B1, B2, B5, B6, C, D3, H, Folic Acid, beta carotene and carotinoids. See, e.g., ECF at 10 (chart showing "infringers" and their participation in illegal schemes in relevant vitamin markets).

[17] Plea Agreement of DuCoa, L.P. (September 30, 2002) *available at* http://www.usdoc.gov/atr.cases/f200300/200380.htm. In the Plea Agreement, DuCoa agreed to the following statement:

Employees Lindell Hilling, John "Pete" Fischer and Antonio Felix have pleaded guilty to price fixing and customer and market allocation in the choline industry. [18]

Bioproducts: Bioproducts has ***not*** pleaded guilty. [19]

Employee John Kennedy pleaded guilty to engaging in price-fixing while employed at Bioproducts/Nutrius. [20] **[**33]**

[*11] *Chinook:* Chinook has pleaded guilty to engaging in price-fixing and market allocation of the North American market for choline chloride. [21]

Employees Russell Cosburn, John Kennedy, and Robert Samuelson have also pleaded guilty to engaging in illegal price fixing while employed by Chinook. [22]

…The information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price of, allocating customers for, and allocating the volume of the choline chloride manufactured by the defendant and its co-conspirators and sold by them in the United States and elsewhere, beginning at least as early as January 1988 and continuing until at least September 29, 1998, in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*.

DuCoa also provided information to the European Commission regarding its role in the following agreements:

- the worldwide market for choline chloride was to be shared among the participants

- the North American producers were to withdraw from Europe and vice versa; sales volumes and market shares were to be stabilized;

- the activities of converters and distributors were to be controlled by cutting their supplies and/or forcing them out of business;

- prices for each grade or form of the product were to be increased worldwide according to an agreed schedule;

- regular meetings were to be held and commercial information was to be exchanged in order to monitor the implementation of the above agreement.

DUCOA SUPP 000869.

[18] PJC P40; Plea Agreements of Lindell Hilling (Mar. 2, 1999), John L. "Pete" Fischer (Mar. 2, 1999), Antonio Felix (Mar. 2, 1999). In their Plea Agreements, Hilling, Fischer, and Felix all agree to the following statement:

> …The information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price and allocating customers for, and the volume of the choline chloride sold in the United States and elsewhere, beginning at least as early as January 1988 and continuing until at least September 29, 1998, in violation of the Sherman Antitrust Act, *15 U.S.C. § 1*.

Hilling Plea at 2; Fischer Plea at 2; Felix Plea at 2.

[19] Although it has not pleaded guilty in any forum, Bioproducts obtained immunity from prosecution in the United States for its role in the vitamins conspiracy by cooperating with the United States Department of Justice investigation into the industry. PJC P38.

[20] PJC P38. Mr. Kennedy was the former choline business manager at Bioproducts. Id. Mr. Kennedy also worked at Chinook as vice-president for marketing sales. In his plea agreement, Mr. Kennedy admits that during the time period from January 1988 through at least September 29, 1998, during which time Kennedy worked at Bioproducts and subsequently at Chinook, he "participated in a conspiracy with representatives from other vitamin manufacturers, the primary purpose of which was to fix the price, allocate customers, and allocate the volume of choline chloride sold in the United States and elsewhere." Tr. of Guilty Plea of John Kennedy before N.D. Tex. (Aug. 16, 1999).

[21] PJC at P36; Chinook Plea Agreement (Sept. 29, 1999).

[22] PJC at P36; Cosburn Agreed Statement of Facts (Fed. Ct. Canada) (Sept. 21, 1999); Kennedy Plea Agreement (Mar. 2, 1999); Samuelson Plea Agreement (Mar. 2, 1999).

Additionally, there is evidence in the record of UCB's participation in the choline conspiracy. For example, in BASF's Agreed Statement of Facts to the Department of Justice in Canada, BASF states that it met in 1992 with senior representatives from Akzo Nobel, UCB, Bioproducts, Chinook, and DuCoa in Mexico City. In that meeting, the parties "discussed, but did not agree on, a market allocation arrangement and the desirability of a price increase for choline chloride." BASF Agreed Statement of Facts (Fed. Ct. Canada) (Sept. 17, 1999).

The above facts indicating the Defendants' positions with respect to admissions on a choline conspiracy are recited merely for foundational purposes. The instant motion focuses solely on whether an all-vitamins conspiracy existed from the viewpoint of each Defendant.

II. DISCUSSION

The Summary Judgment Standard [23]

[34]** *1. Matsushita and the Antitrust Standard*

HN1[] Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact …." *Fed. R. Civ. P. 56(c)*). When analyzing this evidence, the Court must view the underlying facts in the light most favorable to the party opposing the motion for summary judgment. See e.g. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, **[*12]** 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, *United States v. Diebold, Inc., 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*. At issue in this case is whether Plaintiffs' claim that Defendants participated in an all-vitamins antitrust conspiracy can survive summary judgment. The Matsushita line of cases addresses the summary judgment standard relating to conspiracy allegations in the civil antitrust context, and controls in the instant case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* **[**35]** [24]

Based on an analysis of *Fed. R. Civ. P. 56(c)*) and *56(e)*, the Court held in Matsushita that ***HN2***[] in order to survive summary judgment, litigants "must establish that there is a genuine issue of material fact as to whether [Defendants] entered into **[**36]** an illegal conspiracy that caused [Plaintiffs] to suffer a cognizable injury." *Matsushita, 475 U.S. at 585-86*. The Court further explained this analysis stating:

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[23] The parties attempted in their briefs to diverge from the central Celotex/Matsushita line, which is the primary analysis here. The Court has considered these arguments and finds them unpersuasive.

Plaintiffs cite to criminal cases (*United States v. Tarantino, 269 U.S. App. D.C. 398, 846 F.2d 1384 (D.C. Cir. 1998)*; *United States v. Poindexter, 725 F. Supp. 13 (D.D.C. 1989)*; *United States v. Kanchanalak, 37 F. Supp. 2d 1 (D.D.C. 1999))*; criminal antitrust cases (*United States v. Yonkers Contracting Co., 706 F. Supp. 296 (S.D.N.Y. 1989)*; *United States v. American Honda Motor Co., 273 F. Supp. 810 (N.D. Ill.)*); and a civil antitrust case (*In re Copper Antitrust Litig., 98 F. Supp. 2d 1039 (W.D. Wis. 2000))* to support their contention that a single or multiple conspiracy issue is always a question of fact for the jury.

The single civil case that Plaintiffs point to for support, In re Copper Antitrust Litig., is distinguishable in that the court was considering a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. *Id. at 1042*. The standard of review under a *Rule 12(b)(6)* motion, that the plaintiff must provide only "a short and plain statement of the claim showing that the pleader is entitled to relief," is substantially different from the standard of review for summary judgment. *Id. at 1047*.

[24] In Matsushita, respondents Zenith Corporation and National Union Electric Corporation sued Matsushita and 20 other Japanese manufacturers and distributers of consumer electronic parts for antitrust violations under *§§ 1and 2* of the Sherman Act, as well as other antitrust provisions. Respondents alleged that the Japanese manufacturers conspired to fix and maintain high prices for television sets sold in Japan while simultaneously conspiring to fix and maintain low prices for television sets exported to the United States. The sets exported were allegedly sold at substantial losses for the defendants. *Matsushita, 475 U.S. at 577-78*.

> This showing has two components. First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct.
> ....
>
> Second, the issue of fact must be "genuine" .... In the language of [Fed. R. Civ. Pro. 56(e)], the nonmoving party must come forward with "specific facts showing there is a "*genuine issue for trial.*"
> ....
> It follows then from these settled principles that if the factual context renders respondents' claim implausible - if the claim is one that simply makes no economic sense - respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Matsushita, 475 U.S. at 585-87 (citations omitted) (emphasis in original).

The Court in Matsushita clarified that **HN3**[] in the face of economic factors dictating that the nonmoving party's theory is irrational, that party must submit evidence to establish that the **[**37]** theory remains practical and genuine despite economic evidence to the contrary. Citing Monsanto Co. v. Spray-Rite Serv. Corp., the Matsushita Court reiterated that the limits ***antitrust law*** places on the range of permissible inferences from ambiguous evidence dictate that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id. at 588* (citing *465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984))*. The importance of the nonmovant asserting a theory that makes "economic sense" is further explained by the Court:

> **HN4**[] The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule **[*13]** *56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Id. at 596-97 **[**38]** .

2. Economic Plausibility

The defense argues that Plaintiffs' economic theory is implausible, and the evidence presented indicates procompetitive, rather than anticompetitive, conduct. Defendants further submit that the Monsanto case bars Plaintiffs from an inference of antitrust behavior because there are two reasonable interpretations of the evidence, and Plaintiffs interpretation of the evidence is supported by an economic theory that is irrational like the theory presented in Matsushita. See, e.g., Hr'g Tr. at 121-23; *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. The reason that there are competing inferences, Defendants argue, is that the so-called "co-conspirators" had legitimate business relationships with the choline Defendants as either buyers or sellers of certain products. Hr'g Tr. at 121-23. Defendants contend that all of the evidence proffered by Plaintiffs in response to their motions is consistent with procompetitive conduct. For example, Defendants argue that Roche's position as a buyer of choline renders every communication with the choline Defendants legitimate.

In response to Defendants **[**39]** references to the implausible economic theory rejected by the Matsushita Court, Plaintiffs argue their all-vitamins conspiracy theory stands on solid ground:

> Many vitamin purchasers - and plaintiffs in this litigation - bought a broad range of different vitamins. Because many customers purchased a panoply of vitamins, defendants needed to avoid the appearance of vigorous price competition on one vitamin vis-a-vis any other vitamin. As defendants frequently recognized, price trends on one vitamin product could affect prices for other vitamin products and especially that deterioration of pricing on one vitamin could spread to other vitamins. Thus, the success of the overall vitamins conspiracy depended on the participation by each member of the conspiracy, including those who sold only a single vitamin.

PJO at 37.

The question is whether communications among Defendants regarding the vitamin markets are justified as procompetitive behavior or are consistent with collusive activity. Judge Posner, writing for the three judge panel in In re High Fructose Corn Syrup, suggested that Matsushita permitted a sliding scale approach in antitrust cases, stating: "more **[**40]** evidence is required the less plausible the charge of collusive conduct." *In re High Fructose Corn Syrup Antitrust Litig. 295 F.3d 651, 661 (7th Cir. 2002).* [25] **[**41]** Judge Posner **[*14]** further explained in cases where there is no proof of defendant admissions as to a price fixing conspiracy, evidence "from which the existence of such an agreement can be inferred" may be presented to defeat summary judgment. *Id. at 654*. This point was further explained when Judge Posner warned of certain "traps" courts should avoid when ruling on motions for summary judgment. He explains that a court should not fall into the trap of assuming that:

> if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. [26]

Id. at 656.

One certainty that can be drawn in this case is that various Defendants' alleged conduct is without question dissimilar to the conduct at issue in Matsushita. In Matsushita, the defendants' conduct had tangible, procompetitive effects: each defendant was lowering the price of their product in the U.S. market. *Matsushita, 475 U.S. at 577*. When prices are lowered, other competitors are forced to compete and consumers win. The rationale behind the Supreme Court's decision in Matsushita is to protect market players who exhibit this type of unquestionably **[**42]** procompetetive behavior that leads to consumer-friendly results in the overall marketplace.

If Roche discusses choline production with a choline producer, that discussion is one of many routine business transactions that occurs world-wide in virtually every market on a daily basis. Although the inference of collusion may be unclear, as Defendants suggest, it is just as unclear that any *procompetitive* effects result from such behavior. Furthermore, the inference against procompetitive effects in these situations is significantly stronger in light of the concession made by some defendants that a choline chloride conspiracy took place. The Court recognizes that Roche is also a legitimate purchaser of choline chloride and has the right to talk to its sellers as a legitimate purchaser. As explained in High Fructose, however, the evidence as a whole - i.e., the backdrop of widespread, admitted, illegitimate behavior - cannot be ignored. Defendants position that discussions between admitted conspirators *must* be evidence of procompetitive behavior simply is not convincing.

In looking at the entire factual context to determine whether the reasonable inferences that Plaintiffs **[**43]** seek could have a competing inference of independent action, as is required by *Matsushita, 475 U.S. at 587-88*, the Court finds that the Plaintiffs' inference of conspiracy is, in general, entirely plausible. Furthermore, ***HN5***[] as the Supreme Court explained in Eastman Kodak Co. v. Image Technical Serv., Inc., "The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special **[*15]** burden on plaintiffs facing summary judgment in antitrust cases ... *Matsushita* demands only that the nonmoving party's inferences be

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[25] In the High Fructose Corn Syrup case, the plaintiff class of direct purchasers brought suit against the principal manufacturers of high fructose corn syrup ("HFCS"). *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002)*. The plaintiffs claimed that in 1988, the defendants secretly agreed to raise prices of differently graded HFCS products. These artificial price increases allegedly continued until approximately mid-1995. *Id. at 653-54*. Judge Posner, writing for the three judge panel, held that although there was no proof of defendant admissions as to a price fixing conspiracy, evidence "from which the existence of such an agreement can be inferred" could be presented to defeat summary judgment. *Id. at 654*. Judge Posner suggested that Matsushita permitted a sliding scale approach: "more evidence is required the less plausible the charge of collusive conduct." *Id. at 661*.

[26] The other two traps Judge Posner warned against include "weighing conflicting evidence (the job of the jury)" and "failing to distinguish between the existence of a conspiracy and its efficacy ... An agreement to fix list prices [even where actual sales were made below those list prices] is ... a per se violation of the *Sherman Act* even if most or for that matter all transactions occur at lower prices. *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 656 (7th Cir. 2002)*.

reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision." *504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

The Alleged "All-Vitamins" Conspiracy

Both Plaintiffs and Defendants use essentially ***HN6***[] the same elements to define what constitutes a conspiracy: [27] (1) Defendants must have had knowledge of an "all-vitamins" conspiracy, (2) Defendants must have intended to join the "all-vitamins" conspiracy, and (3) by joining the "all-vitamins" conspiracy, Defendants were interdependent upon one another in **[**44]** that their respective benefit depended on the success of the "all-vitamins" venture. E.g. *United States v. Tarantino, 269 U.S. App. D.C. 398, 846 F.2d 1384, 1392 (D.C. Cir. 1988)*.

[45]** *1. Knowledge*

HN7[] In order to establish the requisite knowledge of the conspiracy, Plaintiffs must prove that each Defendant was united in a common unlawful goal or purpose, or knew of the conspiracy's general scope and purpose. *Tarantino, 846 F.2d at 1392* ("A single conspiracy may be established when each conspirator knows of the existence of the larger conspiracy and the necessity for other participants, even if he is ignorant of their precise identities."). [28] **[**46]** The parties are in agreement on this issue. [29]

HN8[] Although Plaintiffs must show that each Defendant had knowledge of an agreement as to the overall conspiracy, they need not show (1) evidence of a formal agreement, or (2) knowledge, on behalf of the Defendant, of every detail of the alleged conspiracy. *United States v. Nusraty, 867 F.2d 759, 763 (2d Cir. 1989)* **[*16]** ("the 'government's proof of an agreement' does not require evidence of a formal or express agreement; it is enough that the parties have a tacit understanding **[**47]** to carry out the prohibited conduct.") (citations omitted)); *Mylan Lab., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1066 (D. Md. 1991)* ("[plaintiff] need not show that each alleged conspirator had knowledge of all of the details of the conspiracy" (citations omitted)).

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[27] Compare the headings in the Plaintiffs' brief:

> A. A Defendant Joined the General Vitamins Conspiracy if [1] It Knew That Vitamins Other Than Those It Sold Were Involved and [2] That Its Own Benefits Depended on the Success of the Larger Venture.
>
> F. Defendants' Intent to Join the Common Goal Can Be Inferred from the Evidence of Knowledge and Interdependence

PJO at 26, 47.

> with the elements proscribed in the Defendants' brief:
>
> To meet their burden of showing the Moving Defendants participated in an all-vitamins conspiracy, plaintiffs must demonstrate, defendant by defendant, that: (i) each Moving Defendant had knowledge of such a purported all-vitamins conspiracy; (ii) each Moving Defendant intended to join the purported all-vitamins conspiracy; and (iii) there was interdependence among the defendants alleged to have participated in the purported conspiracy.

Defs.' Mem. at 9.

[28] The Court agrees with Defendant's statement, "The substantive legal standards for determining the existence and scope of a conspiracy are the same in the civil and criminal contexts." Defs.' Mem. at 10, n.6. Judge Posner, writing for the court in Jones v. City of Chicago, held in a *section 1983* tort claim that "the requirements for establishing participation in a conspiracy are the same … as in a case (criminal or civil) in which conspiracy is a substantive wrong." *856 F.2d 985, 992 (7th Cir. 1988)* (citing *Hartford Accident & Indem. Co. v. Sullivan, 846 F.2d 377, 383 (7th Cir 1988))*.

[29] Compare PJO at 27 ("If plaintiff can show a single plan, goal or purpose on the part of defendants, it can establish a single conspiracy." (citing *In re Copper Antitrust Litigation, 98 F. Supp.2d 1039, 1054*; *United States v. Daily, 921 F.2d 994, 1007 (10th Cir. 1990)))*; with Defs.' Mem. at 11-12 ("A defendant need not be aware of every detail of the alleged conspiracy to be found liable, but it must at least know the object and general scope of the conspiracy." (citing *Mylan Lab., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1066-67 (D. Md. 1991)))*.

Additionally, *HN9*[] although Plaintiffs must establish a common goal, it is not necessary to provide direct evidence of the conspiracy. See *United States v. Consol. Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978)* (holding that direct evidence is not needed to prove a conspiracy, rather "a common purpose and plan may be inferred from a 'development and a collocation of circumstances") (citing *Glasser v. United States, 315 U.S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942))*. Cf. *Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* (noting that parties should be given the full benefit of their evidence without the Court "compartmentalizing the various factual components and wiping the slate clean after scrutiny of each").

2. Intent to Join

HN10[] **[**48]** Knowledge alone is not sufficient to prove that any particular Defendant intended to join the all-vitamins conspiracy. *United States v. Townsend, 924 F.2d 1385, 1391 (7th Cir. 1991)* (mere knowledge not enough to "tie the conspiracy together"); *United States v. Simms, 508 F. Supp. 1188, 1198 (W.D. La. 1980)* (mere knowledge of object or purpose, "without the intention and agreement to cooperate" not sufficient). Cf. *United States v. Saro, 306 U.S. App. D.C. 277, 24 F.3d 283, 288 (D.C. Cir. 1994)* (defendant "not accountable" where co-conspirators actions are merely foreseeable).

Although "mere knowledge of another similarly motivated conspiracy or an overlap in personnel do not prove one overall agreement," there may be an intent to join an overall, conspiracy if the "common purpose of a single enterprise .... motivates each participant and each act." *United States v. Snider, 720 F.2d 985, 988 (8th Cir. 1983)*. The Supreme Court has explained that a party progresses from mere knowledge of an endeavor to intent to join it when there is "informed and interested cooperation, stimulation, instigation. And there is also **[**49]** a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.". *Direct Sales Co. v. United States, 319 U.S. 703, 713, 87 L. Ed. 1674, 63 S. Ct. 1265 (1943)*. The intent that must be shown in a conspiracy case is the intent to advance the unlawful purpose of the conspiracy. *United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 112 (D.C. Cir. 1976)*.

3. Interdependence

In this case, Defendants argue that "[Plaintiffs must show that] each individual vitamin producer needed to have the prices of many vitamins fixed to benefit from anticompetitive conduct in its vitamin market" and if there is no such showing, "a fact finder could not legitimately conclude that a single conspiracy existed." Defs.' Mem. at 20. "Thus, plaintiffs must show, for example, that price fixing activities in Vitamin B5 were somehow necessary for manufacturers of choline chloride to successfully raise prices." Defs.' Mem. at 21.

This Circuit has recognized a more relaxed standard. *HN11*[] "Fairly minimal" evidence is needed in order to establish interdependency between various branches of a common conspiracy. *United States v. Gatling, 321 U.S. App. D.C. 63, 96 F.3d 1511, 1522 (D.C. Cir. 1996)* **[**50]** **[*17]** (finding interdependence between various participants in conspiracy to commit bribery based on minimal factors such as an overlap in participation and timing); *United States v. Graham, 317 U.S. App. D.C. 418, 83 F.3d 1466, 1471-72 (D.C. Cir. 1996)* (finding interdependence between members of competing drug cliques who assisted each other on occasion, even though the assistance was not significant to the success of each clique). *United States v. Mathis, 342 U.S. App. D.C. 127, 216 F.3d 18, 24 (D.C. Cir. 2000)* ("Fairly minimal' evidence may establish interdependency").

The All-Vitamins Conspiracy Evidence

1. The Choline Conspiracy

a. The North American Market

Chinook and other North American co-conspirators admit that they began fixing prices, allocating customers, and allocating the volume of choline chloride sold in Canada, the United States, and elsewhere around January 1988.

Chinook Plea Agreement (Sept. 29, 1999); Hilling Plea Agreement (Mar. 2, 1999); Felix Plea Agreement (Mar. 2, 1999); Fischer Plea Agreement (Mar. 2, 1999). The North American choline producers' conspiracy agreement ran at least until September **[**51]** 1998. Id.

Russell Cosburn testified that around 1988 he met with representatives from companies including Bioproducts, DuCoa, and DuPont at DuPont's offices in Wilmington, Delaware. PJC P 358 (citing Cosburn Dep. at 54). Cosburn stated that the meeting was called and chaired by Dr. Earnest Porta on behalf of DuPont. Porta indicated to the group that the European choline producers "knew how to market and sell products better than the participants they had sort of industry connections amongst themselves." Cosburn Dep. at 53-54. Porta suggested that the meeting attendees (i.e., the North American choline producers) "should start doing the same things in North America." Id. Porta proposed that the North American producers should "decide how [they] could keep price stability in the market" by, for example, "divid[ing] up customers, or … stay[ing] firm on prices." Id. at 56.

In early 1988, DuCoa, Bioproducts and Chinook agreed to raise prices of choline. Cosburn indicated that the agreement to do so was carried out as follows:

> … We would increase the choline prices by three-quarters of a cent or a cent or whatever was decided by whose turn it was to raise prices **[**52]** … so that [for example] if DuCoa announced an increase of one cent a pound on choline chloride on such and such a date, across the board … then Chinook would come out and say, "We are going to adopt the new price list published by," et cetera, and then Bioproducts would do it, and this would go on and on.

Cosburn Dep. at 62-63. The price increases were published in trade publications such as the industry trade journal, Feedstuffs. Id.

b. The European Market

The evidence indicates that the European producers began fixing prices and allocating market shares of choline chloride as early as 1983. See, e.g., UCB Answers to Interrogs. (Dec. 7, 2001). UCB submissions to the European Commission indicate meetings among the European producers to fix prices and allocate markets in Europe. See, e.g., UCBSA-017937 (meeting between UCB, BASF and Akzo Nobel re: "guid[ing] prices, supply to a certain number of clients in Germany, Belgium, France, and The Netherlands"). [30]

[53]** **[*18]** Russell Cosburn testified in his deposition that by around January 1988, it was "fairly common knowledge" in the choline industry that the Europeans were engaged in cartel activity. Cosburn Dep. at 54. Specifically, the European producers "probably got together and managed the industry in one way or another." Id. Management of the industry included the choline chloride market. Id.

c. The Europeans vs. the North Americans: Conspiracies Threatened

The North Americans and Europeans were successfully controlling their respective markets by the early 1990s. Cooperation across the two markets did not arise until players from each side entered, or threatened to enter, the other's market. Price competition from overseas would have destabilized or destroyed the separate conspiracies in each market. PJC at P 355.

For example, around 1990, Chinook, the North American producer located in Canada, began to "aggressively" expand their choline sales into Europe, which "upset" the European producers. Cosbum Dep. at 98-99; Hooghe Dep. at 295. Mr. Leopold Hooghe, a UCB employee, testified that around 1990, he met with Chinook representative Russell Cosburn at a bar in the **[**54]** Brussels, Belgium airport. Hooghe Dep. at 299-300. Hooghe testified that:

> [Cosburn] became a bit talkative and [began] telling me that [Chinook was] to become the biggest [choline producer] all over the world … because [Chinook] had the best quality and the best product and the lowest

[30] While BASF admitted to conspiratorial activity in North America, BASF only acknowledged that "sporadic efforts" were made among the three European producers of choline to "reach agreements regarding European markets and prices" but that "no effective agreement was ever reached or implemented" regarding choline chloride. BASF AG 0033446.

> price … [Cosburn said that Chinook would] just start in Belgium, but one country after another [Chinook would] take and … within a couple of years, there will be left only one name in choline chloride and that will be Chinook.
> … [Cosburn] told me that [Chinook was] happy and they could always undercut [UCB]. There wouldn't be a problem even if they had to sell at very low prices.

Id. At that same meeting at the Brussels airport, Mr. Hooghe also became aware that American choline producers (i.e., Bioproducts and DuCoa) had "agreements" among themselves to control market prices: "So in that same informal meeting, Russ Cosburn made very clear to me that there were agreements between the American producers." Id.

Cosburn testified that only "a few months" after Chinook started selling in Europe, he received a phone call from Dr. Walter Kohler of BASF. Cosburn **[**55]** Dep. at 98. Kohler indicated "that [the European producers] had noticed Chinook had become very active in the Far East … and the most disturbing thing to him was that [Chinook was] now putting product into Europe." Id. at 99. Kohler wanted to know what Chinook's objectives and intentions were in the choline markets. Id.

The Europeans retaliated. In 1992, a BASF subsidiary in Mexico entered into a contract to supply choline in the United States. In response, Bioproducts, Chinook and DuCoa called a meeting with BASF to "complain about [BASF's] pricing and to suggest setting limit prices in the U.S." BASF AG 0033443.

In early 1992, Leopold Hooghe from UCB traveled to North America for separate meetings with DuCoa and Chinook. **[*19]** Hooghe Dep. at 293. Hooghe told the North American producers that UCB was interested in selling choline in the United States. The statement was a bluff, intended to force the North Americans to "reconsider the way they started behaving in selling … in Europe one or two years before." Id. at 294. Hooghe told Chinook about the sham strategy, then told Bioproducts and DuCoa a day and two days later in part to confirm "there were [illegal] **[**56]** contacts" among those producers. Id. at 301-02.

d. The North Americans and Europeans Meet

The greater choline conspiracy involving both the North Americans and Europeans began at least in 1992, at approximately the same time both sides began penetrating each other's markets. PJC PP 343-44. It is through this interaction to coordinate conspiracies that Plaintiffs allege the North American Defendants became aware of the all-vitamins conspiracy.

In a call Walter Kohler made to Russell Cosburn of Chinook, Kohler suggested that Cosburn meet with representatives from UCB and Akzo Nobel, the two other European choline producers. Cosburn Dep. at pp. 104-05. Kohler even provided names for Cosburn to contact. Id. Cosburn followed up with meetings with representatives from both companies. Id.

The first meeting between all the major parties was in Mexico around October 1992. Hooghe Dep. at pp. 290-91. There, UCB met with BASF, Akzo Nobel, Bioproducts, Chinook and DuCoa. Both sides talked about exiting the other's markets. Kennedy Dep. at 419. BASF then took the lead and proposed that the parties stop arguing about territory and settle on "world capacities for choline." **[**57]** Id. at 420. The parties agreed to meet again in Germany. Id. at 426.

The following month, the parties gathered at Ludwisghaven, Germany. In Ludwigshafen, an agreement was made whereby the North American suppliers would withdraw from Europe and the Europeans would withdraw from the United States. Id. at 447. The parties also discussed "target prices" which the parties agreed to charge customers. Id. at 448-450. From November 1992 through April 1994, the parties met on a number of occasions to reaffirm their agreement by exchanging data regarding market shares, sales and overall progress. PJC at PP 367-68

2. The All-Vitamins Conspiracy Evidence Against Each Party

HN12[] The Court must view the evidence from the standpoint of each Defendant to determine liability in a conspiracy case. *United States v. United States Gypsum Co., 438 U.S. 422, 463, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)* ("Liability [can] only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged.")

a. UCB

Although UCB contests liability for the choline conspiracy, there is evidence that UCB participated in the price fixing and **[**58]** allocation of the choline market. For example, the evidence indicates that UCB attended the Mexico City meeting in 1992 where senior representatives from BASF, Akzo Nobel, Bioproducts, Chinook, and DuCoa discussed choline market allocation. See, e.g., BASF Agreed Statement of Facts (Fed. Ct. Canada) (Sept. 17, 1999).

The main document Plaintiffs offered to link UCB to the all-vitamins conspiracy is the internal memorandum from Christopher Tarmu to Guy Van Den Bossche, both UCB employees, detailing Tarmu's meeting with John Hobbs from Roche. **[*20]** UCBSA 018056-018057. The relevant portion of the memo reads, "I learned some interesting information about competition and the price information which is given below was taken directly off John Hobbs' computer screen which he turned round for me to read!!" Id. (emphasis in original).

The document indicates that Tarmu was meeting with Hobbs, "who is Purchasing Director at Roche Products," in order to "sort out the ongoing problem about this first trial bulk delivery." Id. Looking at the document in its entirety, the statement quoted above has a much more innocuous meaning. In addition, there is evidence in the record **[**59]** that Tarmu frequently met with Hobbs in order to discuss legitimate sales. See, e.g., UCBSA013971-013972. Further, Tarmu writes,

> One of the problems with Roche is the transparency of their purchasing information around Europe. John Hobbs is a smart man, and he only revealed the UCB Leuna information to me after we had quite a hard negotiation in which I was attempting to justify no weakening of the current price offered of £ 520/tonne.
>
> John Hobbs has accepted this further trial order, but I quite understand his point against the background of the above information, when he says that if UCB wishes to have business every month …., then there has to be further negotiation on prices.

UCBSA-018057. The Plaintiffs' theory that Roche is coordinating the price-fixing of choline through its buyer position is not supported here. Rather, it is contradicted. Roche is conducting negotiations with UCB. The implication to be drawn is that Roche is willing to deal with UCB, but only if their price can be negotiated. Plaintiffs cannot be entitled to the inference of an all-vitamins conspiracy from this document that so plainly speaks in competitive terms.

The Plaintiffs also attempt **[**60]** to establish UCB's liability on the all-vitamins conspiracy through its seller/buyer relationship with Roche and Rhone-Poulenc:

> Like the other choline producers … UCB had a close relationship with non-choline producer and Vitamins Inc. ringleader Roche. In addition to these arrangements with Roche, UCB sold choline to Rhone Poulenc, another key member of Vitamins Inc. UCB also sold choline to Degussa, another member of Vitamins Inc. that did not produce choline. Through these relationships with companies involved in other aspects of the conspiracy, UCB knew the full scope and implication of Vitamins Inc. In addition, it even adopted the conspiracy's terminology calling the choline component the "club." And UCB followed the same model that was used throughout the conspiracy in setting prices and adhering to market allocation.

PJC at *1918 OK 751, 71 Okla. 286, 177 P 376*. This "relationship" evidence, even viewed in the light most favorable to Plaintiffs, does not indicate even an inference of UCB's knowledge of or participation in an all-vitamins conspiracy.

The Plaintiffs have provided no evidence that can satisfy even a very low burden of establishing that **[**61]** UCB at least knew of and possibly participated in an all-vitamins conspiracy.

b. DuCoa

One of the most damaging documents indicating DuCoa's participation in the alleged all-vitamins conspiracy is a fax from Takeda to DuCoa regarding a February 9, 1993 meeting between the two companies. DUCOA 060806. The fax lists "Overall market review" as one of the topics on the proposed agenda. Id. The next line on the fax proposes that the choline **[*21]** chloride market be next on the agenda, broken down between the world market and the Asia/Japan market. Id.

Although the term "Overall market review" is not defined, the Court can infer that this phrase relates to vitamins other than choline for two reasons. First, discussion of the Choline Chloride market is listed as a separate agenda item. Second, because Takeda neither manufactures, sells nor purchases choline chloride, [31] it is hard to believe that discussion of "Overall market review," which is to be lead by Takeda, will discuss Choline Chloride. Although there is no evidence that this meeting actually took place, that issue is immaterial to the Court's analysis. At a minimum, this document indicates that these two parties **[**62]** had discussions regarding vitamins other than choline.

The Court is not bound to examine this document in a vacuum. See, e.g., *Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* ("The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (citations omitted)). In light of the factual background that Takeda was found to have participated illegally in five different cartels (specifically, vitamins B1, B2, B6, Folic Acid, and C); [32] **[**63]** and DuCoa has pleaded guilty to price-fixing and customer and market allocation in the choline industry, [33] there is a higher probability that this document supports a finding of illegal activity on behalf of DuCoa.

A similar document sent by Rhone-Poulenc to DuCoa shows substantially the same conduct. In an April 1, 1997 fax from Rhone-Poulenc to DuCoa, Rhone-Poulenc lays out a planned agenda for meetings between the two parties on April 28, 1998 and April 29, 1998. DUCOA087581-DUCOA087583. On the top of the list of topics to be covered at the meeting states the following: "First and Foremost is this is an opportunity for open sharing of plans and directions for both companies to complement each others objectives and goals in the long term." DUCOA-087582. These are two competitors meeting about "sharing plans" and "complementing" their businesses - not the types of discussions that should take place between competitors.

Also included in the topics to be covered during the meeting **[**64]** were "DuCoa's plans for vitamin premixes" and "How can RPAN support [DuCoa's] efforts"; a review of DuCoa's operations, products, and services; "DuCoa's perception of how the livestock market will evolve in the next 5 years;" comments DuCoa has "regarding **[*22]** key players in the market"; and a request for comments on DuCoa's competitors of choline, premixes and distribution, Roche, BASF, Novus, Degussa, and the National feed companies." Id. In exchange, the agenda called for Rhone-Poulenc to "share their perspective in several of the [same areas]." Id. Rhone-Poulenc was also to cover an "update on the global vitamin market (demand and pricing) with a focus on vitamin E." DUCOA-087583.

These two documents establish that there is a genuine issue of fact as to whether DuCoa had knowledge of an all-vitamins conspiracy. Additionally, this documents show there is enough evidence to create a factual issue as to

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[31] There is no indication in the record that Takeda manufactured, sold or bought choline chloride. See, e.g., PJC at PP 17-20.

[32] See, e.g., Mem. of Points and Authorities Supp. Takeda's Mot. Partial Summ. J. Dismissing Pls.' All-Vitamins Conspiracy Claim, Any Claim That Takeda Participated in Any Conspiracies Involving Vitamins That It Did Not Manufacture, and Any Claim That Takeda Participated in Any Conspiracies Extending Beyond 1995, at 7 (citing Comm'n of the European Communities, Comm'n Decision of November 21, 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement, at 10(a)).

This document is not part of the record of the instant motions, but was submitted in conjunction with all dispositive motions. It is cited here solely for use of the information conveyed.

[33] "Three individuals employed by DuCoa have pleaded guilty to price-fixing and customer and market allocation in the choline industry: Lindell Hilling, Pete Fischer, and Antonio Felix." PJC at 19 P40 (citing Plea Agreements of Lindell Hilling (Mar. 2, 1999), John L. "Pete" Fischer (Mar. 2, 1999) and Antonio Felix (Mar. 2, 1999)).

whether DuCoa manifested an intent to join, and interdependence on, the all-vitamins conspiracy. Summary judgment in DuCoa's favor is therefore not justified.

c. Bioproducts

Bioproducts asserts it did not manufacture or sell any vitamin other than choline and **[**65]** premix, or any of the raw materials used in the manufacture of other vitamins, during the conspiracy periods alleged by Plaintiffs. Bioproducts Mem. at 2. Bioproducts also points out that it has never been tried for, convicted of, or pleaded guilty to any criminal offense in the United States. Id. at 4. Nevertheless, John Kennedy, a former Bioproducts employee who later was employed by Chinook, pleaded guilty to charges relating to his involvement in a choline chloride conspiracy and served time in prison. Id. at 10.

On June 27, 1991, Kennedy, who was working for Bioproducts at the time, had a meeting with Dietz Kaminski and Peter Haag of BASF. Among the notes taken during that meeting, Kennedy drew out a rough organizational chart of the BASF Fine Chemical Division. BIO 019731. Kennedy, Kaminski and Haag discussed BASF's general sales figures and research costs. BIO 019732. Kaminski and Haag broke down for Kennedy the total market for vitamin feed among the four main world competitors: BASF, Roche, Rhone-Poulenc, and Takeda. Kaminski and Haag also gave company-specific sales volumes for vitamins A, E, B2, C, and Calpan. BIO 019733.

In his narrative notes of the same meeting, **[**66]** Kennedy mentioned discussions about "acceptable margins" for the "vitamin businesses." BIO 019734. Kennedy reported, "[BASF] obviously [is] trying to push vitamin and choline prices up to achieve acceptable profitability." Id. Kennedy thought this information was so productive that he proposed "Bioproducts should make the effort to meet with [BASF] no less than annually for both vitamin and choline world perspectives." Id. This document provides a clear indication that Bioproducts was aware of the vitamins conspiracies in general. Bioproducts wanted to update itself frequently on the progress of the conspiracies in each market, likely in order to track parallel progress of the conspiratorial successes or failures outside their market.

Furthermore, Kennedy had been aware of the interrelationship of the conspiratorial agreements. In the choline meeting set up in Ludwigshaven shortly after the Mexico meeting, Kennedy had commented (in the context of choline-specific agreements) that "everything was interrelated, that it didn't make sense to agree on one thing if [the producers] could not agree on the other things." Hooghe Dep. at 386.

This evidence fulfills Plaintiffs **[**67]** burden to demonstrate that there exists a genuine issue as to Bioproducts knowledge of the all-vitamins conspiracy. Furthermore, the evidence establishes that whether Bioproducts possessed an intent to join and interdependence on the all-vitamins conspiracy **[*23]** are issues that should be presented to a jury.

d. Chinook

Evidence connecting Chinook to the alleged all-vitamins conspiracy is seen through the deposition testimony of Chinook employee, Russell Cosburn. Cosburn testified that around January 1988, he met with representatives from companies including Bioproducts, DuCoa, and DuPont at DuPont's offices in Wilmington, Delaware. Cosburn Dep. at 52-53. At that meeting, Dr. Porta of DuPont referred to European "cartel type business" in the vitamin markets. Id. at 53-53. It was suggested that North American producers should adopt these cartel type business practices. Id. at 56. During the last couple months of 1988, a second meeting was held in which North American Choline producers, including Chinook, agreed to fix the prices of choline chloride. Id. at 62-63.

Cosburn also testified that during a trip to Europe that included a meeting with Dr. Walter Kohler **[**68]** of BASF, he learned that Europeans had a cartel related to vitamins other than choline. Cosburn Dep. at 104-106. Cosburn testified, "On more than one occasion there was [sic] vitamin cartels referred to … ." Id. This evidence establishes that Cosburn, acting on behalf of Chinook and with the consent of his boss Peter Copland, [34] had knowledge of a conspiracy other than the choline conspiracy.

There is evidence that Chinook, through Cosburn, actively participated in the choline price-fixing conspiracy. Furthermore, Chinook employees knew there were conspiracies involving vitamins other than choline. When the evidence supporting these two facts is woven together and viewed in the light most favorable to the plaintiffs, it establishes a genuine issue as to whether Chinook **[**69]** knew of, intended to join, and was interdependent on the all-vitamins conspiracy.

III. CONCLUSION

Under the Matsushita analysis, the conspiratorial actions engaged in by Defendants do not indicate a reasonable presumption of procompetitive conduct. Therefore, Plaintiffs are entitled to the benefit of the jury determining inferences rather than the Court doing so at the summary judgment stage. Where the evidence is insufficient to allow a reasonable inference of participation in the alleged all-vitamins conspiracy, however, Plaintiffs' case must fail. The Court has evaluated Plaintiffs' claims from the standpoint of each individual Defendant. The elements of conspiracy doctrine are minimally satisfied by the evidence presented with respect to DuCoa, Bioproducts and Chinook.

For the reasons set forth above, Defendants DuCoa, Bioproducts and Chinook's Motions for Summary Judgment are denied; Defendant UCB's Motion for Summary Judgment is granted. An appropriate order will accompany this Memorandum Opinion.

April 8, 2004

/s/

Thomas F. Hogan

Chief Judge

/s/

Thomas F. Hogan

Chief Judge

End of Document

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[34] Cosburn testified that after the first cartel meeting among North American producers, Cosburn reported back to Copland who advised him to "be cautious," but indicated to "go along with [the conspiracy agreement]." Cosburn Dep. at 58.

United Wis. Servs. v. Abbott Labs. (In re Terazosin Hydrochloride Antitrust Litig.)

United States District Court for the Southern District of Florida

April 8, 2004, Decided ; April 8, 2004, Filed

CASE NO. 99-MDL-1317-SEITZ/KLEIN

Reporter

220 F.R.D. 672 *; 2004 U.S. Dist. LEXIS 6176 **; 2004-1 Trade Cas. (CCH) P74,388; 17 Fla. L. Weekly Fed. D 581

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION; THIS ORDER RELATES TO: United Wisconsin Services, Inc., et. al. v. Abbott Laboratories, Case No. 99-C-7410 (N.D. Ill.); Grosskrueger, et. al. v. Abbott Laboratories, et. al., Case No. 99-C-7883 (N.D. Ill.); Reid, et. al. v. Abbott Laboratories, et. al., Case No. 00-342 (D.D.C.); Scafani v. Abbott Laboratories, et. al., Case No. 00-00508-SBA (N.D. Cal.); Mednick v. Abbott Laboratories, et. al., Case No. 2:00-3468 (C.D. Cal); O'Neal v. Abbott Laboratories, et. al., Case No. 00-J-1504-S (N.D. Ala.); Grund v. Abbott Laboratories, et. al., Blue Cross and Blue Shield of Alabama, Inc. v. Abbott Laboratories, et. al., Case No. 00-1303-CIV-Lenard (S.D. Fla.); Bernstein v. Abbott Laboratories, et. al., Case No. 2-00-CV-72974 (E.D. Mich.); Blue Cross and Blue Shield of Michigan v Abbott Laboratories, et. al., Case No. 5:01-CV-95 (W.D. Mich.)

Subsequent History: Class certification denied by *In re Terazosin Hydrochloride Antitrust Litig., 223 F.R.D. 666, 2004 U.S. Dist. LEXIS 19323 (S.D. Fla., June 23, 2004)*

Prior History: *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 2003 U.S. App. LEXIS 23286 (11th Cir. Fla., 2003)*

Disposition: **[**1]** Indirect Purchaser Plaintiffs' Motions for Class Certification granted in part and denied in part.

Core Terms

Purchaser, Indirect, generic, class certification, terazosin, patent, antitrust, consumers, class member, third-party, Defendants', class representative, Plaintiffs', class action, damages, unjust enrichment, hydrochloride, predominate, proposed class, co-payment, pharmacy, premiums, brand, insured, certification, benefits, conflicts, delayed, reimbursed, Co-Lead

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN1[] Class Actions, Certification of Classes

It is well-settled in the Eleventh Circuit that prior to the certification of a class, and before undertaking any of the analysis under *Fed. R. Civ. P. 23*, the district court must determine that at least one named class representative has U.S. Const. art. III standing to raise each class claim. Indeed, only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by *Fed. R. Civ. P. 23(a)*, to assert the rights of others.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN2[] Justiciability, Standing

Under the principles of standing, a plaintiff must allege and show that he personally suffered injury. To meet the requirement for standing under U.S. Const. art. III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that the prospective relief will remove the harm. Thus, to satisfy this requirement, the court must determine that the class representative is part of the class and possesses the same interest and suffered the same injury as the class members. Ordinarily, it is not sufficient that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN3[] Justiciability, Standing

With respect to standing requirements in general, the required showing depends on the stage of the litigation at which the standing issue is being decided.

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

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN4[] Standards of Review, Abuse of Discretion

Once a court has considered whether the named class representatives have standing to assert claims on behalf of the class, the analysis shifts to the requirements of *Fed. R. Civ. P. 23*. The burden of proof to establish the propriety of class certification rests with the advocate of the class. As the Eleventh Circuit instructs, the district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion. Assuming that the district court properly exercised its discretion within the parameters of the criteria of *Rule 23*, the court's determination should stand. Nonetheless, the court must conduct a rigorous analysis into whether the prerequisites of *Rule 23* are met before certifying a class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN5[] Class Actions, Certification of Classes

A class action may be maintained only when it satisfies all of the requirements of *Fed. R. Civ. P. 23(a)* and at least one of the alternative requirements of *Rule 23(b)*. Pursuant to *Rule 23(a)*, a class may be certified only if: (1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. These four prerequisites of *Rule 23(a)* are commonly referred to as numerosity, commonality, typicality, and adequacy of representation, and they are designed to limit class claims to those fairly encompassed by the named plaintiffs' individual claims.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN6[] Parties, Joinder of Parties

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN7[] **Class Actions, Class Members**

To meet the numerosity requirement, plaintiffs need not establish the exact size of the proposed class or identify all of the class members, but rather must demonstrate that the number is sufficiently large so as to make joinder impracticable. Impracticability, however, does not mean impossibility. The numerosity requirement is met when it would be inconvenient or difficult to join all of the class members, and may be satisfied with as few as 25-30 class members. While the size of the class is a highly relevant consideration, courts must take into account a number of other factors under *Fed. R. Civ. P. 23(a)(1)*, including the geographic diversity of the class members, the nature of the action, the size of each plaintiff's claim, judicial economy and the inconvenience of trying individual lawsuits, and the ability of the individual class members to institute individual lawsuits.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN8[] **Class Actions, Certification of Classes**

Under *Fed. R. Civ. P. 23(a)(2)*, class certification requires a showing that there are questions of law or fact common to the class. The threshold finding for commonality under this section is qualitative rather than quantitative. Consequently, *Rule 23(a)(2)* does not require that all the questions of law and fact raised by the dispute be common. Instead, courts in the Eleventh Circuit have held that a single common question is sufficient to satisfy *Rule 23(a)(2)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

Where a complaint alleges that the defendants have engaged in a standardized course of conduct that affects all class members, the commonality requirement will generally be met. Specifically in the antitrust context, courts in the Eleventh Circuit have consistently held that allegations of price-fixing, monopolization, and conspiracy by their very nature involve common questions of law or fact.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN10[] Class Actions, Certification of Classes

Under the third prerequisite for class certification, a court must assess whether the claims or defenses of the named representatives are typical of the claims or defenses of the class. *Fed. R. Civ. P. 23(a)(3)*. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. If the party advancing the class can establish that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims. Any atypicality or conflict between the named plaintiffs' claims and those of the class must be clear and must be such that the interests of the class are placed in significant jeopardy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] Class Actions, Prerequisites for Class Action

The main principle behind typicality is that the plaintiff will advance the interests of the class members by advancing her or his own self-interest. The alignment of interest is not the test for typicality. It is the result. The plaintiffs and class members have similar interests because they have similar claims. The plaintiff whose claim is typical will ordinarily establish the defendants' liability to the entire class by proving his or her individual claim.

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN12[] Class Members, Named Members

Typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff. Indeed, there is nothing in *Fed. R. Civ. P. 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN13[] Class Actions, Prerequisites for Class Action

Fed. R. Civ. P. 23(a)(4) requires that the representative party in a class action must adequately protect the interests of those he purports to represent. As interpreted by the United States Supreme Court and by the United States Court of Appeals for the Eleventh Circuit, this requirement applies to both the named plaintiffs and to the class counsel. Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class. This analysis encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14[] **Class Actions, Appellate Review**

The United States Court of Appeals for the Eleventh Circuit Court of Appeals has held that if substantial conflicts of interest are determined to exist among a class, class certification is inappropriate. However, the existence of minor conflicts alone will not defeat a party's claim to class certification; the conflict must be a fundamental one going to the specific issues in controversy. A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefited other members of the class. In such a situation, the named representatives cannot vigorously prosecute the interests of the class through qualified counsel because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15[] **Class Actions, Certification of Classes**

The burden of establishing that class certification is appropriate rests with the advocate of the class. While this is a correct statement of the law in the Eleventh Circuit, class certification cannot be defeated merely because defendants assert unsupported allegations of conflict between potential class members. When defendants come forward with an alleged conflict, the court must scrutinize the record citations defendants cite to determine whether such evidence establishes the existence of a conflict, or whether it provides a basis for the court to imply that a realistic possibility of antagonism exists. If the evidence provided by the defendants is deemed to be inaccurate or unreliable the plaintiffs may yet meet their burden of proof necessary to maintain a class action under *Fed. R. Civ. P. 23(a)(4)*.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN16[] **Class Actions, Certification of Classes**

In addition to satisfying the four requirements of *Fed. R. Civ. P. 23(a)*, plaintiffs must meet one of the alternative requirements set forth in *Rule 23(b)*. Class certification under *Rule 23(b)(3)*, imposes two additional requirements: (1) that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3)*. In conducting this analysis, the court must scrutinize the evidence plaintiffs propose to use in proving their claims without unnecessarily reaching the merits of the underlying claims.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN17[] Prerequisites for Class Action, Commonality

That common questions of law or fact predominate over individualized questions means that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof. The predominance inquiry focuses on the legal or factual questions that qualify each class member's case as a genuine controversy, and is far more demanding than *Fed. R. Civ. P. 23(a)*'s commonality requirement. Nonetheless, common questions need only predominate; they need not be dispositive of the litigation.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN18[] Class Actions, Class Members

As part of the predominance analysis, courts must examine the causes of action asserted in the complaint on behalf of the putative class. Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. The predominance inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy. Therefore, when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] Class Actions, Prerequisites for Class Action

In determining whether *Fed. R. Civ. P. 23(b)(3)* is satisfied, a court must consider how plaintiffs intend to prove: (1) liability on each of their claims; (2) the fact of injury; (3) the quantum of injury, namely the amount of their damages; and (4) whether the evidence is common to the class or unique to the individual class members. In so doing, the court must not consider the merits of the plaintiffs' claims, but rather must consider whether each element is susceptible to proof by generalized evidence. A *Rule 23* determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN20[] **Private Actions, Remedies**

In general, a federal or state claim based upon a theory of antitrust conspiracy raises three ultimate issues to be proven at trial: (1) the existence of a contract, combination or conspiracy in restraint of trade (liability); (2) injury-in-fact (antitrust injury); and (3) the extent of injury (damages).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN21[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Courts repeatedly have held that the existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present. This holding is equally applicable to market allocation cases.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN22[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Whether proceeding under federal or state ***antitrust law***, claims of monopolization are generally proven by demonstrating: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance or use of that power by anti-competitive or exclusionary means.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN23[] **Monopolies & Monopolization, Actual Monopolization**

The first element of a monopolization claim -- monopoly power -- is the power to control market prices or exclude competition. The material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so. In determining whether a defendant has market power, a court must assess whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN24[] **Private Actions, Remedies**

In an overcharge case, impact is shown through proof that: (1) defendants charged more than they would have but-for their antitrust violation; and (2) class members made some purchases at the illegally inflated or stabilized price. Courts in the Eleventh Circuit have recognized that a presumption of impact properly arises in such cases where the defendants have market power and are alleged to have conspired with competing manufacturers.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > General Overview

HN25[] Types of Contracts, Quasi Contracts

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. A person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust. Finally, a person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or chooses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. Taken together, these set forth a four-part test for claims of unjust enrichment: (1) the unjust; (2) retention of; (3) a benefit received; (4) at the expense of another.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > General Overview

HN26[] Types of Contracts, Quasi Contracts

Courts have recognized that state claims of unjust enrichment are universally recognized causes of action that are materially the same throughout the United States.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN27[] Purchasers, Indirect Purchasers

Antitrust plaintiffs have a limited burden with respect to showing that individual damages issues do not predominate. Plaintiffs do not need to supply a precise damage formula at the certification stage of an antitrust action. Instead, in assessing whether to certify a class, the court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all. At the class certification stage, therefore, plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN28[] **Class Actions, Prerequisites for Class Action**

Fed. R. Civ. P. 23(b)(3) requires that a court determine that the class action device is superior to other available methods for the fair and efficient adjudication of these controversies. Factors to be considered as part of this analysis include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

HN29[] **Class Actions, Prerequisites for Class Action**

The class action device is particularly appropriate where it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Class Attorneys > General Overview

Civil Procedure > ... > Class Actions > Class Attorneys > Appointments

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Attorneys > General Overview

HN30[] **Prerequisites for Class Action, Adequacy of Representation**

A court, in making the appointment of class counsel, must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in this action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(C)(i). The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class and may, if it deems it necessary, direct the proposed class counsel to provide information on any subject pertinent to the appointment. Fed. R. Civ. P. 23(g)(1)(C)(ii)-(iii).

Counsel: For Sherman Act Class Plaintiffs: Bryant McCulley, Esq., Richard B. Drubel, Esq., Kimberly Schultz, Esq., Co-Counsel, BOIES, SCHILLER & FLEXNER, L.L.P., Hanover, NH.

For Sherman Act Class **[**2]** Plaintiffs: Rene D. Harrod, Esq., Mitchell W. Berger, Esq., Liaison Counsel, BERGER SINGERMAN, Fort Lauderdale, FL.

For Valley Drug Company: Rene D. Harrod, Esq., Mitchell W. Berger, Esq., BERGER SINGERMAN, Fort Lauderdale, FL.

For Sherman Act Class Plaintiffs: Bruce Gerstein, Esq., Barry S. Taus, Esq., GARWIN, BRONZAFT, Co-Counsel, GERSTEIN & FISHER, L.L.P., New York, NY.

For Louisiana Wholesale: Bruce Gerstein, Esq., Barry S. Taus, Esq., GARWIN, BRONZAFT, GERSTEIN & FISHER, L.L.P., New York, NY.

For Walgreen, Plaintiff: Scott E. Perwin, Esq., KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, P.A., Miami, Fl.

For Indirect Purchaser, Plaintiffs: Robert Wozniak, Esq., Daniel A. Small, Esq., Co-Lead Counsel, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC.

For Indirect Purchaser, Blue Cross Blue Shield of Michigan, Plaintiffs: Matt Fridy, Esq., Kimberly West, Esq., Co-Lead Counsel, WALLACE JORDAN RATLIFFE & BRANDT, LLC, Birmingham, AL.

For Indirect Purchaser, Plaintiffs: Robert C. Gilbert, Esq., ROBERT C. GILBERT, P.A, Coral Gables, FL.

For Indirect Purchaser, Cobalt Corp., Plaintiffs: Geoffrey Horn, Esq., Stephen Lowey, Esq., Richard **[**3]** Cohen, Esq., Co-Lead Counsel, LOWEY DANNENBERG BEMPORAD & SELINGER, P.C., White Plains, NY.

For Indirect Purchaser, Blue Cross Blue Shield of Alabama, Plaintiffs: Pamela B. Slate. Esq., SLATE KENNEDY, LLC, Birmingham, AL.

For Valley Drug Co.: Daniel Berger, Esq., BERGER & MONTAGUE, P.C., Philadelphia, PA.

For Rite And Corp & CVS Meridian, Inc.: Joseph T. Lukens. Esq., HANGLEY ARONCHICK SEGAL & PUDLIN, Philadelphia, PA.

For Kaiser Foundation Health Plan. Inc.: W. Scott Simmer Esq., Kathleen Pitzer, Esq., ROBINS KAPLAN MILLER & CIRESI, LLP, Washington, DC.

For Louisiana Wholesale Drug Co.: Aubrey B. Calvin, Esq., THE CALVIN LAW FIRM, P.C., Houston, TX.

For Rite Aid Corp. & CVS Meridian, Inc.: Steve D. Shadowen, Esq., HANGLEY ARONCHICK SEGAL & PUDLIN, Harrisburg, PA.

For Katser Foundation Health Plan, Inc.: Scott R. Strand, Esq., ROBINS KAPLAN MILLER & CIRESI, LLP, Minneapolis, MN.

For Attorney General of Florida: Barbara Smithers, Esq., OFFICE OF THE ATTORNEY GENERAL, Orlando, FL.

For Abbott Laboratories: Jeffrey I. Wemberger, Esq., Stuart N. Senator, Esq., David Rosenzweig, Esq., MUNGER, TOLLES & OLSON LLP, Los Angeles, **[**4]** CA.

For Geneva Pharmaceuticals: Wayne A. Cross, Esq., Robert A. Milne, Esq., Brendan G. Woodard, Esq., WHITE & CASE, LLP, New York, NY.

For Char-Mar Pharm., Inc.: David S. Mandel, Esq., MANDEL & CALE LLP, Miami, FL.

For Abbott Loboratories: Rohit K. Singla, Esq., MUNGER, TOLLES & OLSON LLP, San Francisco, CA.

Judges: PATRICIA A. SEITZ, UNITED STATES DISTRICT JUDGE.

Opinion by: PATRICIA A. SEITZ

Opinion

[*675] ORDER GRANTING INDIRECT PURCHASER PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION OF STATE-WIDE CLASSES

THIS CAUSE is before the Court upon the Indirect Purchaser Plaintiffs' ("IPPs") Motions for Class Certification of a State-Wide Class of End-Payers in: Alabama [DE-453], California [DE-452], the District of Columbia [DE-451], Florida [DE-450], Illinois [DE-464], Kansas [DE-463], Maine [DE-462], Michigan [DE-461], Minnesota [DE-460], Mississippi [DE-459], Nevada [DE-458], New Jersey [DE-457], New Mexico [DE-455], New York [DE-456], North Carolina [DE-454], North Dakota [DE-465], South Dakota [DE-466], West Virginia [DE-467], and Wisconsin [DE-468]. Upon review of the Motions and supporting memoranda, the Defendants' joint opposition, Indirect **[**5]** Purchaser Plaintiffs' Reply, the parties' supplemental briefings, and oral argument, the Court will GRANT the Indirect Purchasers' Motions for Class Certification of a State-Wide Class of End Payers with the exception of the Motion for Class Certification in the District of Columbia [DE-451], which is DENIED, and the Motion for Class Certification in New Jersey [DE-457], which is DENIED AS MOOT. [1]

I. Factual Background

This case arises from Indirect Purchaser Plaintiffs' assertion of antitrust **[**6]** injury and unjust enrichment in nineteen states, based on the allegedly anti-competitive conduct of Defendants Abbott Laboratories ("Abbott"), Geneva Pharmaceuticals, Inc. ("Geneva"), and Zenith Goldline Pharmaceuticals, Inc. ("Zenith") [2]. Since 1987. Abbott has been **[*676]** exclusively manufacturing and marketing the chemical compound terazosin hydrochloride under the brand name "Hytrin," a drug used for the treatment of hypertension and enlarged prostate. Both Geneva and Zenith are generic drug manufacturers that developed generic versions of Hytrin for sale in the United States. Indirect Purchaser Plaintiffs assert that two 1998 agreements, one between Abbott and Geneva and another between Abbott and Zenith, violated the laws of the various states and resulted in delayed domestic competition for the sale of terazosin hydrochloride. Indirect Purchaser Plaintiffs further allege that Abbott unlawfully extended its monopoly power over the market for terazosin hydrochloride by misusing its Hytrin patents, ignoring certain regulations issued by the Food and Drug Administration ("FDA"), and engaging in baseless patent litigation against Geneva and Zenith. The relevant facts of the case, which **[**7]** firmly situate this case in the complex intersection of antitrust and patent law, are as follows:

A. The Regulatory Framework and Abbott's Patent Litigation

Under federal law, FDA approval is required before a company may begin selling a new drug in interstate commerce in the United States. [3] Applications for FDA approval can be filed as either new drug applications ("NDA") or abbreviated new drug applications ("ANDA"). If FDA approval is granted pursuant to an NDA, the drug manufacturer is issued a new patent which allows the patent owner to exclude others from making, using, or selling the drug in the United States for the duration of the patent. **[**8]** Upon approval by the FDA, information regarding any claimed patents are listed in a publication known as the Orange Book.

As a patent nears expiration, generic manufacturers often seek to market the generic version of brand name drugs that the FDA previously approved as an NDA. In that case, the Drug Price Competition and Patent Term

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[1] On September 11, 2002, this Court issued an Order Granting In Part and Denying In Part Defendants' Motion to Dismiss Certain State Counts of the Indirect Purchaser Plaintiffs' Third Amended Coordinated Complaint [DE-873]. In that Order, this Court dismissed with prejudice the claims of the New Jersey indirect purchasers. *Id.* at p.7. Accordingly, the motion to certify a class of indirect purchasers in New Jersey, which was filed a year before the Court's dismissal of their claims, must be denied as moot.

[2] Zenith, now known as Ivax Pharmaceuticals, Inc., entered into a settlement with Indirect Purchaser Plaintiffs in 2002. The Settlement Agreement was preliminarily approved by this Court on August 23, 2002 [DE-858]. Following a fairness hearing, the Court finally approved the settlement and entered final judgment as to Ivax on December 19, 2002 [DE-913].

[3] The regulatory framework governing FDA approval for drugs, and the significance of the patent system, is more thoroughly explained in the Eleventh Circuit Court of Appeals' decision in *Valley Drug Co. v. Geneva Pharms., 344 F.3d 1294, 1296-1300 (11th Cir. 2003)*.

Restoration Act of 1984, 21 U.S.C. § 355 ("the Hatch-Waxman Act") permits the generic drug manufacturers to seek expedited FDA approval by filing an ANDA pursuant to 21 U.S.C. § 355(j). While the NDA applicant must submit safety and efficacy studies for every proposed new drug, ANDA applicants may rely on the safety and efficacy data already **[**9]** filed with the FDA by the manufacturer of the equivalent brand name drug.

After a generic applicant has submitted its ANDA to the FDA, it must file a patent certification with respect to each patent claiming the listed drug (or a method of using the listed drug) of which the applicant is aware. In so doing, the applicant must certify that: (1) the patent information has not been filed with the FDA; (2) the underlying patent is expired; (3) the patent will expire, identifying the expiration date; or (4) the patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug. If the applicant certifies either that the patent information has not been filed or that the patent is expired, the FDA approval of the ANDA can proceed immediately. If the patent has not yet expired, the ANDA will not be approved until after the expiration date of the relevant patent. However, if the certification falls into the fourth category (known as a "paragraph IV certification"), the applicant must notify the patent holder, who then has the statutory right to bring suit for patent infringement, which will automatically delay approval of the ANDA for a period of thirty months.

Abbott **[**10]** holds a number of patents permitting it to manufacture and market drugs containing the chemical compound terazosin hydrochloride. Specifically, between 1977 and 1996, the United States Patent and Trademark Office ("the PTO") issued Abbott seven different patents covering various terazosin formulations. According to Indirect Purchaser Plaintiffs, prior to March 1995, only three of Abbott's relating to Hytrin had been submitted to the FDA for **[*677]** listing in the Orange Book. Indirect Purchaser Plaintiffs contend that Abbott's other claimed patents are invalid "add-on" patents. Add-on patents, as Indirect Purchaser Plaintiffs explain, are those that are improperly obtained and listed in the Orange Book with expiration dates long after the expiration date of the patent for the active ingredient. The purpose of listing such an "add-on" patent on the eve of an anticipated ANDA application, as Indirect Purchaser Plaintiffs' allege Abbott did, is to be able to initiate a patent infringement suit against the ANDA applicant and to trigger the automatic thirty-month stay under the Hatch-Waxman Act. It can, therefore, be used as a blockade by the brandname drug manufacturer to delay generic competition.

[11]** Because of Hytrin's success in the pharmaceutical market, [4] in the early 1990s, several generic drug makers including Geneva and Zenith began taking steps to develop generic versions of Hytrin that contained the same active chemical components but different inactive ingredients. For instance, between 1993 and 1996, Geneva filed four ANDAs based on Abbott's NDA for Hytrin, each time making paragraph IV certifications. In September 1994, Abbott exercised its statutory right to sue Geneva for patent infringement and initiated several actions against Geneva in the United States District Court for the Northern District of Illinois. The ensuing litigation, as alleged by Indirect Purchaser Plaintiffs, delayed Geneva's efforts to market its own generic drug for an indefinite period of time pending resolution of the parties' ongoing patent disputes. Abbott also instituted legal actions against Zenith in 1994 and 1995, after it learned that Zenith had filed an ANDA for a terazosin hydrochloride drug. Therefore, from 1994 onwards, Abbott found itself involved in concurrent disputes with both Geneva and Zenith, as well as other generic manufacturers, over the validity of its Hytrin patents while **[**12]** Geneva and Zenith competed with each other to bring the first generic terazosin hydrochloride drug to market.

B. The Abbott-Zenith and Abbott-Geneva Agreements

In late March and early April 1998, Abbott entered into separate confidential settlement agreements with Zenith and Geneva, its two fiercest potential competitors, to resolve the ongoing patent litigation. Under the Abbott-Zenith agreement, entered into on March 31, 1998, Zenith agreed to accept $ 3 million to join Abbott in dismissing the pending actions between the two parties, as well as an additional $ 6 million per quarter to "not sell, offer for sale, donate, or otherwise commercially distribute in the United States any Terazosin **[**13]** Hydrochloride Product."

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[4] Hytrin proved to be a highly profitable drug for Abbott, generating $ 481 million in sales for Abbott in 1998 alone. This figure constituted approximately 20% of Abbott's net sales of pharmaceutical products that year, and made Hytrin the 33rd best selling prescription drug in the United States by dollar volume.

Zenith also obtained Abbott's permission to market such products once generic competition began. Similarly, pursuant to the April 1, 1998 Abbott-Geneva agreement, Geneva agreed to accept Abbott's payment of $ 4.5 million per month to refrain from selling any generic terazosin hydrochloride drug, including a terazosin capsule for which Geneva had obtained FDA approval in March 1998, until the earlier of: (1) the date on which another drug maker sold a generic version of Hytrin in the United States; or (2) the date on which Geneva received a final, unappealable judgment that its proposed generic tablet did not infringe Abbott's patents.

As a result of these agreements, Abbott exclusively sold the only terazosin hydrochloride drug available in the United States until August 1999. The Abbott-Zenith and Abbott-Geneva agreements terminated on August 13, 1999, in response to a Federal Trade Commission investigation of the agreements which resulted in a consent settlement. On August 13, 1999, Geneva began to market its terazosin capsules, the first generic terazosin hydrochloride drug in the United States. Other generics, such as Mylan's terazosin capsule introduced **[**14]** in February 2000, soon followed. While Abbott raised its average wholesale price for Hytrin capsules by 11.8% in the nine months following Geneva's entry into the market, Geneva's capsules were sold **[*678]** at a price approximately 46% lower than Hytrin. Further generic penetration into the market caused the generic average wholesale price to drop even further to less than 16% of Abbott's Hytrin price by April 2000.

II. The Indirect Purchaser Plaintiffs' Class Certification Motions

As asserted in their Fourth Amended Complaint, Indirect Purchaser Plaintiffs seek damages from Defendants based on antitrust [5] and unjust enrichment theories. Specifically, Indirect Purchaser Plaintiffs allege that the Abbott-Zenith and Abbott-Geneva agreements evidence a conspiracy to restrain trade in violation of the various state statutes. [6] Indirect Purchaser Plaintiffs also allege that Abbott's conduct in filing "add-on" patents, pursuing frivolous patent litigation, and entering into anti-competitive agreements with their primary generic competitors delayed generic entry in the market, and served to extend Abbott's monopoly over the domestic market for terazosin hydrochloride. Finally, Indirect **[**15]** Purchaser Plaintiffs contend that the delayed generic entry into the market resulted in Defendants being unjustly enriched, in that: (a) Abbott derived excess profits from the overcharges that Hytrin purchasers paid during the period of generic foreclosure; and (b) Geneva was paid substantial amounts to delay marketing its generic terazosin capsule under the Abbott-Geneva agreement of April 1998.

[16]** On September 4, 2001, Indirect Purchaser Plaintiffs moved for certification of nineteen statewide classes of "end-payers" in Alabama, the District of Columbia, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Dakota, West Virginia, and Wisconsin [DE-450 through 468]. Indirect Purchaser Plaintiffs define "end -payers" as those consumers and third-party payers [7] who bore the economic risk for purchases of terazosin. Invoking the interest of judicial economy, Indirect Purchaser Plaintiffs have moved to certify the following class:

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[5] Under United States Supreme Court precedent, indirect purchasers do not have standing to seek damages under the federal ***antitrust law*** *See* *Hanover Shoe v United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*; *see also* *Illinois Brick Co v Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. However, in the instant case, each proposed indirect purchaser state class is proceeding under an *Illinois Brick* repealer statute, or under unfair trade practices legislation.

[6] As will be addressed in section III.C.I below, the various state statutes under which Indirect Purchaser Plaintiffs are proceeding require the same elements for claims of monopolization and restraint of trade as the federal antitrust laws.

[7] Third-party payers, sometimes referred to here as TPPs, can be further categorized into: (1) traditional insurers, such as proposed class representatives Cobalt, Blue Cross Blue Shield of Michigan, and Blue Cross/Blue Shield of Alabama, and (2) self-funded employer health benefit plans ("SFPs") that act as insurers for their own employees.

> All persons and entities who or which have at any time from October 15, 1995 to June 30, 2002 [8] **[**18]** paid all or part of the purchase price of Hytrin or its AB-rated generic bioequivalents other than for resale, in [state] or via mail for residents of [state]. Excluded from the Class are the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Hytrin and its generic bioequivalents for resale, to the extent of such **[**17]** purchases for resale; direct purchasers of Hytrin and its generic bioequivalents from Defendants, to the extent of such direct purchases; and indirect purchasers who **[*679]** suffered no economic injury as a result of Defendants' allegedly unlawful conduct. [9]

See IPPs' Response to Defs.' Submission Regarding Alternative Indirect Purchaser Class Definitions, filed on March 2, 2004 [DE-1085] at p. 2. As Indirect Purchaser Plaintiffs bear the burden of satisfying the requirements for a class action under *Fed. R. Civ. P. 23*, *see* *Gilchrist v. Bolger, 733 F.2d 1551, 1556 (11th Cir. 1984)*, the Court will address those provisions in turn.

III. Discussion

A. Standing

HN1[] It is well-settled in the Eleventh Circuit that prior to the certification of a class, and before undertaking any of the analysis under *Rule 23*, the district court must determine that at least one named class representative has Article III standing to raise each class claim. *Wolf Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)*; *see also* *Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987)* ("Any analysis of class certification must begin with the issue of standing."). Indeed, "only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined **[**19]** by *Rule 23(a)*, to assert the rights of others." *Griffin, 823 F.2d at 1482*.

HN2[] Under the principles of standing, "a plaintiff must allege and show that he personally suffered injury." *Id. (see* *Payne v. Travenol Lab., Inc., 565 F.2d 895, 898 (5th Cir.)* ("To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that the prospective relief will remove the harm.") (citation omitted), *cert. denied, 439 U.S. 835, 58 L. Ed. 2d 131, 99 S. Ct. 118 (1979)*). Thus, to satisfy this requirement, the Court must determine that the class representative is "part of the class and possess[es] the same interest and suffered the same injury as the class members." *Prado-Steiman, 221 F.3d at 1279* (citing *Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982))*. Ordinarily, it is not sufficient that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, "each claim must be analyzed separately, **[**20]** and a claim cannot be asserted on behalf of a class unless at least one

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[8] The Court notes that this proposed class definition represents a slight modification of the original definition suggested by the Indirect Purchaser Plaintiffs. Specifically, the current proposal provides a June 30, 2002 end date for the class period. When asked about the significance of this date at the March 12, 2004 oral argument. Indirect Purchaser Plaintiffs responded that it does not have any particular significance, but that it represents a reasonable ending date for the class period. While some residual damages may have continued to accrue after that date, Indirect Purchaser Plaintiffs believe that prices had stabilized by then. Defendants have not asserted any particular opposition to the June 30, 2002 date.

[9] The clear exclusion of "indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct" also represents a modification of the original class definition. As will be more fully discussed below, this exclusion eliminates some of the potential conflicts that may arise in the context of the *Rule 23(a)(4)* analysis.

named plaintiff has suffered the injury that gives rise to that claim." [10] *Prado-Steiman, 221 F.3d at 1280* (citing *Griffin, 823 F.2d at 1483*).

The classes proposed by Indirect Purchaser Plaintiffs include both third-party **[**21]** payers and individual consumers. As will be addressed more fully in connection with the Court's *Rule 23* analysis, Defendants object to the inclusion of both types of purported end-payers in the same class, contending that the claims of insurance companies are atypical of the individual consumers' claims and that antagonistic interests exist between the two groups. *See* Section III.B.4(a). [11] While these arguments were raised as challenges to typicality and adequacy of representation, and not as part of an Article III standing analysis, the Court recognizes that the issues **[*680]** of standing and typicality are closely aligned. *See* *Prado-Steiman, 221 F.3d at 1279* (stating that "it should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class"). As discussed in Section III.B.4(a) below, Indirect Purchaser Plaintiffs have demonstrated the requisite nexus between the claims of the third-party payers and the individual consumers, and the Court has concluded that no conflicts exist between the two types of end payers that would preclude class **[**22]** certification. With these principles in mind, the Court assesses each proposed class to determine whether at least one named class representative, whether a third-party payer or an individual consumer, has Article III standing to raise the classes' claims of antitrust violations and unjust enrichment.

1. Named Third-Party Payer Class Representatives

a. Cobalt

As an initial matter, the Court notes that in an Order dated September 11, 2002. this Court concluded that Cobalt (formerly known as United Wisconsin Services, Inc. or "UWSI") had Article III standing to assert the class claims in the states at issue. [DE-873]. Specifically, the Court held that "despite Defendants' arguments to the contrary, UWSI is **[**23]** not limited to pursuing a claim under the laws of Wisconsin only." *Id.* at p. 6. This ruling was made in the context of Defendants' Motion to Dismiss Certain State Counts of the Indirect Purchaser Plaintiffs' Third Amended Coordinated Complaint. However, it is worth noting that ***HN3***[] with respect to standing requirements in general, the required showing depends on the stage of the litigation at which the standing issue is being decided. *See* *Lujan v. Defenders of Wildlife, 504 U.S. 555, 562, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*. Because this case has proceeded far beyond the pleading stage, the Court must now look beyond the allegations of the complaint and assess whether record evidence supports a finding that Cobalt has Article III standing. *Id.*

Cobalt purports to be a named class representative in fifteen states California, Florida, Illinois, Kansas, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, West Virginia, and Wisconsin. The record evidence reflects that during the class period, Cobalt reimbursed the following number of Hytrin and terazosin prescriptions in each state: 274 in California; 1,518 in Florida; 648 **[**24]** in Illinois; 95 in Kansas; 369 in Minnesota; 28 in Mississippi; 137 in Nevada; 22 in New Mexico; 29 in New York; 342 in North Carolina; 3 in North Dakota; 23 in South Dakota; 47 in West Virginia; [12] and 79,429 in Wisconsin. *See* Defs.' Opp'n,

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[10] Although the Eleventh Circuit instructs that each claim must be analyzed separately for standing purposes. In this case, the interwoven facts that give rise to both Plaintiffs' antitrust and unjust enrichment claims indicate that any class representative who has Article III standing for one claim will necessarily have standing for the other. *See* IPPs' Mot. at p. 45 ("The same operative facts which form the basis of each of the state Classes' claims based upon antitrust theories form the basis of the Classes' claims for unjust enrichment") Indeed, in then arguments on standing and typicality. Defendants have failed to distinguish between the antitrust and unjust enrichment claims.

[11] Because many of the elements relevant to class certification overlap with one another, the Court will often cross-reference other sections in this Order. For the convenience of the parties, the Court has appended to the end of this Order an index listing the pages on which each subsection begins.

[12] Defendants, in a footnote devoid of any citations, also challenge Cobalt's standing in South Dakota and West Virginia. Specifically, Defendants argue that because those states' monopolization claims test on allegations regarding Abbott's unilateral

at Ex. 44. There is no record evidence reflecting whether Cobalt made any purchases (or reimbursed any purchases) of Hytrin and/or generic terazosin in Michigan.

[25]** Defendants do not dispute that Cobalt, a Wisconsin corporation whose principal place of business is in Wisconsin, may serve as a named class representative in Wisconsin. *See* Defs.' Opp'n. at p. 51; *see also* Compl. at P 13. Defendants do assert, however, that Cobalt lacks standing in any state other than Wisconsin. *Id.* at 50-53. Specifically, applying the "most significant relationship" test, Defendants conclude that any injury suffered by Cobalt occurred in Wisconsin, thereby making Cobalt's claims subject to Wisconsin law. *Id.* In support of this argument, Defendants point out that: (1) Cobalt is a Wisconsin corporation with its principal place of **[*681]** business in Wisconsin; (2) the vast majority of Cobalt's claims are based on transactions that occurred in Wisconsin; and (3) the reimbursements giving rise to Cobalt's claims in the various states are based on transactions that occurred in Wisconsin. *Id.* at p. 51.

While Defendants' claim is premised on the notion that the state of purchase is the state where Cobalt reimburses the claims, Defendants have failed to provide any support for this argument. Indeed, other courts have recognized the propriety of basing class **[**26]** eligibility on the state where the patient resides, as opposed to the state where the pharmacy or insurance company is located. *See generally* *In re Cardizem, 200 F.R.D. 297 (E.D. Mich. 2001)*; *see also* *FTC v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 205 F.R.D. 369, 396 (D.D.C. 2002)* (holding that "the plaintiffs' choice to base class eligibility upon the [third-party payer] class members' plan members' states of residence [is] fair and reasonable because it generally comports with the purposes of the states' antitrust laws."). [13] Accordingly, the Court concludes that Cobalt has standing to assert the claims of the class members in California, Florida, Illinois, Kansas, Minnesota, Mississippi, Nevada, New Mexico, North Carolina. North Dakota, South Dakota, West Virginia, and Wisconsin.

[27]** As for Michigan, because Indirect Purchaser Plaintiffs have failed to proffer any evidence establishing that Cobalt reimbursed any claims in that state, Cobalt does not have standing to assert the Michigan class' antitrust and unjust enrichment claims. Cobalt also lacks standing to assert the class claims in New York. As Defendants correctly argued, because the *Donnelly Act*'s *Illinois Brick* repealer was effective on January 1, 1998 and is not retroactive, and because Cobalt's sole pre-1998 reimbursement in New York occurred in 1996, Cobalt is an inadequate class representative in that state. [14] However, as with Michigan, Cobalt's exclusion as a class representative in New York is not fatal to that state's class certification motion, as another appropriate class representative exists. *See* Section III.A.2(g).

[28] b. Blue Cross/Blue Shield of Alabama and of Michigan**

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conduct between 1995 and 1998, and Cobalt made no purchases in those states during that time period. Cobalt lacks standing either individually or as a representative of the class. *See* Defs.' Opp'n. at p. 51, n. 26. Defendants have failed to provide any support for this argument. As will be discussed in more detail under the typicality requirement, there is no requirement under *Rule 23* that the claims of the named class representatives be identical in substance or scope to those of the class members, either for standing or for typicality purposes. *See* Section III. B. 3 below. Therefore, the mere fact that Cobalt's rembursements were not made during the same time period as the class' allegations does not defeat Cobalt's standing in those states.

[13] In the *Lorazepam & Clorazepate Antitrust Litig* case, the United States District Court for the District of Columbia recognized that basing class eligibility on, for instance, the location of the pharmacy where the prescription is filled or the state where the third-party payer resides, would result in "anomalous situations" in which residents of particular states could benefit from other state's statutes although the legislature of their own states intended for no such protections. *205 F.R.D. at 396-97*.

[14] Although Indirect Purchaser Plaintiffs' did not dispute Defendants' interpretation of the *Donnelly Act*, they did argue that "Defendants' merits-based statute of limitations arguments are improperly raised in this class certification motion." However, the Eleventh Circuit has recognized that "a class representative whose claim is time-barred cannot assert the claim on behalf of the class." *See* *Piazza v Ebsco Indus. Inc, 273 F.3d 1341 (11th Cir. 2001)* (citing *Carter v West Publ'g Co, 225 F.3d 1258, 1267 (11th Cir 2000)* (reversing class certification because the named plaintiff, whose claim was time-barred, lacked standing to assert the claim)). While the Court reaches no ultimate conclusion on the merits of Defendants' statute of limitations argument, it appears, based on the information presently before the Court, that Cobalt's New York claims cannot proceed.

Blue Cross/Blue Shield of Alabama ("Alabama Blue") and Blue Cross/Blue Shield of Michigan ("Michigan Blue") seek to serve as named class representatives in Alabama and Michigan, respectively. [15] **[**29]** Although there is no specific evidence in the record indicating the amount of reimbursements these two third-party payers made in Alabama and Michigan, there is a sufficient basis for this Court to find that they have standing to pursue the claims of the Alabama and Michigan state classes. First, the parties have engaged in extensive discovery regarding Alabama Blue and Michigan Blue, and Defendants have not contested these third-party payers' standing in Alabama and Michigan. Second, Defendants' own expert, Dr. Daniel Rubenfeld, has repeatedly made reference to the data regarding Alabama Blue and Michigan Blue's reimbursements in those states, **[*682]** and has conducted his own regression analyses using such data. *See* Defs.' Opp'n, at Exs. 42-43. Accordingly, there is a sufficient basis for the Court to conclude that these third-party payers have standing to assert their antitrust and unjust enrichment claims. [16]

2. Named Consumer Representatives

a. Alabama

Class representative Willie O'Neal purchased Hytrin and generic terazosin hydrochloride from pharmacies in Alabama during the period of 1997-2001. *See* IPPs' Pre-Argument Submission on Class Certification, Ex. G, Tab 1. Mr. O'Neal paid cash out-of-pocket for all of his prescription drug purchases during that period, and paid a lower price for generic terazosin than for Hytrin. *Id.* Mr. O'Neal testified that he switched to generic terazosin as soon as his pharmacist informed him that a generic had become available. *Id.* at 29, 33. Because Mr. O'Neal paid more for Hytrin during the period of alleged generic foreclosure, and later switched to the generic, he has the same interest and has alleged facts sufficient to indicate that he suffered the same injury as the purported **[**30]** class.

b. California

As to the named consumer class representatives, the record indicates that Victor Scafani and William Mednick both purchased Hytrin and generic terazosin hydrochloride from pharmacies in California during the periods of 1998-2000 and 1996-2002, respectively. See Ex. G, at Tabs 2-3. Mr. Seafani's purchase records indicate that he incurred a $ 15 co-payment for Hytrin, but paid only a $ 10 co-payment for generic terazosin hydrochloride once it became available *Id.* at Tab 2. As for Mr. Mednick, pursuant to the terms of his health insurance benefit plan, his co-payments for purchases of Hytrin ranged from $ 10 to $ 15, while his co-payments for purchases of the generic drug ranged from $ 5 or $ 9 during the relevant period. *Id.* at Tab 3. Both Mr. Scafani and Mr. Mednick, therefore, have the same interest and have alleged facts sufficient to indicate that they suffered the same injury as the purported class.

c. District of Columbia

As to the proposed District of Columbia class, the sole named class representative, Clarence Reid, does not have Article III standing. While Mr. Reid purchased Hytrin during part of the class period, the record does **[**31]** not indicate that he suffered any injury from Defendants' alleged anticompetitive conduct. *See* Ex. G, at Tab 4. Specifically, Mr. Reid's deposition testimony indicates that under his health insurance benefits plan, he initially incurred a $ 15 co-payment for Hytrin prescriptions, which subsequently increased to $ 40 when generic terazosin hydrochloride became available. *Id.* Further, Mr. Reid testified that he never purchased the generic because as of November 1999, shortly after the generic became available, he became asymptomatic and no longer required medication for his prostate. *Id.* at pp. 42-43. There is also no indication that Mr. Reid would have purchased the generic had it been available earlier. [17] **[**32]** Consequently, absent any evidence that he personally suffered an

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[15] On March 2, 2004, Alabama Blue and Michigan Blue moved the Court for permission to be joined as named class representatives in all of the other proposed state classes [DE-1086]. The Court denied their motion as untimely.

[16] If the record evidence ultimately reveals that Alabama Blue and or Michigan Blue do not have standing to assert these claims, the Court may, under *Fed. R. Civ. P. 23(e)(1)(C)*, amend its Order at any time before final judgment.

injury attributable to delayed generic entry, Mr. Reid does not have standing to assert any of the claims raised by the District of Columbia class. [18] Because Mr. Reid **[*683]** is the only named class representative, his lack of Article III standing is fatal to the purported District of Columbia class' certification motion.

d. Florida

As Indirect Purchaser Plaintiffs conceded at the March 12, 2004 hearing, the named individual representative for the proposed Florida class, Antonio Lopez-Souto, does not have Article III standing. Indeed, in his deposition testimony, Mr. Lopez-Souto admitted that the never gave any thought to substituting generic terazosin hydrochloride for Hytrin. *See* Ex. G, at Tab 5, p. 14. However, because Cobalt does have standing in Florida, the standing requirement is met.

e. Maine

Class representative David Grund purchased Hytrin and generic terazosin from a pharmacy in Maine during **[**33]** the period of 1995-2001. *See* Ex. G, at Tab 6. Pursuant to his health insurance benefits plan, Mr. Grund made co-payments of $ 10, $ 20, or $ 30 during that time period for various pill counts and dosages of terazosin hydrochloride. *Id.* Based on the record evidence, Mr. Grund has standing to assert the claims of the purported class.

f. Michigan

Class representative Martin Bernstein purchased Hytrin and generic terazosin from a pharmacy in Michigan during the period of 1999-2001. *Id.* at Tab 7. Pursuant to his prescription drug benefits coverage, Mr. Bernstein was initially charged a co-pay of $ 3, which subsequently increased to $ 10, for each prescription filled. *Id.* Mr. Bernstein does not recall the specific difference in his co-payment for brand name drugs versus the generic versions, but he does recall that the generic cost him less. *Id.* Typical of the claims of other class members, Mr. Bernstein claims that he was overcharged during the period preceding generic entry into the market. *Id.* at 43. Based on the record evidence, Mr. Bernstein has standing to assert the claims of the purported class.

g. New York

Class representatives Albert J. Meyer **[**34]** and Lloyd Latona both purchased Hytrin and generic terazosin from pharmacies in New York, the former from 1998-2001 and the latter from 1994-2001. Mr. Meyer paid cash for Hytrin until 1998, when his wife changed health insurance coverage. *See* Ex. G, at Tab 8. Under the insurance plan, Mr. Meyer paid a $ 10 co-payment for Hytrin, until he switched to generic terazosin in January 2000 and began paying a $ 5 co-payment. *Id.* at pp. 29-30. Mr. Meyer, therefore, has alleged the same injury as the class, and Indirect Purchaser Plaintiffs have provided evidence that adequately supports his claim for purposes of the standing analysis. As to Mr. Latona, while it is clear that he switched from Hytrin to generic terazosin, Indirect Purchaser Plaintiffs have not provided the Court with any record evidence to indicate that he actually paid less for the generic than he did for the branded Hytrin. Based on the evidence currently before the Court, Mr. Latona, therefore, does not have Article III standing.

h. Wisconsin

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[17] At the hearing held on March 12, 2004, Indirect Purchaser Plaintiffs' counsel posited that evidence exists to support the conclusion that Mr. Reid *would have* switched to the generic had it been available earlier. However, Indirect Purchaser Plaintiffs' counsel admitted that any claim by Mr. Reid under the antitrust laws is too speculative, thereby conceding that Mr. Reid does not have standing to assert any antitrust violations on behalf of the class.

[18] In conceding that Mr. Reid does not have standing to assert the antitrust violations on behalf of the class. Indirect Purchaser Plaintiffs suggested that Mr. Reid does have standing for unjust enrichment claims. However, Indirect Purchaser Plaintiffs have failed to demonstrate (either in their submissions of at oral argument) how Mr. Reid, who did not pay any overcharge or suffet any economic damage, has standing to raise the claims that Defendants were unjustly enriched with excessive profits.

Class representative Lavera Grosskrueger's husband, Ewald Grosskrueger, was prescribed Hytrin and generic terazosin hydrochloride during the period from 1998-2001. **[**35]** *See* Ex. G, at Tab 10. The Grosskruegers paid cash out-of-pocket for those prescriptions, which were filled via mail order by the American Association of Retired Persons Pharmacy and through two local pharmacies in Wisconsin. *Id.* Because she paid a lower price for the generic than for branded Hytrin, Mrs. Grosskrueger has standing to assert the claims of the Wisconsin class.

3. Standing Analysis Conclusion

Based on the foregoing analysis, the Court finds that for all of the proposed classes, except for the District of Columbia, at least one named plaintiff possesses the same interest and suffered the same alleged injury as the class members. *Prado-Steiman, 221 F.3d at 1279-80*. As to the District of Columbia **[*684]** class, the Court concludes that class certification is inappropriate due to lack of standing. The Court will therefore proceed to the *Rule 23* analysis only as it relates to the remaining seventeen proposed state classes.

B. Standards for Determining Class Certification Under *Fed. R. Civ. P. 23*

HN4[] Once a court has considered whether the named class representatives have standing to assert claims on behalf **[**36]** of the class, the analysis shifts to the requirements of *Fed. R. Civ. P. 23*. The burden of proof to establish the propriety of class certification rests with the advocate of the class here, the Indirect Purchaser Plaintiffs. *See Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975)* [19]; *see also Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997)*. As the Eleventh Circuit instructs, the district court retains broad discretion in determining whether an action should be certified as a class action, and its decision, based upon the particular facts of the case, should not be overturned absent a showing of abuse of discretion. *See Andrews v. AT&T, 95 F.3d 1014, 1022 (11th Cir. 1996)* ("Assuming that the district court properly exercised its discretion within the parameters of the criteria of *Rule 23*, the court's determination should stand."). Nonetheless, the Court must conduct a "rigorous analysis" into whether the prerequisites of *Rule 23* are met before certifying a class. *Jones v. Firestone Tire and Rubber Co., Inc., 977 F.2d 527, 534 (11th Cir. 1992)* (citing **[**37]** *General Tel. Co. v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982))*.

HN5[] "A class action may be maintained only when it satisfies all of the requirements of *Fed. R. Civ. P. 23(a)* and at least one of the alternative requirements of *Rule 23(b)*." *Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000)* (citing *Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997))*. Pursuant to *Rule 23(a)*, a class may be certified only if: (1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims **[**38]** or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)*. These four prerequisites of *Rule 23(a)* are commonly referred to as "numerosity, commonality, typicality, and adequacy of representation, and they are designed to limit class claims to those fairly encompassed by the named plaintiffs' individual claims." *Prado-Steiman v. Bush, 221 F.3d 1266, 1278 (11th Cir. 2000)*. Reviewing each of these requirements in turn, the Court finds that Indirect Purchaser Plaintiffs have met their burden under *Rule 23(a)*.

I. Numerosity

HN6[] *Fed. R. Civ. P. 23(a)(1)* requires that the class be "so numerous that joinder of all members is impracticable." Defendants do not dispute that the proposed classes, as defined, satisfy the numerosity requirement. *See* Defs.' Opp'n, at p. 13, n. 6. Nonetheless, despite Defendants' concession on this element, the Court "has the responsibility of conducting its own inquiry as to whether the requirements of *Rule 23* have been

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[19] In *Bonner v City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

satisfied in a particular case." *See* *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1188 (11th Cir. 2003)* **[**39]** (citing *Martinez-Mendoza v. Champion Int'l Corp., 340 F.3d 1200, 1216 n. 37 (11th Cir. 2003))*.

HN7[] To meet the numerosity requirement, Indirect Purchaser Plaintiffs need not establish the exact size of the proposed class or identify all of the class members, but rather must demonstrate that the number is sufficiently large so as to make joinder impracticable. *See* *Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986)*. Impracticability, however, does not mean impossibility. The numerosity requirement is met when it would be inconvenient or difficult to join all of the class members, and may be satisfied with as few as 25-30 class members. *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 508 (S.D.N.Y. 1996)*; *see also* ***[*685]*** *Kreuzfeld A.G. v. Carnehammar, 138 F.R.D. 594, 599 (S. D. Fla. 1991)* (Paine, J.). While the size of the class is a highly relevant consideration, courts must take into account a number of other factors under *Fed. R. Civ. P. 23(a)(1)*, including "the geographic diversity of the class members, the nature of the action, the size of each plaintiff's **[**40]** claim, judicial economy and the inconvenience of trying individual lawsuits, and the ability of the individual class members to institute individual lawsuits." *Walco Invs., v. Thenen, 168 F.R.D. 315, 324 (S.D. Fla. 1996)* (Moreno, J.).

Considering these several factors, the Court finds that the Indirect Purchaser Plaintiffs have met their burden of establishing that the proposed classes are "so numerous that joinder of all members is impracticable." In the Fourth Amended Complaint, Plaintiffs allege that between October 1995 and August 1999, Hytrin was the highest-margin product of Abbott's Pharmaceutical Products Division, with total sales of Hytrin exceeding $ 1.75 billion. *See* Compl. at P10. Based on these sales figures, and using IMS data, [20] Indirect Purchaser Plaintiffs have posited that in each of the seventeen remaining classes, the most conservative estimate of the number of class members ranges from roughly 3,200 (North Dakota) to nearly 150,000 (California). [21] *See* Supplemental Measures of Class Damages, attached to IPPs' Pre-Argument Submission on Class Certification as Ex. K. Adding together all seventeen classes, the conservative estimated **[**41]** number of class members exceeds half a million end payers. *Id.*

It is undisputed that these thousands of members **[**42]** of the state Classes are geographically dispersed across their jurisdictions and throughout the United States. Further, many of the individual members of the state classes have claims that are far too small to justify bringing individual suits against the corporate Defendants. For these reasons, joinder of all members of the prospective classes would be highly impracticable. The Court therefore finds that the numerosity requirement of *Rule 23(a)(1)* has been satisfied.

2. Commonality

HN8[] Under *Fed. R. Civ. P. 23(a)(2)*, class certification requires a showing that "there are questions of law or fact common to the class." The threshold finding for commonality under this section is qualitative rather than quantitative. *See* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:10 (4th ed. 2002). Consequently, *Rule 23(a)(2)* "does not require that all the questions of law and fact raised by the dispute be common." *See* *Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1557 (11th Cir. 1986)*. Instead, courts in the Eleventh Circuit have held that "a single common question is sufficient to satisfy *Rule 23(a)(2)*." *Powers v. Stuart-James Co., 707 F. Supp. 499, 502 (M.D. Fla. 1989).* **[**43]** As with the numerosity element, Defendants do not dispute that this

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[20] IMS monitors prescriptions, compiling data by product and by distribution channel for a number of customers, including pharmaceutical companies. As Indirect Purchaser Plaintiffs noted at the March 12, 2004 oral argument. Abbott itself also relied on IMS data to predict the impact that generic entry would have on the market. Abbott has not disputed this.

[21] As observed by several courts and commentators, once the good faith estimate of the class size reaches the thousands, the joinder impracticability test is satisfied and the analysis focuses on the "manageability and superiority of the proposed class action relative to other means for fan adjudication of the controversy." *See* I Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:5 (4th ed. 2002). These issues will he addressed later in the Court's analysis of *Fed. R. Civ. P. 23(b)(3)*.

requirement is met. [22] Nonetheless, the Court has conducted its own inquiry into the Rule 23(a)(2) requirement, and concludes that it has been satisfied.

HN9[] Where the complaint alleges that the Defendants have engaged in a standardized course of conduct that affects all class members, the commonality requirement will generally be met. *See* Roper v. Consurve, Inc., **[*686]** 578 F.2d 1106, 1113 (5th Cir. 1978). Specifically in the antitrust context, courts in this Circuit have consistently held that allegations of price-fixing, monopolization, **[**44]** and conspiracy by their very nature involve common questions of law or fact. In re Carbon Dioxide Antitrust Litig., 149 F.R.D. 229, 232 (M.D. Fla. 1993); *see also* In re Infant Formula Antitrust Litig., 1992 U.S. Dist. LEXIS 21981, No. MDL-878, 1992 WL 503465, at *3 (N.D. Fla. Jan. 13, 1992); *see also* State of Alabama v. Blue Bird Body Co., 573 F.2d 309, 319 (5th Cir. 1978).

Indirect Purchaser Plaintiffs cite several common questions of law and fact that affect all class members. *See* IPPs' Mem. at pp. 8-9. Among them are: (1) whether, under common principles of antitrust and unfair trade practice law, Defendants' methods, practices and acts, including, but not limited to, the Abbott-Zenith and Abbott-Geneva Agreements, violated the applicable laws of the respective Indirect Purchaser States; (2) whether Defendants' acts, contracts, combinations and conspiracy restrained competition for the sale of Hytrin and its generic bioequivalents and prevented or delayed introduction of any AB-rated generic version of Hytrin in the United States; (3) whether, and the amount by which, Defendants' illegal, inequitable and unfair trade practices have inflated the prices **[**45]** paid by members of the classes for Hytrin and its generic bioequivalents over the amounts they would have paid in a competitive market unaffected by Defendants' illegal acts; and (4) whether, under common principles of unjust enrichment. Defendants unjustly enriched themselves to the detriment of Plaintiffs and the classes, entitling Plaintiffs and the classes to disgorgement of all benefits derived therefrom. *Id.*

Because these, and many other, common questions of law and fact are applicable to the claims of all class members, the Court finds that the requirements of Rule 23(a)(2) have been satisfied.

3. Typicality

HN10[] Under the third prerequisite for class certification, the Court must assess whether the claims or defenses of the named representatives are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). [23] "A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984)*; *see also In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 698 (N.D. Ga. 1991).* **[**46]** If the party advancing the class can establish that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then "the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims." In re Managed Care Litig., 209 F.R.D. 678, 682 (S.D. Fla. 2002) (Moreno, J.) (citing Davis v. Southern Bell Tel. & Tel. Co., 1993 U.S. Dist. LEXIS 20033, No. 89-2839-CIV-NESBITT, 1993 WL 593999, at *4 (S.D. Fla. Dec. 23, 1993) (Nesbitt, J.); *see also* Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985) (noting that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences"). "Any atypicality or conflict between the named Plaintiffs'

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[22] While Defendants do not contest that there are common questions of law or fact sufficient to meet the Rule 23(a)(2) requirement, they do contend that the proposed classes cannot be certified because those common issues do not predominate over questions affecting only individual class members. This argument, however, is properly considered in the Rule 23(b)(3) analysis, and will be addressed at that time.

[23] The Eleventh Circuit has recognized that "in many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification. Traditionally, commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class." Prado-Steiman, 221 F.3d at 1278-79 (internal citations omitted).

claims and those of the Class 'must be clear and must be such that the interests of the class are placed in significant jeopardy.'" *Id.* (citing *Walco, 168 F.R.D at 326*).

[47]** Indirect Purchaser Plaintiffs assert that they have met the typicality requirement by virtue of the fact that all of the members of the proposed classes consumers and third party payers alike have been subjected to overcharges for their payments for Hytrin because of the Defendants' same unlawful conduct. *See* IPPs' Mem. at p. 10. Specifically, Indirect Purchaser Plaintiffs argue that because "all of the claims of both the representative Plaintiffs and the Classes **[*687]** arise out of the same conduct of Defendants and are based on the same related antitrust theories of monopolization and conspiracy in restraint of trade," the claims of the class representatives are typical of those of the class members. *Id.* Further, Indirect Purchaser Plaintiffs emphasize that despite some variation in the manner in which the overcharge was paid (for instance, in some cases either the consumer or the third party payer paid the entire amount of the prescription, while at other times, the consumer paid a portion and the third-party payer paid the remainder), the consumers and third party payers who comprise the proposed state classes all overpaid for Hytrin or generic terazosin as a direct result of **[**48]** Defendants' alleged misconduct. *Id.*

Defendants challenge Indirect Purchaser Plaintiffs' ability to satisfy the typicality requirement, arguing that each class member's ability to prove its claim will depend on the unique facts surrounding that class member's payment for its prescription for Hytrin and/or its generic alternatives. Further, Defendants dispute that the claims of third-party payers are properly considered "typical" of the claims of consumers, and that the claims of consumers are "typical" of the claims of third-party payers. These arguments, however, misconstrue Indirect Purchaser Plaintiffs' burden under *Rule 23(a)(3)*. [24]

[49]** As noted above, once the party advancing the class establishes that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then "the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims." *In re Managed Care Litig., 209 F.R.D. at 682*; *see also Singer v. AT&T Corp., 185 F.R.D. 681, 689 (S.D. Fla. 1998)* (noting that typicality "does not demand factual homogeneity. Therefore, the existence of factual differences does not defeat typicality."). In this case, Indirect Purchaser Plaintiffs allege that the same unlawful conduct affected both the class representatives and the class itself. Specifically, consumers and third-party payers "engaged in the exact same type of transactions (retail payments for terazosin), most often as partners in common transactions (as co-payers) and suffered the same damage as a result of generic delay - they paid more than they otherwise would have paid for terazosin." *See* IPPs' Pre-Argument Submission on Class Certification, at p. 11.

As explained in *Newberg on Class Actions,*

> ***HN11***[] The main principle behind **[**50]** typicality is that the plaintiff will advance the interests of the class members by advancing her or his own self-interest. The alignment of interest is not the test for typicality. It is the result. The plaintiffs and class members have similar interests because they have similar claims. The plaintiff whose claim is typical will ordinarily establish the defendants' liability to the entire class by proving his or her individual claim.

See 6 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 18:8 (4th ed. 2002). Here, the claims of the consumer and the third-party payer class representatives are not only typical of the claims of all class members, they are virtually identical in nature, notwithstanding variations in the amount of damages. Consequently, if one class representative is able to prove that Defendants' alleged anticompetitive acts caused an overcharge for terazosin hydrochloride, or that Defendants were unjustly enriched at Indirect Purchaser Plaintiffs' expense, such proof will likewise prove the case on liability for every other class member. While Defendants attempt to distinguish

[24] While Defendants state that they challenge Indirect Purchaser Plaintiffs' ability to meet the *Rule 23(a)(3)* standard, they have focused their arguments on the 23(a)(4) and 23(b)(3) elements, never clearly articulating the nature of their opposition with respect to the typicality prong. The elements of *Rule 23* are overlapping and often difficult to extricate from one another. Therefore, while Defendants have asserted additional arguments that may, arguably, apply to the typicality analysis, those arguments are more appropriately considered in the Court's analysis of *Rule 23(a)(4)and 23(b)(3)*.

the claims of the individual consumers from those of the third-party **[**51]** payers, it must be noted that ***HN12***[] "typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff." *In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 242* ***[*688]*** *(E.D. N.Y. 1998)*. Indeed, "there is nothing in *Rule 23(a)(3)* which requires named plaintiffs to be clones of each other or clones of other class members." *Id.* (quoting *In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1036 (N.D. Miss. 1993)* (rejecting the argument that diversity among named plaintiffs destroys typicality)). Accordingly, the Court finds that the interests of the class representatives and the absent class members are sufficiently aligned for purposes of *Rule 23(a)(3)*.

4. Adequacy of Representation

HN13[] *Rule 23(a)(4)* requires that the representative party in a class action "must adequately protect the interests of those he purports to represent." *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)* (citing *Phillips v. Klassen, 163 U.S. App. D.C. 360, 502 F.2d 362, 365 (D.C. Cir. 1974))*. As interpreted by the Supreme Court and by the Eleventh Circuit, this requirement **[**52]** applies to both the named plaintiffs and to the class counsel. *See London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1253 (11th Cir. 2003)* (citing *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 n. 20, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997))*. "Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan, 221 F.3d 1235, 1253 (11th Cir. 2000)* (internal citations omitted). This analysis "encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Valley Drug Co., 350 F.3d at 1189* (citing *In re Healthsouth Corp. Secs. Litig., 213 F.R.D. 447, 460-61 (N.D. Ala. 2003))*.

a. Conflicts of Interest

HN14[] The Eleventh Circuit Court of Appeals has held that "if substantial **[**53]** conflicts of interest are determined to exist among a class, class certification is inappropriate." *Id.* However, "the existence of minor conflicts alone will not defeat a party's claim to class certification; the conflict must be a 'fundamental' one going to the specific issues in controversy." *Id.* (citations omitted). A fundamental conflict exists "where some party members claim to have been harmed by the same conduct that benefited other members of the class." *Id.* "In such a situation, the named representatives cannot 'vigorously prosecute the interests of the class through qualified counsel' because their interests are actually or potentially antagonistic to, or in conflict with, the interests and objectives of other class members." *Id.* (citing *In re Healthsouth Corp. Secs. Litig., 213 F.R.D. 447, 461-63 (N.D. Ala. 2003))*; *see also Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000)* (holding that "a class action cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class."). Notably, a class conflict **[**54]** can be established in two ways: (1) where the record shows hard evidence of an actual disagreement or conflict; or (2) where the class is such that the court can simply imply that a realistic possibility of antagonism exists. [25] *See Miles v. Metro, Dade County, 916 F.2d 1528, 1534 (11th Cir. 1990)* (citing *Horton v. Goose Creek Ind. School Dist., 690 F.2d 470, 485-86 (5th Cir. 1982))*.

Defendants assert several potential "conflicts" and alleged antagonistic interests that they claim defeat Indirect Purchaser Plaintiffs' class certification motions. Specifically, Defendants focus on: (1) perceived **[**55]** conflicts of interest between third-party payers and insured consumer class members; (2) conflicts among third-party payer insurers and pharmacy benefits management companies ("PBMs"); (3) consumers who paid the same flat co-payment for branded drugs as for the **[*689]** generic equivalent; and (4) "brand loyal" consumers. *See Defs.'*

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[25] In assessing whether a realistic possibility of antagonism exists, the Eleventh Circuit has looked at the economic realities of the case to determine whether "the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class representatives." *See Valley Drug Co., 350 F.3d at 1189-90*.

Submission Regarding Application of Eleventh Circuit's Direct Purchaser Class Certification Ruling to Indirect Purchaser Plaintiffs' Consolidated Motion for Class Certification, [DE-1052] at pp. 2-8; *see also Defs.' Citations of Record Evidence,* [DE-1080] at pp. 2-10. The Court has carefully considered each of these purported "conflicts," and concludes that they do not preclude certification of the proposed classes.

i. Conflicts Between Third-Party Payers and Consumers

As addressed in Section III.B.3, *supra,* Defendants object to the inclusion of both consumers and third-party payers in the same class. [26] Here, Defendants argue that third-party payers have not been injured by any alleged antitrust violations, and therefore are not proper class members or class representatives, because they would have recovered any overcharges to which they **[**56]** may have been subjected through premiums collected from insured consumers. *See Def.'s Opp'n,* at pp. 14-15; *see also* DE-1052 at pp. 7-8. The crux of Defendants' argument on this issue is summarized in the following passage:

> … Insurers generally determine an insured group's prescription drug benefit premiums for a plan year by adding up the group's covered claims experience for the preceding year, using actuarial techniques to project the prior experience forward and estimate expected claims for the coming year, and then calculating the premium needed to recover the expected claims (plus any administrative expenses and profit). Because they reflect a group's complete claims experience, including reimbursements for all covered branded and generic drugs, premiums automatically reflect not only the costs of all covered drugs but also all changes in such costs, including from the introduction of generics. Under this system, therefore, the premiums paid by all insured consumers and their employers (because they pay a portion of the premiums) will vary depending on the availability of generic versions of drugs without the insurer needing to track or predict specific generic **[**57]** launches because the claims experiences will incorporate the prices of all drugs and will fall with generic entry as a new generic makes price and market share inroads on a branded drug.

See Defs.' Opp'n, at p. 14. Indirect Purchaser Plaintiff's argue that Defendants' asserted "conflict" is based on a misreading of the record evidence and misapprehends the nature of the premium setting process. [27]

[58]** In support of this contention, Defendants rely primarily on the testimony of Janet McGowin, a Vice President with Alabama Blue, and Michael Murray, Cobalt's Vice President and Chief Actuary. Ms. McGowin and Mr. Murray both testified (either through depositions or affidavits) as to the model used by insurance companies for setting future premiums. Specifically, Defendants rely on Ms. McGowin's testimony that **[*690]** Alabama Blue looks at the premiums received from a particular group in the previous year, considers the amount of claims incurred from the group, and projects the claims forward to see how much of a percentage increase would be required to cover those claims. Defendants also point to Ms. McGowin's testimony that the claims experience used to project new premiums consists of "any claims paid to any provider or subscriber during the time period" leading up to the

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[26] While this issue was already addressed in the typicality section, it is also relevant to the analysis of the "adequacy of representation" prong, as Defendants contend that fundamental conflicts between the two types of end-payers preclude the certification of mixed consumer-TPP classes.

[27] Indirect Purchaser Plaintiffs also contend that the pass-on issue is "at best, an affirmative defense and may not be considered at the class certification stage." *See IPPs' Reply,* at pp. 11-12. Because Defendants' pass-on argument requires resolution of the factual issue of whether overcharges are actually passed on to premium payers, as well as the legal issue of whether the pass-on defense is viable under a given state's ***antitrust law***. Indirect Purchaser Plaintiffs contend that consideration of this issue is premature at the class certification stage. *Id.* (citing ***In re Domestic Air Transp Antitrust Litig., 137 F.R.D. at 696*** Indirect Purchaser Plaintiffs also contend that *Hanover Shoe v United Shoe Machinery Corp, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, prohibits defensive use of the pass-on argument. However, in *Valley Drug Co.,* the Eleventh Circuit disapproved of Indirect Purchaser Plaintiff's attempt to use *Hanover Shoe* as "a talisman warding away the requirements of *Rule 23* and barring this court from exercising its duty to conduct an inquiry into whether the plaintiffs' proposed class satisfied the four requirements of *Rule 23(a)*." *Valley Drug Co., 350 F.3d at 1192*. Therefore, because the pass-on issue is relevant to the determination of whether any conflicts exist that would preclude class certification, the Court has conducted its own analysis of the record evidence upon which Defendants rely.

renewal calculation, including all drug costs. Similarly, Defendants note Mr. Murray's testimony that Cobalt "analyzes a group's prior pharmacy benefit experience in the aggregate, then factors in information about future trends in drug costs to set a premium for pharmacy benefit coverage."

While these quotes are accurate, **[**59]** the record indicates, and Defendants concede, that the third-party payers take no account of the expected impact of individual drugs (such as Hytrin) on claims when determining premiums to be charged. In fact, Mr. Murray testified that "Cobalt does not consider potential price increases for specific drugs when predicting future trends in drug costs … Instead, Cobalt analyzes drug costs in the aggregate to determine appropriate trend factors for these pharmacy benefits services." Therefore, Defendants' claim that any overcharges for Hytrin in particular were passed on by the third-party payers to consumers the following year is unsupported by the record.

Further, to the extent that any third-party payer did charge its insureds a higher premium because of a drug company's monopolistic activities, the charging of a higher premium in the future cannot be accurately described as a "pass on" of those charges. The record is clear that the purpose of a future projection is, as the name implies, to estimate anticipated future costs. Defendants point to nothing in the record that indicates that the purpose of projecting a future cost (and charging such a cost as a premium in the future) is **[**60]** to recover money that a third-party payer is paying out for present claims. Nor have Defendants shown such a recovery to be the result of future claims projections. Indeed, as Ms. McGowin testified, if, in a given year, an insurance company pays out more in claims that it has charged as a premium, the company records that deficit as a loss and there is no retroactive increase of the premium charged for that year.

Defendants repeatedly argue, throughout their submissions, that ***HN15***[] the burden of establishing that class certification is appropriate rests with the advocate of the class, here the Indirect Purchaser Plaintiffs. While this is a correct statement of the law in this Circuit, *see Gilchrist v. Bolger, 733 F.2d 1551, 1556 (11th Cir. 1984)*, class certification cannot be defeated merely because Defendants assert unsupported allegations of conflict between potential class members. When Defendants come forward with an alleged conflict, the Court must scrutinize the record citations Defendants cite to determine whether such evidence establishes the existence of a conflict, or whether it provides a basis for the Court to imply that a realistic possibility of antagonism **[**61]** exists. *See Valley Drug Co., 350 F.3d at 1192*; *see also Miles, 916 F.2d at 1534*. If "the evidence provided by the defendants is deemed to be inaccurate or unreliable … the plaintiffs may yet meet their burden of proof necessary to maintain a class action under *Rule 23(a)(4)*." *Id.* In this case, extensive discovery on the issue of the alleged "pass on" has been conducted, and Defendants' citations fail to establish any *fundamental* conflict, or provide any indication that a "realistic probability of antagonism" exists, such that class certification would be inappropriate. Accordingly, the Court rejects this argument. [28]

[62]** ii. Conflicts Between Third-Party Payers and PBMs

Next, Defendants contend that conflicts between third-party payers and PBMs **[*691]** preclude certification. [29] PBMs are pharmacy benefit managers, such as Medco, AdvancePCS and Express Scripts, that serve as "conduits" for third-party payers in administering pharmacy benefits. Specifically, PBMs' principal business is to administer pharmacy benefits that their customers, insurers and self-funded plans, offer to insured individuals. *See* Defs.' Opp'n, at p. 31 and included citations. These companies process patient claims and requests for coverage or

[28] Defendants also make a more general argument that conflict necessarily exists between third-party payers and consumers because third party payers will presumably seek to maximize their damages to the detriment of consumer class members. *See* Defs.' Opp'n, at pp. 44-45. The same argument was rejected by the Court in *In re Cardizem200 F.R.D. 326 at 337*. "Such hypothetical conflicts regarding proof of damages are not sufficient to defeat class certification at this stage of the litigation." *Id.* (citing *In re NASDAQ, 169 F.R.D. at 512*).

[29] Defendants also present this argument as a challenge to the predominance requirement of *Rule 23(b)(3)*. I here, Defendants contend that the role of PBMs creates individualized issues that preclude class treatment. In the interest of clarity and brevity, the Court will only analyze this asserted challenge in this section.

reimbursement and pay pharmacies and covered members for the costs of prescriptions filled. *Id.* According to specific contractual terms negotiated with each insurer customer, the insurers then reimburse the PBMs for some or all of the costs of the claims they process and pay. *Id.*

[63]** Defendants contend that the multi-faceted and complex roles that PBMs play in the pharmaceutical distribution and benefits administration process create irreconcilable intra-class conflicts between PBMs and their insurer clients, and render class-wide determination of impact and damages impossible. [30] First, Defendants argue that if a PBM bears the risk of any overcharge for Hytrin purchases, [31] then the insurer would be shielded from the risk and the PBM, not the insurer, would be a class member. In such a situation, Defendants contend, no common formula for calculating damages could properly account for the PBMs absent highly complex, individualized inquiries regarding the reimbursement terms of specific contracts. Second, Defendants argue that PBMs earning fees under an administrative-services only ("ASO") contract may have benefitted by the delay in generic entry because they were compensated with a percentage of the value of claims; therefore, they would have earned more by opting for the more expensive brand-name Hytrin over the less expensive generic substitutes. Similarly, Defendants contend that PBMs receiving Hytrin rebates from Abbott may have fared better prior to generic **[**64]** entry.

[65]** Again, Defendants have failed to identify any specific record evidence supporting their allegations of conflict, or to provide the Court with a sufficient basis for implying that a realistic probability of antagonism exists. First, Indirect Purchaser Plaintiffs concede that to the extent that a PBM is at risk for paying the overcharge at issue, then the PBM falls within the definition of the classes, a possibility taken into account in their damages model. *See* IPPs' Reply Mem., at p. 20. And while Defendants argue that the inclusion of PBMs will create the need for individualized inquiries, any such individual issues can be adequately addressed during the claims administration stage of this litigation. *See* Section III.C.1 below.

Second, Defendants' allegations of fundamental intra-class conflicts are premised **[*692]** largely on unsupported speculation and hypothetical situations. As explained above, *see supra* note 26, Defendants' conflicts argument focuses on the alleged "spread" between the amounts that PBMs pay to pharmacies and the amounts they are reimbursed, the existence of purported "capitated" fee arrangements, and the alleged rebates that Abbott pays to PBMs for Hytrin. **[**66]** As to the first issue, Defendants proffer no evidence that the existence of "spreads" is prevalent or that they existed with respect to Hytrin or generic terazosin at all. [32] In fact, several PBM

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[30] As with other areas of their argument, Defendants' issues regarding PBMs apply to several portions of the *Rule 23* analysis. In particular, Defendants argue that: the inclusion of PBMs in the classes will require several individualized inquiries to prove impact (which relates primarily to the predominance requirement of *Rule 23(b)(3)*); calculating class-wide damages will be impossible in light of the PBMs (also relevant to the *Rule 23(b)(3)* analysis): and intra-class conflicts potentially exist between PBMs and their insurer clients (relevant to the instant *Rule 23(a)(4)* adequacy of representation analysis). Because these issues are, to a certain extent, inextricably intertwined, they will all be addressed in this section.

[31] Defendants provide two potential sources of the "risk" allegedly borne by the PBMs. First, they argue that PBMs have manipulated "spreads" between the amounts that PBMs pay to pharmacies for prescriptions and the amounts that PBMs are reimbursed by their insurer clients in order to reap unfair profits at the insurers' expense. *See* DE-1052 at 4; *see also* Defs.' Opp'n, at pp. 31-32. To the extent that there was an overcharge on Hytrin. Defendants argue. PBMs would have borne a portion of the overcharge as a result of the spread between their pharmacy and insurer reimbursement formulas. *Id.* Second, Defendants contend that PBMs with "capitated" fee arrangements where the insurer pays the PBM a negotrated fee per member per month in exchange for the PBM bearing the responsibility for reimbursing all covered claims bear the risk of any overcharges and also shield the insurer from any such overcharges. *Id.*

[32] On the "spread" issue, Defendants primarily rely on two recently filed state court complaints in California and Ohio. *See* DE-1052 at pp. 4-6. In those two cases, the plaintiffs merely alleged what Defendants argue here, that such spreads existed, resulting in PBMs like Medco reaping improper benefits from then processing of Hytrin prescriptions. *Id.* However, Defendants' assertion that "the very existence of the two lawsuits demonstrates an actual conflict among putative class members on these issues," *see id.* at p. 6. is incorrect. As noted above, a party seeking to demonstrate a fundamental class conflict must either cite to record evidence establishing an actual disagreement or conflict, or provide a sufficient basis for the court to imply that a

representatives testified that to their knowledge, no such "spreads" were in place. *See* IPPs' Reply at pp. 20-21 and citations thereto. Next, while there has been no evidence in this case to support a finding that PBMs have capitated fee arrangements for pharmacy benefits, if such arrangements existed, the number would be *de minimis* and would not impact on the damages calculations. *Id.* And finally, Defendants, despite having taken extensive discovery on the issue of PBMs, have failed to provide any record evidence buttressing their position that the existence of rebates benefitted PBMs and created a "fundamental" intra-class conflict. Indeed, nothing in the record even indicates that a reasonable probability of antagonism exists, particularly one that would result in a "fundamental" intra-class conflict. The presence of PBMs, therefore, will not suffice to defeat class certification.

[67]** iii. Flat Co-Payers

Relying on the Eleventh Circuit's decision in *Valley Drug Co.,* Defendants argue that certification of the proposed classes is inappropriate because they include class members who were unharmed or who, in fact, benefitted from delayed generic entry. As to the former, Defendants point to those insured consumers who paid the same flat co-payment for drug purchases irrespective of whether they opted for the brand name drug or the generic bioequivalent. With respect to these individuals. Defendants argue, there can be no showing that generic foreclosure resulted in any antitrust injury. Further, as Defendants note, Indirect Purchaser Plaintiffs' damages expert. Dr. Hartman, conceded that consumers with flat co-payments would not have been harmed by delayed generic entry.

In this regard, the Court agrees that flat co-payers, who suffered no economic injury due to delayed generic entry, are not proper class members. However, Indirect Purchaser Plaintiffs' proposed class definition properly accounts for the flat co-payer problem, as it specifically excludes "indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct. **[**68]** " Thus, the Court finds that flat co-payers are not part of the proposed classes, as defined, and therefore present no obstacle to class certification. [33]

Iv. Brand Loyalists

Finally, Defendants oppose Indirect Purchaser Plaintiffs' ability to establish the adequacy of class representation requirement because of the presence of brand loyalists in the proposed class definition. Brand loyalists, as defined by Defendants, are those consumers who would not have switched from Hytrin to generic terazosin even if the **[*693]** generic had been available, *i.e.* in the "but-for" world. Defendants contend that these individuals would have benefitted from delayed generic entry because Hytrin prices, on average, increased after generic entry. *See* Defs.' Opp'n, **[**69]** at p. 36. For that reason, Defendants argue that their presence in the class defeats certification under the *Rule 23(a)(4)* analysis. In turn, Indirect Purchaser Plaintiffs seek to include brand loyalists in the classes, to the extent that those who paid less for branded Hytrin post-generic entry were injured by the delayed generic entry to market.

The record is devoid of any evidence that brand loyalists "benefitted" from delayed generic entry, nor does it appear from the record that a reasonable probability of antagonism exists with respect to such individuals. In fact, when asked to provide evidence supporting their argument that brand loyalists benefitted from generic foreclosure. Defendants instead argued that Dr. Hartman's damages methodology fails to adequately account for, or quantify, such consumers. [34] However, the Court also notes that Indirect Purchaser Plaintiffs have failed to identify any

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realistic possibility of antagonism exists. *See* *Miles, 916 F.2d at 1534*. The existence of untested allegations in two state court complaints satisfies neither standard.

[33] Defendants argument that Dr. Hartman's proposed methodologies for calculating class-wide damages fails to account for the exclusion of flat co-paying insurers will be addressed in connection with the Court's *Rule 23(b)(3)* analysis. *See* Section III.C.I below.

[34] As with the flat co-payers. Defendants lead into their *Rule 23(b)(3)* challenge on the predominance issue by arguing that Dr. Hartman's methodology fails to account for brand loyalists. Specifically, Defendants contend that Dr. Hartman has not quantified how many brand loyal consumers are in the proposed classes, and that he has not proposed any method to determine this

record evidence establishing that such injured brand loyalists exist, and supporting their theory that such consumers have suffered an injury. Therefore, at this stage of the litigation, the Court will exclude brand loyalists from the definition of the Indirect Purchaser state classes. **[**70]**

b. Vigorous Prosecution of Class Claims

Rule 23(a)(4) is also designed to ensure that the class representatives and class counsel will vigorously prosecute the class claims. *See Andrews v. AT&T, 95 F.3d 1014, 1023 (11th Cir. 1996)* (citing *In re American Medical Sys., 75 F.3d 1069, 1083 (6th Cir. 1996))*. [35] As discussed in previous sections, the Court **[**71]** has concluded that the claims of the class representatives are typical, that they have an interest in vigorously prosecuting the class claims, that no conflicts exist between the class representatives and the unnamed class members, and that the interests of the class representatives are sufficiently aligned with those of the class members for purposes of *Rule 23(a)* analysis. [36] Further, as will be addressed in Section III.D below, Co-Lead Counsel for the Indirect Purchaser Classes are knowledgeable in the antitrust field, experienced in complex litigation and in jury trials, and possess the necessary incentives and qualifications to vigorously prosecute this action on behalf of the Classes. Therefore, the Court concludes that the vigorous prosecution test of *Rule 23(a)(4)* has been satisfied.

[72] C. The Requirements of *Rule 23(b)(3)***

HN16[] In addition to satisfying these four requirements of *Rule 23(a)*, Indirect Purchaser **[*694]** Plaintiffs must meet one of the alternative requirements set forth in *Rule 23(b)*. With respect to this element, Indirect Purchaser Plaintiffs seek class certification under *Rule 23(b)(3)*, which imposes two additional requirements - (1) that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"; and (2) that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. In conducting this analysis, "the Court must scrutinize the evidence plaintiffs propose to use in proving their claims without unnecessarily reaching the merits of the underlying claims." *See In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 684 (N.D. Ga. 1991)*.

1. Predominance of Common Questions of Law or Fact

HN17[] That common questions of law or fact predominate over individualized questions means that "the issues in the class action that are subject to generalized proof, **[**73]** and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Kerr v. City of West Palm Beach, 875 F.2d 1546, 1558 (11th Cir. 1989)* (quoting *Nichols v. Mobile Bd. of Realtors. Inc., 675 F.2d 671, 676 (5th Cir. 1982))*. "The predominance inquiry focuses on 'the legal or factual questions that qualify each class member's case as a genuine controversy,' and is 'far more demanding' than *Rule 23(a)*'s commonality requirement." *Jackson, 130 F.3d at 1005* (quoting *Amchem Prods. v. Windsor, 521 U.S. 591, 623-24, 138 L. Ed. 2d 689, 117 S. Ct.*

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information without individualized inquiries. Again, these issues, which overlap somewhat with the instant *Rule 23(a)(4)* conflicts analysis, are more appropriately addressed as part of the Court's *Rule 23(b)(3)* analysis. *See* Section III.C.

[35] To a certain extent, the *Rule 23(a)(4)* analysis collapses into the *Rule 23(a)(3)* consideration of typicality, "because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members."

[36] The Court also notes that to the extent that they will act as representatives of the consumer class members (and state agencies who purchased Hytrin) in their states, the Attorneys General from the states of Florida and Kansas are adequate representatives who will vigorously prosecute the claims of those states' consumers. At the March 12, 2004 oral argument, the Court inquired of the Indirect Purchaser Plaintiffs as to the precise nature of the Attorneys General's involvement in this litigation. As explained by Barbara Smithers, Assistant Florida Attorney General, and Patricia Connors, the Chair of the Multistate Task Force of the Antitrust Division of the Florida Attorney General's office, class counsel to the Indirect Purchaser Plaintiffs has ceded the lead in representation of the consumer claims in Florida and Kansas to the Attorneys General's offices In fact, the Attorneys General have a "co-counsel" relationship with Co-Lead Counsel. Then primary involvement, however, will be in the civil penalties damages phase of the case and in representing the interests of the individual consumers in any mediation activities.

2231(1997)). Nonetheless, "common questions need only predominate; they need not be dispositive of the litigation." *In re Potash Antitrust Litig., 159 F.R.D. 682 at 693*.

HN18[] As part of the predominance analysis, courts must "examine the causes of action asserted in the complaint on behalf of the putative class." *Rutstein, 211 F.3d at 1234* (citing *McCarthy v. Kleindienst, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1412 (D.C. Cir. 1984))*. Whether an issue predominates can only be determined after **[**74]** considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. *Id.* (citing *Amchem, 521 U.S. at 623*) ("[The predominance] inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy."). [37] Therefore, "when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position," the predominance test will be met. *See In re Potash Antitrust Litig., 159 F.R.D. at 693* (internal citations omitted); *see also In re NASDAQ, 169 F.R.D. at 517* (noting that the predominance requirement is satisfied "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless.").

[75]** ***HN19***[] In determining whether *Rule 23(b)(3)* is satisfied, the Court must consider how Indirect Purchaser Plaintiffs intend to prove: (1) liability on each of their claims; (2) the fact of injury; (3) the quantum of injury, namely the amount of their damages; and (4) whether the evidence is common to the class or unique to the individual class members. *See In re Cardizem, 200 F.R.D. at 340*. In so doing, the Court must not consider the merits of the Indirect Purchaser Plaintiffs' claims, but rather must consider whether each element is susceptible to proof by generalized **[*695]** evidence. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)* ("A *Rule 23* determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail ..."); *see also In re Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 611 (N.D. Ga. 1997)* (noting that the Court must examine "whether sufficient evidence exists to reasonably conclude that Plaintiffs may proceed in the manner proposed, not whether the evidence can withstand any and all factual challenges leveled by Defendants").

Upon examination of the antitrust **[**76]** and unjust enrichment claims of the proposed classes, and based on an analysis as to whether the resolution of class-wide issues will have a substantial impact on each class member's underlying case, the Court concludes that common questions of law <u>and</u> fact predominate over individuals issues. Therefore, the requirements of *Rule 23(b)(3)*'s predominance test have been met.

a. Common Proof on Antitrust Liability

In this case, the claims of the proposed state classes arise out of the same alleged illegal conduct by Defendants and are based on the same related antitrust theories of monopolization and conspiracy in restraint of trade. Although each proposed class is proceeding under its own state law, class certification pursuant to *Rule 23(b)(3)* is nonetheless appropriate where there is a commonality of substantive law applicable to all class members. *See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-23, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*. Indirect Purchaser Plaintiffs have cited case law under each state antitrust statute interpreting the acts coextensively with the federal antitrust laws. *See* IPPs' Mot. at pp. 21-40. As explained below, the essential elements **[**77]** of Indirect

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[37] *See generally Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)* ("Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.") (quoting*Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963))*; *id at 469 n. 12* ("'The more complex determinations required in *Rule 23(b)(3)* class actions entail even greater entanglement with the merits.'") (quoting 15 C. Wright, A. Millet, & E. Cooper, Federal *Practice and Procedure* § 3911.p. 485 n. 45 (1976)); *Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)* ("Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues."); *Huff v. N.D. Cass Co., 485 F.2d 710, 714 (5th Cir. 1973)* (enbanc) ("It is inescapable that in some cases there will be overlap between the demands of [*Rule] 23(a)* and *(b)* and the question of whether plaintiff can succeed on the merits.").

Purchaser Plaintiffs' antitrust claims do not vary significantly from state-to-state, [38] and they are susceptible to proof using common evidence.

i. Conspiracy to Restrain Trade

HN20[] In general, a federal or state claim based upon a theory of antitrust conspiracy raises three ultimate issues to be proven at trial: (1) the existence of a contract, combination or conspiracy in restraint of trade (liability); (2) injury-in-fact (antitrust injury); and (3) the extent of injury (damages). *See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. As demonstrated by Indirect Purchaser **[**78]** Plaintiffs, all proof relative to Defendants' alleged conspiracy to restrain trade is common to the members of each of the state classes. In fact, ***HN21***[] "courts repeatedly have held that the existence of a conspiracy is the predominant issue in price fixing cases, warranting certification of the class even where significant individual issues are present." *In re NASDAQ, 169 F.R.D. at 518*; *see also In re Potash Antitrust Litig., 159 F.R.D. 682*. This holding is equally applicable to market allocation cases. *See In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682, 706 (E.D. Mich. 2000)*.

Indirect Purchaser Plaintiffs intend to rely on common evidence, in the form of Defendants' covert written agreements to delay domestic competition for the sale of terazosin hydrochloride, to establish the existence of a conspiracy to restrain trade. On this element, there can be no serious dispute that the proposed generalized evidence will apply to each class as a whole, as "such proof obviates the need to examine each class member's individual position." *In re Potash Antitrust Litig., 159 F.R.D. at 693*.

ii. Monopolization

[79]** ***HN22***[] Whether proceeding under federal or state ***antitrust law***, claims of monopolization are generally proven by demonstrating: (1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance or use of that power by anti-competitive or exclusionary means. *United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 **[*696]** (1966)*. In the instant case, all proof relevant to the monopolization claims is common to each of the state classes.

HN23[] The first element of a monopolization claim -- monopoly power -- is "the power to control market prices or exclude competition." *United States v. E.I. DuPont NeMours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. "The material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco Co. v. United States, 328 U.S. 781, 811, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*. In determining whether a defendant has market power, a court must assess whether the "seller has the power to raise prices, or impose other burdensome terms such **[**80]** as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 504, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. All of these issues are capable of determination using common proof, as they focus on Abbott's power and are not impacted by any individual determinations relating to specific classes or class members.

Additionally, the definition of the relevant market for determining market power is a question common to all members of the class, and is one that will predominate over any individualized inquiries. *See Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124, 129 (S.D.N.Y. 1978)*; *see also Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 794 n. 6 (10th Cir. 1970)*. Indirect Purchaser Plaintiffs from all states have uniformly alleged, and will attempt to prove through common evidence, that Abbott had market power in the United States market for terazosin hydrochloride. Each absent member of the proposed classes will assert the same definition. Therefore, whether

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[38] Based on the controlling precedents in each state, the primary difference between the state antitrust laws and the federal statutes is that indirect purchasers, to the extent they can prove that they were injured by Defendants' conduct, have standing to prosecute the state law claims. *See California v. ARC Am Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)*.

Abbott had market power is a question common to all members of each of the state classes, and the **[**81]** resolution of this common issue will affect all members of the classes without regard to individualized inquiries.

Finally, as to the second element of a monopolization claim, Indirect Purchaser Plaintiffs can establish the willful acquisition or maintenance of monopoly power by demonstrating that the alleged monopolist "impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. In this case, once the members of the state classes establish that Abbott is a monopolist, Indirect Purchaser Plaintiffs will uniformly focus on the Abbott-Geneva and Abbott-Zenith agreements to satisfy this second element of the monopolization claim. *See* IPPs' Mot. at p. 18. Accordingly, the predominance test has been met as it relates to Indirect Purchaser Plaintiffs' monopoly claims.

iii. Common Proof of Antitrust Impact

The fact of injury or "impact" is an essential element of the antitrust claims that requires proof that Indirect Purchaser Plaintiffs suffered some injury that was caused by Defendants' antitrust violations. *See Martino v. McDonald's Sys Inc., 86 F.R.D. 145, 147 (N.D. Ill. 1980)* **[**82]** (observing that "the fact of damage pertains to the existence of injury, as a predicate to liability; actual damages involve the quantum of injury, and relate to the appropriate measure of individual relief."). Indirect Purchaser Plaintiffs have shown that they can use common evidence to prove the impact of the Defendants' alleged anti-competitive conduct with a fair degree of certainty as to the proposed classes, without resorting to lengthy individualized examinations.

HN24[] In an overcharge case, impact is shown through proof that: (1) Defendants charged more than they would have but-for their antitrust violation; and (2) class members made some purchases at the illegally inflated or stabilized price. *See Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 489, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*; *Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 324 (5th Cir. 1978)*. Courts in the Eleventh Circuit have recognized that a presumption of impact properly arises in such cases where the defendants have market power **[*697]** and are alleged to have conspired with competing manufacturers. *SeeIn re Agricultural Chems. Antitrust Litig., 1995 U.S. Dist. LEXIS 21075, No. 94-40216-MMP, 1995 WL 787538,* ***[**83]*** *at *12 (N.D. Fla. Oct. 23, 1995)*). Thus, here, a presumption of impact may apply.

However, even putting aside this presumption of impact, Indirect Purchaser Plaintiffs have presented ample common evidence, premised on market data and expert testimony, on this element. Specifically, Indirect Purchaser Plaintiffs propose to establish antitrust impact by showing, *inter alia,* that: [39] (1) Hytrin and its AB-rated generic bioequivalent are interchangeable versions of the same prescription drug product, with the exception that the generic costs significantly less than the branded Hytrin; (2) generic entry into the market results in significant savings for end-payers and a greater market share for the generic drug because many consumers would switch to the lower-priced alternative; (3) after Geneva launched its generic terazosin capsule on August 13, 1999, the shares of sales accounted for by the generic terazosin markedly increased, while the price of terazosin decreased; (4) class members made payments for Hytrin at inflated rates during the period of generic foreclosure, from 1995 through August 12, 1999, which can be confirmed through generalized market data; (5) class members could **[**84]** have obtained terazosin hydrochloride at much lower prices absent the existence of the Abbot-Geneva and Abbot-Zenith accords, and in the absence of Abbott's sham prosecution of the add-on patents; and (6) Defendants used the same data and a substantially similar methodology as that used by Indirect Purchaser Plaintiffs here to forecast the economic effects of generic competition for Hytrin. Other courts have found such generalized evidence of impact to be sufficient for class certification purposes. *See In re Cardizem, 200 F.R.D. at 341*.

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[39] In their papers supporting class certification, Indirect Purchaser Plaintiffs never succinctly set forth their proposed common proof on impact. However, reading the relevant submissions and exhibits in their entirely, it is apparent that the factual demonstrations listed above are the primary sources of Indirect Purchaser Plaintiffs' proposed "generalized evidence" to prove impact.

Defendants primarily challenge the impact element by arguing that: **[**85]** (1) third-party payers passed on all claimed overcharges to consumers, and therefore, cannot prove that they sustained any antitrust impact; (2) the multi-faceted role of PBMs creates individualized inquiries that are not susceptible to common proof on impact; and (3) some consumers included in the class definition were not harmed. The Court has previously addressed, and rejected, each of these contentions. And to the extent that Defendants argue that these issues will necessarily result in individualized inquiries, such individualized examinations "will relate to the quantum of damages, not the fact of injury." *See* *In re Cardizem, 200 F.R.D. at 307*. Therefore, because the fact of antitrust injury is susceptible to common proof, as outlined above, Defendants' challenges are insufficient to defeat class certification.

b. Common Proof of Unjust Enrichment

Likewise, the question of whether Defendants were unjustly enriched is susceptible to proof using common, generalized evidence. *Section 1 of the Restatement (First) of Restitution* provides that ***HN25***[] a "person who has been unjustly enriched at the expense of another is required to make **[**86]** restitution to the other." Under *Comment (a) to Section I*. the Restatement further explains that a "person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust." Finally, *Comment (b)* provides that a "person confers a benefit upon another if he gives to the other possession of or some interest in money, land, chattels, or chooses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage." Taken together, the Restatement sets forth a four-part test for claims of unjust enrichment: (1) the unjust; (2) retention of; (3) a benefit received: (4) at the expense of another. [40]

[87]** **[*698]** Indirect Purchaser Plaintiffs have proffered common evidence that will be used to establish all of the class members' unjust enrichment claims. Indirect Purchaser Plaintiffs posit that all class members' proof will boil down to the common issues of whether: (1) Abbott's invalid patents and agreements with Geneva delayed generic competition; (2) such delay in generic competition enriched Abbott and/or Geneva to a greater extent than if there had been no such delay; (3) such additional profit came at the expense of end-payers; and (4) Abbott, as a matter of equity, should be required to return the excess profits to the end-payers. *See* DE-1021 at p. 13. Indeed, the same common operative facts that form the basis for each of the state classes' antitrust claims forms the basis for the unjust enrichment claims. [41]

[88]** According to Indirect Purchaser Plaintiffs, proof of the conferral of a benefit on Defendants will be established through testimony of participants in the pharmaceutical distribution chain that Abbott's profits from Hytrin were directly attributable to consumer and third-party payer purchases. *See* IPPs' Pre-Argument Submission, at p. 21. Once conferral of a benefit is established, Indirect Purchaser Plaintiffs will demonstrate, through common

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[40] The standards for evaluating each of the various states classes' unjust enrichment claims are virtually identical. ***HN26***[] Courts have recognized that state claims of unjust enrichment "are universally recognized causes of action that are materially the same throughout the United States." ***Singer v. AT&T Corp. 185 F.R.D. 681, 692 (S.D. Fla. 1998)*** (citing *Sollenbarger v. Mountain States Tel. & Tel. Co., 121 F.R.D. 417, 428 (D.N.M. 1988)*). In fact, courts in Alabama, California, Illinois, Kansas, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, West Virginia, and Wisconsin have expressly followed or cited with approval the Restatement's definition of unjust enrichment. *See* IPPs' Mot. at p. 19. n. 11. While Florida, Maine and South Dakota do not cite the Restatement, the elements of an unjust enrichment claim in those states mirror those of the Restatement, only adding the additional element of "realization," "appreciation," or some kind of knowledge on the part of the Defendants of the conferral of the benefit by the Plaintiff. *Id.* at pp. 19-20 (citing Florida, Maine and South Dakota appellate decisions interpreting the unjust enrichment standard). Because Indirect Purchaser Plaintiffs have indicated that they will present common evidence establishing this additional "appreciation" element, the absence of such a requirement under the Restatement (and the law of the states that follow it) presents no obstacle to class certification.

[41] Indirect Purchaser Plaintiffs have explained the evidentiary link between their antitrust and unjust enrichment claims as such "All of the Classes' claims allege that Abbott's illegal conduct created an exclusionary, anti competitive market for the sale of terazosin and that as a result. Plaintiffs paid too much for their prescriptions Defendants were unjustly enriched by the illegal overcharges and equity requires disgorgement for the benefit of the Plaintiffs and the members of each of the state Classes." *See* IPPs' Mot. at p. 45.

evidence from Dr. Hartman, the amount of excess profits that Abbott reaped because of its allegedly invalid patents and its alleged efforts to block generic competition. As is the nature of unjust enrichment claims, this common evidence will focus on the defendant's gain and not on the plaintiff's loss. Accordingly, it is evident that success or failure in proving this unjust enrichment claim will mean success or failure for the class as a whole, not for individual class members. *See* In re Cardizem, 200 F.R.D. at 352. Therefore, the Rule 23(b)(3) analysis has been met.

c. Common Proof of Damages

In addition to showing class-wide injury as a result of Defendant's conduct, Indirect Purchaser Plaintiffs must show that **[**89]** computation of class-wide damages (or the quantum of injury) is susceptible to common proof. *Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 692 (N.D. Ga. 1991)*. ***HN27***[] "Antitrust plaintiffs have a limited burden with respect to showing that individual damages issues do not predominate." In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 348 (E.D. Mich. 2001) (citing In re Potash Antitrust Litig., 159 F.R.D. at 697). Plaintiffs do not need to supply a precise damage formula at the certification stage of an antitrust action. Instead, in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all." *Id.* At the class certification stage, therefore, Indirect Purchaser Plaintiffs need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis.

[*699] Upon review of the detailed reports that Indirect Purchaser Plaintiffs' damages expert, Dr. Raymond S. Hartman, submitted in connection with the class certification motions, the Court concludes that Indirect Purchaser Plaintiffs have proffered **[**90]** reasonable damage methodologies for measuring class-wide damages on an aggregate basis and for calculating damages for individual class members on both the antitrust and unjust enrichment claims. Specifically, Dr. Hartman proposes application of a "before-and-after" regression analysis to calculate the impact of delayed generic entry, buttressed by a secondary analysis using the yardstick model. [42] *See* Defs.' Opp'n, at Exhibits 39-40. These economic methods are widely accepted and have been used in numerous other antitrust class actions. *See* In re Cardizem, 200 F.R.D. at 348-49; *see also* In re NASDAQ, 169 F.R.D. at 521. Furthermore, the methodologies are common to the class, and their validity "will be adjudicated at trial based upon economic theory, data sources, and statistical techniques that are entirely common to the class." In re NASDAQ, 169 F.R.D. at 521. And, as explained by Dr. Hartman and by Indirect Purchaser Plaintiffs at the March 12, 2004 oral argument, these methodologies apply equally to the antitrust claims as to the unjust enrichment claims. The only difference in their application stems from different assumptions **[**91]** upon which the calculations are based.

While Defendants complain that Dr. Hartman's methodologies are too imprecise for class certification, and further object to many **[**92]** of the underlying assumptions upon which his calculations are based, such contentions cannot defeat class certification. As noted above, for class certification purposes, plaintiffs need not supply a precise damage formula and the Court need not decide which approach is best-suited to the particularities of this case. "It is sufficient to note at this stage that there are methodologies available, and that Rule 23(c)(1)and (d) allow ample flexibility" to deal with the individual damages issues that may develop. [43] Id. at 522.

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[42] As part of this analysis, Dr. Hartman calculates the actual price of Hytrin minus the "but for" price absent the illegal conduct, times the quantity that would have been purchased absent the illegal conduct. Using this formula, Dr. Hartman determines: (1) the but-for penetration rate of generic terazosin during the relevant period; (2) the but-for prices of Hytrin and generic terazosin; and (3) the price differential between actual Hytrin prices and the but-for price of its AB-rated generic bioequivalent during the class period. Dr. Hartman has determined each of these inputs and calculated actual damages, with data covering a sufficient number of transactions so as to be scientifically accurate. Dr. Hartman has also factored into his calculations the necessary variations in the industry, such as pricing and substitution rates.

[43] Both Rule 23(e)(1)(C), which allows for the amendment of class certification orders at any time before final judgment, and Rule 23(d), which authorizes courts to make appropriate orders to facilitate class action proceedings, provide ample avenues for the Court to deal with any potential difficulties associated with damage allocations as they may arise. In addition, while the Court acknowledges that this case has progressed further than most cases prior to the class certification ruling, the temporal proximity to trial does not mandate that the Court select a definite damages-methodology, particularly in advance of any *Daubert* proceedings.

[93]** Further, Defendants' challenges to Dr. Hartman's methodologies are concerns that relate primarily to the allocation of damages among individual class members, not to the computation of aggregate damages on a class-wide basis. Assuming the jury renders an aggregate judgment, allocation will become an intra-class matter accomplished pursuant to a court-approved plan of allocation, and such individual damages allocation issues are insufficient to defeat class certification. *See* *In re Potash, 159 F.R.D. at 697* ("The amount of damages largely involves individualized questions. This is typically true in antitrust class actions, however, and does not preclude certification."). Indirect Purchaser Plaintiffs need only show that the proof they will utilize is sufficiently generalized in nature that "the class action will provide a tremendous savings of time and effort" to the Court. Based on the analyses offered by Dr. Hartman, the Court is satisfied that Indirect Purchaser Plaintiffs have sufficiently demonstrated that common issues relating to Defendants' liability, in the aggregate, predominate over potential individual damage issues.

[*700] 2. Superiority of Class Action Mechanism

[94]** ***HN28***[] *Rule 23(b)(3)* requires that the Court determine that the class action device is superior to other available methods for the fair and efficient adjudication of these controversies. Factors to be considered as part of this analysis include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *See* *Fed. R. Civ. P. 23(b)(3)*. Considering these factors, it is clear that a class action is the superior method for the fair and efficient adjudication of this controversy.

The class action mechanism offers substantial economies of time, effort, and expense for the litigants in this matter, as well as for the Court. Indeed, Indirect Purchaser Plaintiffs' "conservative" estimate of the number of potential class members demonstrates the superiority of the class mechanism. Multiple **[**95]** lawsuits brought by thousands of consumers and third-party payers in seventeen different states would be costly, inefficient, and would burden the court system. *See* *In re Cardizem, 200 F.R.D. at 351* (citing *In re NASDAQ, 169 F.R.D. at 527*).

Further, as to the consumer class members, ***HN29***[] the class action device is particularly appropriate where, as here, it is necessary to "permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*; [44] *see also* *In re NASDAQ, 169 F.R.D. at 527* (noting that "the exclusion of class members who cannot afford separate representation would be neither 'fair' nor an 'adjudication' of their claims"). If not for the class mechanism, consumers who purchased Hytrin for only a short period of time, but who nonetheless suffered an injury based on Defendants' alleged anticompetitive conduct, would be effectively left without any reasonable means of recovering their damages. *See* *Payne v. Goodyear Tire & Rubber Co., 216 F.R.D. 21, 29 (D. Mass. 2003)* (recognizing that absent the **[**96]** class action mechanism, "the litigation costs, including extensive scientific expert analysis, of pursuing individual claims ... would be likely, in many cases, to be prohibitive."). And while the third-party payer class members may be financially able to assert their own claims in separate actions, the fact that the same allegedly anticompetitive conduct gives rise to each class member's economic injury makes it highly desirable to concentrate litigation of their claims in this forum. *See* *In re Synthroid Marketing Litig., 188 F.R.D. 295, 295-96 (N.D. Ill. 1999)*.

Defendants argue that the proposed classes are unmanageable because: **[**97]** (1) they would require countless individualized analyses of choice of law questions; [45] **[**98]** (2) substantial variations exist in the individual state

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[44] *See also* *Deposit Guaranty Nat'l Bank v Roper, 445 U.S. 326, 339, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980)* (noting that "where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.").

[45] In particular, the Court finds Indirect Purchaser Plaintiffs' response to this argument particularly persuasive. Indirect Purchaser Plaintiffs point out that they "are not seeking to apply a single state's law to a nationwide, or even a multistage, class of

unjust enrichment laws; and (3) Indirect Purchaser Plaintiffs' proposed methodologies for determining damages are unworkable. These manageability arguments, however, assume that individual rather than common issues predominate as to both the fact of injury and the quantum of injury. [46] As the **[*701]** Court has already concluded, the common issues, and not the individual question, are the ones that predominate. *See supra* Section III.C.1. Further, this position is in stark contrast to the arguments Defendants advanced before state courts in California and New York. [47] And finally, despite their many objections to the class action mechanism, Defendants have failed to suggest any superior alternatives.

[99]** In reaching this conclusion, the Court acknowledges that management of the several state classes will raise numerous challenges. However, these challenges are ones that routinely arise in complex litigation, and they are insufficient to overcome the innumerable advantages that class treatment will afford. Further, Indirect Purchaser Plaintiffs have presented the Court with compelling arguments demonstrating the manageability of the classes, particularly in light of the common evidence that will be used to prove Defendants' alleged illegal conduct. Accordingly, the Court finds that the superiority requirement of *Rule 23(b)(3)* has been satisfied.

D. Appointment of Class Counsel Under *Rule 23(g)(1)*

On June 6, 2000, the Court designated the firms of Lowey Dannenberg Bemporad & Selinger, P.C. ("LDBS") and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. ("CMHT") as co-Lead Counsel for the Indirect Purchaser Plaintiffs. *See* [DE-110] at P5. The law firm of Gauthier, Downing, LaBerre, Beiser & Dean was also added as additional Co-Lead Counsel on August 25, 2000, but was ultimately replaced by Wallace, Jordan, Ratliff & Brandt, LLC ("WJRB") [48] on February 18, 2004 [DE-1072].

[100]** While these firms have been acting on behalf of the proposed Indirect Purchaser Classes as interim counsel, pending a final decision on class certification, the Court must now formally appoint class counsel to represent the certified Indirect Purchaser Classes for the remainder of these proceedings. Pursuant to the amendments to *Rule 23* that took effect on December 1, 2003, ***HN30***[] the Court, in making this appointment, must consider: (1) the work counsel has done in identifying or investigating potential claims in this action; (2)

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purchasers, but rather to apply state law to separate state classes that include those persons who purchased Hytrin in each state." *See* IPPs' Reply, at p. 24. Therefore, each state's substantive ***antitrust law*** will apply to that particular state class' claims. As addressed in Section III.C.1 above, this does not pose a manageability problem because the applicable substantive laws are virtually identical in their required elements.

[46] In addressing manageability arguments similar to those that Defendants assert, the Southern District of New York noted that "if individual damage questions were a barrier to class certification, there would be little if any place for the class action device in the adjudication of antitrust claims." *In re NASDAQ, 169 F.R.D. at 524*. In the event that complications in calculating damages arise, the court in *Cardizem* has suggested three solutions for remedying the problem: (1) the Court could alter or amend its class certification order under *Rule 23(c)(1)*; (2) the Court could bifurcate the liability and damages phases of the litigation, and only allow the action to proceed as a class for liability purposes; and (3) the Court could appoint a special master or a magistrate judge to assist in calculating damages. *See In re Cardizem, 200 F.R.D. at 351* (citing *Little Caesar Entm't, Inc v. Smith, 172 F.R.D. 236, (E.D. Mich. 1997))*. All of these options are similarly available to this Court should complications arise.

[47] As pointed out by Indirect Purchaser Plaintiffs, Defendants successfully stayed other individual and class cases in various state courts pending the outcome of the state law claims now before this Court. *See* DE-1021 at pp. 14-15. In support of their motions to stay, Defendants contradicted their current position, arguing that this Count is the superior forum to resolve all of the state law claims. For instance, in *Damels v. Abbott Lab., et al,* Case No. 00CC04975 (Cal.), Defendants acknowledged that this Court "is uniquely positioned to reach a comprehensive and appropriate resolution of this nationwide dispute that adequately accounts for the interests of all concerned and avoids inconsistent or duplicative judgments." In another related state court case, *Asher v. Abbott Laboratortes, et al, 307 A.D.2d 211, 763 N.Y.S. 2d 555 (1st Dep't 2003)*, the New York appellate court, responding to Defendants' request to stay, agreed that this "federal action will result in a more complete disposition of the basic antitrust issues alleged." *Id.* Therefore, Defendants have, in essence, conceded that this class action is the superior mechanism for adjudicating these disputes.

[48] Although WJRB was only appointed as Co-Lead Counsel on February 18, 2004, the Court notes that the firm had previously been an active member of the Executive Committee on behalf of the end-payer classes.

counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in this action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *See* *Fed. R. Civ. P. 23(g)(1)(C)(I)*. The Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class and may, if it deems it **[*702]** necessary, direct the proposed class counsel to provide information on any subject pertinent to the appointment. *See* *Fed. R. Civ. P. 23(g)(1)(C)(ii)-(iii)*.

[101]** To comply with this recent amendment to *Rule 23*, the Court, on February 9, 2004, directed Indirect Purchaser Plaintiffs to provide supplemental information regarding proposed class counsel. [49] In their response to the Court's query, Indirect Purchaser Plaintiffs have detailed the work performed by class counsel LDBS, CMIIT and WJRB. Specifically, Indirect Purchaser Plaintiffs note that Co-Lead Counsel have explored every avenue of recovery on behalf of the end payer classes, including several claims that this Court has dismissed. *See* IPPs' Pre-Argument Submission on Class Certification, at p. 23. Co-Lead Counsel's efforts have included reviewing millions of pages of documents, taking depositions around the country, surviving several motions to dismiss, and prosecuting the class certification motions. *Id.* In so doing, Co-Lead Counsel has committed substantial resources to representing the classes, already spending approximately $ 1,000,000 in prosecuting this action, and will continue to bear substantial expenses to represent the Indirect Purchaser Classes. *Id.* at pp. 23-24.

[102]** The consideration that the Court finds to be most persuasive, however, relates to Co-Lead Counsel's experience in, and knowledge of, the applicable law in this field. As noted in the firm resumes of LDBS, CMHT, and WJRB, as well as the individual resumes of the firms' members, Co-Lead Counsel have extensive experience in the antitrust and complex litigation fields. For example, LDBS served as co-lead counsel for end payers in the *In re Cardizem* case in Michigan and CMHT was co-lead counsel for end payers in the *Buspirone* litigation in New York, among many others. [50] *Id.* at Tab N. The Court also notes that Co-Lead Counsel have considerable trial experience in complex litigation matters. *Id.* Based on the Court's observations of Co-Lead Counsel, a review of their resumes, and the absence of any argument by Defendants disputing the qualifications of counsel, the Court must conclude that Co-Lead Counsel have fairly and adequately represented the interests of the end-payer classes to date, and expects that they will continue to do so. Accordingly, LDBS, CMHT, and WJRB are appointed as class counsel to represent the certified Indirect Purchaser Classes for the remainder **[**103]** of these proceedings.

IV. Conclusion

For the reasons expressed in the foregoing opinion, it is hereby

ORDERED that:

(1) The Indirect Purchaser Plaintiffs' Motions for Class Certification of a State-Wide Class of End-Payers are GRANTED in: Alabama [DE-453], California [DE-452], Florida [DE-450], Illinois [DE-464], Kansas [DE-463], Maine [DE-462], Michigan [DE-461], Minnesota [DE-460], Mississippi [DE-459], Nevada [DE-458], New Mexico [DE-455], New York [DE-456], North Carolina [DE-454], North Dakota [DE-465], South Dakota [DE-466], West Virginia [DE-467], and Wisconsin [DE-468] [51];

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[49] Specifically, the Court's Order [DE-1055] required Indirect Purchaser Plaintiffs to submit additional information regarding the work proposed class counsel has done in this case, counsel's knowledge of the applicable law (and particularly, the law as to damage calculation involving third-party payers of ultimate consumer drug costs), the resources counsel will commit to representing the class, and counsel's proposed terms as to attorneys fees and nontaxable costs.

[50] While Indirect Purchaser Plaintiffs have not provided a list of cases in which Co-Lead Counsel WJRB participated, the Court notes that members of that firm have experience as lead counsel to several Blue Cross and Blue Shield plans in national mass tort litigation, including proceedings involving breast implants and fen-phen.

[51] The class representatives for each state class of end-payers are identified in Section III.A., *supra.*

(2) The Indirect Purchaser Plaintiffs' Motion for Class **[**104]** Certification of a State-Wide Class of End-Payers in the District of Columbia [DE-451] is DENIED;

(3) The Indirect Purchaser Plaintiffs' Motion for Class Certification of a State-Wide **[*703]** Class of End-Payers in New Jersey [DE-457] is DENIED AS MOOT, in light of the Court's dismissal of the New Jersey indirect purchasers claims in its September 11, 2002 Order [DE-873];

(4) In those states where the Court is granting the motions for certification of a state-wide class of end-payers, the definition of the classes shall be as follows:

> All persons and entities who or which have at any time from October 15, 1995 to June 30, 2002, paid all or part of the purchase price of Hytrin or its AB-rated generic bioequivalents other than for resale, in [state] or via mail for residents of [state]. Excluded from the Class are the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Hytrin and its generic bioequivalents for resale, to the extent of such purchases for resale; direct purchasers of Hytrin and its generic bioequivalents from Defendants, to the extent **[**105]** of such direct purchases; and indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct.

(4) These determinations are conditional and may be modified prior to the decision on the merits in light of any changes in the circumstances that make such modification advisable. *See* *Fed. R. Civ. P. 23(c)(1)*.

DONE and ORDERED in Miami, Florida, this 8th day of April, 2004.

PATRICIA A. SEITZ

UNITED STATES DISTRICT JUDGE

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Craftsmen Limousine, Inc. v. Ford Motor Co.

United States Court of Appeals for the Eighth Circuit

September 10, 2003, Submitted ; April 13, 2004, Filed

Nos. 03-1441/1544, Nos. 03-1444/1546

Reporter

363 F.3d 761 *; 2004 U.S. App. LEXIS 7096 **; 64 Fed. R. Evid. Serv. (Callaghan) 454

Craftsmen Limousine, Inc., and JMRL Sales & Service, Inc., doing business as Craftsmen Limousine, Appellee, v. Ford Motor Company and American Custom Coachworks, Appellants. Craftsmen Limousine, Inc., a Missouri corporation, JMRL Sales & Service, doing business as Craftsmen Limousine, Inc., a Missouri corporation, Appellees; v. Ford Motor Company, a Delaware corporation; General Motors Corporation, a Missouri corporation; Cadillac, a division or affiliate of General Motors Corporation; Limo, an association of limousine builders; AHA Automobile Design, a Canadian corporation, Appellants.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Craftsmen Limousine, Inc. v. Ford Motor Co., 2004 U.S. App. LEXIS 8834 (8th Cir., May 5, 2004)*

On remand at, Partial summary judgment denied by *Craftsmen Limousine, Inc. v. Ford Motor Co., 2005 U.S. Dist. LEXIS 48524 (W.D. Mo., Sept. 12, 2005)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Missouri.

Craftsmen Limousine, Inc. v. Ford Motor Co., 360 F.3d 865, 2004 U.S. App. LEXIS 4782 (8th Cir. Mo., 2004)

Disposition: Affirmed in part and reversed in part. District court's damages award vacated. Case remanded

Core Terms

limousines, coachbuilders, advertising, non-QVM, manufacturers, procompetitive, effects, safety standards, anticompetitive, Magazine, rule of reason, per se rule, district court, restrictions, compliance, safety concerns, testing, conspiracy, trade show, conversion, boycott, join, antitrust, attending, converted, stretched, products, safe, defendants', competitor

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN1[] **Standards of Review, Substantial Evidence**

In determining whether the evidence is sufficient to support a jury's verdict, the appellate court views the evidence in a light most favorable to the appellee. The appellate court must assume as proven all facts that the appellee's evidence tended to show, give it the benefit of all reasonable inferences, and assume that all conflicts in evidence were resolved in its favor.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. Because defendants typically cannot be relied on to confess that they have entered into an unlawful agreement, conspiracy cases usually must be proved by circumstantial evidence. Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to warrant a finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN3[] **Antitrust & Trade Law, Sherman Act**

Although it may be in the form of circumstantial evidence, a plaintiff must present some evidence that tends to exclude the possibility that the alleged coconspirators acted independently. Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Furthermore, in situations where a trade association, its officers, employees or members are found to have violated the antitrust laws, membership in the association will not automatically involve all members in the violation. There must, instead, be some evidence of actual knowledge of, and participation in, the illegal scheme in order to establish a violation of the antitrust laws by a particular association member.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The appellate court reviews a district court's determination that an agreement constituted a per se antitrust violation de novo.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN6[] Antitrust & Trade Law, Sherman Act

Despite its broad language, *15 U.S.C.S. § 1* has long been interpreted to outlaw only those restraints that are unreasonable. The United States Supreme Court has set forth three methods for analyzing the reasonableness of a restraint on trade: rule of reason analysis, per se analysis, and quick look analysis. The rule of reason is the prevailing standard for determining a restraint's effect upon competition in a relevant market. Under this approach, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Per Se Rule Tests, Manifestly Anticompetitive Effects

When a restraint's negative impact on competition is immediately discernable and the restraint has no redeeming virtue, the per se mode of analysis applies. Unlike the rule of reason analysis, per se analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition. Instead, the per se mode of analysis applies a conclusive presumption of illegality. Because of the strength of this presumption, the per se analysis is appropriate only where experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In cases where the repercussions of a suspicious restraint are unclear, courts may make a truncated inquiry into the restraint's output or price effects before deciding which mode of analysis to apply. This "quick look" approach is reserved for circumstances in which the restraint is sufficiently threatening to place it presumptively in the per se class, but lack of judicial experience requires at least some consideration of proffered defenses or justifications. After taking a quick look at the defendant's proffered reasons for the restraint, a district court has three options: First, it may reject that evidence and condemn the restraint with little or no inquiry into power (as unlawful "per se"); second, it may find the evidence essentially unconvincing, but still have a few doubts about whether the restraint itself is appropriate for per se condemnation, thus making at least a quick look at market power appropriate; or third, it may find the evidence plausible, in which case the restraint is subjected to general rule of reason analysis requiring full consideration of power and anticompetitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Exclusion by the joint setting and enforcement of standards is ordinarily evaluated under the rule of reason. This is so because the creation and enforcement of standards, including safety standards, often has pro-competitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

When determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions were procompetitive, but whether they could be.

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

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN11[] Standards of Review, Abuse of Discretion

The court of appeals reviews a district court's decision regarding the admissibility of expert witness testimony for an abuse of discretion.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN12[] Testimony, Expert Witnesses

Fed. R. Evid. 702 governs the admission of expert testimony.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN13[] **Testimony, Expert Witnesses**

See Fed. R. Evid. 702.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

HN14[] **Testimony, Expert Witnesses**

A district court has great latitude in determining whether expert testimony meets the reliability requisites of Fed. R. Evid. 702. In making that determination, the district court is free to evaluate one or all of the following factors: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the theory or technique has a known or potential error rate and standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted in the scientific community.

Counsel: For CRAFTSMEN LIMOUSINE, INC., a Missouri corporation, JMRL SALES & SERVICE, INC., a Missouri corporation dba Craftsmen Limousine, Plaintiffs - Appellees (03-1441, 03-1544): Fred E. Stoops, Sr., Gary L. Richardson, Keith A. Ward, RICHARDSON & STOOPS, Tulsa, OK. Charles L. Richardson, Mark L. Collier, Nancy C. Curtis, RICHARDSON & WARD, Tulsa, OK. Matthew Francis Trokey, CANTWELL & SMITH, Branson, MO.

For FORD MOTOR COMPANY, a Delaware Corporation, Defendant - Appellant (03-1441): David C. Hilliard, Janet A. Marvel, Nerissa Coyle, PATTISHALL & MCAULIFFE, Chicago, IL. George Elliott Feldmiller, Lawrence M. Berkowitz, Patrick J. Stueve, Kirk A. Peterson, H. David Barr, BERKOWITZ & STANTON, Prairie Villiage, KS.

For FORD MOTOR COMPANY, a Delaware Corporation, Defendant - Appellant (03-1544): David C. Hilliard, Janet A. Marvel, Nerissa Coyle, PATTISHALL & MCAULIFFE, Chicago, IL. Charles L. Richardson, RICHARDSON & WARD, Tulsa, OK. George Elliott Feldmiller, Lawrence M. Berkowitz, Patrick J. Stueve, Kirk A. Peterson, H. David Barr, BERKOWITZ & STANTON, Prairie Villiage, KS.

Judges: Before MELLOY, **[**2]** LAY, and SMITH, Circuit Judges. LAY, Circuit Judge, dissenting.

Opinion by: MELLOY

Opinion

[*763] MELLOY, Circuit Judge.

Limousine manufacturers, Craftsmen Limousine, Inc. and JRML Sales & Service, Inc., collectively referred to as "Craftsmen," sued American Custom Coach ("American Coach"), several other limousine manufacturers, and Ford Motor Company ("Ford") for antitrust violations under the Sherman Act, 15 U.S.C. § 1. [1] Craftsmen alleged that

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[1] Craftsmen voluntarily dismissed or settled with all defendants but Ford and American Coach.

defendants conspired to prevent it from advertising in the limousine industry's two trade publications and from attending trade shows. At trial, the jury rendered a verdict in favor of Craftsmen in the amount of $ 2,109,707.00. Craftsmen then filed a motion to treble the verdict and for attorney fees and costs. After denying defendants' post-trial motions, the district court granted Craftsmen's motion for fees and trebled Craftsmen's damage award to $ 5,941,621.00. Defendants now appeal. We affirm in part and reverse in part.

[3]** **[*764]** I. BACKGROUND

A. Craftsmen, Ford, American Coach, & the National Highway Traffic Safety Administration

Craftsmen is a closely held corporation owned by Robert Haswell and Marc Haswell. Since it began in the late 1980's, Craftsmen has converted many automobiles, including Ford's Lincoln Town Cars, into limousines. Like other coachbuilders, Craftsmen creates limousines by cutting a base vehicle in half and adding structural pieces of varying lengths in the middle. Craftsmen sells from an inventory of pre-built units and also offers conversion services on vehicles already owned by the end-users. American Coach, one of the largest manufacturers of limousines in the United States, is one of Craftsmen's direct competitors.

Ford does not make limousines. Instead, it manufactures base vehicles that are later converted into limousines by independent coachbuilders like American Coach and Craftsmen. During the relevant time period in this case, approximately sixty percent of the six thousand limousines produced each year were converted from Ford's Lincoln Town Cars.

The limousine industry is regulated by the National Highway Traffic Safety Administration. The National Highway Traffic **[**4]** Safety Administration promulgates Federal Motor Vehicle Safety Standards with which limousine manufacturers must comply. Coachbuilders are responsible for self-certifying that their vehicles meet the federal safety standards. This self-certification can be in the form of engineering analysis, computer analysis, or other valid documentation. If the National Highway Traffic Safety Administration determines that a coachbuilder's limousine fails to comply with federal standards, it has the authority to fine the coachbuilder and recall the limousine.

In 1992, upon the National Highway Traffic Safety Administration's request, Craftsmen submitted data identifying its limousine conversion techniques. Craftsmen did not provide engineering analyses to demonstrate compliance with all Federal Motor Vehicle Safety Standards requirements. Instead, it claimed its vehicles were safe based on the construction techniques employed and the fact that none of its customers ever returned a limousine out of a concern for safety. [2] At the time, no engineers worked for Craftsmen, and the company had not contracted an independent engineer to test the safety of its vehicles.

[5]** After receiving Craftsmen's data, the National Highway Traffic Safety Administration conducted an inspection of Craftsmen's limousines. The investigation resulted in the recall of some of Craftsmen's vehicles. One recall required Craftsmen to put a placard in its limousines instructing passengers that they had to "unlock door and pull door latch" to exit the vehicle. Another required Craftsmen to replace tires on approximately twenty of its limousines. Craftsmen complied with the recall orders and was not fined by the National Highway Traffic Safety Administration.

B. The Formation of Ford's QVM Program

On April 3, 1987, a wedding party in New York was killed when its limousine was hit and split in half as it crossed an intersection. National media coverage of **[*765]** this accident, coupled with other reports of limousine fires and tire blowouts, prompted the National Highway Traffic Safety Administration to conduct an investigation of the limousine industry. The National Highway Traffic Safety Administration found that there were approximately fifty to sixty coachbuilders nationwide. A few large coachbuilders converted up to one thousand vehicles per year, but many coachbuilders converted **[**6]** one hundred vehicles or less. Some coachbuilders had engineering backgrounds, others did not; some worked out of dirt floor garages, and others out of modern facilities. At trial, Robert Hellmuth,

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[2] Craftsmen also relied upon testing Ford had conducted on its base vehicles to verify the safety of components that were not altered during the conversion process, such as door locks.

former director of the National Highway Traffic Safety Administration's Office of Vehicle Safety Performance, testified that there was little uniformity in the conversion techniques being used at the time. Most coachbuilders either disregarded the Federal Motor Vehicle Safety Standards or were unaware they existed.

After the National Highway Traffic Safety Administration's investigation, Robert Hellmuth urged Ford, General Motors, and the members of the limousine industry to pool their resources to develop testing to make sure that limousines were in compliance with federal safety standards. At trial, Robert Hellmuth recalled his discussion with Ford and General Motors as follows:

> I said, you know, [the coachbuilders] are buying your product, and it would certainly be a wonderful idea for you to help them out, because they certainly don't have the facilities you do, they don't have the technical information you do, and if, if they can't rely on you, you know, they're really not **[**7]** going to be able to build a safe vehicle. (Tr. 1536-37.)

Thereafter, Ford assembled a team of forty-five to fifty engineers to ensure that the 418-Town Car chassis met all federal safety requirements when stretched within certain defined limits. After spending over one year and millions of dollars designing and testing the new 418-Town Car chassis, Ford initially limited 418-conversions to end-products that weighed 7,100 pounds or less and were not longer than 85 inches. Later, Ford determined that 418-Town Cars could be safely stretched to 120 inches.

After conducting this research, Ford formed a vehicle certification program called "Quality Vehicle Modifier" ("QVM"). Through its QVM program, Ford distributed information explaining how to convert Ford 418-Town Cars into limousines that met Federal Motor Vehicle Safety Standards. The manufacturing guidelines, which were available to non-QVM participants and QVM participants alike, set forth conversion techniques, quality control procedures, and continuous improvement practices. As an incentive for complying with its guidelines, Ford paid QVM participants $ 2,000 to $ 3,000 for each 418-Town Car properly converted. If a QVM participant **[**8]** stretched a 418-Town Car outside the limits Ford specified, or stretched any other Ford product, the coachbuilder would no longer be eligible for the QVM program incentives unless it provided test data establishing Federal Motor Vehicle Safety Standards compliance. [3] Ford engineer, Roy Radokovich, testified that by helping coachbuilders build safer products that met all Federal Motor Vehicle Safety Standards, Ford hoped to reduce the potential liability it faced from having its name associated with untested limousines. Radokovich further testified that Ford hoped the QVM program would improve **[*766]** its product image and help Ford compete with General Motors in the luxury car market.

Within two years after Ford's introduction of the QVM program, General Motors introduced a similar safety program, the Cadillac Master Coachbuilders program ("CMC"). The vast **[**9]** majority of coachbuilders in the industry participated in the QVM or CMC program or both.

Shortly after unveiling QVM, Roy Radokovich visited Craftsmen's facilities and asked Robert Haswell to enroll Craftsmen in the program. Haswell testified that he declined for the following reasons: (1) Craftsmen had little to gain from joining, as it was already employing the conversion techniques described in the QVM manual; (2) Craftsmen had already safely built and sold a number of limousines that exceeded the QVM's length restrictions, and if it were to stop building these longer limousines, Craftsmen would dissolve; [4] **[**10]** and (3) Craftsmen did not want to purchase insurance naming Ford as an insured, which was a requirement of the QVM program. At trial, Radokovich admitted that he was impressed with Craftsmen's building process. He testified that Craftsmen had all the QVM information Ford had disseminated, and that Craftsmen had built conversion parts in accordance with the

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[3] To assist those coachbuilders wanting to safely go beyond the QVM guidelines, Ford provided the names of engineering firms that did testing or analysis. T1461.

[4] The record indicates that more than ninety percent of Craftsmen's conversions were over 120 inches.

QVM guidelines. A National Highway Traffic Safety Administration safety compliance engineer who inspected Craftsmen's limousines in the early 1990's agreed that Craftsmen appeared to be following QVM practices. [5]

At trial, Craftsmen argued that although QVM disguised itself as an overseer of safety, it was actually formed to increase Ford's profits from its control of the limousine manufacturing market. Marc Haswell testified that Ford's safety goals were belied by the fact that some QVM builders reduced the gauge of the metal they used and omitted structural pieces that ensured the structural integrity of their limousines. Marsha Tortora, one of the first participants in QVM, testified that from 1990 to 1997 Ford did nothing to determine whether her limousines were **[**11]** safe. Craftsmen claimed that during that time period, Ford never tested the safety of any of the vehicles produced by QVM manufacturers.

Robert Hellmuth, former director of the National Highway Traffic Safety Administration's office of Vehicle Safety Performance, gave a different account of the efficacy of the QVM program. He stated:

> The people that got into the QVM program really started building nice vehicles because they had something they could hang their hat on . . . . They had all the Ford test data[.] Ford did all the crash work for them, did all the documentation, they did everything. Basically if you were in the QVM program and you built it like they told you to build the thing, it would be fully certifiable, it would meet the [federal] standards, it would be a safe vehicle. (Tr. 1547-48.)

Hellmuth further testified that Ford's QVM handbook was "basically a cookbook recipe on how to build a limousine to **[*767]** meet all the federal safety standards." (Tr. 1547.)

C. The Formation of LIMO

Around the same time Ford created QVM, the National Highway Traffic Safety Administration, Ford, and General Motors suggested the formation of the Limousine Industry Manufacturers' **[**12]** Organization ("LIMO"). The National Highway Traffic Safety Administration hoped that LIMO would provide its members with technical information, keep them apprised of upcoming legislation, and enable them to pool their resources for additional safety testing. The record suggests that LIMO did not accomplish all of these objectives. In 1990, the National Highway Traffic Safety Administration commended LIMO's effort to organize safety testing but criticized its failure to provide significant test data. [6]

Although Ford was not a limousine manufacturer, it became a non-voting member of LIMO. American Coach was a voting member. Craftsmen contends that defendants lobbied to exclude it from LIMO. Former LIMO President, Marsha Tortora, testified that during LIMO meetings, Ford's representative would "talk about the importance of QVM, [and] that they had to **[**13]** keep non-compliant people out." (Tr. 323.) Tortora testified that American Coach's representative was equally adamant against allowing non-QVM coachbuilders to join LIMO. According to Tortora, he feared it would take the spotlight away from American Coach's product and would "make Ford unhappy." (Tr. 295.)

Although Tortora believed that LIMO's doors should be opened to QVM and non-QVM coachbuilders alike, LIMO's bylaws initially limited membership to QVM coachbuilders. However, the bylaws were amended in 1995 to allow non-QVM coachbuilders to join LIMO upon submitting valid crash-test results. Because Craftsmen was not a member of QVM and did not perform crash-tests on its vehicles, it was not eligible to join LIMO.

D. Alleged Group Boycott

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[5] The National Highway Traffic Safety Administration safety compliance engineer who inspected the brake systems on Craftsmen's vehicles concluded: "It appears Craftsmen exercised caution during vehicle production by following Ford's QVM guidelines for limousine manufacturers and sound manufacturing processes for all other vehicles. Therefore, Craftsmen's limousines may meet the performance requirements of [the federal safety standard pertaining to hydraulic brakes], but there is no test data to form definite conclusions." (App. at 2320.)

[6] The only test reports LIMO submitted to the National Highway Traffic Safety Administration were in regard to the safety of limousine hydraulic brake systems.

To reach its target market, Craftsmen advertised in limousine magazines and displayed its vehicles at the magazines' trade shows. Craftsmen advertised in *Limousine & Chauffeured Magazine* from 1989 to 1991, when the two had a disagreement over a billing dispute. Thereafter, it began advertising in *Limousine Digest*. Until 1997, *Limousine Digest* and *Limousine & Chauffeured Magazine* were the only trade publications in the limousine **[**14]** industry. [7]

In 1993, *Limousine & Chauffeured Magazine* enacted a policy limiting all limousine advertisements and participation in its trade shows to products that met QVM or CMC standards. Thereafter, *Limousine Digest* also stopped allowing Craftsmen to advertise vehicles that exceeded QVM restrictions, and it rescinded Craftsmen's invitation to attend its 1995 trade show. In May 1996, *Limousine Digest* formally enacted a restrictive advertising policy similar to the one *Limousine & Chauffeured Magazine* had previously adopted. [8] However, *Limousine Digest's* **[*768]** policy was not a blanket-ban on all non-QVM products; it allowed non-QVM coachbuilders to advertise **[**15]** upon submitting independent proof of Federal Motor Vehicle Safety Standards compliance.

At trial, Craftsmen introduced evidence that the magazines' restrictive advertising policies were the result of threats leveled by Ford, American Coach, and other members of LIMO. Marsha Tortora testified that *Limousine & Chauffeured Magazine's* publisher, Sara McLean, told her that the magazine's policy was a result of direct pressure she had received from Ford and the QVM coachbuilders who were voicing their concerns through LIMO. (Tr. 310-12.) Similarly, Robert Haswell testified that *Limousine Digest's* publisher, **[**16]** Ric Cohen, told him that he "was getting pressure to change [Craftsmen's] ad so that [Craftsmen] did not show anything that [QVM coachbuilders] couldn't build." (Tr. 936.) Haswell further testified that when he asked Cohen why he had removed a particular Craftsmen advertisement from *Limousine Digest*, Cohen replied that he had received "all kinds of heat," and that "in order to have a show, [he] had to agree to remove [Craftsmen] and the other non-QVM builders from the magazine as well as the show." (Tr. 958.)

Craftsmen also introduced written evidence showing that *Limousine Digest* was pressured into adopting its advertising restrictions. Minutes of an April 30, 1996 LIMO meeting established that LIMO members unanimously agreed not to endorse or participate in any publication or trade show that promoted non-QVM/CMC coachbuilders. (App. at 2091-92.) Thereafter, LIMO President, Cabot Smith, wrote *Limousine Digest's* publisher, Ric Cohen, a letter informing him of LIMO's policy. (App. at 2093-94.) Upon receiving Smith's letter, Ric Cohen, replied with the following confirmation:

> Effective immediately, we have decided to respond favorably to all of your requests **[**17]** by removing all Non-Compliant advertisements from *Limousine Digest*, as of the very next issue to go to press (July '96). We will also maintain our policy of only allowing QVM and CMC certified limousine manufacturers to exhibit their vehicles at the '96 Limo Digest Show. [9] We are making those concessions contingent upon your agreement to provide the full and exclusive endorsement of LIMO and all of its members for the '96 Limo Digest Show.

[7] In 1997, two new magazines entered the limousine publications market, *Dealer's National Limousine Exchange and International Limousine and Livery Trader*. At trial, Haswell testified that these two publications were not comparable to *Limousine Digest* or *Limousine & Chauffeured Magazine*, as neither provided national exposure.

[8] Although Craftsmen was allowed to attend *Limousine Digest's* 1996 trade show, which took place before *Limousine Digest* adopted its formal ban, Craftsmen received unfavorable treatment: it was relegated to an obscure location behind a curtain; it was required to remove its display car from the showroom after only one night of the three-night show; and it was not allowed to distribute brochures.

[9] At trial, Ric Cohen testified that *Limousine Digest's* policy allowed non-QVM/CMC coachbuilders to advertise if they presented independent proof of Federal Motor Vehicle Safety Standards compliance. (Tr. 1285.) Ultra Limousine, a non-QVM coachbuilder, provided *Limousine Digest* with independent crash-testing data and subsequently advertised a non-QVM limousine in the publication. Ultra agreed to share its crash-testing data with Craftsmen in exchange for $ 35,000, half the crash-testing cost. Robert Haswell testified that he declined Ultra's offer, because crash-testing was not required for Craftsmen to meet National Highway Traffic Safety Administration standards. The record contains a memorandum written by a National Highway Traffic

> Please understand the severe financial implications that this will have upon my company and kindly convey your understanding to any members of our industry **[*769]** that can help to support the changes we are making. I would greatly appreciate LIMO's assistance in attracting additional and more regular support from Lincoln and Cadillac to further assist us in this development. (App. at 2095.)

[18]** Two days after receiving Cohen's letter, Cabot Smith sent the following fax to his fellow LIMO members:

> Congratulations!
>
> Attached you will find a commitment in writing from Ric Cohen of *Limousine Digest* to remove all non-QVM and non-CMC advertisers from his magazine and from displaying at this show.
> The message LIMO sent was loud and clear because it was supported in writing by the individual member companies.
> This unified voice and member support is what LIMO needs to accomplish its objectives. (App. at 2085.)

Craftsmen also presented evidence that LIMO members continued to apply pressure to *Limousine Digest* even after the publication adopted its 1996 restrictions. Coachbuilder Bill Alden testified that he listened to a telephone conference call between Cohen and a number of LIMO members in 1997 or 1998, during which the coachbuilders threatened to quit advertising in *Limousine Digest* if it allowed non-QVM coachbuilders to attend its trade show. To the best of Alden's knowledge, no one from Ford participated in the conference call.

E. Was Ford Driving LIMO?

Ford argues that to the extent LIMO may have influenced *Limousine & Chauffeured* **[**19]** *Magazine* or *Limousine Digest* to exclude non-QVM coachbuilders, Ford played no role in LIMO's actions. Ford relies on the testimony of Marsha Tortora to support its position. Tortora admitted that the main focus of every LIMO meeting was on how to keep non-QVM coachbuilders from advertising and attending trade shows, but she said that most of those discussions were held in executive sessions that Ford, as a non-voting member, was not allowed to attend. Tortora acknowledged that some of the discussions took place in open session, but stated that "Ford was very hands off in those conversations most of the time." [10] According to Tortora, "in open discussion, . . . Ford didn't tell [coachbuilders] not to participate in the shows, they said they won't participate in the shows that had non-QVM's in it." (Tr. 372.)

[20]** Craftsmen maintains that Ford was well aware of LIMO's goals, inasmuch as it attended LIMO meetings, heard its discussions about boycotting non-QVM dealers, and lobbied to keep non-QVM members from joining LIMO. Craftsmen notes that although Tortora testified that Ford was ordinarily "very hands off" during the open session discussions about advertising, she also testified that it was "no secret" that Ford did not want QVM members to advertise in magazines that promoted non-QVM products. (Tr. 375-76). In fact, she stated that "[Ford] told [her] outright and in writing that [she] couldn't participate or sell or have any business with anybody who was non-QVM." (Tr. 376.)

F. Damages

Craftsmen claimed that it lost conversion fees, ranging from $ 25,000 to $ 35,000 per **[*770]** vehicle, from January 1995 through June 1998. [11] It presented evidence that its sales decreased from approximately 50 vehicles in 1995 to approximately 37 vehicles in 1997. Craftsmen alleged that this decline was a result of defendants' alleged

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Safety Administration safety compliance engineer indicating that the National Highway Traffic Safety Administration did not require Craftsmen to crash-test its limousines due to their weight. (App. at 2317).

[10] During cross-examination, Tortora testified that when Vinnie Bergman, a non-QVM coachbuilder, tried to join LIMO, Ford spoke out loudly against it. Despite Ford's protest, LIMO extended membership to Bergman. Defendants claim that they did not want Bergman in LIMO, because he had a reputation for dishonesty and engaged in questionable business practices.

[11] The record suggests that by 1998, Craftsmen began converting sport utility vehicles and buses to mitigate its damages. One of the sport utility vehicles Craftsmen converted was Ford's Lincoln Navigator. *Limousine & Chauffeured Magazine* allowed Craftsmen to advertise the stretched Navigators until Ford barred QVM dealers from converting Navigators.

boycott. In support of Craftsmen's contention, Robert Haswell testified that some of Craftsmen's customers called just to see if it was still in business when Craftsmen **[**21]** was not advertising in the trade magazines. However, Marc Haswell admitted that between 1995 and 1999 Craftsmen's website received approximately 90,000 hits.

Defendants denied that any of their actions caused the decrease in Craftsmen's conversions. They claimed that other factors, including increased competition, affected Craftsmen's growth rate. At trial, Robert Haswell conceded that two new non-QVM coachbuilders, Legendary Coachworks and S&R Coachworks, entered the market in 1995. S&R Coachworks was founded by a person who previously had been responsible for cutting, welding and stretching Craftsmen limousines. Like Craftsmen, Legendary Coachworks and S&R **[**22]** Coachworks both built non-QVM limousines in excess of one-hundred twenty inches.

Before trial, the district court held a hearing to determine whether plaintiffs' expert witness, David Cole, passed muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*. Cole is a certified public accountant. In addition to taking post-graduate courses covering all areas of financial management, including economics, marketing, and finance, Cole has also served as the executive vice president for a national accounting firm and has worked with privately held businesses to establish property values for buy-sell agreements and values for estate tax purposes. Although Cole had no experience in the field of antitrust litigation, he reviewed scholarly literature to support his method of calculating damages in this case.

Cole used a "but for" method to determine Craftsmen's damages. Using Craftsmen's financial statements and tax returns, he calculated an average growth rate of sixty-two percent for the time period beginning in 1991 and ending in 1994. Cole testified that this figure was reasonable in light of conversations he had with Robert Haswell **[**23]** and his review of an outside study that supported his figure. Cole then testified that he calculated what Craftsmen's sales would have been with the projected growth rate and compared those figures to Craftsmen's actual sales. After offsetting the difference between these two figures by Craftsmen's projected operating expenses during the damage period, [12] Cole concluded that Craftsmen sustained a net profit loss of $ 2,109,770.00. In reaching this figure, Cole did not analyze whether general economic conditions or increased **[*771]** competition affected Craftsmen's growth rate. Instead, he assumed that defendants caused all of Craftsmen's injuries. The district court found that Cole's testimony was sufficiently relevant and reliable to go to the jury.

[24]** II. APPLICABLE LAW AND DISCUSSION

A. Whether the Evidence Was Sufficient to Establish an Antitrust Conspiracy

Defendants argue that the jury's verdict must be reversed, because the evidence was insufficient to establish a conspiracy between Ford and American Coach. ***HN1***[] In determining whether the evidence is sufficient to support a jury's verdict, we view the evidence in a light most favorable to the appellee. *Pumps & Power Co. v. Southern States Indus., Inc., 787 F.2d 1252, 1258 (8th Cir. 1986)*. We must assume as proven all facts that the appellee's evidence tended to show, give it the benefit of all reasonable inferences, and assume that all conflicts in evidence were resolved in its favor. *Id. at 1258*.

HN2[] *Section 1 of the Sherman Act* prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. Because defendants typically cannot be relied on to confess that they have entered into an unlawful agreement, conspiracy cases usually must be proved by circumstantial evidence. *ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 553 (8th Cir. 1991)* **[**25]** ("It is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must almost always be

[12] Cole used the term "cost of sales" to reflect Craftsmen's operating expenses. He testified that he needed a calculation to derive an average growth profit percentage "so that sales that we didn't realize in the future wouldn't have been all profit. They would have been a percentage, because there's obviously a cost associated with those sales. So, we had to come up with the average growth profit percentage in order to apply it to the sales that were lost in order to get a lost profit number." Ap. 1773-74 Cole testified that he calculated a figure of 83.75% as the "average cost of sales as compared to gross sales for the period '95 through '98." Id.

proved by inferences that may be drawn from the behavior of the alleged conspirators.") (internal quotations omitted). "Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to warrant a . . . finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement." *Id. at 554* (internal quotations omitted).

HN3[] Although it may be in the form of circumstantial evidence, a plaintiff must present some evidence that tends "'to exclude the possibility that the alleged coconspirators acted independently.'" *St. Louis Convention & Visitors Comm'n. v. N.F.L., 154 F.3d 851, 861 (8th Cir. 1998)* (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*. "Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Lovett v. General Motors Corp., 998 F.2d 575, 578 (8th Cir. 1993)* **[**26]** (citing *Matsushita, 475 U.S. at 588*). Furthermore, "In situations where a trade association, its officers, employees or members are found to have violated the antitrust laws, membership in the association will not automatically involve all members in the violation. There must, instead, be some evidence of actual knowledge of, and participation in, the illegal scheme in order to establish a violation of the antitrust laws by a particular association member." *AD/SAT v. Associated Press, 181 F.3d 216, 234 (2nd Cir. 1999)* (quoting Thomas Vakerics, Antitrust Basics, § 6.13).

Defendants argue that the record contains no evidence from which a reasonable jury could find that they conspired to exclude Craftsmen from advertising or attending trade shows. They note that LIMO's President testified that Ford "didn't tell us not to participate in shows, they said they won't." According to defendants, this evidence confirms that Ford acted **[*772]** independently. Ford argues that even if LIMO's policies evinced concerted action, Ford never voted on or participated in the making of those policies. Defendants' arguments are unpersuasive.

We agree with the district court **[**27]** that the April 30, 1996 LIMO meeting minutes, the May 7, 1996 letter from Ric Cohen to Cabot Smith, and the May 9, 1996 fax from Cabot Smith to his fellow LIMO members provided ample evidence from which a reasonable jury could find that defendants engaged in a conspiracy in violation of *Section 1 of the Sherman Act*. The clear import of these documents is that LIMO members collectively pressured *Limousine Digest* to exclude non-QVM coachbuilders, like Craftsmen, from advertising in their publications and attending their trade shows. From this evidence, a reasonable jury could infer that LIMO applied similar pressure to the industry's only other national publication at the time, *Limousine & Chauffeured Magazine*. Although Ford was not a voting member of LIMO, there is sufficient evidence, including Marsha Tortora's testimony, [13] from which a reasonable jury could find that Ford influenced LIMO's agenda. Taken as a whole, the evidence introduced at trial was sufficient to create a jury question as to whether the defendants acted in concert or independently.

[28]** B. Whether the District Court Erred in Applying the *Per Se* Analysis.

HN4[] We review the district court's determination that the alleged agreement between Ford and American Coach constituted a *per se* antitrust violation de novo. *In re Cardizem CD Antitrust Litigation, 332 F.3d 896, 905-06 (6th Cir. 2003)*; *United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)*; Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P1909b (1998) (although a court's determination that the *per se* rule applies "might involve many fact questions, the selection of a mode [of analysis] is entirely a question of law.").

Section 1 of the Sherman Act provides that ***HN5***[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN6***[] Despite its broad language, *Section 1* has long been interpreted to outlaw only those restraints that are "unreasonable." *Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. The United States Supreme Court has set forth three **[**29]** methods for analyzing the reasonableness of a restraint on trade: rule of reason analysis, *per se* analysis, and quick look analysis.

[13] Tortora testified that Ford sometimes took part in LIMO meeting discussions on how to keep non-QVM coachbuilders from advertising and attending trade shows, and that Ford expressly forbade her from dealing with non-QVM coachbuilders. (Tr. 376.)

The rule of reason is the "prevailing standard" for determining a restraint's effect upon competition in a relevant market. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. See also *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* ("there is a presumption in favor of a rule-of-reason standard"); *State Oil Co. v. Khan, 522 U.S. 3, 22, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)* ("The majority of commercial arrangements subject to the antitrust laws[] should be evaluated under the rule of reason"). Under this approach, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the **[*773]** relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co., 522 U.S. at 10*.

HN7[] When a restraint's negative impact on competition **[**30]** is immediately discernable and the restraint has no redeeming virtue, the *per se* mode of analysis applies. *Continental T.V., Inc., 433 U.S. at 50*; *State Oil Co., 522 U.S. at 10* ("Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."). Unlike the rule of reason analysis, *per se* analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition. *Cardizem, 332 F.3d at 906-07* (citing *National College Athletic Ass'n. v. Board of Regents, 468 U.S. 85, 100, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984))*. Instead, the *per se* mode of analysis applies a "'conclusive presumption'" of illegality. *Id*. (quoting *Maricopa County, 457 U.S. at 344*). Because of the strength of this presumption, the *per se* analysis is appropriate only where "experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it." *Maricopa County, 457 U.S. at 344.* **[**31]** "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)* (internal citations omitted).

HN8[] In cases where the repercussions of a suspicious restraint are unclear, courts may make a truncated inquiry into the restraint's output or price effects before deciding which mode of analysis to apply. See *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* (applying quick look approach to a horizontal agreement among dentists to withhold from their customers a particular service); *Chicago Prof'l Sports Ltd. P'ship. v. NBA, 961 F.2d 667, 676 (7th Cir. 1992)* cert. denied, *506 U.S. 954, 121 L. Ed. 2d 334, 113 S. Ct. 409 (1992)* (finding that district court did not err in application of "quick look" analysis). This "quick look" approach is "reserved for circumstances in which the restraint is sufficiently threatening to place it presumptively in the *per se* class, but lack of judicial experience requires at least some consideration of proffered **[**32]** defenses or justifications." Areeda & Hovenkamp at P 1911a. After taking a "quick look" at the defendant's proffered reasons for the restraint, a district court has three options:

> First, it may reject that evidence and condemn the restraint with little or no inquiry into power (as unlawful "*per se*"); second, it may find the evidence essentially unconvincing, but still have a few doubts about whether the restraint itself is appropriate for *per se* condemnation, thus making at least a quick look at market power appropriate; or third, it may find the evidence *plausible*, in which case the restraint is subjected to general rule of reason analysis requiring full consideration of power and anticompetitive effects. Areeda & Hovenkamp at P 1911c (emphasis added).

At trial, the district court found that Ford had "transformed itself into a horizontal competitor" through its action and influence with the QVM manufacturers. (Tr. 1431.) Without further analysis, the district court held that the *per se* rule was applicable. On appeal, Ford argues that it is not a horizontal competitor of Craftsmen, because Ford does not manufacture limousines. Ford therefore contends **[*774]** that **[**33]** the alleged agreements between Ford and American Coach were vertical restraints subject to the rule of reason analysis. See *Nynex Corp. v. Discon, Inc., 525 U.S. 128, 135, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)* (holding that the *per se* rule does not apply to a vertical agreement between a buyer and supplier, and noting that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors"); *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)* (applying the *per se* rule to a boycott arranged by a single competitor of the plaintiff, but carried out by a "wide combination" consisting of manufacturers and distributors, as well as the competing retailer). We need not determine whether Ford "transformed" itself into a horizontal competitor. Even assuming Ford and American Coach were direct competitors of Craftsmen, the *per se* rule should not have been applied in this case. [14]

[34]** Through its QVM program, Ford established voluntary safety standards for the manufacture of limousines. Although most coachbuilders joined the QVM program and agreed to build within QVM guidelines, some coachbuilders, like Craftsmen, chose not to join or abide by QVM restrictions. Craftsmen alleged that defendants effectively shut them out of the market by pressuring the limousine industry's trade publications to exclude non-QVM coachbuilder from advertising and attending trade shows. In essence, defendants' alleged restraint was an attempt to force Craftsmen to either comply with QVM guidelines or stop selling limousines. The question is whether Ford's insistence on QVM compliance was arguably rooted in safety concerns, and if so, whether this should remove the alleged agreement from the *per se* rule's realm. We believe it does.

As Areeda & Hovenkamp note, ***HN9***[] "Exclusion by the joint setting and enforcement of standards is ordinarily evaluated under the rule of reason." P 2232b. This is so because the creation and enforcement of standards, including safety standards, often has pro-competitive effects. For example, having unsafe limousines in the market could tend to undercut consumer **[**35]** confidence in all limousines, and thereby decrease overall limousine sales. On the other hand, "When consumer confidence in a market is increased, consumers enter the market or are willing to purchase more." Areeda & Hovenkamp at P 2230b. Because the economic impact of safety standards is not immediately discernable, something more than a cursory *per se* analysis is required to determine whether the restraint was unreasonable.

The Seventh Circuit recognized these principles in *Moore v. Boating Indus. Ass'ns, 819 F.2d 693 (7th Cir. 1987)*. There, an association of boat trailer manufacturers was concerned that a boat trailer lamp manufacturer's products did not meet federal safety standards. *Id. at 700-02*. After the association received tests from an independent laboratory indicating that the lamps indeed failed to meet federal standards, the association decided it could no longer certify boat trailers that used **[*775]** the non-complying lamps. *Id. at 702*. The lamp manufacturer filed suit claiming that the association violated antitrust laws by engaging in a group boycott with the purpose of eliminating competition in trailer lights. *Id*. **[**36]** The Seventh Circuit held that plaintiff's claim should have been analyzed under the rule of reason. *Id. at 710*. First, the Court found that there was not a horizontal group boycott, as the boat trailer manufacturers and the boat trailer lamp manufacturers were not competitors. *Id. at 700*. Second, the Court found that *per se* analysis was inappropriate because the anticompetitive affects of the restraint were not immediately apparent. *Id. at 710-11*. The Court stated,

> To promote compliance with the [*National Traffic and Motor Vehicle Safety Act*] and the standards under it, admittedly the purpose of defendants in their compliance program, is not an activity which is "characteristically . . . likely to result in predominantly anticompetitive effects," [*Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co.,] 472 U.S. 284, 296, 86 L. Ed. 2d 202, 105 S. Ct. 2613*. There is no justification, therefore, for applying a *per se* analysis to such activity. *Id*.

Admittedly, the case at bar presents a closer question than Moore. Many of the limousine manufacturers with whom Ford allegedly conspired were direct competitors **[**37]** of Craftsmen. In addition, there is no evidence that Craftsmen's products failed to meet federal safety standards at the time defendants allegedly pressured the trade publications to exclude non-QVM products. Nevertheless, the record reveals that the National Highway Traffic Safety Administration encouraged Ford to develop product safety testing, because it was concerned that many coachbuilders were either ignorant of or not abiding by the Federal Motor Vehicle Safety Standards. Ford responded to the call. It spent millions of dollars researching and developing base vehicles, and it determined how

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[14] The dissent in footnote 3 glosses over a fundamental question that must precede application of the *per se* analysis-whether Ford is a horizontal competitor of the coachbuilders. Ford does not manufacture or sell limousines. It manufactures base vehicles that are later converted into limousines by coachbuilders. Aside from safety and liability concerns, we question whether there are any rational economic reasons for Ford to compete with any of the coachbuilders. Unlike the dissent, we also question whether Ford's position in the market as a supplier of base vehicles to coachbuilders changed with the formation of QVM and LIMO.

to convert those vehicles in compliance with federal safety standards. Through its QVM program, Ford made all coachbuilders aware of the federal safety standards and taught all coachbuilders how to comply with them. Ford disseminated the engineering designs, instruction manuals and test data it developed to QVM and non-QVM coachbuilders alike. [15]

[38]** Ford also may have had profit-making motives in mind when it created the QVM standards and allegedly pressured the trade publications not to advertise non-QVM vehicles. However, the fact remains that safety concerns were arguably a motivating factor behind Ford's actions. On this point, we find it significant that the trade magazines did not exclude *all* non-QVM products; *Limousine & Chauffeured Magazine* allowed non-QVM coachbuilders to advertise upon submission of independent crash-testing data, and *Limousine Digest* allowed non-QVM advertisements so long as the coachbuilder certified, through "some independent means," that its vehicles met federal safety regulations. (Tr. 1185.) We acknowledge that the National Highway Traffic Safety Administration did not require Craftsmen to crash-test its vehicles to prove they were safe. However, the fact that at least one of the trade publications required Craftsmen to **[*776]** take measures beyond what the National Highway Traffic Safety Administration required does not convince us that the *per se* rule should be applied. Whether the crash-testing requirement was disproportionate to the harm it sought to remedy is a question that is appropriately **[**39]** analyzed under the rule of reason. See *State Oil Co., 522 U.S. at 10* (when applying the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect").

At this juncture, we cannot and need not determine whether defendants' alleged restraint actually had procompetitive effects. As the Supreme Court held in *California Dental Ass'n v. FTC, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*, ***HN10***[] when determining whether to apply the rule of reason analysis to non-price advertising restrictions related to product safety, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. *Id. at 778* ("The plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated."). See also Areeda & Hovenkamp at P 1911b (stating that **[**40]** courts must consider the *plausibility* of procompetitive effects when determining which mode of analysis to apply). Because the alleged restraints were arguably based, at least in part, on safety concerns, they may have had some procompetitive effects. It follows that an abbreviated *per se* analysis was inappropriate. See *California Dental, 526 U.S. at 770-781* (holding that a "quick look" analysis was inappropriate for restrictions imposed by professional association of dentists on member advertising where the likelihood of noncompetitive effects of restrictions were not obvious, and restrictions could plausibly be thought to have procompetitive effect on competition).

C. Whether the Testimony of David Cole Satisfied the Requirements for the Admissibility of Expert Testimony.

HN11[] The Court of Appeals reviews the district court's decision regarding the admissibility of expert witness testimony for an abuse of discretion. *White v. Ford Motor Co., 312 F.3d 998, 1007 (9th Cir. 2002)*.

HN12[] *Federal Rule of Evidence 702* governs the admission of expert testimony. The rule provides:

> ***HN13***[] If scientific, technical, or **[**41]** other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, or experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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[15] The dissent makes the case for why Ford's safety concerns were a pretext for anti-competitive behavior. However, it ignores countervailing evidence that the Federal Government encouraged Ford to develop testing to ensure that converted limousines complied with federal safety standards. The evidence presented at trial created a legitimate fact dispute that the jury should have analyzed under the rule of reason rather than the *per se* rule, which presumes that Ford's motives and the effect of its actions were anti-competitive.

HN14[] A district court has great latitude in determining whether expert testimony meets the reliability requisites of Rule 702**.** In making that determination, the district court is free to evaluate one or all of the following factors: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the theory or technique has a known or potential error rate and standards controlling the technique's operation; **[*777]** and (4) whether the theory or technique is generally accepted in the scientific community. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-95, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) **[**42]** (stating that "many factors will bear on the inquiry" and that the above-listed factors do not constitute "a definitive checklist or test"). See Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035, 1039-1040 (8th Cir. 1999) (applying Daubert analysis to expert witness testimony in an antitrust case).

We agree with the district court that Craftsmen's expert, David Cole, had sufficient education and experience to testify as an expert regarding plaintiffs' damages. However, Cole's testimony did not sufficiently aid the jury in determining whether there was an "unreasonable" restraint on trade in violation of the Sherman Act. Cole *assumed* that Craftsmen's alleged lost growth from 1995 through 1998 was caused by defendants' alleged conspiracy. He did not determine whether other factors, including the emergence of two direct competitors, may have affected Craftsmen's growth rate. Under the rule of reason analysis, which should have been applied in this case, such an analysis was required. Because Cole's expert opinion failed to "incorporate all aspects of the economic reality," Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000), **[**43]** it should not have been admitted. [16]

III. CONCLUSION

For the foregoing reasons, the district court's damages award is vacated, and the case is remanded for a new trial on Craftsmen's Sherman Act claim.

Dissent by: LAY

Dissent

LAY, Circuit Judge, dissenting.

It would be hard to imagine a more clearly expressed boycott and resulting restraint on trade than in this case, where these actions were, extraordinarily, documented by the Defendants. [17] It would also be hard to imagine a restraint with a more pernicious anticompetitive effect, as it effectively forced Craftsmen to join either the QVM or CMC programs or cease advertising its product. Reflecting on these undisputed facts, the district court applied the *per se* rule, evidently deciding that the advertising restraint "facially appears to be one that would **[**44]** always or almost always tend to restrict competition." [18] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)**.** The majority now remands for application of the rule of reason on the basis that the restraint "could be" procompetitive and that safety concerns were "arguably" a motivating factor behind Ford's actions. I submit that the evidence does not support these "safety concerns" arguments, and respectfully dissent.

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[16] We are not foreclosing the possibility Cole can testify at a new trial. We agree he is qualified. He will have to formulate a new opinion using the proper standard under a rule of reason analysis.

[17] The boycott agreement and resulting advertising restriction were documented in: 1) the April 30, 1996, LIMO minutes that set out the boycott agreement (J.A. 02091-92); 2) the May 6, 1996, letter from LIMO to the magazine that threatened the boycott (J.A. 02093-94); and 3) the May 9, 1996, fax from the president of LIMO to his fellow members congratulating them on the magazine's change of policy to ban advertisements of non-QVM/CMC coachbuilders (J.A. 02085).

[18] The district court decided the parties' motions for and against application of the *per se* rule from the bench at the close of the Plaintiff's evidence and did not give a rationale for why application of that rule was appropriate. (Tr. 1431-32.)

[45] [*778]** The *Per Se* Rule

The majority is correct to note that the rule of reason is the prevailing standard for analyzing a restraint's effect upon competition. However, the *per se* rule is not entirely obsolete. Both the Supreme Court and other circuit courts continue to identify the *per se* rule as the accepted method of analysis for restraints that are obviously anticompetitive. *See* *State Oil Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)* ("Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*."); *see also* *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 158-59 (3d Cir. 2003)*; *Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002)*; *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058 (8th Cir. 2000)*.

The instant case appears to meet all of the characteristics of a typical *per se* case as described in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*: **[**46]**

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle. In these cases, the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

Id. (citations and quotations omitted). In this case, Ford was irritated by the existence of small coachbuilders who were exploiting the profitable market for extra-long limousines. The existence of these small coachbuilders threatened Ford's QVM program because it essentially penalized QVM coachbuilders, who were prohibited from building extra-long **[**47]** limousines because of QVM restrictions. Consequently, Ford acted in concert with LIMO to quash this competition by using their combined influence to cut off all national advertising resources to these small coachbuilders. [19] **[**48]** In light of this bold and undisguised anticompetitive behavior, I believe this case fits into that category of "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to **[*779]** establish their illegality-they are 'illegal *per se*.'" [20] *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*.

Safety Concerns

[19] I submit that there should be little doubt as to the existence of a horizontal agreement between the Defendants. Ford, a member of LIMO, had obviously involved itself in the manufacturing of limousines. Furthermore, the majority was correct to identify the existence of a conspiracy among the Defendants. I would only add that in addition to the evidence highlighted by the majority, the following evidence also supports that Ford influenced LIMO's agenda and spearheaded the boycott effort: 1) Ford encouraged the formation of LIMO around the time QVM began (Tr. 275); 2) Ford lobbied to keep non-QVM members out of LIMO (Tr. 28990); 3) Ford voiced its opposition to allowing QVM members to advertise in trade journals that allowed non-QVM members to advertise (Tr. 347); 4) the magazines themselves seemed to be receiving similar pressure directly from Ford (Tr. 332-35); and 5) Ford pressured LIMO coachbuilders to make them keep non-QVM members out of LIMO because "[Ford] felt it was better coming from [LIMO] as an organization." (Tr. 282.)

[20] Neither Defendant advocated, or discussed, the application of the "quick look" standard, and it is not appropriate in any event because, in my view, the restraint is obviously anticompetitive.

I am not persuaded that Ford's supposed "safety concerns" remove this case from the purview of the *per se* rule. The evidence simply does not support that Ford was motivated by safety concerns. The majority stresses that Ford spent "millions of dollars" to develop the QVM program to establish safety standards for the manufacture of limousines. However, Ford's own internal documents demonstrate that the motivation behind the program was not safety, but to "ensure that Ford would retain its competitive advantage over Cadillac and further improve the image of [the] Lincoln Town Car" and "produce incremental sales and profits to Ford and its dealers." (J.A. 02213-16.)

The manner in which Ford implemented the program reinforces the idea that Ford was interested in market control and profits, not safety. Coachbuilder Marsha Tortora testified that from 1990 to 1997, Ford never **[**49]** once tested any of her limousines to confirm that she was following QVM guidelines or building safe limousines. (Tr. 274.) This would suggest that Ford was not as concerned with the safety of the end-product as it was with enrolling coachbuilders into the program to ensure that the builders were buying and converting its Lincoln Town Cars.

The idea that Ford was concerned with safety is further undermined by the fact that Ford took a very strong stand against allowing a non-QVM coachbuilder, Vinny Bergman, into LIMO, even though he could show compliance with federal safety standards through separate testing. Bergman, owner of Ultra Coach, wanted to join LIMO. (Tr. 290.) Although he stretched Lincoln Town Cars, he did not join the QVM program, presumably because he stretched the cars 180 inches, outside the QVM program parameters. (Tr. 289.) Bergman, however, proved his 180-inch stretches were compliant with federal safety standards, using an independent crash test study, which cost him $ 250,000. (Tr. 291.) Despite the fact that Bergman had proven compliance with federal safety standards, Ford pressured LIMO members to keep him out of the trade group. (Tr. 290.)

Despite this evidence, **[**50]** the majority insists that Ford's "safety concerns" take this case outside the scope of the *per se* rule. The majority relies principally on two cases to support its position. First, it cites *Moore v. Boating Industry Ass'ns, 819 F.2d 693 (7th Cir. 1987)*, for the principle that the promotion of federal safety standards is not something that is likely to be anticompetitive, and therefore application of *per se* analysis is inappropriate. *Id. at 710-11*. The critical distinction between this case and *Moore*, however, is the absence of evidence that Craftsmen's limousines were unsafe or failed to meet federal safety standards. There was also no suggestion in *Moore* that "safety concerns" were merely a subterfuge for the desire for greater market control and profits, as is true in the instant case. Indeed, none of the conspirators in the *Moore* boycott were direct competitors of the plaintiff-manufacturer, whereas here, both of the Defendants stood to gain from Craftsmen's demise.

Second, the majority cites *California Dental Ass'n v. FTC, 526 U.S. 756,* ***[*780]*** *143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*, stating that "the issue is not whether the restrictions **[**51]** *were* procompetitive, but whether they *could be*." I respectfully submit, however, that *California Dental* cannot be read to support such a sweeping proposition. The relevant language of the case actually reads, "the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id. at 778*. It is not sufficient under *California Dental* to recognize, as the majority does, only that "safety concerns were arguably a motivating factor behind Ford's actions." Instead, a court must determine whether it is "plausible" that the procompetitive effects of the restraint outweigh, or at least equal, the anticompetitive effects. I respectfully submit this understanding of the case is compelled by the fact that the Court speaks of the restraint at issue in that case as plausibly having a "*net* procompetitive effect," *id. at 771* (emphasis added), and not a "*net* anticompetitive effect," *id. at 774* (emphasis added), suggesting **[**52]** that a court is required to weigh the competing effects when deciding which method of analysis to apply.

In other words, application of the rule of reason is not warranted simply because the restraint "could be" procompetitive, based on the Defendants' "arguable" motivations. If this were the case, the *per se* rule would hereafter be extinct, as inventive lawyers could always create a procompetitive justification for their clients' monopolistic behavior. Instead, the procompetitive effects of a restraint must plausibly outweigh, or at least equal, the anticompetitive effects in order to move the case to rule of reason review.

Here, the procompetitive safety rationale is not plausible at all, and I submit the majority's fixation on these doubtful "safety concerns" is particularly inappropriate in light of the anticompetitive effect of the restriction on competition.

Again, there is no evidence that Craftsmen's limousines were unsafe or failed to meet federal safety standards. Furthermore, as discussed above, the evidence suggests that Ford was not motivated by safety, but was interested only in extinguishing small companies that were taking advantage of the market for extra-long **[**53]** limousines, a market outside the control of Ford's QVM program. The majority finds significance in the fact that the restriction allowed advertisements of non-QVM coachbuilders who proved compliance with federal safety standards through separate testing, but this fact has little significance. I do not see how placing this burdensome testing requirement on small coachbuilders who already appear to be in compliance with federal safety standards, but who cannot afford to conduct expensive testing, is procompetitive. Finally, in contrast to these suspect safety claims, the anticompetitive effects of the restriction are overwhelming and undeniable, as it basically eliminated Craftsmen's ability to nationally advertise and promote its limousines. Accordingly, I would affirm the district court.

From my examination of the record, I fail to understand how any jury, under any method of analysis, could find for the Defendants in this case. The very purpose of the *per se* rule is to streamline antitrust analysis by making conclusive presumptions about restrictions that are obviously unreasonable. I respectfully submit that by remanding this case to be retried on the basis of this dubious safety **[**54]** rationale, the majority wastes time and judicial resources.

[*781] The anticompetitive effects of this restriction are so clear and pernicious, and the procompetitive effects of the restriction are so questionable and attenuated, that I submit the *per se* rule is the appropriate method of analysis in this case. I also suggest that the majority's proposed application of the rule of reason to any restraint that arguably "could be" procompetitive is a misinterpretation of *California Dental*, and an expansion of the rule of reason analysis.

In re Initial Pub. Offering Antitrust Litig.

United States District Court for the Southern District of New York

April 13, 2004, Decided ; April 14, 2004, Filed

01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP)

Reporter

2004 U.S. Dist. LEXIS 6248 *; 2004-1 Trade Cas. (CCH) P74,382; Fed. Sec. L. Rep. (CCH) P92,819

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION

Prior History: *In re Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 2003 U.S. Dist. LEXIS 19432 (S.D.N.Y., 2003)*

Disposition: Plaintiffs' motion for partial reconsideration denied.

Core Terms

antitrust, state law, Sherman Act, reconsideration, preemption, preempted, regulated, controlling decision, antitrust claim, Plaintiffs', Memorandum, immune

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN1[] **Judgments, Relief From Judgments**

See U.S. Dist. Ct., S.D.N.Y., R. 6.3.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions to Reargue

HN2[] **Relief From Judgments, Altering & Amending Judgments**

A motion for reconsideration pursuant to U.S. Dist. Ct., S.D.N.Y., R. 6.3 is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved.

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN3[] **Judgments, Relief From Judgments**

To be entitled to reconsideration, a movant must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying motion, which, had they been considered might reasonably have altered the result reached by the court.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN4[] **Relief From Judgments, Altering & Amending Judgments**

The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

International Trade Law > General Overview

HN5[] **Federal & State Interrelationships, Federal Common Law**

It is a fundamental principle of the United States Constitution that Congress has the power to preempt state law.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN6[] **Federal & State Interrelationships, Federal Common Law**

Congress has the authority, in exercising its U.S. Const. art. I powers, to pre-empt state law.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN7[] **Federal & State Interrelationships, Federal Common Law**

There is a presumption against finding pre-emption of state law in areas traditionally regulated by the states, such as antitrust regulation, absent an express statement by Congress indicating such an intention. However, this presumption may be overcome in two instances: First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Securities Law > Regulators > Self-Regulating Entities > General Overview

Securities Law > Regulators > US Securities & Exchange Commission > General Overview

HN8[] **Regulators, Self-Regulating Entities**

The Securities and Exchange Commission's (Commission) explicit obligation to balance the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions.

Antitrust & Trade Law > Sherman Act > General Overview

Securities Law > Regulators > US Securities & Exchange Commission > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

Competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established public policies.

Securities Law > Regulators > US Securities & Exchange Commission > General Overview

HN10[] **Regulators, US Securities & Exchange Commission**

The Securities and Exchange Commission's mandate is to balance the benefits of competition against its other regulatory aims.

Counsel: Christopher Lovell, Esq., Lovell Stewart Halebian LLP, New York, New York, Attorneys for Plaintiffs.

Melvyn I. Weiss, Esq., Ariana J. Tadler, Esq., Milberg Weiss Bershad Hynes & Lerach LLP, New York, New York, Attorneys for the Sherman Act Plaintiffs.

Russel H. Beatie, Esq., Beatie and Osborn LLP, New York, New York, Attorneys for the Robinson-Patman Act Plaintiffs.

Richard A. Cirillo, Esq., King & Spalding, New York, New York, Attorneys for Defendant Credit Suisse First Boston.

Gandolfo V. DiBlasi, Esq., Sullivan & Cromwell, New York, New York, Attorneys for Defendant The Goldman Sachs Group, Inc.

Moses Silverman, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Attorneys for Defendant Lehman Brothers, Inc.

James Benedict, Esq., Jon Roellke, Esq., Clifford Chance Rogers & Wells LLP, New York, New York, Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

Steven G. Bradbury, Esq., Kirkland & Ellis, Washington, D.C., Attorneys **[*2]** for Defendant Morgan Stanley Dean Witter & Co.

Andrew J. Frackman, Esq., O'Melveny & Myers LLP, New York, New York, Attorneys for Defendant Robertson Stephens, Inc.

Robert B. McCaw, Esq., Wilmer, Cutler & Pickering, New York, New York, Attorneys for Defendant Salomon Smith Barney, Inc.

Barry R. Ostrager, Esq., David N. Ichel, Esq., Simpson Thacher & Bartlett, New York, New York, Attorneys for Defendant J.P. Morgan Securities Inc.

Randy M. Mastro, Esq., John A. Herfort, Esq., Gibson, Dunn & Crutcher LLP, New York, New York, Attorneys for Defendant Bear, Stearns & Co., Inc.

Joel M. Mitnick, Esq., Sidley Austin Brown & Wood LLP, New York, New York, Attorneys for Defendant Deutsche Bank Securities Inc.

John D. Donovan, Esq., Ropes & Gray, Boston, Massachusetts, Attorneys for Defendants Fidelity Distributors Corp., Fidelity Brokerage Services LLP, Fidelity Investments Institutional.

W. Hans Kobelt, Esq., Pollack & Kaminsky, New York, New York, Attorneys for Defendant Janus Capital Corp.

Scott E. Mortman, Esq., Mayer, Brown & Platt, New York, New York, Attorneys for Defendant Comerica, Inc. d/b/a Munder Capital Management.

Kevin C. Logue, Esq. **[*3]** , Paul, Hastings, Janofsky & Walker LLP, New York, New York, Attorneys for Defendants Van Wagoner Capital Management, Inc., Van Wagoner Funds, Inc.

Judges: WILLIAM H. PAULEY III, U.S.D.J.

Opinion by: WILLIAM H. PAULEY III

Opinion

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

On November 3, 2004, this Court issued a Memorandum and Order in this consolidated class action holding that the conduct alleged by the various plaintiffs was impliedly immune from antitrust scrutiny. *See* *In re Initial Public Offering Antitrust Litig., 287 F. Supp. 2d 497 (S.D.N.Y. 2003)* ("*IPO Antitrust Litig.*") [1] On November 18, 2003, the *Sherman Act* Plaintiffs moved for partial reconsideration of that decision, arguing that this Court's dismissal of their state law antitrust claims was in error. Specifically, the Sherman Act Plaintiffs argue that this Court overlooked controlling decisions cited in their underlying briefs, principally *California v. ARC America Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)*, standing for the proposition that defendants failed to overcome the presumption against **[*4]** federal preemption of state law. For the reasons set forth below, the Sherman Act Plaintiffs' motion for partial reconsideration is denied.

BACKGROUND

In its November 3, 2003 Memorandum and Order, this Court held that the conduct alleged by plaintiffs was impliedly immune from application of the Sherman Act given the SEC's sweeping jurisdiction to regulate the national securities markets and its explicit congressional mandate to balance competition with its other regulatory policies. *IPO Antitrust Litig., 287 F. Supp. 2d at 523-24*. This Court also held that the federal securities regulatory regime entrusted to the SEC preempted the Sherman Act Plaintiffs' state law antitrust claims, holding that failure to apply such preemption would "eviscerate the implied immunity doctrine." **[*5]** *IPO Antitrust Litig., 287 F. Supp. 2d at 524*. The Sherman Act Plaintiffs move this Court to reconsider only this latter portion of its earlier decision.

DISCUSSION

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[1] Familiarity with this Court's November 3, 2003 Memorandum and Order, and the facts and defined terms set forth therein, is presumed.

I. *Standard for a Motion for Reconsideration*

Local Civil Rule 6.3 provides in relevant part: **HN1**[] "There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." **HN2**[] A motion for reconsideration pursuant to Local Rule 6.3 "is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *Yurman Design, Inc. v. Garden Jewelry Mfg. Corp., 2003 U.S. Dist. LEXIS 15051, No. 99 Civ. 9307 (JFK), 2003 WL 22047849, at *1 (S.D.N.Y. Aug. 29, 2003)*. Thus, **HN3**[] to be entitled to reconsideration, a movant must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying motion, which, had they been considered "might reasonably have altered the result reached by the court." **[*6]** *Consol. Gold Fields v. Anglo Am. Corp., 713 F. Supp. 1457, 1476 (S.D.N.Y. 1989)*. Courts narrowly construe this standard and apply it strictly against the moving party "so as to avoid repetitive arguments on issues that have been fully considered by the court." *Lopez v. Comm'r of Soc. Sec., 2002 U.S. Dist. LEXIS 5091, No. 01 Civ. 183 (NRB), 2002 WL 465298, at *1 (S.D.N.Y. Mar. 27, 2002).* **HN4**[] The decision to grant or deny a motion for reconsideration is within the sound discretion of the district court. *See, e.g., Dietrich v. Bauer, 76 F. Supp. 2d 312, 327 (S.D.N.Y. 1999)*.

II. *Federal Preemption of State Antitrust Claims*

The Sherman Act Plaintiffs fail to meet their burden for reconsideration. This Court did not overlook any controlling decisions in reaching its conclusion that the Sherman Act Plaintiffs' state antitrust claims are preempted by the federal securities regulatory regime. The parties fully briefed the issue of preemption of the state antitrust causes of action in their underlying motions, and this Court rejected plaintiffs' arguments based on *ARC America* and related cases. Their arguments are **[*7]** no more persuasive the second time around.

In this Court's view, *ARC America* is not a "controlling decision" with respect to the doctrine of implied immunity. In *ARC America,* the Supreme Court decided the question of whether the federal antitrust rule prohibiting indirect purchaser recovery preempted state antitrust laws expressly permitting such recovery. *ARC America, 490 U.S. at 100*. The question of whether federal ***antitrust law*** preempts contradictory state ***antitrust law*** is different and more narrow than the question presented here. In this case, the issue is whether the SEC's pervasive authority to balance competition against other forces in regulating the national securities markets, in combination with the its active regulation of and regulatory authority over the conduct alleged, renders that conduct impliedly immune from state antitrust scrutiny. As this Court held in its earlier decision, the answer to that question is yes. *IPO Antitrust Litig., 287 F. Supp. 2d at 524* ("To shield the securities regulatory regime from encroachment by the Sherman Act, only to expose that regime to assault by a swarm of state antitrust claims, would **[*8]** shatter the federal regulatory framework for national securities markets."); *cf. Boyle v. United Techs. Corp., 487 U.S. 500, 504-05, 101 L. Ed. 2d 442, 108 S. Ct. 2510 (1988)* (allowing preemption of state law by federal common law where the interests at stake are "uniquely federal" in nature).

However, even if this Court analyzed the question of implied immunity under the preemption framework described in *ARC America,* the result would be the same. **HN5**[] It is "[a] fundamental principle of the Constitution" that Congress has the power to preempt state law. *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372, 147 L. Ed. 2d 352, 120 S. Ct. 2288 (2000)*; *accord ARC America, 490 U.S. at 100* ("It is accepted that **HN6**[] Congress has the authority, in exercising its Article I powers, to pre-empt state law."). **HN7**[] There is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as antitrust regulation, absent an express statement by Congress indicating such an intention. **[*9]** *ARC America, 490 U.S. at 100*. However, this presumption may be overcome in two instances:

> First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

ARC America, 490 U.S. at 100-01 (internal citations omitted) (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941))*.

Here, the presumption is overcome. As this Court held in its prior decision, "the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct," and possesses a "unique mandate to balance competition with other market concerns." **[*10]** *IPO Antitrust Litig., 287 F. Supp. 2d at 512, 523*. Thus, allowing plaintiffs to use various state antitrust regulations to balkanize the national securities regulatory regime would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines, 312 U.S. at 67*; *see* S. Rep. No. 94-75, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191 (noting that ***HN8***[] the SEC's "explicit obligation to balance . . . the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions."); *Finnegan v. Campeau Corp., 915 F.2d 824, 825-26 (2d Cir. 1990)* ("It is recognized that ***HN9***[] competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established **[*11]** public policies."); *In re Stock Exchs. Options Trading Antitrust Litig., 2001 U.S. Dist. LEXIS 1381, No. 1283, M-21-79(RCC), 99 Civ. 962(RCC), 2001 WL 128325, at *10 (S.D.N.Y. Feb. 15, 2001)*, *aff'd* *317 F.3d 134 (2d Cir. 2003)* (noting ***HN10***[] the Commission's mandate to "balance the benefits of competition against its other regulatory aims."). Accordingly, preemption is appropriate even under the *ARC America* framework.

CONCLUSION

For the reasons set forth above, the Sherman Act Plaintiffs' motion for partial reconsideration of this Court's November 3, 2003 Memorandum and Order is denied.

Dated: April 13, 2004

New York, New York

SO ORDERED:

WILLIAM H. PAULEY III

U.S.D.J.

End of Document

Lockheed Martin Corp. v. Boeing Co.

United States District Court for the Middle District of Florida, Orlando Division

April 22, 2004, Decided ; April 23, 2004, Filed

Case No. 6:03-cv-796-Orl-28KRS

Reporter

314 F. Supp. 2d 1198 *; 2004 U.S. Dist. LEXIS 7171 **; 2004-1 Trade Cas. (CCH) P74,411; 17 Fla. L. Weekly Fed. D 653

LOCKHEED MARTIN CORPORATION, Plaintiff, -vs- THE BOEING COMPANY, WILLIAM ERSKINE, KENNETH BRANCH, and LARRY SATCHELL, Defendants.

Subsequent History: Motion denied by, Motion granted by Lockheed Martin Corp. v. Boeing Co., 2004 U.S. Dist. LEXIS 7165 (M.D. Fla., Apr. 23, 2004)

Disposition: Defendant Boeing's motion to dismiss granted; All other Defendants' motions to dismiss granted in part and denied in part. Plaintiff granted leave to file amended complaint.

Core Terms

enterprise, allegations, relevant market, launch, monopolization, documents, conspiracy, Counts, conspiracy claim, purchasers, employees, bid, conspired, cases, antitrust, team, entity, motion to dismiss, predicate act, proprietary, purposes, racketeering, market power, competitors, contracts, boxes, conspiracy to monopolize, suppliers, pattern of racketeering activity, criminal activity

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Defects of Form

HN1[] **Defenses, Demurrers & Objections, Defects of Form**

A court should not grant a Fed. R. Civ. P. 12(e) motion unless the pleading in question is so vague that a party cannot reasonably be required to frame a responsive pleading. The United States Court of Appeals for the Eleventh Circuit refers to the most vague pleadings as "shotgun pleadings." One typical feature of a shotgun pleading is incorporation of the same lengthy allegations into each claim alleged, which makes it difficult to know which allegations of fact are intended to support which claims for relief.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Motions to Dismiss, Failure to State Claim**

For purposes of a motion to dismiss, a court must view the allegations of the complaint in the light most favorable to the plaintiff. *Fed R. Civ. P. 12(b)(6)*. Furthermore, a court must accept all reasonable inferences from the complaint and consider all allegations as true. A court may not, however, accept conclusory allegations and unwarranted factual deductions as true. Only pleadings and attached written exhibits may be considered in making these determinations. *Fed. R. Civ. P. 10(c)*. Unless it appears beyond doubt that the plaintiff can prove no set of facts entitling him to relief, a complaint should not be dismissed for failure to state a claim.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A plaintiff is entitled to survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* if there is any set of facts that, if proven at trial, would entitle it to recover. A court may not assume, however, that a plaintiff can prove facts that it has not alleged or that a defendant has violated laws in ways that have not been alleged. Nor is the court bound to accept as true a legal conclusion couched as a factual allegation. Although the federal rules embrace a liberal pleading standard, bald assertions and conclusions of law will not defeat a properly supported motion to dismiss.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

See *18 U.S.C.S. § 1962(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act provides for private right of action and civil damages.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN6[] Private Actions, Racketeer Influenced & Corrupt Organizations

See 18 U.S.C.S. § 1962(d).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under the Racketeer Influenced and Corrupt Organizations Act, an enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C.S. § 1961(4). The existence of an enterprise is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN8[] Private Actions, Racketeer Influenced & Corrupt Organizations

The Racketeer Influenced and Corrupt Organizations Act (RICO) does not require that an enterprise possess an "ascertainable structure" distinct from the associations necessary to conduct the pattern of racketeering activity. Moreover, the United States Court of Appeals for the Eleventh Circuit has rejected the contention that Turkette's reference to the RICO enterprise as a "continuing unit" requires participation of all members throughout the life of the enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

A Racketeer Influenced and Corrupt Organizations Act plaintiff need not allege a definable structure distinct from the "racketeering activity."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN10[] Private Actions, Racketeer Influenced & Corrupt Organizations

In the United States Court of Appeals for the Eleventh Circuit, the definitive factor in determining the existence of a Racketeer Influenced and Corrupt Organizations Act enterprise is an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes. The Eleventh Circuit has also stated that an enterprise exists if persons associate formally or informally, with the purpose of conducting illegal activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN11[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A Racketeer Influenced and Corrupt Organizations Act "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. A single pattern of racketeering activity thus does not define the scope of the enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Under *18 U.S.C.S. § 1962(c)*, the allegations must name a Racketeer Influenced and Corrupt Organizations Act (RICO) person distinct from the RICO enterprise. This is because the plain language of *§ 1962(c)* envisions two separate entities, which comports with legislative intent and policy. This distinctness rule reflects Congress' intention in *§ 1962(c)* to target a specific variety of criminal activity, the exploitation and appropriation of legitimate businesses by corrupt individuals.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN13[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Distinctness under the Racketeer Influenced and Corrupt Organizations Act (RICO) is a fact-intensive inquiry that is not driven solely by formal legal relationships among the alleged associates in fact. Even where formalities are important to the distinctness inquiries, the courts are guided by common-sense readings of the complaints in the context of the RICO statute and by the purposes of the statute.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN14[] Private Actions, Racketeer Influenced & Corrupt Organizations

Whether a corporation may be named as a Racketeer Influenced and Corrupt Organizations Act "person" cannot be said to be dependent solely on formalities or reducible to a single set of rules because the distinctness rule is rooted in the language of 18 U.S.C.S. 1962(c), comports with legislative intent and policy, and recognizes that the enterprise is often a passive instrument or victim of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN15[] Private Actions, Racketeer Influenced & Corrupt Organizations

The distinctness requirement arises from the language of 18 U.S.C.S. § 1962(c), which says that it applies to persons who are employed by or associated with the enterprise. In ordinary English one speaks of employing, being employed by or associating with others, not oneself.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Interpretation

HN16[] Private Actions, Racketeer Influenced & Corrupt Organizations

The Racketeer Influenced and Corrupt Organizations Act is to be liberally construed to effectuate its remedial purposes.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN17[] Private Actions, Racketeer Influenced & Corrupt Organizations

The history of the Racketeer Influenced and Corrupt Organizations Act reveals that it was meant to protect the public not only from wholly illegitimate or illegal enterprises, but also from those who would use unlawful acts to victimize a legitimate enterprise and from those who would unlawfully use a legitimate enterprise as a vehicle through which unlawful activity is committed.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN18[] Private Actions, Racketeer Influenced & Corrupt Organizations

An individual who incorporates gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that the Racketeer Influenced and Corrupt Organizations Act (RICO) tries to pierce. Fictitious legal "distinctness," such as between an individual and his corporate self, is important to RICO distinctness to the extent it bears on effectuating this historical policy, not because formalities are always a sufficient basis on which to rest a finding of distinctness.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Elements

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > ... > Authority to Act > Apparent Authority > Reliance

Business & Corporate Law > ... > Establishment > Elements > General Overview

HN19[] **Apparent Authority, Elements**

Three elements are needed to establish an apparent agency: (1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance upon such representation. Actual agency requires a showing of: (1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN20[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act does not suggest that every person who "associates with" an association-in-fact enterprise and participates in conducting that enterprise's affairs illegally need be considered a defining member of that enterprise. Indeed, associations-in-fact are often fluid, "amoeba-like," and comprised of shifting personnel.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN21[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

If distinctness were not required for a *18 U.S.C.S. § 1962(d)* claim, the plaintiffs could circumvent the distinctness rule by simply bringing conspiracy claims, which are arguably easier to allege, rather than *18 U.S.C.S. § 1962(c)* claims.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN22[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To state a civil conspiracy claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff need only allege that the defendant conspired to violate some substantive provision of RICO, that some member of the conspiracy committed an overt act of racketeering, and that the act of racketeering injured the plaintiff. The existence of an "agreement" to participate in a RICO conspiracy may be proved by showing (1) the existence of an agreement on an overall objective, or (2) in the absence of an agreement on an overall objective that the defendant agreed personally to commit two or more predicate acts. A fact-finder may infer there was an agreement from circumstantial evidence of the scheme. In this way, the conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN23[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The elements of a *18 U.S.C.S. § 1962(c)* claim are: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; and (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity. The fifth element of a *§ 1962(c)* claim requires allegations (a) that the defendant committed at least two of the predicate racketeering acts listed in *18 U.S.C.S. § 1961(1)*; (b) that there was relatedness among the predicate acts; and (c) that the multiple predicates amounted to, or threatened the likelihood of, continued criminal activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The United States Court of Appeals for the Eleventh Circuit has stated that proof of the fifth element of an *18 U.S.C.S. § 1962(c)* claims requires not only evidence of pattern but also evidence that the defendants' predicate acts were related to the enterprise charged.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

HN25[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The specific facts of each Racketeer Influenced and Corrupt Organizations Act case determine whether a threat of continued criminal activity has been sufficiently alleged or shown. The concept of continuity may refer to either a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. The former period is referred to as "closed-ended continuity," and the latter as "open-ended continuity."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Transportation Law > Carrier Duties & Liabilities > Contraband

HN26[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In a Racketeer Influenced and Corrupt Organizations Act action, a party may demonstrate closed-ended continuity by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN27[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Under the Racketeer Influenced and Corrupt Organizations Act, a plaintiff must establish that the acts of racketeering by the alleged enterprise be related and amount to, or pose a threat of, continued criminal activity. A person is not liable under *18 U.S.C.S. § 1962(c)* for an enterprise's pattern of racketeering activity; he is liable for conducting the affairs of an enterprise through his own pattern of racketeering activity. *18 U.S.C.S. § 1962(c)*. To state a claim against a particular person, the plaintiff thus needs to establish much more than that the enterprise's activities pose a threat of continued criminal activity; the plaintiff needs to establish that the acts of the person pose a threat of continued criminal activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN28[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Under the Racketeer Influenced and Corrupt Organizations Act, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such a showing may be made with reference to a traditional criminal enterprise or with respect to an ongoing legitimate business. Furthermore, there is no requirement that the predicate acts each be a part of separate illegal "schemes." A showing of this sort ordinarily must encompass a sustained period or set of examples sufficient to draw this conclusion with reasonable certainty. However, a plaintiff attempting to show continuity by reference to the enterprise itself may make use of the totality of the evidence. The plaintiff may thus present evidence of the defendant's business practices with respect to not just the plaintiff, but others as well.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN29[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Florida Racketeer Influenced and Corrupt Organizations Act provides that it is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt. *Fla. Stat. Ann. § 772.103(2)* (2003).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > Criminal Offenses > General Overview

HN30[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Under the Florida Racketeer Influenced and Corrupt Organizations Act (Florida RICO Act), criminal activity includes several predicate crimes named in *Fla. Stat. Ann. 772.104(1)* (2003), and a "pattern of criminal activity" consists of engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred within five years after a prior incident of criminal activity. The term "pattern of criminal activity" does not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons. *Fla. Stat. Ann. § 772.102(4)* (2003). The definition refers to engaging in at least two "incidents" of racketeering conduct rather than "acts" of racketeering conduct set forth in the Racketeer Influenced and Corrupt Organizations Act. Thus, crimes committed at the same time cannot qualify as separate incidents for purposes of proving racketeering conduct under the Florida RICO Act.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN31[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The fact that only a single scheme is alleged does not render a Florida Racketeer Influenced and Corrupt Organizations Act claim insufficiently pled if there are several incidents alleged.

Antitrust & Trade Law > Sherman Act > General Overview

HN32[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > General Overview

HN33[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 15(a) provides for private right of action and civil damages.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN34[] Monopolies & Monopolization, Attempts to Monopolize

In order to state a claim for attempted monopolization under either the Sherman Act or the Florida Antitrust Act, a plaintiff must allege facts that, if proven, would satisfy his burden at trial to prove that: (1) the defendant has engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) that there is a dangerous probability that defendant will achieve monopoly power. The third element of a proper attempted monopolization claim requires a two-part showing that a defendant is close to acquiring controlling market power over the relevant product market.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN35[] Public Enforcement, State Civil Actions

The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN36[] Monopolies & Monopolization, Attempts to Monopolize

Determining the relevant product market for an attempted monopolization claim provides the frame of reference within which a defendant's relative market power is measured. The relevant product market is the part of trade or commerce that the defendant is allegedly attempting to monopolize. *15 U.S.C.S. § 2*. The "outer boundaries" of a product's market are defined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. All purchasers and suppliers within those boundaries make up the market for that product unless there is evidence that the market is narrower because of other considerations. Where evidence shows, for example, that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area, the relevant market is limited by excluding suppliers outside of that geographic area. The scope of the relevant market may also in some cases be narrowed to a certain portion of customers.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN37[] **Regulated Practices, Market Definition**

Ultimately, the contours of the relevant market and the defendant's relative power in that market are issues of fact. Dismissals are exceedingly disfavored in antitrust cases because of their fact-intensive nature. Where, however, a plaintiff alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted. A complaint is also legally insufficient where it shows that the plaintiff's proposed relevant market clearly excludes relevant geographic areas, purchasers, or suppliers. Such a complaint may therefore be dismissed because proving the facts alleged could not support a finding of attempted monopolization.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN38[] **Regulated Practices, Market Definition**

While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers. If, for example, a product is specially designed for a certain group of purchasers and the suppliers concentrate their efforts almost exclusively on those purchasers the product dimension may be limited to the sale of that product to those purchasers. Similarly, where one product is distinct from another because of its salability the relevant market can consist solely of that product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN39[] **Monopolies & Monopolization, Attempts to Monopolize**

A plaintiff's allegations regarding the third element of an attempted monopolization claim--dangerous probability of monopolization--must not only propose an appropriate relevant market but must also include allegations that the plaintiff's competitor is close to acquiring controlling market power. The plaintiff's allegations of a defendant's current market share are the most important factor in determining whether the market power issue should go to the jury. Generally, a showing that a defendant has between 60 and 65 percent market share is sufficient to present the issue of market power to a jury. Other factors, including barriers to entering the relevant market, are thereafter "relevant" to the question of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN40[] Monopolies & Monopolization, Attempts to Monopolize

The United States Court of Appeals for the Eleventh Circuit has stated that courts should be wary of the numbers game of market percentage when considering an "attempt to monopolize" suit under the dangerous probability standard. Other factors, such as barriers to entry into the market like high startup costs and the advantages of experience, may be important to the ultimate decision of whether a defendant has captured a dangerous market share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN41[] Monopolies & Monopolization, Conspiracy to Monopolize

Conspiracy to monopolize has three elements: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN42[] Monopolies & Monopolization, Attempts to Monopolize

The third element of a claim for conspiracy to monopolize requires a showing of specific intent to achieve monopoly power. The Sherman Act prohibits conspiring to monopolize any part of the trade or commerce, *15 U.S.C.S. § 2*. That "part" of trade that it is illegal to conspire to monopolize is the relevant product market: Commodities reasonably interchangeable make up that 'part' of trade or commerce which *§ 2* protects against monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN43[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Because monopoly power is, by definition, power over a relevant market, what constitutes the relevant market is a necessary issue in measuring a defendant's specific intent for conspiracy purposes.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN44[] **Antitrust & Trade Law, Sherman Act**

The defendants' intentions with regard to the market in which the litigants compete are what concern the Sherman Act. Allegations that conspiring defendants specifically intended to drive a plaintiff from a single deal will not ordinarily support a conspiracy to monopolize claim. On the other hand, a plaintiff need not allege that the defendants conspired to drive competitors from commerce altogether. The middle ground suggested by *15 U.S.C.S. § 2* is the requirement that the plaintiff allege that the defendants intended to monopolize a part of trade or commerce. A plaintiff must thus allege a proper relevant market to survive a motion to dismiss a Sherman Act conspiracy claim.

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Governments > Courts > Court Personnel

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Powers > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN45[] **Corporate Governance, Directors & Officers**

In Copperweld, the United States Supreme Court held that, under *15 U.S.C.S. § 1*, a wholly-owned subsidiary could not form a conspiracy with its parent corporation because agreements between parents and subsidiaries do not suddenly bring together economic power that was previously pursuing divergent goals, and these agreements are therefore not within the concern of the antitrust conspiracy statutes. In so holding, the Court noted that officers also cannot conspire, for *§ 1* purposes, with the corporations that employ them because officers of a single firm are not separate economic actors pursuing separate economic interests. In the United States Court of Appeals for the Eleventh Circuit, this Copperweld intracorporate conspiracy doctrine applies equally to *15 U.S.C.S. §§ 1* and *2* conspiracy claims. Courts in the Eleventh Circuit have left open the possibility of, but have rarely found applicable, an exception to the Copperweld doctrine. Though the doctrine applies to officers and employees acting in their official capacities, the exception might bar application of the doctrine where the plaintiff can demonstrate that the officers of a corporation have a personal stake in achieving the object of the alleged conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN46[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN47[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The United States Court of Appeals for the Eleventh Circuit has suggested that an individual's status as an agent in the typical sense is not determinative of whether that individual falls within the Copperweld intracorporate conspiracy doctrine. The court has cited with approval a United States Court of Appeals for the Seventh Circuit decision holding that the intracorporate conspiracy doctrine does not preclude a conspiracy or combination between a corporation and any agent. The guiding principle is the requirement that there be more than one independent business entity involved in the combination or conspiracy. The Eleventh Circuit's decisions therefore use the term "agent" to broadly describe entities who are not separate economic powers pursuing divergent goals from the corporation (or other second entity) in question.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Business & Corporate Law > Agency Relationships > Types > General Overview

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

HN48[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Officers of a single firm cannot conspire with that firm to monopolize not because they are officers, and not precisely because, as agents, their acts are attributed to their principal, but because they are not divergent economic powers. Because the antitrust conspiracy statutes are only triggered when previously divergent economic powers make agreements, a plaintiff's claim must allege a joining of two independent sources of economic power or be dismissed.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN49[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Applying the Copperweld intracorporate conspiracy doctrine in different contexts, the United States Court of Appeals for the Eleventh Circuit has made clear that the doctrine does not turn on particular legal relationships, but rather, as the United States Supreme Court has reiterated since Copperweld, turns on specific antitrust objectives.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN50[] **Antitrust & Trade Law, Sherman Act**

The fact that the Copperweld intracorporate conspiracy doctrine does not per se apply to employees highlights the importance of keeping the Sherman Act's goals in mind. In the Eleventh Circuit and other circuits, when the officers or employees of a corporation act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employers for purposes of the Sherman Act.

Civil Procedure > ... > Pleadings > Service of Process > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN51[] **Pleadings, Service of Process**

A district court can have no jurisdiction over "known" parties who have not been named or served with process. *Fed. R. Civ. P. 4*.

Counsel: [1]** For LOCKHEED MARTIN CORPORATION, a Maryland corporation, plaintiff: Terry C. Young, Michael V. Elsberry, Kevin K. Ross, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, FL.

For BOEING COMPANY, a Delaware corporation, defendant: David B. King, Mayanne Downs, Thomas A. Zehnder, King, Blackwell & Downs, P.A., Orlando, FL. Kristin Linsley Myles, Munger, Tolles & Olson, San Francisco, CA. Brad D. Brian, Dennis C. Brown, Marc A. Becker, Munger, Tolles & Olson LLP, Los Angeles, CA.

For WILLIAM ERSKINE, defendant: Gerry S. Gibson, Traci H. Rollins, Steel, Hector & Davis, West Palm Beach, FL.

For KENNETH BRANCH, defendant: Thomas J. Pilacek, Thomas J. Pilacek & Associates, Winter Springs, FL.

For LARRY SATCHELL, defendant: Darryl M. Bloodworth, Nichole M. Mooney, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, FL. Robert L. Corbin, Michael W. Fitzgerald, Corbin & Fitzgerald LLP, Los Angeles, CA.

For KENNETH BRANCH, cross-claimant: Thomas J. Pilacek, Thomas J. Pilacek & Associates, Winter Springs, FL.

For BOEING COMPANY, cross-defendant: David B. King, Mayanne Downs, King, Blackwell & Downs, P.A., Orlando, FL. Kristin Linsley Myles, Munger, **[**2]** Tolles & Olson, San Francisco, CA. Brad D. Brian, Dennis C. Brown, Marc A. Becker, Munger, Tolles & Olson LLP, Los Angeles, CA.

Judges: JOHN ANTOON II, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN ANTOON II

Opinion

[*1201] MEMORANDUM AND ORDER

Lockheed Martin has filed a twenty-three count Complaint against the Boeing Company and certain individuals related to their alleged theft of trade secrets pertaining to a bid competition to provide the U.S. Government space launch capability. Defendants the Boeing Company, William Erskine, Larry Satchell, and Kenneth Branch have all filed motions to dismiss several of the counts of Lockheed Martin's Complaint for failure to state a claim. Specifically, Defendants seek dismissal of all of the claims pursuant to the *Racketeer Influenced and Corrupt Organizations Act* and the *Florida Civil Remedies For Criminal Activities Act* stated in Counts I - IV ("the racketeering claims" and the "racketeering conspiracy claims") and of all of the claims brought under the *Sherman Act* and the *Florida Antitrust Act of 1980* stated in Counts V - VIII (the "attempted monopolization claims" and the "conspiracy to monopolize claims"). William Erskine's motion also seeks a more **[**3]** definite statement from Lockheed. [1] This memorandum and order supplement the Court's order of March 31, 2004. (Doc. 189, filed March 31, 2004.)

I. BACKGROUND

[2]

Lockheed Martin ("Lockheed") is a company heavily involved in the defense and aerospace industries, including satellite launch services. The Boeing Company ("Boeing") competes with Lockheed in the satellite launch services business. This competition extended to the multi-billion dollar Evolved Expendable Launch Vehicle ("EELV") Program, an Air Force program **[*1202]** seeking assistance from the private **[**4]** sector to develop a cost-efficient national space launch capability. The Air Force contemplated that interested aerospace contractors would engage in a multi-phased competition covering the design, development, and prototyping of the EELV. Initially, the Air Force planned to select the contractor that submitted the proposal representing the "best value" to the Air Force in a "winner take all" competition. The winner was to beawarded $ 1 billion for the development cost of the EELV as well as contracts for future space launches.

The first phase of the competition was called the "Low Cost Concept Validation" ("LCCV") and it required competitors to develop cost and risk reduction concepts. On August 24, 1995, the Air Force awarded LCCV contracts to four contractors: Lockheed, Boeing, McDonnell Douglas, and Alliant Techsystems. The Air Force agreed to pay each competitor $ 30 million for its participation.

The Air Force then called upon the participating companies to submit proposals for the next phase of the competition, which was called "Pre-Engineering and Manufacturing Development" ("Pre-EMD"). The proposals were required to show at least a twenty-five percent savings over current **[**5]** launch costs. On December 20,

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[1] Defendants also challenged Count IX of the Complaint, which alleged violations of the Federal Procurement Act. A prior Order of this Court dismissed the claims in that Count. (Doc. 109, filed October 29, 2003.)

[2] These are the facts as alleged in Lockheed Martin's Complaint. (Doc. 1.)

1995, after receiving the proposals, the Air Force eliminated two of the competitors, Alliant Techsystems and Boeing, and awarded Pre-EMD contracts to Lockheed and McDonnell Douglas. Approximately eight months later, Boeing re-entered the competition when it acquired McDonnell Douglas.

On November 3, 1997 the Air Force changed its acquisition policy by abandoning the "winner take all" approach. The Air Force announced that, instead, it would award each of the two remaining competitors--Lockheed and Boeing--$ 500 million Engineering, Manufacturing and Development contracts ("the EMD contracts"). The EMD contracts awarded to Lockheed and Boeing required that they each develop the engineering and manufacturing process for the "launch vehicle system, launch pads, satellite interfaces, and support infrastructure." The contracts required each of the competitors to demonstrate that its system was capable of launching commercial satellites as well as meeting the Air Force's launch mission requirements.

Also under the new Air Force strategy, the contractors were expected to submit firm, fixed-price bids for the initial thirty launch missions. Information generated **[**6]** by the bidders in the earlier phases of the bid remained relevant to the final award. Believing the winning contractor would enjoy "an enhanced position in the national and international commercial space launch vehicle market from [Department of Defense's] investment in the program," the Air Force also required each contractor to make a financial investment in the new technology.

At the end of the Pre-EMD phase, the Air Force requested that Lockheed and Boeing submit separate proposals for EMD contracts and Launch Services contracts. The Air Force advised the contractors that its allocation of the initial thirty launch missions would be based on which company's proposal would provide the best value to the Air Force. On October 16, 1998, much to Lockheed's disappointment, the Air Force awarded nineteen of the first twenty-eight initial Launch Services contracts to Boeing and only nine to Lockheed. Additionally, the first seven of the Launch Services contracts went to Boeing, while Lockheed's first launch contract was not to take place until the fourth fiscal year of the EELV program. In making this uneven allocation, the Air Force took into account Boeing's lower proposed **[*1203]** price, **[**7]** Boeing's lower evaluated risk in several assessment categories, and the Air Force's determination that Boeing's proposal was technically equivalent to Lockheed's proposal. These were factors contributing to the Air Force's assessment as to which company offered the "best value." The Air Force is now considering expanding the EELV program from thirty to fifty launches within the next ten to twelve years. Lockheed believes the original disproportionate allocation places it at a distinct disadvantage in competing for future Launch Services contracts.

All three of the individual Defendants are former Boeing employees. Kenneth Branch ("Branch") began work with General Dynamics, Lockheed's predecessor, at Cape Canaveral, Florida in 1989, and stayed on when Lockheed took over. He worked on the Atlas I and Atlas II launches and continued to be assigned to Lockheed facilities at Cape Canaveral or Kennedy Space Center until he terminated his employment with the company on January 29, 1997.

In May 1995, Lockheed temporarily assigned Branch to Lockheed's Denver facility to assist with the company's LCCV proposal. Because of his experience with the Atlas II, which was the starting point for the **[**8]** EELV design concept, Branch was again asked to assist with the EELV proposal team at the Denver facility from October 1995 to August 1996. During his second assignment to the Denver facility, Branch was a member of the Operations Group and focused on cost data and on reduction of launch vehicle processing time at the launch site. While performing this work for Lockheed, Branch had access to sensitive Lockheed proprietary documents.

In August 1996, about the time Lockheed was completing its Pre-EMD proposal, Branch returned to Florida to find that his position with Lockheed had been eliminated. He maintained a position with the company as a consultant to the EELV team in Denver, however, while he sought another position. On November 3, 1996, Branch accepted a position with Lockheed's Reusable Launch Vehicle program in Florida. On January 14, 1997, Branch gave Lockheed two weeks' notice of his intention to leave and resigned effective January 29, 1997. Surprisingly, he began employment with Boeing on January 28, 1997, the day before his employment with Lockheed ended. Branch continued to work for Boeing until August 2, 1999, when he was terminated for violating Boeing policy by possessing **[**9]** and distributing Lockheed EELV-related proprietary documents during the EELV competition--the conduct that ultimately gave rise to this suit.

Lockheed alleges that as early as August 1996, when it was finalizing its Pre-EMD proposal, Branch traveled to Boeing's facilities in Huntington Beach, California to be interviewed by Boeing employees Tom Alexiou ("Alexiou") and William Erskine ("Erskine") regarding possible employment with Boeing. Mr. Alexiou was Boeing's EELV Infrastructure Team Lead and Erskine was Boeing's EELV Ground Operations Lead. At this meeting, Branch allegedly showed Erskine Lockheed documents including a presentation entitled "EELV Launch Operations Cycle Time Reduction," a document that contained trade secrets and was marked as Lockheed property. This document described Lockheed's strategy for reduction of costs and reduction of the time period a launch vehicle must remain on a pad in preparation for a flight. During the meeting, Mr. Alexiou questioned Branch regarding elements of Lockheed's EELV proposal, including engines and performance. Branch disclosed Lockheed's plan for reducing costs of its EELV program and gave the two Boeing employees other Lockheed documents. **[**10]** While still employed **[*1204]** by Lockheed and prior to being hired by Boeing, Branch had at least two other meetings with Boeing employees assigned to the EELV program.

On January 14, 1996 Boeing offered Branch a position on Boeing's EELV proposal team. Branch immediately accepted the offer and Branch began work on January 28, 1997. When Branch joined the Boeing EELV proposal team, Boeing officials then questioned him about his work with the Lockheed EELV program. At one point Mr. Alexiou, introducing Branch to Tom Parkinson, Boeing's Vice-President, and to program managers, described Branch as a former Lockheed employee who knew the details of Lockheed's EELV program. Boeing officials questioned Branch regarding Lockheed's proprietary and trade secret information, including strategy, cost, and other information relevant to Lockheed's EELV proposal.

On February 19, 1997, Branch returned to Huntington Beach, where he met with Boeing's EELV Capture Team. A short time later he was assigned on paper to Mr. Alexiou's office in Huntington Beach even though his office was actually in Florida. According to Lockheed, Branch made forty-three trips to Huntington Beach to provide Boeing with Lockheed **[**11]** proprietary information and trade secrets. Boeing promoted Branch to the position of Ground Command Control & Communication Mechanical Equipment Lead in charge of sixty employees responsible for developing the electrical ground support system for EELV launches.

After starting with Boeing, Branch spent time with Larry Satchell ("Satchell"), Boeing's EELV Program Manager of Strategic Planning and Analysis. Lockheed charges that Satchell's position with Boeing was also known as the "Black Hat Team Leader" because one of his job responsibilities was to gather information about Lockheed's EELV Program for Boeing's benefit. By speaking with former Lockheed employees, Satchell attempted to discover technical and cost aspects of Lockheed's EELV proposal. This information was sought to give Boeing a better chance of proposing a lower price to the Air Force. Satchell had numerous conversations with Branch regarding Lockheed's EELV program, and Branch gave him Lockheed proprietary and trade secret information, including cost data.

Kimberly Tran, a Boeing software engineer, became alarmed upon seeing Branch in possession of a binder containing Lockheed proprietary materials while on the Boeing **[**12]** premises at Huntington Beach. Ms. Tran reported the incident to her Boeing supervisors. When Mr. Alexiou learned of Ms. Tran's report he told her she should have made the report to him instead of to her supervisors. Mr. Alexiou maintains that Boeing conducted an investigation in response to Ms. Tran's report and the investigation cleared Branch of wrongdoing. Boeing has since admitted, however, that there is no record of the investigation.

In June of 1999, Steve Griffin, a Boeing engineer, heard Erskine boast that he had offered Branch the Boeing job in exchange for the Lockheed EELV proposal. Mr. Griffin reported these remarks made by Erskine to the Boeing Human Resources Representative and the Boeing Delta IV launch site manager. Coincidentally, Mr. Griffin's wife, Bridget Griffin, was an engineer with Lockheed at this time and made a similar report outlining Erskine's remarks to a Lockheed ethics officer. Lockheed contends that, when Mr. Griffin made his report, Boeing became aware that it could no longer conceal the fact that Boeing had received proprietary information and trade secrets. Only then did Boeing report the situation to Boeing's lawyer, Mark Rabe.

[*1205] Mr. Rabe began his **[**13]** investigation of the report by speaking to Mr. Griffin, who repeated what Erskine had told him. Erskine allegedly said that Branch had come to Erskine and offered him the entire Lockheed

EELV proposal to assist Erskine in preparing Boeing's EELV proposal. Erskine also told Mr. Griffin that he had told Branch that if Boeing were not eliminated from the competition, Branch would have a job with Boeing in return for the Lockheed information. Indeed, as soon as the Air Force selected Lockheed and Boeing for the final phase of the competition, Boeing hired Branch. Erskine added that the documents delivered by Branch assisted Boeing in explaining weaknesses in Lockheed's proposal to the Air Force. When Mr. Griffin suggested to Erskine that his conduct was unethical, Erskine replied that he did not care because he had been hired to win the bid and he would do whatever it took to do so.

Mr. Rabe interviewed Branch in June and July 1999. Upon questioning by Mr. Rabe, Branch disclosed a stack of Lockheed documents located in his office and admitted that they were Lockheed property. After this disclosure, Branch was suspended pending further investigation. After the suspension, other Lockheed **[**14]** documents, marked "proprietary," were found in Branch's office, including one marked "Satchell EELV Observations." Mr. Rabe also interviewed Erskine, who confirmed that he had been part of the Boeing EELV team when he met with Branch in August 1996.

Lockheed alleges that by the end of June 1999 Boeing was aware of the facts outlined above. Notwithstanding this knowledge, Boeing intentionally and fraudulently withheld this information from Lockheed and the Air Force to protect Boeing's interest in the EELV program. Lockheed maintains that in continuing the cover-up, Boeing's in-house lawyer, Gary Black, telephoned Lockheed's Deputy General Counsel, Stephen E. Smith, on June 29, 1999 and said that he had just learned that Boeing had hired Branch, who had brought two Lockheed documents dated 1996 to Boeing. Mr. Black told Mr. Smith that Boeing had suspended Branch. Mr. Black added that there was no indication that the two documents in Branch's possession had been seen or used by anyone on Boeing's EELV proposal team. Upon Mr. Smith's request, Mr. Black also spoke to Michael Kramer, General Counsel of Lockheed Astronautics. Mr. Black repeated his understated assessment of the facts to **[**15]** Mr. Kramer and assured him that none of the information from Branch had been seen by Boeing personnel or used in preparing Boeing's EELV proposal. Relying on the representations that only two documents had been found and that they had not been seen by Boeing EELV personnel, Lockheed did not take action at that time.

On November 1, 1999, Mr. Black again called Mr. Kramer to inform him that another fifteen Lockheed documents possibly containing proprietary and trade secret information were in Boeing's possession. Despite what had been gleaned from the Boeing internal investigation, Mr. Black represented that the documents were all dated earlier than 1996, that they had not been out of Boeing's Florida office, and that they had not been seen by anyone on Boeing's EELV proposal team. In this conversation Mr. Black assured Mr. Kramer that Branch was a "first line engineer" and that he was not involved with Boeing's EELV proposal team.

The fifteen documents Mr. Black referred to were sent to Lockheed. Upon receipt, the documents were inspected and fourteen were found to have been proprietary and confidential. Nonetheless, based on the foregoing assurances from Mr. **[*1206]** Black that the documents **[**16]** had not been seen by the EELV proposal team, Lockheed continued to believe it had not been injured.

After Mr. Black's last conversation with Mr. Kramer, Boeing fired Branch and Erskine. Thereafter, Branch and Erskine initiated an action against Boeing for wrongful termination ("the Erskine litigation"). During that litigation, a lawyer for Boeing contacted Lockheed to advise that, as evidence of Erskine and Branch's misconduct, Boeing was prepared to file a box of Lockheed documents that "might be proprietary." Boeing asserted along with the submission that it had found the box in Branch's office in June or July of 1999. These documents detailed Lockheed's specific cost estimates and pricing strategies, including labor plans and cost-cutting measures, for Lockheed's EELV proposal. The documents also made it possible for Boeing to direct its efforts toward developing technology that it had not previously possessed. The documents, furthermore, revealed that Boeing had hired Branch because of his access to Lockheed's proprietary and trade secret information. Though it was not a party in the Erskine litigation, Lockheed sought review of documents filed with the court in connection with **[**17]** that case, but Boeing objected on grounds that the documents were protected from inspection by order of court. Lockheed's motion to review the documents in the Erskine litigation was denied.

In March 2002, Valerie Schurman, Boeing Vice President and Assistant General Counsel, wrote to Lockheed and stated that she could not explain why all the documents obtained from Mssrs. Erskine and Branch had not been sent to Lockheed in 1999. Ms. Schurman concluded, "At any rate, all documents have now been transmitted to you and I would like to apologize for the series of errors that have occurred in handling this case." Notwithstanding this representation, in April of 2002, Boeing issued an "Investigative Report" stating that it "possessed approximately two boxes of Lockheed documents." In May 2002, Mr. Smith asked Ms. Schurman to confirm that Boeing possessed only the two boxes of Lockheed documents mentioned earlier. Confirming her earlier report, Ms. Schurman replied: "On your question about documents, I think we've answered that a number of times. We have provided you with all Lockheed documents of which we are aware." This, too, turned out to be incorrect.

On April 23, 2003, while the **[**18]** Air Force was conducting an investigation of Boeing, Steven Horton, Boeing's Chief Counsel at its Seal Beach, California office, admitted to Mr. Smith, Lockheed's counsel, that Boeing had ten additional boxes of Lockheed documents, three or four of which might contain Lockheed proprietary information and one or two of which might contain trade secrets belonging to Lockheed's predecessors, including General Dynamics. Mr. Horton explained that the documents had been removed from Branch's office and that Boeing's Law Department believed the relevant documents had been turned over to Lockheed. Mr. Horton assented to Mr. Smith's request for the documents. On April 24, 2003, Lockheed received nineteen documents, eighteen of which contained Lockheed or General Dynamics proprietary markings. Included in the documents were the detailed launch operations plan for Lockheed's EELV launch vehicle and an internal strategic plan containing cost estimates. On April 26, 2003, Boeing sent eleven more boxes of Lockheed documents to Lockheed's outside counsel. Those boxes also contained Lockheed proprietary and trade secret information.

Boeing continued to produce Lockheed documents in its possession. **[**19]** On May 9 **[*1207]** and May 23, 2003, Boeing sent Lockheed another four boxes of Lockheed proprietary and trade secret information. On June 2, 2003, Boeing turned over copies of two e-mail messages from Branch to another Boeing employee attaching Lockheed proprietary documents. On June 4, Boeing surrendered another 1,850 pages of Lockheed documents, and finally, on June 6, 2003 Boeing advised Lockheed that it had still more Lockheed documents in its possession. By the time the Complaint in this case was filed on June 10, 2003, Boeing had turned over 37,173 pages of Lockheed documents.

II. MOTION FOR A MORE DEFINITE STATEMENT

Erskine describes Lockheed's Complaint as a "shotgun pleading" and seeks a more definite statement from Lockheed under *Federal Rule of Civil Procedure 12(e)*. (Doc. 55 at 2.) ***HN1***[] A court should not grant a *Rule 12(e)* motion unless the pleading in question is "so vague that a party cannot reasonably be required to frame a responsive pleading." *Fed. R. Civ. P. 12(e)*; *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll., 77 F.3d 364, 367 (11th Cir. 1996)*. The Eleventh Circuit **[**20]** Court of Appeals refers to the most vague pleadings as "shotgun pleadings." One typical feature of a shotgun pleading is incorporation of the same lengthy allegations into each claim alleged, which makes it difficult "to know which allegations of fact are intended to support which claim(s) for relief." *Anderson, 77 F.3d at 366*. Lockheed's Complaint is not a shotgun pleading. Lockheed does repeatedly incorporate into each Count all of the general allegations in paragraphs 1-168. In each Count, however, Lockheed also reiterates in detail the particular relevant portions of those general allegations. Erskine was able to and did file adequate responsive motions to this Complaint. For these reasons, Erskine's motion for a more definite statement is denied.

III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

HN2[] For purposes of a motion to dismiss, a court must view the allegations of the complaint in the light most favorable to the plaintiff. *Fed R. Civ. P. 12(b)(6)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*; *Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).* **[**21]** Furthermore, a court must accept all reasonable inferences from the complaint and consider all allegations as true. Id. A court may not, however, accept conclusory allegations and unwarranted factual deductions as true. Gersten v. Rundle, 833 F. Supp. 906, 910 (S.D. Fla. 1993) (citing Associated Builders, Inc., v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974)). Only pleadings and attached written exhibits may be considered in making these determinations. See Fed. R. Civ. P. 10(c); GSW, Inc., v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir. 1993). Unless it appears beyond doubt that a plaintiff can prove no set of facts entitling him to relief, a complaint should not be dismissed for failure to state a claim. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Hunnings v. Texaco, Inc., 29 F.3d 1480, 1484 (11th Cir. 1994). "Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases." Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002).

HN3[] A plaintiff is "entitled to **[**22]** survive a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6) if there is any set of facts that, if proven at trial, would entitle [it] to recover." Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 551 n.8, 74 **[*1208]** L. Ed. 2d 723, 103 S. Ct. 897 (1983). A court may not assume, however, that a plaintiff can prove facts that it has not alleged or that a defendant has violated laws in ways that have not been alleged. Id. at 526; Beck v. Interstate Brands Corp., 953 F.2d 1275, 1276 (11th Cir. 1992) (per curiam). Nor is the court bound to accept as true a legal conclusion couched as a factual allegation. See B.H. Papasan v. Allain, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986). Although the federal rules embrace a liberal pleading standard, bald assertions and conclusions of law will not defeat a properly supported motion to dismiss. See Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996).

IV. THE RACKETEERING CLAIMS

In Counts I - IV of the Complaint, Lockheed alleges that it is entitled to civil damages because the Defendants violated the Racketeer **[**23]** Influenced and Corrupt Organizations Act ("RICO") and the Florida Civil Remedies for Criminal Activities Act ("the Florida RICO Act"). In Count I, Lockheed contends that

> Boeing, Erskine, Satchell, Branch, together with Alexiou, Black, and others known and unknown to Lockheed Martin, acting in concert and on behalf of Boeing, have unlawfully, knowingly, and intentionally conducted and are continuing to conduct [through a pattern of racketeering activity] an enterprise referred to herein as the "Boeing Trade Secrets Theft Enterprise," an association in fact. This same enterprise includes, and may not be limited to, the "Boeing EKV Proposal Team," and, more recently, the "Boeing EELV Proposal team."

(Doc. 1 PP175-77.) [3] The proposed Boeing Trade Secrets Theft Enterprise ("BTSTE") allegedly existed to steal trade secrets not only from Lockheed, but also from other competitors, including Raytheon, with whom Boeing competed to win the Missile Defense Agency's EKV contract, and AssureSat. (Doc. 1 PP156-63.) Count I is based on section 1962(c) of RICO, which provides that

> **HN4**[] It shall be unlawful for any *person* employed by or associated with any *enterprise* engaged **[**24]** in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such *enterprise's* affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C § 1962(c)(2001) (emphasis added); see 18 U.S.C. § 1964(c) (**HN5**[] providing for private right of action and civil damages).

In Count II, Lockheed alleges that, in violation of section 1962(d) of RICO, the Defendants all conspired to violate section 1962(c). Section 1962(d) provides that it **HN6**[] "shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). In Counts III and IV, Lockheed attempts **[**25]** to state claims under parallel provisions of the Florida RICO Act, sections 772.103(3) and (4) of the Florida Statutes. [4] Lockheed alleges that all of the Defendants are "persons" within the RICO definition because

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[3] "EKV" stands for exoatmospheric kill vehicle. Lockheed alleges that in 1999, Boeing was involved in misconduct pertaining to its involvement in the U.S. Missile Defense Agency's competition for the EKV. (Doc. 1 PP156-59.)

they are entities capable of holding a legal or **[*1209]** beneficial interest in property, and that the BTSTE is an "association-in-fact" enterprise. *18 U.S.C. §§ 1961(3)-(4)*. In their motions to dismiss, Defendants make several arguments: (1) that the allegations would not support a finding that Lockheed's proposed enterprise, the BTSTE, was an ongoing organization and thus a true "enterprise"; (2) that, in light of the distinctness rule, Boeing may not be liable as a "person" who associated with the BTSTE; (3) that Lockheed has not sufficiently alleged a "pattern of racketeering activity;" and (4) that Lockheed's conspiracy claims necessarily fail if Lockheed has failed to state a sufficient underlying racketeering claim.

[26]** *A. The BTSTE as the "Enterprise": RICO & The Florida RICO Act*

Defendants argue that Lockheed fails to state a claim under *section 1962(c)* because the Complaint does not contain allegations that would support a finding that the BTSTE is an association-in-fact enterprise. (See, e.g., Doc. 46 at 9.) ***HN7***[] Under RICO, an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4) (2001)*. The existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*. Defendants contend that proof of the facts alleged would not support a finding that the BTSTE is an "ongoing organization" in which the "various associates function as a continuing unit" because Lockheed's definition of the enterprise consists "entirely of two Boeing *bid proposal teams,"* which "makes clear that . . . the enterprise itself . . . ended upon proposal submission, **[**27]** after which the proposal teams by definition ceased to exist." (Doc. 46 at 9; see also Doc. 41 at 5; Doc. 55 at 4.)

Defendants suggest that, under Turkette, a plaintiff must allege that an association-in-fact enterprise was made up of a "coherent association of members." (See, e.g., Doc. 46 at 9 n.7.) This argument, however, was rejected in United States v. Hewes, in which the Eleventh Circuit Court of Appeals held that shifting associations can form an enterprise if the participants "overlapped to a significant degree." *729 F.2d 1302, 1311 (11th Cir. 1984)*. The court confirmed this in 1985, when it stated that Turkette did not alter the rule that

> ***HN8***[] [RICO does not require that an] enterprise . . . possess an "ascertainable structure" distinct from the associations necessary to conduct the pattern of racketeering activity . . . . Moreover, [the Eleventh Circuit has also rejected] the contention that Turkette's reference to the RICO enterprise as a "continuing unit" required participation of all members throughout the life of the enterprise.

United States v. Weinstein, 762 F.2d 1522, 1537 n.13 (11th Cir. 1985). Defendants' **[**28]** arguments hinging on the lack of a "coherent association" are therefore unavailing. Defendants also suggest that under Turkette, there must be some organization or purpose distinct from the object of the enterprise's criminal acts. (See, e.g., Doc. 46 at 9-10 n.7.) The Eleventh Circuit Court of Appeals also rejected this reading of Turkette in Hewes, in which it held that ***HN9***[] a plaintiff need not allege "a definable structure distinct from the 'racketeering activity.'" *729 F.2d at 1310*.

HN10[] In this circuit, "the definitive factor in determining the existence of an enterprise [is] an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes . . . ." *Weinstein, 762 F.2d **[*1210]** at 1537*. The Court of Appeals has also stated that an enterprise exists if persons "associate formally or informally, with the purpose of conducting illegal activity." *Hewes, 729 F.2d at 1311*, quoted in *Weinstein, 762 F.2d at 1537*.

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[4] With one exception, addressed in subsection C.2. of this discussion, the parties agree that the Florida RICO Act was modeled after RICO and that their arguments about RICO apply equally to the counterpart state claims. See *Gross v. State, 765 So. 2d 39, 42-43 (Fla. 2000)*. (See, e.g., Doc. 46 at 4-5 n.2; Doc. 57 at 2 n.2.)

Lockheed's allegations satisfy these very broad definitions of a RICO enterprise. It is true that the focus of Lockheed's Complaint, including **[**29]** the RICO allegations, is the Defendants' conduct with regard to the EELV bid. The allegations about the enterprise, however, do--if only just barely--allege that the BTSTE was ongoing and continuing. The association- in-fact enterprise is, for example, alleged to include members of a proposal team unrelated to the EELV project, the "EKV Proposal Team." This allegation refers to claims in the Complaint that, as "part of a pattern and practice by Boeing to engage in economic espionage," Boeing employees were involved in stealing trade secrets not just from Lockheed, but also from Raytheon (Boeing's competitor in the Missile Defense Agency's EKV competition), and also from AssureSat. (Doc. 1 PP156-61.) Both the proposed enterprise and these other allegations suggest that the BTSTE had a life beyond the EELV proposal. Lockheed also alleges that the enterprise members' illegal activity was allegedly geared toward not just the EELV bid, but toward "procuring, analyzing, and using the highly sensitive, proprietary and trade secret information of its competitors, *including, without limitation,* Lockheed Martin." (Doc. 1 P175) (emphasis added.) These allegations add to the implication that **[**30]** winning the EELV bid was only "one ostensible purpose" of the BTSTE and that Lockheed will attempt to prove that the enterprise existed to continually steal from several or all of Boeing's competitors. [5] (See id.) Lockheed has thus sufficiently alleged a RICO enterprise. Whether Boeing may be held liable as a defendant "person" who "associated with" that ongoing and continuing enterprise also requires discussion.

B. Boeing as a "Person": RICO & The Florida RICO Act

1. 18 U.S.C. § 1962(c) & Section 772.103(3), Fla. Stat.

[31]** Boeing challenges the allegations that it is a RICO defendant "person" who associated with the alleged enterprise, the BTSTE. The BTSTE, again, is alleged to "include[], and may not be limited to, the 'Boeing EKV Proposal Team,' and, more recently, the 'Boeing EELV Proposal team.'" (Doc. 1 PP175-77.) Boeing concedes that a corporation may be a "person" under *section 1961(3)*, [6] but argues that the Boeing corporation is not sufficiently distinct from the enterprise as alleged. Because of the lack of distinctness between it and the alleged enterprise, Boeing urges that it cannot be a defendant "person" and that dismissal of the RICO claims against it is required.

HN12[] Under *section 1962(c)*, the allegations "must name a RICO person distinct from the RICO enterprise." *United States v. Goldin Indus., 219 F.3d 1268, 1271 (2000)* **[**32]** ("Goldin I"). This is because "the plain language of *§ 1962(c)* envisions two separate **[*1211]** entities, which comports with legislative intent and policy." *Id. at 1270*. This distinctness rule "reflects Congress' intention in *§ 1962(c)* to target a specific variety of criminal activity, 'the exploitation and appropriation of legitimate businesses by corrupt individuals.'" Id. (quoting *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union, 639, 280 U.S. App. D.C. 60, 883 F.2d 132, 139 (D.C. Cir. 1989)*, rev'd in part on other grounds, *286 U.S. App. D.C. 182, 913 F.2d 948 (D.C. Cir.1990)* (en banc).

When the Eleventh Circuit Court of Appeals recently adopted the distinctness rule in Goldin I, it joined all of the other circuits and overruled the contrary prior decision of a three-judge panel in *United States v. Hartley, 678 F.2d 961 (11th Cir. 1998)*. Courts have applied this rule in several ways to preclude suits against corporations. For example, the rule has prevented a plaintiff from naming a corporation as both the person and the enterprise, *Haraco v. American National Bank & Trust Co. of Chicago, 747 F.2d 384, 402 (7th Cir. 1984)*; **[**33]** from naming a corporation as the person and naming a division of that corporation as the enterprise, *United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982)*, overruled on other grounds by *Busby v. Crown Supply, Inc.,*

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[5] It is true that the "pattern of racketeering" is alleged to have a much more narrow goal, (see Doc. 1 P177, alleging that the pattern of activity was all "in furtherance of" the EELV scheme), but ***HN11***[] the "'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette, 452 U.S. at 583*. A single pattern of racketeering activity thus does not define the scope of the enterprise.

[6] Under RICO, "'person' includes any individual or entity capable of holding a legal or beneficial interest in property . . . ." *18 U.S.C. § 1961(3)*.

896 F.2d 833, 840 (4th Cir. 1990); from naming a corporation as the person and naming a grouping of that corporation's subsidiaries as the enterprise, Discon v. NYNEX Corp., 93 F.3d 1055, 1063 (2d Cir. 1996) (contra Haraco, 747 F.2d at 402); and from naming a corporation as the person and naming a grouping of that corporation's own employees and agents as the enterprise, Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 344 (2d Cir. 1994).

It is on the Riverwoods application of the rule that Boeing hangs its hat. Boeing characterizes the alleged enterprise as a grouping of divisions of Boeing (the EELV and EKV proposal teams), Boeing employees (Erskine and Satchell) and a Boeing "agent" (Branch). [7] Boeing argues it cannot be named as a RICO "person" because the alleged enterprise is "nothing more than a subdivision or a part of" Boeing and thus **[**34]** Boeing is no more distinct from the BTSTE than the corporation in Riverwoods was from the grouping of the corporations' employees and agents alleged in that case to be the enterprise. (Doc. 46 at 6.)

Lockheed counters that because Branch was not technically **[**35]** a Boeing employee or agent at all relevant times, Boeing is sufficiently distinct from the enterprise that includes Branch. According to Lockheed, Boeing was simply one of many distinct members of the association-in-fact enterprise, the BTSTE. Lockheed analogizes this case to one in which a district court held that "where the alleged enterprise consists of a corporation and its present and former employees who allegedly continued their racketeering activity after leaving their employment in the corporation, the pleadings sufficiently allege an enterprise separate and distinct from the RICO persons." *Ctr. Cadillac, Inc. v. Bank Leumi Trust Co. of N.Y., 808 F. Supp. 213, 236* ***[*1212]*** *(S.D.N.Y. 1992)*, aff'd, *99 F.3d 401 (2d Cir. 1995)*.

Because Branch was neither formally an employee or agent of Boeing, nor completely disassociated from Boeing like an ex-employee, neither the facts of *Riverwoods* nor those of *Center Cadillac* are convincingly analogous to the facts presented here. [8] The Eleventh Circuit's decision in *United States v. Goldin, 219 F.3d 1271, 1277 (11th Cir. 2000)* ("Goldin II"), along with Riverwoods, two other important **[**36]** Second Circuit distinctness cases, and the only Supreme Court distinctness case, *Cedric Kushner Productions, Ltd. v. Don King, 533 U.S. 158, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*, demonstrates that ***HN13***[] distinctness is a fact-intensive inquiry that is not driven solely by formal legal relationships among the alleged "associates in fact." Even where formalities were important to the distinctness inquiries in these cases, the courts were guided by common-sense readings of the complaints in the context of the RICO statute and by the purposes of the statute. These cases show that the allegations of Branch's "association with" the BTSTE does not make Boeing sufficiently distinct from the BTSTE to render Boeing a "person" under RICO.

The first and only case in which the Eleventh Circuit Court of Appeals applied the distinctness rule must **[**37]** guide the analysis of Lockheed's allegations. In *Goldin II,* the court found that each of three corporations--Goldin Mississippi, Goldin Alabama, and Goldin Louisiana--was sufficiently distinct from an alleged association-in-fact enterprise consisting of the three corporations, such that each corporation could be a RICO defendant "person." *219 F.3d at 1277*. The Court of Appeals reasoned that, despite mutual connection to the original Goldin and some overlapping ownership, each corporate "person" was truly "separate and distinct. Each is incorporated in a separate state. Each is a separate ongoing business with a separate customer base. Each is free to act independently and advance its own interests contrary to those of the other two corporations." Id.

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[7] Even this is a generous reading of Lockheed's definition of the enterprise. Lockheed's proposed enterprise specifically includes only the two proposal teams, and does not specifically include Branch. (Doc. 1 P175.) Read strictly, the Complaint alleges that subdivisions of Boeing made up the enterprise and thus does not allege that Branch formed a *part* or was a *member* of the enterprise. Pursuant to this reading, the Complaint only alleges that Branch, along with the other Defendants, "conducted" the affairs of the enterprise through a pattern of racketeering activity. (Id.) Branch eventually became a part of the EELV proposal team, however, so it is not unfair to presume that Lockheed included Branch as a member of the alleged enterprise.

[8] It is noted that Center Cadillac was decided before the Second Circuit ruled in Riverwoods that a corporation is not sufficiently distinct from an enterprise comprised of its own employees.

The Eleventh Circuit Court of Appeals considered the facts in Goldin II to lie somewhere in between those in two Second Circuit cases, Securitron Magnalock Corp. v. Schnabolk and Discon, Inc. v. NYNEX Corp. Goldin II, *219 F.3d at 1277*. In Securitron, the Second Circuit Court of Appeals held that even though two corporations had the same owner and president, each corporation was sufficiently **[**38]** distinct from an enterprise consisting of the two corporations and their owner because the corporations were "independent entit[ies]." *65 F.3d 256, 263 (2d Cir. 1995)*. In Discon, in contrast, the same court upheld the dismissal of a complaint that named a parent holding company, NYNEX, and two of its wholly-owned subsidiaries as "persons" who had illegally conducted the affairs of an association-in-fact enterprise made up of those same three companies. *93 F.3d 1055, 1063 (2d Cir. 1996)*, vacated on other grounds *525 U.S. 128, 142 L. Ed. 2d 510, 119 S. Ct. 493 (1998)*. The court in Discon reasoned that, despite the fact that the subsidiaries were legally distinct from the holding company, they were in fact indistinct from the holding company with whom they allegedly formed the association-in-fact enterprise. *Id. at 1064*. This was because the subsidiaries acted "on behalf of the" NYNEX. Id. This holding made clear that formally separate entities are not always truly distinct for RICO purposes. *Id. at 1063-64* (distinguishing *Cullen **[*1213]** v. Margiotta, 811 F.2d 698 (2d Cir. 1987)*, in which the Second Circuit found that a **[**39]** municipality, the town's Republican Committee, and the county's Republican Committee were *both* legally distinct *and* capable of being be differentiated from the enterprise-group).

Discon only confirmed what had been hinted at by the Second Circuit Court of Appeals in Riverwoods. [9] In the latter case, real estate developers who had borrowed from Marine Midland Bank's predecessor alleged that when the Bank acquired the predecessor, the Bank and several of its vice presidents illegally forced the borrowers to restructure their loans. The plaintiffs sought RICO civil damages from the Bank itself, alleging that the Bank was a "person" who illegally conducted the affairs of the "Restructuring Group Enterprise," an association-in-fact consisting of the Bank itself and the employees who had negotiated the restructuring. The Second Circuit Court of Appeals held that the Bank was not distinct enough from the proposed enterprise to justify a claim against the Bank as a RICO "person."

[40]** In Riverwoods, the court wrote that the distinctness principle "may not be circumvented" by artful pleading such as alleging that the employees of the corporation, rather than just the corporation, make up the enterprise. Id.; see also *Discon, 93 F.3d at 1063* (quoting this language). Thus, though the distinctness rule "does not foreclose the possibility of a corporate entity being held liable as a defendant under *section 1962(c)* where it associates with others to form an enterprise," the rule *does* foreclose the prospect of a corporation being held liable where it associates with others who are not "sufficiently distinct from itself." *Riverwoods, 30 F.3d at 344*. The court did consider traditional notions of the formal legal relationship of employee/agent to employer important to the distinctness inquiry presented by the facts of that case. *Riverwoods, 30 F.3d at 344* ("Because a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant [person] itself."). The opinion as a whole, however, **[**41]** makes the point that the ultimate test of sufficient distinctness does not always turn on "legal fictions." ***HN14***[] Whether a corporation may be named as a RICO "person" cannot be said to be dependent solely on formalities or reducible to a single set of rules because, as the Second Circuit noted, the distinctness rule is rooted in the language of 1962(c), "comports with legislative intent and policy," and "recognizes that the enterprise is often a passive instrument or victim of racketeering activity." *Riverwoods, 30 F.3d at 343*.

The only Supreme Court case to address the distinctness rule, *Cedric Kushner Productions, Ltd. v. Don King, 533 U.S. 158, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*, echoes Riverwoods by instructing that the designations of "persons" and "enterprises" should fit naturally into the language of the statute and should effectuate the purposes of the statute. In Cedric Kushner, the Supreme Court held that the RICO distinctness principle was not offended by

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[9] Lockheed's assertion that *Riverwoods* is no longer good law lacks merit. It is true that another Second Circuit Court of Appeals decision that was later overruled by the Supreme Court had relied on *Riverwoods. Cedric Kushner Promotions, Ltd. v. King, 219 F.3d 115, 117 (2d Cir. 2000)*, rev'd, *533 U.S. 158, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*. The Supreme Court made clear, however, that the Second Circuit Cedric Kushner decision had *incorrectly* analogized to Riverwoods; the Supreme Court did not suggest that Riverwoods was not good law. *Cedric Kushner, 533 U.S. at 166*.

charging Don King, the individual, **[*1214]** as a "person" who associated with or was employed by the "enterprise," Don King Productions, an incorporated entity of which King was the president and sole shareholder. *533 U.S. at 163.* **[**42]** The Court wrote that it found nothing in the statute to require more "separateness" than that entailed by the different legal status an individual has from his incorporated self. Id. Contrary to Lockheed's suggestion at oral argument, however, Cedric Kushner does not stand for the proposition that formal legal relationships or a lack thereof among those allegedly "associated in fact" will always be determinative of distinctness in every case. (See Tr. of Hr'g on Mot. to Dismiss at 87-90.) The opinion as a whole, like those of *Riverwoods* and *Discon*, makes clear that distinctness is not always commensurate with "legal fictions."

As the Second Circuit Court of Appeals had in Riverwoods, the Supreme Court noted in Cedric Kushner that ***HN15***[] the distinctness requirement arises from the language of *section 1962(c)*, which "says that it applies to 'person[s]' who are 'employed by or associated with' the 'enterprise.' In ordinary English one speaks of employing, being employed by or associating with others, not oneself." *Cedric Kushner, 533 U.S. at 161* (citations omitted). It was natural, the Court wrote, to speak of Don King, "a corporate employee, **[**43]** as 'a person employed by or associated with' the corporation," Don King Productions. *Id. at 164*. The Court distinguished the facts in Riverwoods because in that case it was "less natural to speak of [the Bank] as 'employed by' or 'associated with' an 'enterprise'" made up of a bank together with its own employees and agents. *Id. at 166* (also distinguishing facts of Discon on same basis).

As it regularly does when construing the terms of the RICO statute, the Supreme Court also considered whether applying the statute and the distinctness principle to find Don King a proper RICO "person" was "consistent with the statute's basic purposes as [the] Court has defined them." *Cedric Kushner, 533 U.S. at 164*; see *Sedima v. Imrex Co., 473 U.S. 479, 498, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* (noting that ***HN16***[] RICO is to be "liberally construed to effectuate its remedial purposes") (quoting *Pub. L. 91-452, § 904(a), 84 Stat. 947*). ***HN17***[] The history of the statute reveals that it was meant to protect the public not only from wholly illegitimate or illegal enterprises, but also from those who would use unlawful acts to victimize a legitimate **[**44]** enterprise and from "those who would unlawfully use a [legitimate] enterprise as a 'vehicle' through which 'unlawful . . . activity is committed' . . . ." *Cedric Kushner, 533 U.S. at 164-65*; see also *Reves v. Ernst & Young, 507 U.S. 170, 180-82, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993)* (describing differences in other bills proposed and that which became RICO).

As the Seventh Circuit Court of Appeals put it, ***HN18***[] an individual who incorporates "gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce." *R.D. McCullough, II v. Suter, 757 F.2d 142, 144 (7th Cir. 1985)*. Fictitious legal "distinctness," such as between an individual and his corporate self, is important to RICO distinctness to the extent it bears on effectuating this historical policy, *not,* as Lockheed suggests, because formalities are always a sufficient basis on which to rest a finding of distinctness. Indeed, the Supreme Court distinguished the facts in Cedric Kushner from those in Discon, in which, as discussed, the Second Circuit found that *despite* the formal **[**45]** distinctness between a holding company and its subsidiaries, an association-in-fact enterprise **[*1215]** made up of those companies was not sufficiently distinct from each company named as a RICO defendant "person."

Analysis of the facts and reasoning in *Goldin II*, *Securitron*, *Discon*, *Riverwoods*, and *Cedric Kushner* confirms the common-sense conclusion that Boeing is not a proper defendant "person" in this case because Boeing is not sufficiently distinct from the BTSTE despite Branch's involvement in the BTSTE. Lockheed alleges that Branch was at all relevant times seeking a job with Boeing; that Boeing promised Branch a job, *quid pro quo,* if he provided Boeing with the Lockheed information that would help Boeing win the first phase of the EELV bid; and that Branch was always working "on behalf of" Boeing. (See, e.g., Doc. 1 PP63-70, 75, 101.) The distinctness rule may not be circumvented by Lockheed's artful grouping into an association-in-fact of the corporation itself (Boeing), employees of the corporation (Erskine and Satchell), groups of employees of the corporation (the EKV and EELV proposal teams), and a would-be employee of the corporation (Branch), all of whom were at **[**46]** all relevant times allegedly working on behalf of the corporation. Not only was Branch himself not "sufficiently distinct" from Boeing during the five months before he became an actual employee, those five months did not morph the allegedly years-long BTSTE, which would otherwise clearly be a corporate enterprise indistinct from Boeing, into something separate from Boeing. [10]

[47]** Unlike the corporations named as "persons" and alleged to comprise the association-in-fact in Goldin II and Securitron, none of those alleged to make up the BTSTE ever acted independently from Boeing or the BTSTE to advance his own interests. Erskine and Satchell were employees of Boeing, and Branch was analogous to them and to the employees or agents in Riverwoods because even before he became an agent or employee of Boeing, he was always "acting on behalf of" Boeing. [11] Like the subsidiaries in Discon vis-a-vis their parent holding company, Branch, as a "non-employee," was only technically distinct from Boeing.

[48]** As was the case in Discon and Riverwoods there is an unnatural fit between the allegations against Boeing as a person and *section 1962(c)*. Lockheed's allegations about Boeing being "employed by" or "associated with" the alleged enterprise are like those in Riverwoods, which the Supreme Court called "odd" in Cedric Kushner, because Lockheed's allegations speak of Boeing as "a person employed by or associated with" a group made up of Boeing employees and Branch, who was **[*1216]** working on behalf of Boeing. There can be little doubt that the odd grouping Lockheed alleges is designed as it is for no other reason than to reach the deep pockets of Boeing. It would have been far more obvious, workable, and natural to allege that Boeing was the "enterprise" which Erskine, Satchell, and Branch conducted through a pattern of racketeering activity. [12] There is no suggestion in this case,

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[10] With regard to whether there was a continuing and ongoing *enterprise,* Lockheed's arguments emphasize the several different goals of the alleged enterprise and the enterprise's long history and varied personnel. In that context, Lockheed de-emphasizes the allegations suggesting that one person and one bid, Branch and the EELV bid, were so integral to many of the alleged predicate acts. As already discussed, the allegations about the enterprise do indeed suggest that it was ongoing and continuing beyond the five months before Branch was hired and was much larger than Branch himself. With regard to the issue of whether Boeing may be a liable person associated with this enterprise, however, Lockheed seeks to define the enterprise by Branch's association with it, particularly by five months of that two-year long association. Lockheed cannot have it both ways.

[11] ***HN19***[] "Three elements are needed to establish an apparent agency: (1) a representation by the purported principal; (2) reliance on that representation by a third party; and (3) a change in position by the third party in reliance upon such representation." *Ilgen v. Henderson Props., Inc., 683 So. 2d 513, 514 (Fla. 2d DCA 1996)*. Actual agency requires a showing of: "(1) acknowledgment by the principal that the agent will act for him; (2) the agent's acceptance of the undertaking; and (3) control by the principal over the actions of the agent." *Id. at 515*.

[12] There is no debate about whether Lockheed has sufficiently alleged that Branch (and the other individual defendants) "associated with" and was later "employed by" Boeing/the BTSTE. ***HN20***[] The statute does not suggest, however, that every person who "associates with" an association-in-fact enterprise and participates in conducting that enterprise's affairs illegally need be considered a defining member of that enterprise. Indeed, the Court of Appeals for the Eleventh Circuit has often held that associations-in-fact are often fluid, "amoeba-like," and comprised of shifting personnel. See, e.g., *United States v. Hewes, 729 F.2d 1302, 1311 (11th Cir. 1984)* (rejecting the contention that an association-in-fact "requires participation of all of its members throughout the life of the enterprise" and finding that "shifting associations" whose participants "overlapped to a significant degree" formed an enterprise under the statute); *United States v. Church, 955 F.2d 688, 698-99 (11th Cir. 1992)* (same).

Many of these difficult distinctness cases could potentially be eliminated by a more particular reading of the association-in-fact definition. It could be argued that a RICO defendant corporation should never be considered a "member" of an association-in-fact. The definition of enterprise "includes any *individual,* partnership, corporation, association, or other legal entity, and any union or group of *individuals* associated in fact although not a legal entity . . . ." *18 U.S.C. § 1961(4) (2001)* (emphasis added). As the Eleventh Circuit Court of Appeals once stated, because *section 1961(3)* defines a "person" as an individual or entity capable of holding a beneficial interest in property, "it is clear . . . that 'individual' is used differently from 'person' in the act to connote *a living person." United States v. Hartley, 678 F.2d 961, 989 n.46 (11th Cir. 1982)*, overruled on other grounds by *Goldin I, 219 F.3d. 1268 (11th Cir. 2000)* (en banc) (emphasis added). Because corporations are not living individuals, they thus arguably cannot be a part of an association-in-fact under *section 1962(c)*, though of course they can, as "persons," associate *with* an association-in-fact enterprise. Id. This theory that Congress did not have corporations in mind when it wrote the second half of *section 1961(4)* is buttressed by the fact that corporations necessarily fall within the first half of the definition. So does the often-repeated theory that the second part of the definition of enterprise was designed to snare not "duly formed corporation[s] moreover, that endorsing an unnatural fit between the allegations and the statute or focusing on the lack of a formal employment relationship between Branch and Boeing is necessary to effectuate the special remedial purposes of RICO. Branch's association with the BTSTE does not make Boeing sufficiently **[**49]** distinct from that enterprise such that Boeing is a "person" under *section 1962(c)*.

[50]** Lockheed also argues that the allegation that the enterprise included "others unknown" to Lockheed makes the BTSTE sufficiently distinct from Boeing. It does not. The "others unknown," first of all, **[*1217]** are alleged to have been working on behalf of Boeing and thus furnish no more distinctness than Branch does. Secondly, while it is reasonable to infer from the Complaint that Boeing included Branch in the "EELV Proposal Team" that was said to be a part of the enterprise, the Complaint does not reasonably imply that these unknowns are alleged to be part of the enterprise. Thirdly, it would not be fair to hold that simply alleging "unknowns" is sufficient to circumvent the distinctness rule. Lockheed's final argument for distinctness, raised for the first time at oral argument, is that the Complaint alleges that McDonnell Douglas was another entity in the "enterprise" because some of the predicate acts took place before Boeing acquired McDonnell Douglas. (Tr. of Hr'g on Mot. to Dismiss at 8.) Only an extremely strained reading of the Complaint supports this argument, and Defendants cannot be said to have been on notice that Lockheed was claiming that McDonnell Douglas played a part in this **[**51]** enterprise.

The *section 1962(c)* RICO claim against Boeing and the parallel state claim against Boeing under *section 772.103(3)* of the Florida Statutes are accordingly dismissed.

2. Conspiracy: 18 U.S.C. § 1962(d) & Section 772.103(4), Fla. Stat.

The conclusion that Boeing is indistinct from the BTSTE also dictates that Lockheed's conspiracy claims in Counts II and IV against Boeing, under *section 1962(d)* and *section 772.103(4), Florida Statutes*, be dismissed. Lockheed's claim in essence is that Boeing conspired to conduct or participate, directly or indirectly, in the conduct of an enterprise comprised of Boeing, employees of Boeing, and Branch through a pattern of racketeering activity. See *18 U.S.C. §§ 1962(c)*,*(d)*. This allegation fits no more smoothly into *section 1962(d)* than the statement that Boeing conducted the affairs of that enterprise through a pattern of racketeering activity fits into *section 1962(c)*. Furthermore, ***HN21***[] if distinctness were not required for a *section 1962(d)* claim, plaintiffs could circumvent the distinctness rule by simply **[**52]** bringing conspiracy claims, which are arguably easier to allege, rather than *section 1962(c)* claims. [13] Accord *Sluka v. Estate of Herink, 1996 U.S. Dist. LEXIS 20230, No. 94 CV 4999, 1996 WL 612462, at *7 (E.D.N.Y. Aug. 13, 1996)*.

that elect[] officers and hold[] annual meetings," but "amoeba-like infra-structure[s] that control[] secret criminal networks." *Hewes, 729 F.2d at 1310* (quoting *United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978))*; contra *C.A. Westel de Venez. v. Am. Tel. & Tel. Co., No. 90 Civ. 6665, 1994 U.S. Dist. LEXIS 14481, at *13-15 (S.D.N.Y. Oct. 11, 1994)* (holding that only an "overly rigid" reading of *section 1961(4)* would convince that groups of corporations cannot be "associations in fact" because the definition of enterprise is by its terms not exhaustive, and stating that such a reading would "perversely insulate the most sophisticated racketeering combinations from RICO's sanctions, the precise opposite of Congress' intentions.") This issue is academic, however, because it has been either not litigated or overlooked by courts. Moreover, courts in this circuit and others have approved associations-in-fact enterprises made up of groupings of corporations. See, e.g., *Goldin II, 219 F.3d 1271 (11th Cir. 2000)*.

[13] ***HN22***[] To state a civil conspiracy claim under RICO, a plaintiff need only allege that the defendant conspired to violate some substantive provision of RICO, that some member of the conspiracy committed an overt act of racketeering, and that the act of racketeering injured the plaintiff. *Beck v. Prupis, 162 F.3d 1090, 1098 (11th Cir. 1998)*, aff'd, *529 U.S. 494, 146 L. Ed. 2d 561, 120 S. Ct. 1608 (2000)*. The existence of an "agreement" to participate in a RICO conspiracy may be proved by "showing (1) the existence of an agreement on an overall objective, or (2) in the absence of an agreement[] on an overall objective that the defendant agreed personally to commit two or more predicate acts." *United States v. Castro, 89 F.3d 1443, 1451 (11th Cir. 1996)*. A fact-finder may infer there was an agreement "from circumstantial evidence of the scheme." *United States v. Church, 955 F.2d 688, 695 (11th Cir. 1992)*. In this way, "the conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable." *Beck, 162 F.3d at 1099 & n.18*; *Beck, 529 U.S. at 506-07*.

[53]** Several other courts have concluded that distinctness is required for civil section 1962(d) conspiracy claims in the same way as for section 1962(c) claims. See, e.g., New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am., 18 F.3d 1161, 1165 (4th Cir. 1994); Genty v. Resolution Trust Corp., 937 F.2d 899, 907 (3d Cir. 1991); Sluka, 1996 U.S. Dist. LEXIS 20230, 1996 WL 612462, at *7. Others have held the same but on the more limited theory that a corporation only acts through its employees and agents. See, e.g., Neb. Sec. Bank v. Dain **[*1218]** Bosworth, Inc., 838 F. Supp. 1362, 1371 (D. Neb. 1993). Still others have reached the same conclusion but solely on the theory that the Copperweld antitrust intracorporate conspiracy doctrine, which forbids finding that a conspiracy exists between a corporation and either its employees or its subsidiaries for purposes of Sherman Act conspiracy claims, applies equally to RICO conspiracy claims. See, e.g., Fogie v. THORN Americas, Inc., 190 F.3d 889, 899 (8th Cir. 1999). [14]

[54]** Those courts that have allowed section 1962(d) claims to stand in cases where distinctness was an issue for companion section 1962(c) claims have done so for either one or both of two reasons. The first is that the court in question either did not address distinctness or found that plaintiffs *had* alleged an enterprise distinct from the corporate defendant "person." See, e.g., Webster v. Omnitrition Int'l, 79 F.3d 776, 787 (9th Cir. 1996) (declining to dismiss section 1962(d) claim, but never addressing whether there was distinctness between the alleged enterprise and the named defendant "persons"); Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1280-81 (7th Cir. 1989) (declining to apply distinctness principle to section 1962(d) claims against corporate defendant because defendant "person" was distinct from the enterprise it allegedly conspired to conduct through a pattern of racketeering activity).

The second reason cited by these courts for declining to dismiss section 1962(d) claims where there was an issue of distinctness is that the parties simply debated whether the Copperweld intracorporate conspiracy doctrine applied to RICO claims, **[**55]** and the courts in question correctly declined to apply that doctrine to RICO claims because the Copperweld doctrine applies only in the antitrust context. See, e.g., Ashland Oil, 875 F.2d at 1281 (refusing to apply Copperweld intracorporate conspiracy doctrine to case of alleged RICO conspiracy between a parent corporation and its wholly-owned subsidiary); Webster, 79 F.3d at 787 (adopting rationale of Ashland Oil); Bowman v. W. Auto Supply Co., 773 F. Supp. 174, 180 (W.D. Mo. 1991) (adopting rationale of Ashland Oil);Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp 1231, 1241 (S.D.N.Y. 1983) (rejecting extension of Copperweld to RICO conspiracy and also noting that intracorporate conspiracies are allowed in other contexts).

Section 1962(d) cases in which the court did find distinctness between the defendant "person" and the enterprise do not apply. As stated above, in the instant case there is a lack of distinctness between Boeing and the BTSTE. Furthermore, the Copperweld doctrine has not been offered by Defendants as a grounds for dismissal. [15] Lockheed's section 1962(d) RICO claim **[**56]** against Boeing, and its parallel state claim against Boeing under section 772.103(4), Florida Statutes, are accordingly dismissed. The RICO and the Florida RICO Act claims in Counts I - IV against Erskine, Satchell and Branch are discussed below.

C. Erskine, Satchell, & Branch: Pattern of Racketeering Activity

1. 18 U.S.C. § 1962(c)

Assuming that Lockheed has sufficiently alleged **HN23**[] "(1) the existence of an enterprise; (2) that the enterprise affected interstate **[*1219]** commerce; (3) that the defendants were employed by or associated with the enterprise; [and] (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise," all of the individual Defendants challenge the allegations relating to the fifth element, "that **[**57]** the defendants

[14] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), and the intracorporate conspiracy doctrine are discussed at length in the context of Lockheed's Sherman Act claims.

[15] The Supreme Court did recently confirm that the Copperweld intracorporate conspiracy doctrine "turns on specific antitrust objectives." Cedric Kushner, 533 U.S. at 166.

participated through a pattern of racketeering activity." United States v. Starrett, 55 F.3d 1525, 1541 (11th Cir. 1995). [16] This fifth element of a section 1962(c) claim requires allegations (a) that the defendant committed at least two of the predicate racketeering acts listed in section 1961(1); (b) that there was relatedness among the predicate acts; and (c) that the multiple predicates "amounted to, or threatened the likelihood of, continued criminal activity." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989); Starrett, 55 F.3d at 1542. [17]

[58]** Lockheed alleges that the individual Defendants committed several predicate acts in the categories of mail and wire fraud and receipt and use of stolen property that had traveled across state lines. (Doc. 1 P184); see 18 U.S.C. § 1961(1) (listing predicate acts). None of the individual Defendants argues that Lockheed attributes to him an insufficient number of predicate acts. The individual Defendants also do not argue that Lockheed has pled the predicate acts with insufficient particularity, or that the alleged acts were not related. Instead, they all argue that the allegations would not support a finding that the alleged predicate acts demonstrate continued criminal activity or a threat of continued criminal activity. (Doc. 46 at 6; Doc. 41 at 3-5; Doc. 55 at 4; Doc. 56 at 1.) [18]

[59]** ***HN25***[] The specific facts of each case determine whether a threat of continued criminal activity has been sufficiently alleged or shown. H.J. Inc., 492 U.S. at 242-43. The concept of continuity may refer to either "a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 242. The former period is referred to as "closed-ended continuity," and the latter as "open-ended continuity." See id.; Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm., 953 F.2d 587, 593 (11th Cir. 1992).

Lockheed first argues that it has alleged sufficient facts to state a claim of closed-ended continuity. ***HN26***[] A party may demonstrate closed-ended continuity "by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." H.J. Inc., 492 U.S. at 242.

[*1220] Lockheed alleges that each of the individual Defendants committed at least two predicate acts over a period of at least two years. Branch's first alleged predicate **[**60]** act took place in 1996 when he transported stolen Lockheed property interstate from either Florida or Colorado to California to meet with Erskine and Alexiou. (Doc. 1 P183(i).) Between 1997 and mid-1998, Branch allegedly flew approximately forty-three times from Florida to California to transport stolen documents and spoke with Satchell over the phone about those documents. (Id. PP182(ii)-(iii), 183(xi).) Erskine's first alleged predicate act took place in 1996 when he transported from Colorado to California stolen Lockheed papers that Branch had given him at their first meeting. (Id. P183(i).) Throughout the course of the EELV competition and until Boeing submitted its bid in July of 1998, Erskine allegedly took receipt of stolen documents that had been transported across state lines and used them in preparing Boeing's bid. (Id. PP183(xii), (xiii).) Satchell's first alleged predicate act took place "shortly after Branch began working for Boeing," which was in early 1997 (id. P71), when Satchell and Branch began having telephone conversations about the Lockheed papers (id. P182(ii)). Lockheed alleges that the phone conversations continued into mid-1998 and that **[**61]** Satchell also received Lockheed papers in the mail in 1997 and 1998. (Id. at P182(iii).) These allegations of interstate fraud and trafficking in stolen property over at least two years represent much more than

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[16] Though Boeing addressed this element, because the RICO claims against Boeing are dismissed for lack of distinctness the rest of this discussion of RICO deals only with the allegations against the individual Defendants-Erskine, Satchell, and Branch.

[17] ***HN24***[] The Eleventh Circuit has also stated that proof of the fifth element requires not only evidence of pattern but also evidence "that the defendants' predicate acts were related to the enterprise charged." Starrett, 55 F.3d at 1542. Erskine, Satchell, and Branch have not argued that Lockheed's allegations fail to satisfy this "relationship" requirement.

[18] Erskine does state that "there is no allegation that Erskine participated in any purported conversion of trade secrets from any person or any other than the alleged incident involving Lockheed [sic]." (Doc. 55 at 4.) It is not clear what he means by this. Assuming he means that he is not alleged to have stolen anything himself, this does not bar the claim against him and is not a reason to dismiss. Lockheed alleges that the individual Defendants' predicate acts were in the categories of mail fraud, wire fraud, and interstate transportation and use of stolen property. (See Doc. 1 P184.)

claims of "predicate acts extending over a few weeks or months." See H.J., Inc., 492 U.S. at 242. The Complaint thus sufficiently alleges closed-ended continuity for purposes of the pattern element. See Starrett, 55 F.3d at 1549 (finding that evidence of a series of related predicates extending over a period of two years was sufficient to establish the fifth RICO element against one defendant) (citing H.J. Inc., 492 U.S. at 242). [19]

[62]** Lockheed also argues that it has alleged facts sufficient to show open-ended continuity. The Supreme Court has suggested examples of how open-ended continuity **[*1221]** might be shown, including the following:

> **HN28**[] The threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.

H.J. Inc., 492 U.S. at 242-43. Such a showing may be made with reference to "a traditional criminal enterprise or with respect to an ongoing legitimate business." Jones v. Childers, 18 F.3d 899, 911 (11th Cir. 1994). Furthermore, there is no requirement that the predicate acts each be a part of separate illegal "schemes." H.J. Inc., 492 U.S. at 237, 241-42 & n.3. A showing of this sort "ordinarily must encompass a sustained period or set of examples sufficient to draw this conclusion with reasonable certainty." Jones, 18 F.3d at 912. As the Supreme Court's language **[**63]** suggests, however, a plaintiff attempting to show continuity by reference to the enterprise itself may make use of "the totality of the evidence." Id. The plaintiff may thus present evidence of the defendant's business practices with respect to not just the plaintiff, but others as well. In Jones, for example, the Eleventh Circuit Court of Appeals found that the defendant's two predicate acts perpetrated against the plaintiffs did not, "in and of themselves, provide a sufficient basis for finding 'continuity . . . .'" Jones, 18 F.3d at 912. Nevertheless, the court found that "the totality of the evidence as to [the defendant's] business practices with respect to [other individuals] sufficiently established a pattern of criminal activity." Id. at 913; see also United States v. Church, 955 F.2d 688, 694 (11th Cir. 1992).

Lockheed's Complaint alleges multiple related predicate acts and that the BTSTE existed for purposes of stealing trade secrets from Boeing's competitors "including, without limitation, Lockheed Martin." (Doc. 1 PP175, 180.) Most of the alleged predicate acts were associated with winning the EELV bid, but **[**64]** the Complaint also contains allegations about stealing proprietary information from Raytheon regarding the EKV bid and about stealing from AssureSat. (Id. PP156-61.) Under H.J. Inc. and Jones, these allegations sufficiently state an open-ended pattern. Satchell, Erskine, and Branch's motions to dismiss the section 1962(c) RICO claims against them are accordingly denied.

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[19] The allegations about the acts of "Boeing," and about the acts of Alexiou, Black, and others employed by Boeing are irrelevant here. The RICO claims against Boeing have been dismissed and the other individuals are not named as defendants. The listing of these individuals' acts among the allegations of racketeering perhaps stems from confusion about the nature of the pattern element. Like each Defendant's failure to focus on the predicate acts alleged to have been committed by himself in favor of more general arguments, the allegations referring to non-parties seem to stem from the understanding that, **HN27**[] under RICO, the plaintiff must establish "that the acts of racketeering *by the alleged enterprise* be related and amount to, or pose a threat of, continued criminal activity." (See, e.g., Doc. 41 at 5) (emphasis added.) A person is not liable under section 1962(c) for an *enterprise's* pattern of racketeering activity; he is liable for conducting the affairs of an enterprise through his *own* pattern of racketeering activity. 18 U.S.C. § 1962(c); H.J. Inc., 492 U.S. at 232, 244. To state a claim against a particular person, a plaintiff thus needs to establish much more than that the enterprise's activities pose a threat of continued criminal activity; the plaintiff needs to establish that the acts of the *person* pose a threat of continued criminal activity.

This confusion between what a plaintiff must show about what the "person" did and what a plaintiff must show about the alleged "enterprise" may exist in part because, as discussed in section A of this discussion, "continuity" is relevant to proof of an association-in-fact "enterprise" and, as explained in this section, to proof of a "person's" pattern of racketeering activity. Further confusing the issues is the fact that, as discussed below, the nature of the "enterprise" may serve as part of the proof that the defendant "person's" acts constitute an open-ended pattern of racketeering activity.

Because Satchell agreed with Boeing that the federal law conclusions should determine the fate of the Florida RICO claims, his motion to dismiss the parallel claim against him pursuant to *section 772.103(3)*, Florida Statutes, is also denied. This conclusion would apply to Erskine and Branch as well had they not raised an argument Satchell did not. As already noted, Erskine and Branch agreed that federal law should govern the Florida RICO claims, except in the context of the "pattern of racketeering activity" element. [20] Their extra argument that the Florida RICO Act's more stringent pattern requirement requires dismissal of the Florida claims against them is discussed below.

[65]** *2. Section 772.103(3), Fla. Stat.*

Erskine and Branch argue that Lockheed has failed to state a claim against them for violation of *section 772.103(2)* of the Florida Statutes, pointing out that the Florida RICO Act "pattern requirement" is more stringent than the RICO requirement. (Doc. 55 at 5; Doc. 56 at 1.) ***HN29***[] The Florida RICO Act provides that **[*1222]** it is unlawful for any person "employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity or the collection of an unlawful debt." *§ 772.103(2), Fla. Stat. (2003)*. ***HN30***[] Criminal activity includes several predicate crimes named in *section 772.103(1)*, Florida Statutes, and a "pattern of criminal activity" under the Florida RICO Act consists of

> engaging in at least two *incidents* of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred **[**66]** within 5 years after a prior incident of criminal activity. For the purposes of this chapter, the term "pattern of criminal activity" shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons.

§ 772.102(4), Fla. Stat. (emphasis added). The definition "refers to engaging in at least two 'incidents' of racketeering conduct rather than 'acts' of racketeering conduct set forth in [RICO.]" State v. Marks, *758 So. 2d 1131, 1138 (Fla. 4th DCA 2000)* (quoting *State v. Lucas, 600 So. 2d 1093, 1095-96 (Fla. 1992))*. "Thus, crimes committed at the *same time* cannot qualify as separate incidents for purposes of proving racketeering conduct under the Florida act." Id. (emphasis added).

Erskine and Branch characterize Lockheed's Complaint as "merely" alleging "one incident." At worst, however, the alleged predicate acts arose in the context of one scheme-the scheme to steal and use Lockheed's EELV secrets. ***HN31***[] The fact that only a single *scheme* is alleged does not render a Florida RICO Act claim insufficiently pled if there are several **[**67]** *incidents* alleged. *Davis v. S. Bell Tel. & Tel. Co., 1994 U.S. Dist. LEXIS 13257, No. 89-2839-CIV, 1994 WL 912242, at *20 (S.D. Fla. Feb. 1, 1994)* (holding that multiple solicitations in furtherance of one scheme to defraud customers satisfied the Florida Act requirements) (citing *H.J. Inc., 492 U.S. at 239*). The Complaint alleges several incidents that took place at *several different times* spanning at least two years, satisfying the Florida Act pleading requirements. Erskine and Branch's motions to dismiss the *section 772.103(3)* claims against them are denied.

D. Erskine, Satchell, & Branch: Conspiracy

1. 18 U.S.C. § 1962(d)

Erskine, Satchell, and Branch argue that the conspiracy claims against them should be dismissed because "where the Plaintiff fails to allege a substantive violation of RICO, no claim for civil conspiracy to violate RICO may exist." (Doc. 41 at 6; see also Doc. 55 at 5; Doc. 56 at 1.) This argument is without merit. First of all, as concluded in the previous section of this discussion, Lockheed *has* stated a claim against these three Defendants under *section 1962(c)*. Secondly, the Defendants do not cite any **[**68]** case that supports their proposition that *section 1962(d)* claims necessarily fall with *section 1962(c)* claims. They all cite Beck v. Prupis, but in that case, in which the

[20] See supra note 4.

Supreme Court affirmed the Eleventh Circuit Court of Appeals, the Supreme Court explicitly declined to either adopt or even address that proposition:

> We do not resolve whether a plaintiff suing . . . for a RICO conspiracy must allege an actionable violation under *§§ 1962(a)-(c)*, or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury.

[*1223] *Beck, 529 U.S. 494, 506 n.10, 146 L. Ed. 2d 561, 120 S. Ct. 1608 (2000)*. The issue in Beck was actually "whether a plaintiff can bring a *section 1962(d)* claim for injury flowing from an overt act that is not an act of racketeering." Id. The individual Defendants do not raise this or any other issue regarding the RICO conspiracy counts, and they do not cite any authority other than Beck for their proposition.

The Eleventh Circuit Court of Appeals' Beck opinion also does not support the individual Defendants' argument. In that **[**69]** opinion, the court did not address the idea that all *section 1962(d)* claims fall with *section 1962(a)-(c)* claims, nor did it suggest that such is the case. [21] On the contrary, the court upheld summary judgments for the defendant on *section 1962(c)and (d)* claims *for different reasons.* The court wrote that the plaintiff had standing to sue under *section 1962(c)* but had failed to prove the underlying predicate racketeering acts and so had failed to prove a violation of *section 1962(c)*. *Beck v. Prupis, 162 F.3d 1090, 1096-98 (11th Cir. 1998)*. The court did not then automatically find that the *section 1962(d)* claim also failed. Instead, the court found that the plaintiff did not have standing to sue under *section 1962(d)* because he alleged that his injury had been proximately caused by an overt act committed in furtherance of the conspiracy instead of by actual racketeering activity. *Id. at 1098*.

[70]** The motions of Erskine, Satchell, and Branch to dismiss the RICO conspiracy claims against them are denied. Satchell's motion to dismiss the Florida RICO Act conspiracy claim against him is also denied. This conclusion would also apply to Erskine and Branch had they not raised an argument regarding conspiracy claims under the Florida RICO Act that Satchell did not. Their extra argument is discussed below.

2. Section 772.103(4), Fla. Stat.

Erskine and Branch add the argument that the conspiracy claim brought under *section 772.103(4)* of the Florida Statutes is dependent on the *section 772.103(3)* Florida RICO Act claim so that the former should be dismissed because the latter should be. (Doc. 55 at 6; Doc. 56 at 1.) As was the case with the same argument regarding the federal conspiracy claims, because the *section 772.103(3)* claims against them are not dismissed, this argument is unavailing. The motions of Erskine and Branch to dismiss the Florida RICO Act conspiracy claims against them are accordingly denied.

E. Summary

Lockheed's Complaint sufficiently alleges that the BTSTE is an enterprise. The allegations do not support **[**71]** naming Boeing as a liable defendant "person," however, because Boeing is not sufficiently distinct from the BTSTE. The claims against Boeing in Counts I - IV are accordingly dismissed. Because Lockheed has sufficiently alleged the five elements of a *section 1962(c)* claim against Erskine, Satchell, and Branch, including that they engaged in a pattern of racketeering activity, their motions to dismiss the claims in Counts I and III against them are denied. Because Erskine, Satchell, and Branch have also provided no reason to dismiss the conspiracy claims against them and none is apparent, their motions to dismiss Counts II and IV against them are also denied.

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[21] Many other circuits *have* held that a plaintiff must allege a viable claim that the defendant violated one of *sections 1962(a)-(c)* in order to state a claim that a defendant violated *section 1962(d)*. See *In re Managed Care, 298 F. Supp. 2d 1259, 1285-86 (S.D. Fla. 2003)* (citing cases). Because Lockheed has alleged viable claims against the individual Defendants under *section 1962(c)*, there is no need to address this issue.

[*1224] V. THE ANTITRUST CLAIMS

Lockheed alleges that Boeing, Erskine, Satchell, and Branch intended to obtain monopoly power for Boeing by acquiring and using Lockheed's trade secrets in preparation for Boeing's EELV bid. Lockheed also alleges that the Defendants furthered the attempt by concealing their actions. Based on these allegations, Lockheed claims violations of the Sherman Act, *15 U.S.C. § 2 (2001)*, and of the Florida Antitrust Act of 1980, *§ 542.19, Florida Statutes (2003)*. **[**72]** Counts V and VII charge attempted monopolization under *15 U.S.C. § 2* and *§ 542.19, Florida Statutes*. Counts VI and VIII charge conspiracy to monopolize under *15 U.S.C. § 2* and *§ 542.19, Florida Statutes*. Defendants Boeing, Erskine, Satchell, and Branch have all moved to dismiss these antitrust claims, and they join in each others' arguments. (Docs. 46, 55, 41, & 56.)

A. Counts V & VII: Attempted Monopolization

Section 2 of the Sherman Act provides, in part, that ***HN32***[] "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2 (2001)*; see also *15 U.S.C. § 15(a)* (***HN33***[] providing for private right of action and civil damages). ***HN34***[] In order to state a claim for attempted monopolization under either the Sherman Act or the Florida Antitrust Act, [22] a plaintiff must allege facts that, if proven, would satisfy his burden at trial to prove that: (1) the defendant has **[**73]** engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) that there is a dangerous probability that defendant will achieve monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 993 (11th Cir. 1993)*. The third element of a proper attempted monopolization claim requires a two-part showing that a defendant is close to acquiring controlling market power over the relevant product market. *U.S. Anchor Mfg., Inc., 7 F.3d at 994*. Focusing on this third element, Defendants challenge the legal sufficiency of Lockheed's allegations of both the relevant market and of Boeing's proximity to acquiring a controlling market share.

[74]** *1. The Relevant Product Market*

HN36[] Determining the relevant product market for an attempted monopolization claim provides the frame of reference within which a defendant's relative market power is measured. The relevant product market is the "part of trade or commerce" that the defendant is allegedly attempting to monopolize. See *15 U.S.C. § 2*; *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The "outer boundaries" of a product's market are defined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *U.S. Anchor Mfg. Inc., 7 F.3d at 995* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. All purchasers and suppliers within those boundaries make up the market for that product unless there is evidence that the market is narrower because of other considerations. [23] **[*1225]** Id. Where evidence shows, for example, "that consumers within the geographic area

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[22] ***HN35***[] "The Florida legislature has, in effect, adopted as the law of Florida the body of ***antitrust law*** developed by the federal courts under the Sherman Act." *St. Petersburg Yacht Charters, Inc. v. Morgan Yacht, Inc., 457 So. 2d 1028, 1032 (Fla. 2d DCA 1984)*; *§ 542.32*, Fla. Stat.; *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 745 n.11 (11th Cir. 1998)* ("Federal and Florida antitrust laws are analyzed under the same rules and case law.").

[23] Courts sometimes refer to "relevant product submarkets" to describe narrow relevant product markets. "Submarket," however, is a misnomer; the submarket is simply the relevant market for a specially designed product for which the consumer has a relatively inelastic demand. See 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** pt. 2, ch.5 P533 ("Speaking of submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a 'relevant market'--that is, a market relevant to the particular legal issue being litigated."); *U.S. Anchor Mfg., Inc., 7 F.3d at 995* (noting that the process for defining a submarket is the same as that for defining a market). In the hope of dispensing with this confusion, only the terms "relevant market" and "relevant product market" will be used in this discussion.

cannot realistically turn to outside sellers should prices rise within the defined area," the relevant market is limited by **[**75]** excluding suppliers outside of that geographic area. *T. Harris Young & Assoc., Inc. v. Marquette Electronics, Inc., 931 F.2d 816, 823 (11th Cir. 1991)*. The scope of the relevant market may also in some cases be narrowed to a certain "portion of customers." *Id. at 824-25*. Lockheed's attempt to define the relevant market with reference to only a subset of customers, the U.S. Government, is at issue here.

[76]** ***HN37***[] Ultimately, the contours of the relevant market and the defendant's relative power in that market are issues of fact. *U.S. Anchor Mfg., Inc., 7 F.3d at 994*. Dismissals are exceedingly disfavored in antitrust cases because of their fact-intensive nature. *Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002)*. Where, however, a plaintiff "alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, [the] relevant market is legally insufficient and a motion to dismiss may be granted." *JES Props., Inc. v. USA Equestrian, Inc., 253 F. Supp. 2d 1273, 1282 (M.D. Fla. 2003)*. A complaint is also legally insufficient where it shows that a plaintiff's proposed relevant market clearly excludes relevant geographic areas, purchasers, or suppliers. Such a complaint may therefore be dismissed because proving the facts alleged could not support a finding of attempted monopolization.

As explained earlier, EELV is the Air Force's term for the service of designing, developing, building, and operating "the next **[**77]** generation of expendable launch vehicles." (Doc. 1 P11.) Lockheed proposes that EELVs are the relevant product, or rather the relevant service, and that no other services are in this market because EELVs are "a highly complex and unique product [and are] the only means reasonably available to launch medium, intermediate and heavy lift satellites into space economically and efficiently. There are no economic and technological substitutes." (Doc. 1 PP221-22.) Lockheed thus alleges that there is no reasonable interchangeability of use between EELVs and other services because at no price would those needing to launch medium, intermediate, and heavy lift satellites stop purchasing EELVs in favor of another service. Defendants do not contest this delineation of the outer boundaries of the relevant market.

Lockheed's allegations propose alternative relevant markets for EELVs: (a) the "U.S. Government EELV market," for which the United States is the "relevant geographic market," or (b) the "worldwide commercial EELV market." (Doc. 1 PP221-22.) Defendants argue that the Complaint shows that the first alternative, which excludes all purchasers other than the U.S. Government, is too narrow **[**78]** and therefore an insufficient proposed market. Defendants argue that the Complaint itself **[*1226]** demonstrates that the second alternative is the relevant market.

a. The U.S. Government EELV Market

Lockheed's first alternative allegation of the dangerous probability element of its attempted monopolization claim is based on the statement that Boeing "currently has a market share of approximately 75%" of its first proposed relevant market--the U.S. Government EELV market. (Doc. 1 P223.) Lockheed argues that the relevant market should exclude purchasers other than the U.S. Government because the government can only buy from domestic suppliers and would be the victim of reduced innovation and higher prices if one of its potential suppliers had a "monopoly" on the government's purchases. (Doc. 57 at 10-12.)

A relevant market sometimes consists of only a portion of those purchasers of a generally-defined product or service--boats, for example. It is not the nature of the purchasers that makes this narrowing appropriate, however. Rather, it is the nature of the more specific product or service in question--aircraft carriers, for example--that makes designating the narrower market legitimate: **[**79]**

> ***HN38***[]
>
> While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the *product* sold to those customers. If, for example, a product is specially designed for a certain group of purchasers and the suppliers concentrate their efforts almost exclusively on those purchasers . . . the

> product dimension may be limited to the sale of that product to those purchasers. Similarly, where one product is distinct from another because of its salability . . . the relevant market can consist solely of that product.

T. Harris Young & Assocs., 931 F.2d at 824-25. Following this logic, in T. Harris Young, the Eleventh Circuit Court of Appeals found that the market for EKG recording paper could not be limited to particular purchasers--hospitals with more than 200 beds--as the plaintiff proposed, because the evidence did not show a distinction between the paper sold to hospitals with more than 200 beds and the paper sold to "smaller hospitals, clinics, and doctors' offices." *Id. at 825*.

In Heatransfer Corp. v. Volkswagenwerk, A.G., by contrast, the Fifth Circuit Court of Appeals **[**80]** held that the relevant market for automobile air conditioners was legitimately narrowed to include only Volkswagen importers rather than all purchasers of the air conditioners. *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 980 (5th Cir. 1977)*. [24] The court reasoned that "the distinct engineering problems associated with the Volkswagen imports" meant that the *product* marketed to these importers was different from the air conditioners marketed to other purchasers of automobile air conditioners. Id. The court also noted that the production and sales by the producers of Volkswagen air conditioners made up the bulk of the business of those who produced the special air conditioners. Id.

A Supreme Court case about monopolizing the boxing promotion business also illustrates **[**81]** that product or service distinctions, and not purchaser characteristics *per se,* work to narrow markets. In International Boxing Club of New York v. United States, the Supreme Court found that the relevant market was the market for the promotion of championship boxing contests as opposed to all boxing contests because the two products were different **[*1227]** and the former was a product for which there was no substitute in the eyes of consumers. *358 U.S. 242, 250-51, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959)*. Because of a "particular and special demand" for championship boxing, most of its consumers would not, if prices went up in championship boxing, substitute by watching and paying for regular boxing. *Id. at 251*.

Likewise, in Associated Radio Services Co. v. Page Airways, Inc., though the defendants contended "that the relevant market was the sale and installation of avionics and interiors in all turbine-powered private aircraft," the Fifth Circuit Court of Appeals upheld the jury's finding that the relevant market was instead the sale and installation of avionics and interiors in Grumman Gulfstream-II aircraft only. *624 F.2d 1342, 1349 (5th Cir. 1980)*. This conclusion **[**82]** reflected that, due to their complexity and expense, avionics produced for the G-II were distinct from the broader field of avionics. Id. [25]

The instant Complaint presents a situation analogous to that in *T. Harris Young* and distinct from those in *Heatransfer*, *International Boxing*, and *Associated Radio Services*. Lockheed does not allege any distinction between the EELVs sold to the U.S. Government and those sold to commercial **[**83]** buyers of launch services or that the launch services needs of the U.S. Government differ substantially from those of other potential purchasers. If Lockheed had alleged that the EELVs designed for the U.S. Government were truly distinct from those designed for commercial consumers of EELVs, and that "Boeing, Lockheed and other suppliers of EELVs concentrate their efforts almost exclusively on the U.S. Government," as required by the court in Heatransfer, the U.S. Government market for EELVs might be a legally sufficient proposed relevant market. Lockheed, however, does not allege this; instead, the allegations actually indicate the same EELVs that the U.S. Government buys are marketable to commercial purchasers of launch systems and services. Lockheed alleges, for example, that at the time the U.S.

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[24] Decisions of the former Fifth Circuit handed down prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)*.

[25] Lockheed also cites National Reporting Co. v. Alderson Reporting Co. in its argument on this issue. In that case, no court specifically addressed the allegations regarding the size of the relevant market because at the district court level the parties "basically concurred" that the market should be limited to the "geographic market" of the "United States Tax Court," and the Court of Appeals passed over the issue. *National Reporting Co., 567 F. Supp 1011, 1019 (E.D. Mo. 1983)*, rev'd on other grounds, *763 F.2d 1020 (8th Cir. 1985)*.

Government first sought bids on EELVs, all parties involved hoped to "increase the U.S. space launch industry's international competitiveness in the commercial launch services business." (Doc. 1 P11); commercial enterprises were "clamoring for additional satellite capacity" (id. P5); and there was a "robust commercial space launch market" (id. P24).

The cases Lockheed relies **[**84]** upon do not support its arguments that characteristics of purchasers, other than their demands, should determine the scope of the relevant market. As Boeing notes, a number of Lockheed's cases "rely upon *product characteristics--i.e.,* function, brand, or means of distribution--to define the market." (Doc. 78 at 6.) Two courts, for example, allowed narrowing of the market on the basis of distribution methods because the different methods provided distinct services and benefits to purchasers of a good. *PepsiCo, Inc. v. Coca-Cola Co., 1998 U.S. Dist. LEXIS 13440, at *38, 98 CIV-3282 (S.D.N.Y. Aug. 27, 1998)*; *FTC v. Cardinal Health, 12 F. Supp. 2d 34, 48 (D. D.C. 1998)*. In another case, *In re* Owens-Illinois, the Federal Trade Commission defined several relevant **[*1228]** markets according to the distinct elasticities of demand of subgroups of purchasers, not, as Lockheed suggests, according to the purchasers' ability to turn to a greater or lesser number of suppliers of a single good they needed. *115 F.T.C. 179 (1992)*. Specifically, producers of some end-products (such as shelf-stable juices, liquors and spaghetti sauces) could substitute **[**85]** metal or plastic for their containers if glass container prices significantly rose; the "product market for the supply of glass containers for shelf-stable juices" had thus "not been established." *Id. 115 F.T.C. at 306*. In contrast, some purchasers, such as mayonnaise bottlers, could not, because of their particular needs, substitute metal or plastic for glass in the face of significant price increases in the latter. A relevant market including those purchasers thus could exclude suppliers of metal and plastic. Id. These delineations of separate markets based on the different capacities of consumer subgroups to substitute do not suggest that, when it is agreed that only one product (EELVs) will do for all purchasers (Government and commercial space launchers), certain purchasers of the unique product should be excluded when measuring market power. The allegations of the Complaint do not suggest that there are not "enough customers" other than the U.S. Government who can "defeat the price increase by taking their business elsewhere," so there is no suggestion that the "grouping of all [EELVs] is not a relevant product market." *Id. at 297*.

The other cases **[**86]** Lockheed cites for the proposition that its proposed narrowing by reference to purchaser characteristics is legitimate are also inapposite because they deal with characteristics of *suppliers* in a relevant market. See *FTC v. Imo Indus., Inc., 1989 U.S. Dist. LEXIS 14050, No. 89-2955, 1992-2 Trade Cas. (CCH) P69, 943 at P68, 558 (D. D.C. 1989)*; *FTC v. Alliant Techsystems, Inc., 808 F. Supp. 9, 15, 18, 20 (D. D.C. 1992)*; *Int'l Logistics Group v. Chrysler Corp., 884 F.2d 904, 909 (6th Cir. 1999)*; *Fiberglass Insulators, Inc. v. Dupuy, No. 84-1244-1, 1986 U.S. Dist. LEXIS 19711, at *9-10 (D. S.C. Sept. 30, 1986)*. Again, the issue is not whether suppliers of launch services other than Boeing and Lockheed are part of the relevant market but rather whether other purchasers are part of the relevant market.

Although one case Lockheed cites does seem to follow Lockheed's logic in defining the relevant market, the reasoning of that case is not persuasive. In Dauro Advertising, Inc. v. General Motors Corp., an advertising agency accused defendant GM of illegally tying advertising services to wholesale sale of GM automobiles to dealerships. The court **[**87]** in that case began its relevant market analysis with the premise that particular buyers, GM dealerships, were adversely affected by an alleged tying program. *Dauro Adver., Inc., 75 F. Supp. 2d 1165, 1169 (D. Colo. 1999)*. The court then derived the definition of the relevant product--GM automobiles--by reference solely to these dealers because, it reasoned, "GM dealers have no interest in purchasing cars or trucks from any other manufacturer." Id. It was a mistake in that case, however, for the court to assume which purchasers make up the relevant market and then decide what the relevant product was on that basis. Determining which products make up the market is the first step. Purchasers are relevant at this initial stage only insofar as their demands govern cross-elasticity, which determines whether and which substitutes are relevant products. Other considerations serve to narrow the field only after these outer limits are defined.

The argument that, because it cannot turn to many suppliers, the U.S. Government has been or will be harmed by unfair **[*1229]** trade practices by one of few suppliers does not alter this analysis. The goal of ***antitrust law*** is to prevent harm **[**88]** to *competition,* not to prevent harm to one of many purchasers of a product: "Purchasing constraints on a single consumer, such as a required competitive bidding procedure, do not change that conclusion;

the fundamental objective of our antitrust laws is to promote fair competition for the benefit of all consumers." Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993); United States v. E.I. DuPont de Nemours, 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). The relevant market is not the U.S. government EELV market.

b. The Worldwide Commercial EELV Market

Lockheed's complaint alternatively alleges that the relevant market is the worldwide commercial market for EELVs, and the Defendants do not quarrel with this assertion. As already noted, the Complaint repeatedly and emphatically alleges that the same EELVs that the U.S. Government buys are marketable to commercial purchasers of launch systems and services and that there was a "robust commercial space launch market." (Doc. 1 P24.) Whether Defendants are correct that the attempted monopolization claims should nevertheless be dismissed for failure to sufficiently allege that Boeing has sufficient **[**89]** market power is addressed below.

2. Market Power

HN39[] Lockheed's allegations regarding the third element of an attempted monopolization claim--"dangerous probability of monopolization"--must not only propose an appropriate relevant market but must also include allegations that the plaintiff's competitor is close to acquiring controlling market power. U.S. Anchor Mfg., Inc., 7 F.3d at 993. A plaintiff's allegations of a defendant's current market share are the most important factor in determining whether the market power issue should go to the jury. Generally, a showing that a defendant has between sixty and sixty-five percent market share is sufficient to present the issue of market power to a jury. Id. at 999-1000. Other factors, including barriers to entering the relevant market, are thereafter "relevant" to the question of market power. Id.; Associated Radio Servs. Co., 624 F.2d at 1354. Lockheed's Complaint does not include any allegations about Boeing's relative share of the worldwide commercial EELV market, the minimum required to survive a motion to dismiss. Valet Apartment Servs., Inc. v. Atlanta Journal & Constitution, 865 F. Supp. 828, 832 (N.D. Ga. 1994) **[**90]** (case dismissed where plaintiff failed to allege market shares of participants in relevant markets "that could support an allegation that defendants have a dangerous probability of monopolizing"), aff'd mem., *50 F.3d 1039 (11th Cir. 1988)*; see also U.S. Anchor Mfg., Inc., 7 F.3d at 999-1000. The allegations are thus not sufficient to state a claim of attempted monopolization of the market that has been determined above to be the only adequate proposed relevant market, the worldwide commercial EELV market.

As noted above, the U.S. Government EELV market is not the relevant market. Defendants' arguments regarding the sufficiency of Lockheed's market power allegations as to that alternative market nevertheless merit brief discussion. Defendants argue that even if the relevant market were the narrower U.S. Government EELV market, Lockheed's allegations fail on this issue. This is not the case. Were the relevant market the U.S. Government EELV market, it would be too early to foreclose the possibility that Lockheed could prove a dangerous probability of monopolization.

[*1230] Lockheed alleges that Boeing controls 75% of the U.S. Government EELV market. (Doc. **[**91]** 1 P223.) Defendants argue that this figure is meaningless in this case because under the EELV bidding system of fixed-price, fixed-term contracting, no contractor can achieve monopoly power, which is defined as the power to increase prices or exclude competition. U.S. Anchor Mfg., Inc., 7 F.3d at 994. "No dangerous probability of monopoly power exists," Defendants argue, "because [Boeing] cannot raise the price during the contract term, and the contract can be rebid at the end of the term." (Doc. 46 at 13.) Defendants thus suggest that there is a *per se* rule that fixed-price, fixed-term bid markets can never be monopolized. Lockheed counters that such a bidding process does not necessarily preclude monopoly because factors such as high barriers of entry into the EELV market mean that Boeing's winning all of the early bids will give it control or at least a major head start in future bids.

HN40[] The Eleventh Circuit Court of Appeals has stated that courts should be "wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit under the dangerous probability standard." U.S. Anchor Mfg., Inc., 7 F.3d at 999. Other factors, **[**92]** such as barriers to entry into the market like high startup costs and the advantages of experience, may be important to the ultimate decision of whether a defendant has captured a dangerous market share. Id.; Associated Radio Servs. Co., 624 F.2d at 1354; Gen. Cigar Holdings, *Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335, 1351 (S.D. Fla. 2002)*, aff'd mem. *54 Fed. Appx. 492, 2002 WL 31519816 (11th Cir. 2002)*. Lockheed does allege that barriers to entry of the U.S. Government market for EELVs make this a non-standard market. If this were the relevant market, these allegations would not be susceptible to the conclusion that Lockheed cannot allege "dangerous probability of monopolization" because there is no *per se* rule that fixed-price, fixed-term bid markets can never be monopolized.

The cases Defendants cite to support their suggestion are not persuasive. In Alabama Ambulance Service, Inc. v. City of Phenix City, Alabama, for example, a district court relied on another district court case for its conclusion that a defendant, the winner of a fixed-term, fixed-cost bid contract "in open bidding against a number of other bidders **[**93]** . . . [did] not have the power to control prices or exclude competition" and thus had no market power. *71 F. Supp. 2d 1188, 1195 (M.D. Ala. 1999)* (citing *Kirk-Mayer, Inc. v. Pac Ord, Inc., 626 F. Supp. 1168 (C.D. Cal. 1986))*. Both of these cases ultimately take their reasoning from an Eighth Circuit case, National Reporting v. Alderson Reporting Co., Inc. See *Ala. Ambulance Serv., Inc. at 1195-1196* (discussing *Kirk-Mayer, Inc., 626 F. Supp. at 1169-71*, which cited rationale of *Nat'l Reporting, 763 F.2d 1020 (8th Cir. 1985))*. None of these cases supports Defendant's contention that the winner of 75% of the contracts in a fixed-term, fixed-price bidding market can *never* be shown to have dangerous market power. The decision in National Reporting, read in context, instead reflects that there are no *per se* rules regarding measuring market power:

> As soon as the contract goes back up for bids, *there are numerous other court-reporting companies* who can bid and try to undercut the company holding the contract. Alderson could not control prices, because if it tried to raise its price, the contract would **[**94]** again be up for bids. Both parties agree that Alderson could not exclude any company from bidding, and by 1980 there were several other companies capable of meeting the Tax Court court-reporting contract requirements. Competition was alive and well in the relevant market.

[*1231] *Nat'l Reporting, 763 F.2d at 1023* (emphasis added).

Reading Nat'l Reporting narrowly is consistent with the Eleventh Circuit Court of Appeals' emphasis on considering many factors when determining market power. Accord William E. Kovacic, "Mixed Signals: Recent Cases Make the Legality of Future Hospital Mergers Less Predictable," 59 Antitrust L.J. 1005, 1088-94 (1991) (emphasizing that "mechanical application" of relevant market and market power rules is often not appropriate in government bid cases.) Assuming, therefore, that the "U.S. Government EELV market" were the relevant market, if Lockheed could show that high barriers to entry prevent it and others from making bids in the future, that Boeing will have significant advantages over potential competitors at the end of its current fixed-term contracts, or that other factors are significant, it might be able to **[**95]** convince a fact-finder that there is a dangerous probability of monopolization of that market. The relevant market is *not* the U.S. Government EELV market, however, so allegations about Defendant's power in that market are irrelevant.

Because the U.S. Government EELV market is not the relevant market and Lockheed has failed to allege facts relating to Boeing's market power in the worldwide commercial EELV market, the attempted monopolization claims against all of the Defendants under the Sherman Act and the Florida Antitrust Act of 1980 are dismissed. Focus now turns to the issues raised by the claims in Counts VI and VIII alleging conspiracy to monopolize under *15 U.S.C. § 2* and *section 542.19* of the Florida Statutes.

B. Counts VI & VIII: Conspiracy to Monopolize

Defendants Boeing, Erskine, Satchell, and Branch all move to dismiss the antitrust conspiracy claims against them. (Docs. 46, 55, 41, & 56.) ***HN41***[] "Conspiracy to monopolize has three elements: (1) the existence of a combination or conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize." *Ala. Ambulance Serv., Inc. v. City of Phenix City, Ala., 71 F. Supp. 2d 1188 (M.D. Ala. 1999)*; **[**96]** *United States v. Yellow Cab Co., 332 U.S. 218, 225, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947)*, overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*; *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1555-56 (11th Cir. 1996)*.

Lockheed alleges that Boeing, Erskine, Satchell, and Branch, "acting in concert and on behalf of Boeing," intentionally conspired to monopolize the relevant markets, and that in furtherance thereof they obtained and misused Lockheed's trade secrets and concealed these acts. Defendants argue that the conspiracy claims should be dismissed because Lockheed has failed to allege facts sufficient to support the first and the third elements of the conspiracy claims. These arguments are discussed in reverse order.

1. Specific Intent: The Relevant Product Market

The Defendants maintain that this claim rises or falls with the sufficiency of Lockheed's relevant market allegations. (See, e.g., Doc. 46 at 14.) Lockheed does not respond to this argument but in its Complaint Lockheed implicitly acknowledges that a relevant market showing is important to a conspiracy claim **[**97]** because it alleges that Defendants conspired to "monopolize the relevant markets described herein." (Doc. 1 P244.) The Court of Appeals for the Eleventh Circuit has not specifically ruled on the need to propose a sufficient relevant market for conspiracy to monopolize claims. The failure to allege facts that could support a proposed relevant product market would indeed be fatal to conspiracy to monopolize counts **[*1232]** under *section 2* just as it is for the attempted monopolization claims.

HN42[] The third element of a claim for conspiracy to monopolize requires a showing of specific intent to *achieve* monopoly power. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 995 (11th Cir. 1993)*; cf. *Ala. Ambulance Serv. Inc., 71 F. Supp. 2d at 1196-97* ("Where the alleged conspiracy, if successful, would not amount to illegal monopolization, there may be no liability for conspiracy to monopolize."). The Sherman Act prohibits conspiring to monopolize "any part of the trade or commerce," *15 U.S.C. § 2*. That "part" of trade that it is illegal to conspire to monopolize is the relevant product market: "Commodities reasonably interchangeable make **[**98]** up that 'part' of trade or commerce which *section 2* protects against monopoly power." *United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *U.S. Anchor Mfg., Inc., 7 F.3d at 995* (defining the relevant product market as made up, at the outer boundaries, of "reasonably interchangeable" commodities).

HN43[] Because monopoly power is, by definition, power over a relevant market, what constitutes the relevant market is a necessary issue in measuring a defendant's specific intent for conspiracy purposes. *U.S. Anchor Mfg., Inc., 7 F.3d at 995* (monopoly power is "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market").

HN44[] Defendants' intentions with regard to the market in which the litigants compete are what concern the Sherman Act. Allegations that conspiring defendants specifically intended to drive a plaintiff from a single deal will not ordinarily support a conspiracy to monopolize claim. On the other hand, a plaintiff need not allege that the defendants conspired **[**99]** to drive competitors from commerce altogether. The middle ground suggested by *section 2* is the requirement that the plaintiff allege that the defendants intended to monopolize a "part of trade or commerce." See also *Associated Radio Servs. Co. v. Page Airways, Inc., 624 F.2d 1342, 1348 (5th Cir. 1980)* (noting that "the jury's finding on the extent of the market must be upheld if we are to sustain the jury's verdict finding [attempt or conspiracy] violations of *[section 2*] of the Sherman Act"). A plaintiff must thus allege a proper relevant market to survive a motion to dismiss a Sherman Act conspiracy claim. [26]

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[26] In a criminal *section 2* conspiracy case, the Second Circuit Court of Appeals found there to be no need to allege or prove what market the defendants attempted to monopolize, but the opinion is not persuasive. The court wrote that

> the charge here is conspiracy to monopolize, not monopolization. In a monopolization case the market must be proved. See *International Boxing Club v. United States, 358 U.S. 242, 3 L. Ed. 2d 270, 79 S. Ct. 245*. This is because such a charge requires a showing of power to exclude competitors, and without an accurate delineation of the market, it is impossible to determine the presence or absence of this power. But where the charge is conspiracy to monopolize, the essential element is not the power, but the specific intent, to monopolize. *Section 2* makes it unlawful "to conspire to monopolize 'any part' of interstate commerce," without specifying how large a part must be affected. Hence it is enough if "some appreciable part of interstate commerce is the subject" of the conspiracy.

[100] [*1233]** As explained above, the "U.S. Government space launch market" is not the relevant market. If Lockheed's only allegation were that Defendants conspired to monopolize that market, its antitrust conspiracy claims would fail. As already noted, however, Lockheed alleged in the alternative that Defendants conspired to monopolize the "national and international commercial space launch market." (Doc. 1 P244.) As already stated, there is nothing in the pleadings to suggest that this is not the relevant market. Lockheed has alleged, therefore, specific intent to monopolize [the worldwide commercial space launch market]." *Ala. Ambulance Servs., Inc., 71 F. Supp. 2d at 1196*; *Levine, 72 F.3d at 1555-56*. Failure to allege a relevant market is therefore not a reason to dismiss Lockheed's conspiracy claims.

2. The Existence of a Conspiracy

Defendants also argue, however, that the Copperweld intracorporate conspiracy doctrine dictates that the Sherman Act conspiracy claims against them be dismissed because no conspiracy can have existed between Boeing and the individual Defendants. Therefore, Defendants argue, Lockheed has failed to allege the "existence **[**101]** of a combination or conspiracy," the first element of a *section 2* conspiracy claim. *Ala. Ambulance Serv., Inc., 71 F. Supp. 2d at 1196*. ***HN45***[] In Copperweld Corp. v. Independence Tube Corp., the Supreme Court held that, under *section 1*, [27] a wholly-owned subsidiary could not form a conspiracy with its parent corporation because agreements between parents and subsidiaries "do not suddenly bring together economic power that was previously pursuing divergent goals," and these agreements are therefore not within the concern of the antitrust conspiracy statutes. *467 U.S. 752, 769, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. In so holding, the Court noted that officers also cannot conspire, for *section 1* purposes, with the corporations that employ them because "officers of a single firm are not separate economic actors pursuing separate economic interests." Id. In the Eleventh Circuit, this Copperweld "intracorporate conspiracy doctrine" [28] applies equally to *section 1* and *section 2* conspiracy claims. *Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 817 n.9 (11th Cir. 1990)*, overruled on other grounds, *980 F.2d 1381 (11th Cir. 1993)* ("Bolt III"). **[**102]** Courts in **[*1234]** this circuit have left open the possibility of, but have rarely found applicable, an exception to the Copperweld doctrine. Though the doctrine applies to officers and employees acting in their official capacities, the exception might bar application of the doctrine where "the plaintiff can demonstrate that the officers of a corporation have a personal stake in achieving the object of the alleged conspiracy." *Tiftarea Shopper, Inc. v. Ga. Shopper, Inc., 786 F.2d 1115, 1118 (11th Cir. 1986)*.

United States v. Consol. Laundries Corp., 291 F.2d 563, 573 (2d Cir. 1961) (internal citations omitted).

In Consolidated Laundries Corp., the court contrasted conspiracy to monopolize and monopolization, but the Sherman Act provisions regarding those acts both aim to prevent control over only a "part of trade or commerce," which has been defined as the relevant product market. The court did not make clear the difference, in the context of a conspiracy claim, between the need to allege "dangerous probability of monopolization," which is done by defining the relevant market *and* alleging defendant's off-balance market power in that market, and the need to just allege a "relevant product market." The law is clear that alleging the "dangerous probability of monopolization" is not required to state a conspiracy claim. *Levine, 72 F.3d at 1555-56*. The plaintiff thus need not allege the defendant's relative market power--*how large* a part of the trade or commerce defendant intended to monopolize. The plaintiff must nevertheless show *what* part of the trade or commerce defendant had in mind, namely the relevant market. To hold otherwise is to hold that *section 2* could support liability for conspiring to "monopolize" a single transaction. Other statutes address unfair trade practices which are illegal regardless of any larger antitrust intent. Antitrust statutes, however, cannot be interpreted without reference to their remedial goals.

[27] *Section 1* provides that ***HN46***[] "every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . ." *15 U.S.C. § 1 (2001)*; see also *15 U.S.C. § 15(a)* (providing for a private right of action and civil damages).

[28] The doctrine stated in Copperweld is also sometimes referred to as the "intraenterprise conspiracy doctrine." See, e.g., *Copperweld, 467 U.S. at 783 n.9* (citing articles); *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1296 (11th Cir. 1998)*. To avoid confusion with the RICO issues presented by Lockheed's Complaint, only the terms "intracorporate conspiracy doctrine" and "Copperweld doctrine" will be used in this discussion.

[103]** *a. Boeing, Erskine, & Satchell*

Erskine and Satchell were employees of Boeing during the period Lockheed claims they conspired with Boeing. No allegation suggests that any exception applies to their cases. Under *Copperweld*, Erskine and Satchell thus cannot be held liable under *section 2* for actions in furtherance of a conspiracy with Boeing. The antitrust conspiracy claims against Erskine and Satchell are accordingly dismissed.

b. Boeing and Branch

The Copperweld doctrine also bars Lockheed's conspiracy claims to the extent that they stem from any alleged actions or agreements between Boeing and Branch that took place after Branch became a Boeing employee in January of 1997. Lockheed argues, however, that because it alleges the conspiracy began five or more months before Branch became an employee of Boeing, the doctrine does not bar the claim that Branch conspired with Boeing. Boeing and Branch counter that Branch was Boeing's "agent" for the whole relevant period and that the Copperweld doctrine bars claims of conspiracies among corporations and all of their "agents." Boeing and Branch are correct that the Copperweld doctrine bars the *section 2* conspiracy **[**104]** claims against them, but this conclusion does not turn on whether Branch was an "agent" during that period.

Tiftarea Shopper, Inc., upon which Boeing and Branch rely, is only the latest of a series of cases in this circuit to use "agents of the corporation" to describe the class of people with whom the corporation generally cannot conspire and to cite Copperweld for that proposition. *786 F.2d at 1117*. Though the Eleventh Circuit Court of Appeals has often used the term "agent" when stating the doctrine, it usually has done so in the context of holding that actual *employees* of a corporation cannot conspire with the corporation, as it did in Tiftarea Shopper. Viewed in the context of the facts of these cases, these statements of the doctrine do not necessarily support Defendant's argument that, for Sherman Act purposes, Branch cannot have conspired during the five months before he became a Boeing employee. The Court of Appeals has never held that a non-employee who has no formal or acknowledged relationship with a corporation, like Branch during those five months, cannot conspire with a corporation for antitrust purposes.

HN47[] The Court of Appeals has suggested, **[**105]** however, that an individual's status as an agent in the typical sense is not determinative of whether that individual falls within the Copperweld doctrine. The court has cited with approval a Seventh Circuit decision holding that the intracorporate conspiracy doctrine "does not preclude a conspiracy or combination between a corporation and *any agent.* The guiding principle is the requirement that there be more than one independent business entity involved in the combination or conspiracy." *St. Joseph's Hosp. v. Hosp. Corp. of Am., 795 F.2d 948, 956 (11th Cir. 1986)* (quoting *Tamaron Distrib. Corp. v. Weiner, 418 F.2d 137 (7th Cir. 1969))*. The Court of Appeals' decisions therefore use the term "agent" to broadly describe entities who are not separate economic powers pursuing divergent goals from the corporation **[*1235]** (or other second entity) in question. The exact nature of Branch's relationship with Boeing during those five months, however, is not controlling. [29] What is important is that Branch himself was not at any time an "economic power pursuing divergent goals" from Boeing's. It is for this reason that any agreements between him and Boeing cannot **[**106]** be the basis for a *section 2* conspiracy claim. The rationale of Copperweld, and not formal titles or legal relationships, determines the application of the doctrine.

Eleventh Circuit cases evaluating agreements between doctors and hospitals confirm that **[**107]** the purpose of the Sherman Act's conspiracy provisions is key to understanding the Copperweld doctrine. The Court of Appeals'

[29] It is not clear what the Eleventh Circuit Court of Appeals means when it uses the term "agent" in the context of the Copperweld doctrine. If the court means "agent" in the traditional sense of agency law, then the allegations do not precisely support Branch's falling within the doctrine. See supra note 11 (noting Florida definitions of agency). It would be possible to interpret the Eleventh Circuit statements of the doctrine as referring to the traditional understanding of agent, because the court frequently lists the term among other parties to specific formal relationships (employees, officers). The actual application of the doctrine in a variety of cases, and Copperweld itself, however, show that this interpretation would be too limited.

statements of the doctrine's exceptions along with the general rule in these cases that courts must favor realities over form also confirm that emphasis on the Act's rationale is critical.

The decision in Copperweld about subsidiaries, and similar rules about employees and divisions that the Court mentioned, are not based on formal arrangements or titles but on the relative threats to competition presented by concerted activity between these entities and the corporations (or other entities) with whom they are associated. In that case, the Court wrote that, in order to properly understand whose conduct is prohibited by the antitrust conspiracy provisions, it was important to keep in mind the nature of the threat concerted activity presents to competition. The Court wrote:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are **[**108]** combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld, 467 U.S. at 768-69.

The Court of Appeals sometimes states the doctrine in shorthand, stating, for example, that "an agreement among the officers of a single corporation acting in their official capacity is not a conspiracy *because a corporation cannot conspire with itself,"* implying that the doctrine has its root in agency principles. *Tiftarea Shopper, Inc., 786 F.2d at 1118* (emphasis added). The rationale of Copperweld, however, makes clear that ***HN48***[] officers of a single firm cannot conspire with that firm to monopolize not *because* they are officers, and not precisely because, as agents, their acts are attributed to their principal, but because they are not divergent economic powers. *Copperweld, 467 U.S. at 769.* **[**109]** Because the antitrust conspiracy statutes **[*1236]** are only triggered when previously divergent economic powers make agreements, a plaintiff's claim must allege a "joining of two independent sources of economic power" or be dismissed.

HN49[] Applying Copperweld in different contexts, the Eleventh Circuit Court of Appeals has made clear that the doctrine does not turn on particular legal relationships, but rather, as the Supreme Court has reiterated since Copperweld, "turns on specific antitrust objectives." *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 166, 150 L. Ed. 2d 198, 121 S. Ct. 2087 (2001)*. The Court of Appeals agreed, for example, with a district court holding that the executive director, counsel, and director of operations for an underwriting association could not conspire, for Sherman Act purposes, with the association which controlled them "because they lack the requisite diversity of interests. . . ." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293, 1295 (11th Cir. 1998)*. The court has also noted that "the guiding principle is the requirement that there be more than one independent business entity involved in **[**110]** the combination or conspiracy." *St. Joseph's Hosp., 795 F.2d at 956* (quoting *Tamaron Distrib. Corp., 418 F.2d at 137*).

The application of the Copperweld doctrine to cases in this circuit dealing with entities other than corporations and other than formal employees also makes clear that the special concerns of ***antitrust law*** determine the protective reach of the doctrine. In Bolt III, a physician alleged that three hospitals and members of their medical staffs who were on peer review committees had conspired to revoke his privileges at the hospitals. The court held that the defendant staff physicians--part of a hospital's staff for peer review purposes--were not within the Copperweld doctrine because "a hospital and the members of its medical staff . . . are legally separate entities." *Bolt III, 891 F.2d at 819*. In later similar cases, the Court of Appeals refined this holding, clarifying that doctors who served on hospital staff for some hospital purposes were not *per se* within the Copperweld doctrine "if they are not employed by the hospital *and* are acting as separate economic actors." *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1446 n.13 (11th Cir. 1991)* **[**111]** (emphasis added); *Crosby v. Hosp. Auth. of Valdosta & Lowndes County, 93 F.3d 1515, 1529 (11th Cir. 1996)*. Todorov makes it especially clear that the Copperweld doctrine can protect individuals who are not employees and who are not otherwise officially associated with the larger defendant entity: the individual defendants in that case were not on the hospital's peer review committee performing "official duties," as were the individual defendants in Bolt III and Crosby; their only connection to the hospital had been to give "negative recommendations about plaintiff to the relevant peer review committees." *Crosby, 93 F.3d at 1529 n.19*. These cases illustrate that antitrust conspiracy law targets entities such as doctors who compete with a hospital to sell medical services yet suddenly join forces with the hospital to keep other doctors out of the competition. In contrast, antitrust conspiracy law does not concern itself with an employee joining forces with his corporate employer unless the employee *himself,* the first entity, previously competed with or pursued "divergent goals" from the employer, the second entity.

HN50[] The fact that **[**112]** the Copperweld doctrine does not *per se* apply to employees also highlights the importance of keeping the Sherman Act's goals in mind. In this and other circuits, when the officers or employees of a corporation "act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employers for purposes of" the Sherman Act. Id.; *St. Joseph's* ***[*1237]*** *Hosp., 795 F.2d at 956* (internal citations omitted).

The allegations in the instant case do not suggest that Branch *himself* ever competed with or otherwise pursued goals divergent from Boeing's. In the five months before Branch was hired by Boeing, it is true that his alleged acts cannot be said to have been in *Lockheed's* interest. His acts, however, were also not in his *own* interest as distinct from Boeing's interest, any more so than Erskine's or Satchell's acts in their official capacities were in their own distinct interests. Whether Branch was being paid by Boeing in those five months for handing over Lockheed's documents or simply doing it to impress Boeing in his hopes of obtaining employment, his interests, for antitrust conspiracy purposes, were **[**113]** analogous to those of any formal employee or a wholly owned-subsidiary of Boeing. Indeed, the allegations of this Complaint more than once characterize Branch as "associated with Boeing," or as acting "on behalf of Boeing." (Doc. 1 PP178, 179.) The collusion between Branch and Boeing represented no joining of economic powers; it did not "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld, 467 U.S. at 769*. Collusion between Boeing and Lockheed or a similar competitor would have represented a threat targeted by the Sherman Act, but collusion between Boeing and Branch, no matter how despicable, did not represent such a threat. All conspiracy claims against Branch and Boeing are accordingly dismissed.

The conspiracy allegations regarding the "others known and unknown to Lockheed Martin" are also dismissed. (Doc. 1 P243.) ***HN51***[] A district court can have no jurisdiction over "known" parties who have not been named or served with process. *Fed. R. Civ. P. 4*. In addition, both they and the unknown co-conspirators allegedly were acting "on behalf of Boeing." (Doc. 1 **[**114]** P243.) Assuming these people exist, they accordingly are analogous to Erskine, Satchell, and Branch and could not have conspired with Boeing under Copperweld. See also *Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985)* (finding that allegations that co-conspirators of single named defendant were "at this time unknown" to plaintiff were not sufficient to state a claim of conspiracy and did not give fair notice to named defendant).

C. Summary

Lockheed has failed to state a claim under *section 2 of the Sherman Act* that the Defendants attempted to monopolize the "U.S. Government EELV market" because the allegations show that the relevant market is, as a matter of law, not so narrow. Lockheed has also failed to state a claim under *section 2* that the Defendants attempted to monopolize the "worldwide commercial EELV market," which is the relevant market, because Lockheed did not allege any facts relating to Boeing's share of that market. Finally, Lockheed has failed to state a claim under *section 2* that the Defendants conspired to monopolize because it has failed to allege a conspiracy among formerly divergent economic powers.

VI. CONCLUSION

[115]** Based on the foregoing discussion, the Court rules as follows:

It is **ORDERED** and **ADJUDGED** that:

1. The Boeing Company's Motion to Dismiss (Doc. 46) is **GRANTED** as follows:

Counts I - VIII, as against The Boeing Company, are **DISMISSED** without prejudice.

[*1238] 2. William Erskine's Motion to Dismiss (Doc. 55) is **DENIED IN PART** and **GRANTED IN PART** as follows:

a. As to Counts I and III (the racketeering claims), the motion is **DENIED.**

b. As to Counts II and IV (the racketeering conspiracy claims), the motion is **DENIED.**

c. As to Counts V and VII (the attempted monopolization claims), the motion is **GRANTED.** Counts V and VII, as against William Erskine, are **DISMISSED** without prejudice.

d. As to Counts VI and VIII (the conspiracy to monopolize claims), the motion is **GRANTED.** Counts VI and VIII, as against William Erskine, are **DISMISSED** without prejudice.

e. As to the motion for a more definite statement, the motion is **DENIED.**

3. Larry Satchell's Motion to Dismiss (Doc. 41) is **DENIED IN PART** and **GRANTED IN PART** as follows:

a. As to Counts I and **[**116]** III (the racketeering claims), the motion is **DENIED.**

b. As to Counts II and IV (the racketeering conspiracy claims), the motion is **DENIED.**

c. As to Counts V and VII (the attempted monopolization claims), the motion is **GRANTED.** Counts V and VII, as against Larry Satchell, are **DISMISSED** without prejudice.

d. As to Counts VI and VIII (the conspiracy to monopolize claims), the motion is **GRANTED.** Counts VI and VIII, as against Larry Satchell, are **DISMISSED** without prejudice.

4. Kenneth Branch's Motion to Dismiss (Doc. 56) is **DENIED IN PART** and **GRANTED IN PART** as follows:

a. As to Counts I and III (the racketeering claims), the motion is **DENIED.**

b. As to Counts II and IV (the racketeering conspiracy claims), the motion is **DENIED.**

c. As to Counts V and VII (the attempted monopolization claims), the motion is **GRANTED.** Counts V and VII, as against Kenneth Branch, are **DISMISSED** without prejudice.

d. As to Counts VI and VIII (the conspiracy to monopolize claims), the motion is **GRANTED.** Counts VI and VIII, as against Kenneth Branch, are **DISMISSED** without prejudice. **[**117]**

5. Lockheed Martin is **GRANTED LEAVE** to file an amended complaint within thirty (30) days of the issuance of this memorandum.

DONE and **ORDERED** in Orlando, Florida on this 22nd day of April, 2004.

JOHN ANTOON II

UNITED STATES DISTRICT JUDGE

Dooley v. Crab Boat Owners Ass'n

United States District Court for the Northern District of California

April 26, 2004, Decided

No. C 02-0676 MHP

Reporter
2004 U.S. Dist. LEXIS 7117 *; 2004-1 Trade Cas. (CCH) P74,421

JOHN DOOLEY, JOHN B. JONES III, DAVID GRATZER, NYLE GRIFFIN, DAN REYES and CAITLIN ANN, LLC, Plaintiffs, v. CRAB BOAT OWNERS ASSOCIATION, FISHERMEN'S MARKETING ASSOCIATION OF BODEGA BAY, HALF MOON BAY FISHERMEN'S MARKETING ASSOCIATION, JOHN MORGAN, MORGAN FISH COMPANY, INC., DUNCAN MACLEAN, TODD WAILEY, JIM SALTER, ROBERT N. MILLER, MICHAEL MCHENRY, DAVID BETTENCOURT, LARRY COLLINS, WILLIAM WISE, JOHN T. TARANTINO, and GEORGE BOOS, Defendants.

Subsequent History: Related proceeding at *Crab Boat Owners Ass'n v. Hartford Ins. Co., 325 F. Supp. 2d 1057, 2004 U.S. Dist. LEXIS 13481 (N.D. Cal., July 16, 2004)*

Prior History: *Dooley v. Crab Boat Owners Ass'n, 271 F. Supp. 2d 1207, 2003 U.S. Dist. LEXIS 12381 (N.D. Cal., 2003)*

Disposition: [*1] Defendants' motions for summary judgment granted in part and denied in part. Counterdefendants' motion for summary judgment granted.

Core Terms

crab, fishing, plaintiffs', defendants', counterdefendants, associations, genuine issue of material fact, fishermen, enterprise, summary judgment motion, tie-ups, antitrust, extortion, lines, predicate act, caught, Fresh, present evidence, damages, season, vessel, sufficient evidence, crab pot, participated, conspiracy, alleges, pattern of racketeering activity, reasonable factfinder, prices, intentional interference

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is proper when the pleadings, discovery and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Material facts are those which may affect the outcome of the case. A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] Supporting Materials, Affidavits

The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out that there is an absence of evidence to support the nonmoving party's case. Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. Mere allegations or denials do not defeat a moving party's allegations. Nor is it sufficient for the opposing party simply to raise issues as to the credibility of the moving party's evidence. If the nonmoving party fails to show that there is a genuine issue for trial, the moving party is 'entitled to judgment as a matter of law.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3[] Hobbs Act, Elements

18 U.S.C.S. § 1962(c) prohibits persons whose actions affect interstate commerce from using an enterprise to engage in a pattern of racketeering activity. To prove a violation of *18 U.S.C.S. § 1962(c)*, plaintiffs must demonstrate that defendants engaged in conduct of an enterprise through a pattern of racketeering activity. *28 U.S.C.S. § 1962(c)* provides: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. "Person" is defined broadly under the statute to include any individual or entity capable of holding a legal or beneficial interest in property. *18 U.S.C.S. § 1961(3)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

Establishing the existence of an enterprise requires proof of an ongoing organization, formal or informal, with various associates functioning as a continuing unit. An enterprise may include both legitimate and illegitimate entities, but it must exist separate and apart from the pattern of racketeering activity in which it engages. At a minimum the entity must exhibit some sort of structure for the making of decisions, whether it be hierarchical or consensual. The structure should provide some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis. The structure requirement, however, does not mean that every decision must be made by the same person, or that authority may not be delegated. In order to participate in the conduct of the enterprise, one must have participated in the operation or management of the enterprise. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement. Furthermore, a plaintiff may name members of an association-in-fact enterprise as individual defendants.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

An enterprise is operated not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Racketeering > Extortion > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Penalties

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN6[] Hobbs Act, Elements

In order to satisfy the requirement under the Racketeer Influenced and Corrupt Organizations Act that a defendant have engaged in a pattern of racketeering activity, each defendant must have committed at least two predicate acts within 10 years. 18 U.S.C.S. § 1961(5). An indictable offense under the Hobbs Act is considered "racketeering activity," 18 U.S.C.S. § 1961(1)(B), and two or more such offenses within ten years may constitute a "pattern," 18 U.S.C.S. § 1961(5). In relevant part, the Hobbs Act prohibits extortion, or an attempt or conspiracy to commit extortion, that in any manner affects interstate commerce. 18 U.S.C.S. § 1951(a). The Hobbs Act defines extortion as the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C.S. § 1951(b)(2). Threats or acts of physical violence in furtherance of a plan or purpose to do anything in violation of this section are also prohibited. 18 U.S.C.S. § 1951(a). Under the Hobbs Act, the term "property" includes the right to make business decisions free from wrongful coercion.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN7[] Hobbs Act, Elements

Because the Hobbs Act prohibits not only extortion, but also attempt or conspiracy to commit extortion, an attempt or conspiracy to commit extortion constitutes an indictable offense under the Racketeer Influenced and Corrupt Organization Act (RICO). 18 U.S.C.S. § 1951(a); 18 U.S.C.S. § 1961(1)(B). Thus, attempting or conspiring to commit extortion through the use of actual or threatened force, violence, or fear may be considered a predicate act for purposes of RICO.

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Elements

Criminal Law & Procedure > ... > Robbery > Unarmed Robbery > Elements

Criminal Law & Procedure > Criminal Offenses > Racketeering > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > General Overview

Criminal Law & Procedure > ... > Extortion > Hobbs Act > Penalties

HN8[] Hobbs Act, Elements

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. 18 U.S.C.S. § 1951(a).

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In order to establish a pattern of racketeering activity, a plaintiff must also demonstrate a "relationship" between the predicate acts and a threat of continuing activity. A plaintiff may establish a threat of continuing activity if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit, even if the number of related predicate acts is small and if they occur close together in time.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In order to sue for a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must have been injured in his business or property by reason of the RICO violation. *18 U.S.C.S. § 1964(c)*.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN11[] **Conspiracy, Elements**

Under *18 U.S.C.S. § 1962(d)*, a conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense. For purposes of conspiracy liability, a plaintiff is not required to show that each defendant agreed to commit two predicate acts. Rather, the defendant must have been aware of the essential nature and scope of the criminal enterprise and intended to participate in it.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN12[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize any part of trade or commerce in a particular state. *15 U.S.C.S. § 2*. In order to succeed on a claim of actual monopolization, a plaintiff must demonstrate that the defendant willfully acquired or maintained monopoly power in the relevant market through anticompetitive conduct. In order to succeed on a claim of attempted monopolization, a plaintiff must demonstrate that the defendant engaged in anticompetitive conduct with a specific intent to monopolize and had a dangerous probability of achieving monopoly power. Under either claim, a plaintiff must demonstrate that the anticompetitive conduct caused antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Under either a claim for monopolization or a claim for attempted monopolization, a plaintiff must set forth both the relevant product and geographic markets that defendants have endeavored to monopolize. The relevant product market includes the pool of goods or services that enjoy a reasonable interchangeability and a cross-elasticity of demand. The relevant geographic market is defined by the area of effective competition where buyers can turn for alternate sources of supply. The definition of the relevant market--both product and geographic--is generally a question of fact reserved for the jury.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] **Attempts to Monopolize, Elements**

Plaintiffs must also show that the defendant has monopoly power within the relevant market. *15 U.S.C.S. § 2*. The question of whether monopoly power exists depends heavily upon market share and barriers to entry. A lesser showing of market power is required in an attempt case than in an actual monopolization case. Entry barriers are factors in the market that deter entry while permitting incumbent firms to earn monopoly returns. In order to demonstrate sufficient barriers to entry, plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

HN15[] **Antitrust & Trade Law, Sherman Act**

A violation of the Sherman Act also requires a showing of anticompetitive conduct. While competition among rivals does not violate the Sherman Act, a reduction of competition which harms consumer welfare does contravene the Act. Thus, a plaintiff must demonstrate a significant and more-than-temporary harmful effect on competition, not just on a competitor or consumer. Therefore, it is necessary to consider defendants' conduct not only as it relates to plaintiffs, but also as it impacts consumers and competition overall. A company engages in predatory behavior when it attempts to exclude rivals on some basis other than efficiency. Thus, exclusionary conduct includes behavior that not only tends to impair the opportunities of rivals, but also fails to further competition or furthers competition in an unnecessarily restrictive manner.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

In order to recover under the Sherman Act, a plaintiff must demonstrate antitrust injury. To prove antitrust injury, plaintiffs must prove that their loss flowed from the defendants' anticompetitive conduct. The conduct that causes the injury must also adversely affect competition.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN17[] **Standing, Requirements**

In order to maintain an antitrust action, the injured party must be a participant in the same market as the defendants.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN18[] **Standing, Requirements**

A shareholder of a corporation injured by an antitrust violation does not have standing to sue. This rule applies even if the injured shareholder is the sole shareholder or if the shareholder alleges that the antitrust violations were intended to drive the individual out of the industry.

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act prohibits parties from entering into agreements and conspiracies that unreasonably restrain trade. *15 U.S.C.S. § 1*.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN20[] **Per Se Rule & Rule of Reason, Sherman Act**

Courts analyze agreements or conspiracies to restrain trade under either the "per se rule" or the "rule of reason." Courts evaluate concerted activity under *15 U.S.C.S. § 1* more rigorously than under *15 U.S.C.S. § 2*, and may hold that certain agreements are so inherently anticompetitive that they are illegal per se without further inquiry into the harm they have actually caused.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN21[] **Antitrust & Trade Law, Sherman Act**

The Cartwright Act, *Cal. Bus. & Prof. Code § 16750*, is patterned after the Sherman Act, and federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN22[] **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17200 borrows violations from other laws by making them independently actionable as unfair competitive practices. An action may also be deemed unfair even if it does not amount to a violation of some other law.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN23[] **Private Actions, Remedies**

Under California's Unfair Competition Laws, damages are limited to restitution.

Contracts Law > Breach > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN24[] **Contracts Law, Breach**

Intentional interference with contractual relations requires that the plaintiff demonstrate (1) a valid contract between the plaintiff and a third party; (2) defendants knowledge of the contract; (3) intentional acts designed to induce breach or disrupt the contractual relationship; (4) actual breach or disruption of the relationship; and (5) resulting damage.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN25[] **Legislation, Effect & Operation**

Intentional interference with prospective economic advantage requires (1) an existing economic relationship or one containing the probability of future economic benefit; defendants' knowledge of the relationship; (2) acts designed to disrupt the relationship; (3) actual disruption of the relationship; and (4) damages proximately caused by the defendants. A plaintiff must demonstrate that defendants' conduct was wrongful by some legal measure; it is not sufficient to prove merely interference itself. A plaintiff may prove that a defendants' conduct was independently wrongful by presenting evidence that defendants' actions fell outside of the realm of legitimate business transactions.

Governments > State & Territorial Governments > Licenses

Insurance Law > ... > Coverage > Advertising & Personal Injuries > Advertising Injuries

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Insurance Law > Claim, Contract & Practice Issues > Allocation

HN26[] **State & Territorial Governments, Licenses**

To succeed on a claim of predatory pricing under *Cal. Bus. & Prof. Code § 17043*, a plaintiff must prove both that the seller (1) sold its product below cost, and (2) had the purpose of injuring competitors or destroying competition. To meet the cost requirement, the vendor must have sold below his or her own fully allocated or fully distributed cost. Cost includes the cost of raw materials, labor and all overhead expenses. *Cal. Bus. & Prof. Code § 17026* . Overhead expenses include labor, rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, deliver costs, credit losses, all types of licenses, taxes, insurance and advertising. *Cal. Bus. & Prof. Code § 17029*. California's fully allocated cost standard includes both fixed and variable costs attributable on an average basis to each unit of output. Stated simply, cost includes the initial expense of producing the article together with its share of the load of carrying on the business through which it is sold. Determination of cost is an issue of fact. To meet the purpose requirement, the vendor must act with the purpose, i.e., the desire, of injuring competitors or destroying competition. Where the plaintiff proves both below cost sales and injurious effect, the court may infer an intent to injure competitors or destroy competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN27[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Whether the sale was conducted with the purpose of injuring competitors and had the tendency or capacity to injure the plaintiff are usually questions of fact.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN28[] Regulated Practices, Trade Practices & Unfair Competition

A business practice violates the California Unfair Competition Act, *Cal. Bus. & Prof. Code § 17200 et seq.*, if it violates another provision of California law.

Counsel: For John Dooley, John B. Jones, III, David Gratzer, Dan Reyes, Caitlin Ann, LLC, Plaintiffs: Paul F. Higaki, Jr., Attorney at Law, Oakland, CA. Karien L. Balluff, Young deNormandie & Oscarsson, P.C., Seattle, WA.

For Crab Boat Owners Association, a California non-profit corporation, Fishermen's Marketing Association Incorporated of Bodega Bay, a California non-profit corporation, Duncan Maclean, an individual, Jim Salter, an individual, Robert N. Miller, an individual, David Bettencourt, an individual, Larry Collins, an individual, William Wise, an individual, John T. Tarantino, an individual, George Boos, an individual, Half Moon Bay Fisherman's Marketing Association, Defendants: Michael A. Duncheon, Hanson Bridgett Marcus Vlahos & Rudy LLP, San Francisco, CA. Gordon Douglas McAuley, Hanson Bridgett Marcus Vlahos & Rudy LLP, San Francisco, CA.

For John Morgan, an individual, Morgan Fish Company, Inc., a California corporation, Defendants: Andrew H. Schwartz, Sommers & Schwartz LLP, San Francisco, CA. Gordon Douglas McAuley, Hanson Bridgett **[*2]** Marcus Vlahos & Rudy LLP, San Francisco, CA.

For Todd Wailey, an individual, Defendant: Donald R. Wild, Wild, Carey & Fife, San Francisco, CA. Michael A. Duncheon, Hanson Bridgett Marcus Vlahos & Rudy LLP, San Francisco, CA. Gordon Douglas McAuley, Hanson Bridgett Marcus Vlahos & Rudy LLP, San Francisco, CA.

For Michael McHenry, an individual, Defendant: Geri Lynn Green, Law Offices of Geri Lynn Green, San Francisco, CA.

For John Morgan, an individual, Morgan Fish Company, Inc., a California corporation, Counter-claimants: Andrew H. Schwartz, Sommers & Schwartz LLP, San Francisco, CA.

Judges: MARILYN HALL PATEL, Chief Judge, United States District Judge.

Opinion by: MARILYN HALL PATEL

Opinion

MEMORANDUM & ORDER

Cross Motions for Summary Judgment

The Caitlin Ann fishing company, its managing director John Dooley, and several crew members bring this action against three fishing associations and their members, as well as a purveyor of fish, seeking relief for alleged interference with the Caitlin Ann's Dungeness crab harvesting off the coast of California. Now before the court are defendants' motions for summary judgment and plaintiffs' motion for summary judgment on **[*3]** defendant Half Moon Bay Fishermen's Marketing Association's counterclaims. After having considered the parties' arguments and submissions, and for the reasons set forth below, the court rules as follows.

BACKGROUND [1]

In its memorandum and order of July 14, 2003, the court set forth the background of this action. For context, the court will repeat some of this background here.

The Caitlin Ann LLC, a Washington limited liability corporation, is the owner of a fishing boat also named the Caitlin Ann. Under the management of John Dooley, the company harvests Dungeness crab off the coast of California, Washington and Oregon. Plaintiffs and defendants agree that crabs are harvested commercially using steel and wire traps, or pots, that rest on the ocean floor. A buoy, attached to each pot, acts as a marker for the fishermen.

The parties agree on little else. According to plaintiffs, the conflict between the parties **[*4]** began when the State of California opened the Northern California Dungeness crab season on December 1, 1999. Plaintiffs contend that two fishermen's marketing associations not named in this action refused to harvest crab, hoping that this refusal would help them negotiate a favorable fixed price with buyers. [2] In a show of solidarity, members of the three defendant associations--the Crab Boat Owners Association ("CBOA"), the Fishermen's Marketing Association Incorporated of Bodega Bay ("FMABB"), and the Half Moon Bay Fishermen's Marketing Association ("HMBFMA")--also allegedly refused to fish in order to set a price more favorable to the fishermen.

[*5] Plaintiffs, however, did not join this "tie up." [3] **[*6]** Instead, Dooley prearranged to sell his catch to Three Captains, a local buyer in Half Moon Bay. Maclean, the President of the HMBFMA, came to the Three Captains facility and told the owners, Larry and Mary Fortado, that the HMBFMA would "blackball" [4] their company if they purchased Dooley's crab. When the Caitlin Ann boat returned to port, a group of angry HMBFMA members, including Maclean, confronted the crew and yelled obscenities. Dooley later discovered the word "scab" spray painted on the side of the vessel. During the next crab season, members of the associations refused to sell their crab to Three Captains. Three Captains suffered financial harm as a result of being "blackballed," and it refused to buy crab from Dooley during the 2000 crab season.

When the Southern California Dungeness crab season opened on November 15, 2001, plaintiffs claim that the three defendant associations and their members once again refused to fish so as to fix a favorable price for crab. The Caitlin Ann company had already contracted with a buyer, Exclusive Fresh. On November 16, 2001, plaintiffs allege that association members told Dooley that there would be "trouble" and "heavy repercussions" if he harvested crab during the tie-up, and a group of members, including Maclean and Salter, came to the dock and threatened the Caitlin Ann's crew.

Despite these threats, the Caitlin Ann departed on November 16, 2001, and set approximately 930 crab pots. The following day, the crew of the Caitlin Ann returned to the area where they had set the pots and found approximately 647 crab pot lines cut. Plaintiffs allege that defendant Todd Whaley [5] was involved in cutting the lines. Plaintiffs **[*7]**

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[1] Unless otherwise noted, this fact recitation is culled from the parties' moving papers.

[2] Fishermen typically enter into market orders with local purchasers prior to leaving port. Before entering into a market order, the associations typically require the purchaser to sign an "Assessment Agreement." This Agreement includes a clause which provides that the purchaser agrees to remit a tax, in addition to the minimum price per pound, to the Association on a regular basis. The tax required for Dungeness Crab is three-cents per pound, and is required regardless of whether the fisherman selling the crab is a member of the association. The associations will not enter into a market order with the purchaser if it refuses to sign the Assessment Agreement.

[3] If fishermen are unable to reach an agreed upon price for crab at the start of the season, they will keep their boats tied up at the dock, resulting in a "tie-up" or "strike." Plaintiffs argue that tie ups typically occur during the first two weeks of the season, from November 15th to December 1st, in order to obtain a higher price for crab and to keep Northern District fishermen from fishing. The Northern District consists of District 6, 7, 8, and 9 and runs from Point Arena to the California/Oregon border. District 10 is immediately south of the Northern District and includes the bays at issue in this case. The Northern District season typically opens on December 1st, while the District 10 season opens as early as November 15th.

[4] The parties use the word "blackball" to refer to a situation where members of the associations and other fishermen would refuse to sell their crab catch to specific individuals.

spotted a Crescent City style boat near plaintiffs' gear. Whaley's boat, the Dynamik, is a Crescent City style boat. Whaley does not dispute that his boat was near the lines. Rather, he claims that on the evening of November 17, 2001, he went out to pull plaintiffs' buoys to see if they were catching crab and that when he arrived the lines had already been cut. Prior to returning to Half Moon Bay, Dave Bracciotti, a fisherman, had warned John Dooley's brother, Robert Dooley, that someone intended to cut their crab pot lines. [6]

Defendants also allegedly interfered with plaintiffs' ability to deliver crab to Exclusive Fresh. Prior to Caitlin Ann's return to port, Dooley contacted Phil Bruno, the owner of Exclusive Fresh. Bruno informed Dooley that **[*8]** Michael McHenry had contacted him and urged him not to purchase Dooley's crab. Bruno also informed Dooley that he would be unable to purchase the crab because the transient dock at Half Moon Bay was blocked by another vessel owned by defendant Duncan Maclean. Dooley had previously made plans with the harbor master to use the transient dock, the only space that could accommodate a vessel the size of the Caitlin Ann. Plaintiffs contend that Maclean, encouraged by the associations, deliberately blocked the Caitlin Ann from docking in order to punish plaintiffs for harvesting crab during the strike. Maclean argues that he tied up at the transient dock to undertake maintenance of his vessel. [7]

[*9] Unable to access Half Moon Bay, plaintiffs sailed to San Francisco, where they had identified a new buyer for their crab, J&S Quality Seafood ("J&S"). Prior to plaintiffs' arrival, members of the associations allegedly threatened Jim Schach, the owner of J&S, with "blackballing" if he purchased Dooley's crab. John Morgan, the owner of Morgan Fish Company, Inc., a large purveyor of Dungeness crab, also contacted Schach, warning him not to buy Dooley's crab. One of Morgan's employees contacted Shach to convey a similar message. Following J&S' purchase of plaintiffs' crab, Morgan contacted customers of J&S to dissuade them from purchasing crab from J&S and allegedly told them they would be boycotted if they purchased the crab. Morgan, a distributor of Polar Ice, a company owned by John Tarantino, also refused to sell ice to J&S. [8]

[*10] On February 7, 2002, plaintiffs filed a complaint against three defendant fishermen associations located in the greater San Francisco Bay Area, the CBOA, FMABB, and HMBFMA; individual members of the associations, Duncan Maclean, Jim Salter, Robert N. Miller, Michael McHenry, Larry Collins, William Wise, John T. Tarantino and George Boos; and other individuals that allegedly cooperated with the associations, John Morgan, Morgan Fish Company, Inc., [9] Todd Whaley and David Bettencourt. In large measure, plaintiffs accuse defendants of violating *sections 1962(c)and (d)* of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *sections 1* and *2 of the Sherman Act*, and *sections 16750* and *17200 of the California Business and Professions Code*. *18 U.S.C. §§ 1962(c)*,*(d)*; *15 U.S.C. §§ 1*,*2*; *Cal. Bus. & Prof. Code §§ 16750, 17200*. Plaintiffs also allege that defendants unlawfully interfered with contractual relations and with prospective economic advantage, and adding conversion and trespass to chattels claims as well. In turn, defendant HMBFMA brings three counterclaims against Caitlin Ann LLC and Dooley (collectively **[*11]** "counterdefendants"). HMBFMA alleges that counterdefendants sold crab below

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[5] Plaintiffs erroneously spelled his name "Wailey" in their complaint.

[6] Plaintiffs later recovered a small portion of their gear. They made an effort to fish with the crab pots that remained, but were unable to reach their anticipated income for the crab season.

[7] The log book for the San Mateo Harbor District at Pillar Point, dated November 17, 2001, states, "Fisherman approached the office asking to use the end of pier to block Dooly [sic] from offloading." The log further states on November 18, 2001, "Duncan asked to tie FV Barbara Faye to load crab gear--gave permission--but now think he just wants to make it difficult for FV Caitlin Ann to tie there."

[8] Similar events occurred with respect to Richard Axelson, a fisherman who had agreed to fish for Bodega Bay Fish Company during the 2001 tie-up. The company refused to purchase Axelson's crab after being threatened by members of the FMABB. Axelson had seventy of his crab pots cut. Later in the season, J&S purchased approximately 6,000 lbs. of crab from Axelson, which he placed into a tank. That night someone disabled J&S' circulating seawater system causing the crab in the tank to die. Shach also found a note on his truck stating: "It's not over."

[9] Throughout their papers, John Morgan and the Morgan Fish Company, Inc. refer to themselves as the "Morgan defendants." They have not indicated that Morgan Fish Company, Inc. should be treated as anything other than the alter ego of John Morgan. Thus, for purposes of this motion, the court treats John Morgan and the Morgan Fish Company, Inc. as a single defendant.

cost from 1999 to the present, used a boat that had a trawling net in violation of state permitting requirements, and, in 1999, fished in a wasteful and destructive manner. HMBFMA also alleges that counterdefendants threatened HMBFMA members and other fishermen with damage to their fishing gear, and did in fact damage gear by trawling through fishing areas already set with pots. Through this conduct, HMBFMA alleges that counterdefendants violated *sections 17200and 17043* of the California Business and Profession Code, and engaged in tortious interference with prospective economic advantage.

[*12] On March 31, 2003, countedefendants filed a motion for summary judgment. On July 14, 2003, following a hearing on that motion, this court issued a memorandum and order finding that HMBMFA had not produced any evidence demonstrating that counterdefendants had (1) engaged in predatory pricing, (2) procured and renewed a permit for Dungeness crab with a vessel that was equipped with a trawling net, or (3) dragged a trawling net over fishing areas in order to deter HMBFMA members from placing their crab pots there. Accordingly, the court ordered HMBMFA to submit declarations explaining the reasonable basis for its claims. HMBFMA subsequently filed two declarations with the court. On August 12, 2003, the court granted HMBFMA's motion to dismiss its third counterclaim for tortious interference with prospective economic advantage. Now before the court are defendants' motions for summary judgment as to all of plaintiffs' claims and plaintiffs' motion for summary judgment as to HMBFMA's counterclaims.

LEGAL STANDARD

HN1[] Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled **[*13]** to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* ***HN2***[] The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. On an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. Mere allegations **[*14]** or denials do not defeat a moving party's allegations. Id.; see also *Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959-60 (9th Cir. 1994)*. Nor is it sufficient for the opposing party simply to raise issues as to the credibility of the moving party's evidence. *National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983)*. If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is 'entitled to judgment as a matter of law.'" *Celotex Corp., 477 U.S. at 323* (quoting *Fed. R. Civ. P. 56(c)*).

DISCUSSION

I. Plaintiffs' Claims

A. *RICO Section 1962(c)*

Plaintiffs seek treble damages under the civil provisions of RICO for acts of extortion prohibited by the *Hobbs Act*. Specifically, plaintiffs contend that defendants violated *RICO section 1962(c)*. ***HN3***[] *Section 1962(c)* prohibits persons whose actions affect interstate commerce from using an enterprise to engage in a "pattern of racketeering activity." [10] *18 U.S.C. § 1962(c)*. To prove a violation of *section 1962(c)*, plaintiffs must demonstrate **[*15]** that

[10] *Section 1962(c)* provides:

defendants engaged in conduct of an enterprise through a pattern of racketeering activity. *Salinas v. United States, 522 U.S. 52, 62, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997)*.

1. Defendants' Enterprise

Defendants contend that plaintiffs' RICO claim fails because plaintiffs have not put forward sufficient evidence to demonstrate the existence of an enterprise. ***HN4***[] Establishing the existence of an enterprise **[*16]** requires proof of an ongoing organization, formal or informal, with various associates functioning as a continuing unit. *Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996)*. An enterprise may include both legitimate and illegitimate entities, but it must exist separate and apart from the pattern of racketeering activity in which it engages. *United States v. Turkette, 452 U.S. 576, 580-81, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*. At a minimum the entity:

> must exhibit some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual. The structure should provide some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis. The structure requirement, however, does not mean that every decision must be made by the same person, or that authority may not be delegated.

Chang, 80 F.3d at 1299 (citations and internal quotation marks omitted). In order to participate in the conduct of the enterprise, one must have participated in the "operation or management" of the enterprise. *Reves v. Ernst & Young, 507 U.S. 170, 180, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993).* **[*17]** "The function of overseeing and coordinating the commission of several different predicate offenses and *other activities* on an on-going basis is adequate to satisfy the separate existence requirement." *Chang, 80 F.3d at 1298*. Furthermore, a plaintiff may name members of an association-in-fact enterprise as individual defendants. *River City Markets, Inc. v. Fleming Foods West, Inc., 960 F.2d 1458, 1462 (9th Cir.1992)*.

Plaintiffs allege that defendants participated in an enterprise separate and apart from the pattern of racketeering activity. The three associations cooperated at the beginning of the crab season to determine an appropriate "ex-vessel" price for crab. [11] The associations abided by the decisions of each other as to the agreed upon price and voted by majority vote. Salter Dep. at 63, 117. Jim Salter stated in his deposition that, in 2001, the entire fleet of commercial crab fishermen in fishing in the Gulf of the Farollones agreed not to fish because two of the three associations were unwilling to accept a market price of $ 2.00 per pound. Salter Dep. at 117. John Tarantino regularly contacted association representatives and served **[*18]** as a central clearinghouse for information among the fishermen. McHenry Dep. at 142; Whaley Dep. at 57. Phone records also indicate that the associations and individual defendants contacted each other prior to the opening of the season. Sheer Decl., Exh. S. A reasonable factfinder could conclude that the three associations constitute an enterprise because they operate as an informal organization, separate and distinct from the alleged racketeering activity at issue in this case. Because Maclean, Salter, Wise, Miller, Collins, and Boos were all members of and served in executive positions in the associations, a reasonable factfinder could determine that they participated in the operation of the enterprise.

Plaintiffs have also demonstrated that there exists a genuine question of material fact as to whether John Morgan **[*19]** and the Morgan Fish Company, Inc. participated in the enterprise. Morgan and the Morgan Fish Company, Inc. cooperated in the operation of an ice plant owned by Tarantino. Morgan abided by the associations' decision not to fish or sell crab at the start of the season by not purchasing crab and by picketing in front of J&S following their purchase of Dooley's crab. The Morgan Fish Company, Inc. also assessed a three-cent tax on each pound of Dungeness crab against the fisherman and remitted this tax to the association. As a result, a reasonable

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> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Person" is defined broadly under the statute to include "any individual or entity capable of holding a legal or beneficial interest in property." *18 U.S.C. § 1961(3)*.

[11] Members of the associations sell crab at a fixed price through market orders issued by the associations. The market order states the agreed-upon or "ex-vessel" price set by the associations.

factfinder could conclude that Morgan and the Morgan Fish Company, Inc. participated in the operation of the enterprise.

Finally, plaintiffs have demonstrated a genuine issue of material fact as to whether Whaley, McHenry and Bettencourt participated in the enterprise. Defendants' primary argument is that these individuals were not members of any association and thus could not have participated in the operation or management of the enterprise. As the Supreme Court noted in Reves, *HN5*[] "an enterprise is operated not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." **[*20]** *Reves, 507 U.S. at 178-79, 184* (internal quotation marks omitted). Moreover, on a motion for summary judgment, the court must construe the evidence in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. Defendant Whaley abided by the price schedule set by the associations and participated in the 2001 tie-up. While McHenry was not a member of an association, he also abided by the price schedule set by the associations and contacted Tarantino to determine whether he could fish based on the associations' decision as to the set price. In addition, Bettencourt allegedly refused to sell crab to Three Captains following their purchase from Dooley during the 1999 tie-up. Based on these facts, a reasonable factfinder could conclude that an enterprise existed between the associations, Whaley, McHenry and Bettencourt.

2. Pattern of Racketeering Activity

HN6[] In order to satisfy the requirement under RICO that a defendant have engaged in a pattern of racketeering activity, each defendant must have committed at least two predicate acts within ten years. **[*21]** *18 U.S.C. § 1961(5)*; *Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990)*; see also *Volmar Dist. Inc. v. New York Post Co., Inc., 825 F. Supp. 1153, 1166 (S.D.N.Y. 1993)*; *Pelfresne v. Village of Rosemont, 22 F. Supp. 2d 756, 764 (N.D. Ill. 1998)*. An indictable offense under the *Hobbs Act* is considered "racketeering activity," *18 U.S.C. § 1961(1)(B)*, and two or more such offenses within ten years may constitute a "pattern," *18 U.S.C. § 1961(5)*. In relevant part, the *Hobbs Act* prohibits extortion, or an attempt or conspiracy to commit extortion, that in any manner affects interstate commerce. *18 U.S.C. § 1951(a)*. [12] *The Hobbs Act* defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *18 U.S.C. § 1951(b)(2)*. Threats or acts of physical violence "in furtherance of a plan or purpose to do anything in violation of this section" are also prohibited. *18 U.S.C. § 1951(a)*. Under the *Hobbs Act*, the term "property" **[*22]** includes "the right to make business decisions free from wrongful coercion." *United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980)*. *HN7*[] Because the *Hobbs Act* prohibits not only extortion, but also attempt or conspiracy to commit extortion, an attempt or conspiracy to commit extortion constitutes an indictable offense under RICO. See *18 U.S.C. § 1951(a)*; *18 U.S.C. § 1961(1)(B)*. Thus, attempting or conspiring to commit extortion "through the use of actual or threatened force, violence, or fear" may be considered a predicate act for purposes of RICO. See *18 U.S.C. § 1951(a)*; *18 U.S.C. §§ 1961(1)(B)*,*(5)*; see also *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp 1114, 1133 (E.D.N.Y. 1992)*.

[*23] Defendants argue that no defendant committed two predicate acts, and so no defendant engaged in a pattern of racketeering activity. A genuine issue of material fact exists as to whether defendants Morgan and Maclean committed two predicate acts. This court determined in its prior order that the following acts could function as the necessary predicate acts:

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[12] In full, the *Hobbs Act* provision at issue states:

> *HN8*[] Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a).

> Defendants Maclean and Michael McHenry, as well as other members of the associations, threatened Exclusive Fresh with loss of business so that the company reneged on its promise to purchase crab from plaintiffs;
> Defendant Morgan and other members of the associations threatened J&S Quality Seafood with loss of business if the company purchased crab from plaintiffs;
> Defendant Morgan and his company, Morgan Fish, threatened buyers and customers of J&S Quality Seafood with loss of business if they purchased "scab crab" from the company;
> Defendants Maclean, Jim Salter and other members of the associations threatened the crew of the Caitlin Ann with harm if they went fishing;
>
> Defendant William Wise and FMABB threatened Bodega Bay Fish with loss of business if the company provided bait to another fisherman, **[*24]** Richard Axelson, who planned to go fishing during the strike in November 2001; and
> Defendant Whaley as well as members of the associations conspired to and were involved in cutting the lines to the Caitlin Ann's crab pots.

July 14, 2003, Order at 9. With the exception of the allegations in regard to Wise, plaintiffs have put forward sufficient evidence, through the depositions of Dooley, Shach, Axelson, Whaley, and others, to raise a genuine issue of material fact as to whether these acts occurred. Whether defendants engaged in these acts to further a scheme of extortion is a question of fact, resolution of which depends upon the intent of the individuals involved. If these acts did in fact occur, and if the defendants did participate in these acts to further a scheme of extortion, a reasonable factfinder could determine that defendants Morgan and Maclean engaged in a pattern of racketeering activity in violation of *section 1962(c)*. [13]

[*25] A genuine issue of material fact also exists as to whether the defendant associations committed two predicate acts. Plaintiffs have presented evidence that the defendant associations attempted to commit extortion in violation of the *Hobbs Act*. See *18 U.S.C. § 1951(a)*. In particular, in 1999, members of the associations allegedly threatened Three Captains, telling Three Captains that it would be "blackballed" if it purchased Dooley's crab. L. Fortado Decl. P5. During the 2001 tie-up, association members threatened Dooley with "trouble" and "heavy repercussions" if Dooley harvested crab. Dooley Decl. P15. Tarantino, who allegedly served as a central contact person between the associations, refused to sell ice to J&S through his company, Polar Ice, following J&S' purchase of Dooley's crab during the 2001 tie-up. Schach Decl. P11. These actions were not limited to Dooley, but also extended to other fishermen who attempted to harvest crab during tie-ups. See Axelson Decl. P7. Based on this evidence, a reasonable juror could conclude that the defendant associations engaged in repeated attempts to keep Dooley from selling crab in District 10 during tie-ups. **[*26]** See *Zemek, 634 F.2d at 1174*. Individual members of the associations, who were also fishermen, stood to gain financially from Dooley's exclusion from the local market. While they were not ultimately successful in keeping Dooley out of the market, a genuine issue of material fact exists as to whether, through their actions, the associations violated the *Hobbs Act*. See *18 U.S.C. § 1951(a)*. As this court noted in its prior order, "That defendants in fact failed to halt the Caitlin Ann's operations does not affect the analysis, since the *Hobbs Act* reaches both actual extortion and attempts or conspiracies to commit extortion." July 14, 2003, Order at 8-9. A reasonable juror could conclude that the defendant associations engaged in multiple attempts to extort plaintiffs in violation of the *Hobbs Act*. See *18 U.S.C. § 1951(a)*. Because each of these attempts is an indictable offense under the *Hobbs Act*, each constitutes a predicate act for purposes of RICO.

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[13] Plaintiffs also argue that other predicate acts support their claim. Plaintiffs allege that defendants boycotted Three Captains because Three Captains purchased crab from Dooley; that defendants cut crab pot lines belonging to Axelson; that defendants sabotaged the catch purchased by J&S; that defendants coordinated strikes designed to keep boats from the North out of District 10; that defendants refused to terminate a strike even though buyers offered a price acceptable to the fishermen; that defendants slashed a fisherman's tires in retaliation for fishing during a strike; that defendants vandalized Schach's vehicle; and that defendants threatened to blow-up Schach's car if he purchased "scab crab." Plaintiffs do not allege that any particular defendants committed these acts. They merely state that "defendants" engaged in such acts. These aallegations are insufficient to constitute predicate acts for purposes of RICO because plaintiffs have not produced any evidence showing that these defendants or which defendants committed these acts.

See *18 U.S.C. § 1961(1)(B)*. Plaintiffs have therefore demonstrated a genuine issue of material fact as to whether the defendant associations **[*27]** engaged in a pattern of racketeering activity. See *18 U.S.C. § 1962(c)*.

A genuine issue of material fact also exists as to whether John Tarantino committed two predicate acts. Tarantino allegedly attempted and conspired to commit extortion in violation of the *Hobbs Act*. See *18 U.S.C. § 1951(a)*. Tarantino's direct connection with the associations, and his service as a central contact person between the associations, indicates that he conspired to extort defendants in violation of the *Hobbs Act*. See McHenry Dep. at 142; Whaley Dep. at 57. In addition, Tarantino refused to sell ice to J&S through his company, Polar Ice, in connection with Morgan and Morgan Fish Co., following J&S' purchase of Dooley's crab. See Schach Decl. P11. A reasonable juror could conclude that Tarantino's refusal to sell ice to J&S constitutes an attempt to commit extortion in violation of the *Hobbs Act*. Because both acts are considered indictable offenses under the *Hobbs Act*, a genuine issue of material fact exists as to whether Tarantino committed two predicate acts for purposes of RICO. See *18 U.S.C. § 1962(c)*. While **[*28]** plaintiffs have properly demonstrated that Morgan, Morgan Fish Co., Maclean, the defendant associations and Tarantino committed two predicate acts, they have not presented sufficient evidence to demonstrate that any other defendant engaged in two predicate acts for purposes of RICO. [14] See *18 U.S.C. § 1961(5)*.

Defendants also argue that plaintiffs' alleged pattern of racketeering lacks continuity. ***HN9***[] In order to establish a pattern of racketeering activity, a plaintiff must also demonstrate a "relationship" between the predicate acts and a "threat of continuing activity." *H.J. Inc., v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).* **[*29]** A plaintiff may establish a threat of continuing activity "if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit," even if the number of related predicate acts is small and if they occur close together in time. *Id. at 242*. In this case, defendants allegedly engaged in "tie-ups" and threatened crab purchasers not only during the 2001 season, but also in previous years. Further, defendants did not confine these threats to plaintiffs. They allegedly threatened to "blackball" Three Captains during the 1999 season and later threatened Richard Axelson and J&S for engaging in crab sales during the November 2001 "tie-up." The threat of long-term, continuous racketeering activity against Dooley, J&S, Schach, Axelson, and others is at least implicit in defendants' acts. Construing this evidence in a light most favorable to the nonmoving party, the court concludes that plaintiffs' RICO claim does not fail for lack of continuity.

3. Standing

Defendants argue that plaintiffs' only recoverable damages are the loss of plaintiffs' crab pots and gear, and that plaintiffs have failed to demonstrate that the **[*30]** associations or any of the individual defendants were involved in the cutting of plaintiffs' crab pot lines. As a result, defendants allege that plaintiffs do not have standing to bring a RICO claim because they cannot show that defendants injured their business or property. ***HN10***[] In order to sue for a violation of RICO, a plaintiff must have been injured "in his business or property" by reason of the RICO violation. *18 U.S.C. 1964(c)*. Whaley allegedly damaged plaintiffs' crab gear. Plaintiffs suffered financial losses for the season due to the cost of replacing that gear and the inability to fish until they were able to replace it. Defendants' threats to crab purchasers and to customers of crab purchasers may have resulted in financial loss to plaintiffs' business as well. As a result of these alleged acts, plaintiffs suffered financial losses. These financial losses demonstrate injury to plaintiffs' business and property sufficient to survive a motion for summary judgment

B. RICO Conspiracy Under *Section 1962(d)*

Plaintiffs also allege that defendants conspired to violate *section 1962(c)*, which is itself a violation of *RICO section 1962(d)*. **[*31]** *18 U.S.C. § 1962(d)*. ***HN11***[] Under *section 1962(d)*, "a conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas, 522 U.S.*

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[14] While plaintiffs have presented evidence that Jim Salter, Michael McHenry, and Todd Whaley committed a single predicate act, in order to be liable under *section 1962(c)*, each of these defendants must have committed at least two predicate acts within ten years. See *18 U.S.C. § 1961(5)*.

52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). For purposes of conspiracy liability, a plaintiff is not required to show that each defendant agreed to commit two predicate acts. Id.; United States v. Frega, 179 F.3d 793, 810 n.21 (9th Cir. 1999). Rather, the defendant "must have been aware of the essential nature and scope of the criminal enterprise and intended to participate in it." Howard v. America Online Inc., 208 F.3d 741, 751 (9th Cir. 2000) (citing Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993)) (internal quotation marks omitted).

As stated above, plaintiffs have sufficiently demonstrated, for purposes of a motion for summary judgment, that defendants were involved in an enterprise which engaged in a pattern of racketeering activity. Plaintiffs have put forward evidence that several of the defendants participated in the enterprise and engaged in acts to further the purpose of the enterprise. These acts include the aforementioned predicate **[*32]** acts, as well as the following overt acts:

> Defendant Maclean threatened Larry and Mary Fortado that Three Captains would be blackballed if they purchased scab crab;
> Defendant Bettencourt and others refused to sell to Three Captains after they purchased crab from Dooley;
> Defendant Whaley as well as members of the associations allegedly conspired to and were involved in cutting the lines to the Caitlin Ann's crab pots;
> Tarantino served as a central contact person between the associations and, in connection with Morgan, refused to sell ice to J&S following Dooley's sale of crab to J&S; and
> Defendant Maclean blocked the transient dock in order to prevent Dooley from docking in Half Moon Bay to deliver crab to Exclusive Fresh.

Plaintiffs have put forward sufficient evidence, through the declarations of Larry and Mary Fortado, Schach and Dooley, as well as the depositions of Whaley, McHenry and others, to raise a genuine issue of material fact as to whether these acts occurred. Based on the aforementioned predicate acts and these overt acts, a reasonable factfinder could conclude that the associations, Morgan, Morgan Fish Company, Inc., Maclean, Whaley, **[*33]** Salter, McHenry, Bettencourt, and Tarantino conspired to further an endeavor to prevent plaintiffs and other individuals who did not participate in the "tie-up" from engaging in the crab business within the greater San Francisco Bay Area. In contrast, plaintiffs have not raised a genuine issue of material fact with respect to the conspiracy claim in regard to defendants Miller, Collins, Wise and Boos because they have not put forward evidence demonstrating that these defendants intended to further the conspiracy.

C. Claim for Violation of Section 2 of the Sherman Act

The associations, joined by Whaley, also contend that this court should grant summary judgment in their favor with regard to plaintiffs' claim that defendants violated section 2 of the Sherman Act. **HN12**[] Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize any part of trade or commerce in a particular state. 15 U.S.C. § 2. [15] In order to succeed on a claim of actual monopolization, a plaintiff must demonstrate that the defendant willfully acquired or maintained monopoly power in the relevant market through anticompetitive conduct. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872, 878-79 (2004) **[*34]** (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)); American Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publs., Inc., 108 F.3d 1147, 1151 (9th Cir. 1997). In order to succeed on a claim of attempted monopolization, a plaintiff must demonstrate that the defendant engaged in anticompetitive conduct with a specific intent to monopolize and had a dangerous probability of achieving monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993); see also Thurman Indus., Inc. v. Pay'N Pak Stores, Inc., 875 F.2d 1369, 1378 (9th Cir. 1989). Under either claim, a plaintiff must demonstrate that the anticompetitive conduct caused antitrust injury. Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

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[15] Section 4 of the Clayton Act provides a private right of action for violations of section 2 and allows the plaintiff, in such an action, to recover treble damages. 15 U.S.C. § 15.

[*35] 1. Relevant Market

HN13[] Under either a claim for monopolization or a claim for attempted monopolization, a plaintiff must set forth both the relevant product and geographic markets that defendants have endeavored to monopolize. *Spectrum Sports, Inc., 506 U.S. at 459*. The relevant product market includes "the pool of goods or services that enjoy a reasonable interchangeability and a cross-elasticity of demand." *Morgan, Strand, Wheeler & Biggs, 924 F.2d 1484, 1489 (9th Cir. 1991)*. The relevant geographic market is defined by "the area of effective competition where buyers can turn for alternate sources of supply." *Id. at 1490*. The definition of the relevant market--both product and geographic--is generally a question of fact reserved for the jury. *High Tech. Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993)*; see also *Oahu Gas Serv., Inc. v. Pac. Resources Inc., 838 F.2d 360, 363 (9th Cir. 1988)* ("Our previous decisions establish that both market definition and market power are essentially questions of fact.").

Plaintiffs contend that the product market is limited to crab caught in **[*36]** the San Francisco Bay Area between November 15th and December 1st. Plaintiffs have presented evidence demonstrating that crab caught in the San Francisco Bay Area is fuller, firmer, and more flavorful than crab caught in other areas, and that fresh crab is not reasonably interchangeable with frozen crab. Caito Decl., P3; Dooley Decl., P11. While plaintiffs have alleged that demand for fresh crab peaks between November 15th and December 1st, they have failed to present any evidence that crab caught during this period differs from crab caught later in the season. Based on this evidence, a reasonable factfinder could not determine that the relevant product market was limited to crab caught between November 15th and December 1st, but could conclude that relevant product market is fresh crab caught in the San Francisco Bay Area.

Plaintiffs contend that the relevant geographic market is limited to the greater San Francisco Bay Area, which includes San Francisco Bay, Half Moon Bay, and Bodega Bay. Defendants argue that consumers can turn to other sources of supply for crab, including the Crescent City/Eureka area, Oregon and Washington. The crab season in these northern areas does not open **[*37]** until December 1st. Therefore, crab caught in the North does not compete with local San Francisco crab caught during the November 15th to December 1st time period. Defendants also argue that certain Native American tribes compete with San Francisco Bay Area crab fishermen for sales by fishing in the North prior to November 15th and shipping the crab by truck to San Francisco. In contrast, plaintiffs have presented evidence that crab caught in the San Francisco Bay Area is superior to crab caught in other areas, and that customers prefer and will pay more for crab caught in the San Francisco Bay Area. Dooley Decl. P11. In addition, the industry segregates and markets crab caught in the San Francisco Bay Area as a branded product. Caito Decl. P4. Based on this evidence, plaintiffs have demonstrated a genuine issue of material fact as to whether the relevant geographic market is limited to crab caught in the San Francisco Bay, Half Moon Bay, and Bodega Bay areas.

2. Monopoly Power

HN14[] Plaintiffs must also show that the defendant has monopoly power within the relevant market. *15 U.S.C. § 2*. The question of whether monopoly power exists depends heavily upon market **[*38]** share and barriers to entry. *Oahu Gas Serv., Inc., 838 F.2d at 366*; see also *Rebel Oil, 51 F.3d at 1437*. A lesser showing of market power is required in an attempt case than in an actual monopolization case. [16] *Rebel Oil, 51 F.3d at 1438*. Entry barriers are "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Id. at 1439*. In order to demonstrate sufficient barriers to entry, "the plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output to challenge the predator's high price." *Id.*

[16] A market share of less than 50% in an actual monopolization case, and a market share of less than 30% in an attempted monopolization case, will generally be deemed insufficient. *Rebel Oil, 51 F.3d at 1438*.

Plaintiffs have demonstrated that a genuine issue of material fact exists with regard to defendants' **[*39]** monopoly power. Plaintiffs have presented evidence that association members owned and operated 289 of approximately 300 vessels in the District 10 fleet. Dooley Decl. at P7; Sheer Decl., Exhs. Q, U, V, W, and X. This amounts to a 96% market share, and it is well within the range that would allow defendants to exercise actual monopoly power over the local San Francisco fresh crab market. In addition, plaintiffs have put forward sufficient evidence to create a genuine issue of material fact as to barriers to entry. Plaintiffs have presented evidence that defendants prevented non-local fishermen, including Dooley, from selling crab to local buyers during the tie-ups. Bruno Decl. at P7; Dooley Decl. at P12. They have also presented evidence that defendants encouraged local buyers not to purchase crab from fishermen during the tie-ups. Bruno Decl. at P6; L. Fortado Decl. at P5; Scach Decl. at P6. Based on the evidence of defendants' market share and barriers to entry, a reasonable factfinder could determine that defendants have acquired monopoly power within the relevant market.

3. Anticompetitive Conduct

HN15[] A violation of the *Sherman Act* also requires a showing of anticompetitive conduct. **[*40]** *Verizon Communications, Inc., 124 S. Ct. at 879*. While competition among rivals does not violate the *Sherman Act*, a reduction of competition which harms consumer welfare does contravene the Act. *Rebel Oil, 51 F.3d at 1433* ("An act is deemed anticompetitive under the *Sherman Act* only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality."). Thus, a plaintiff must demonstrate a "significant and more-than-temporary harmful effect on competition," not just on a competitor or consumer. *American Prof'l Testing, 108 F.3d at 1151*; see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (9th Cir. 1993)* ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'"); *Oahu Gas Serv., 838 F.2d at 370* ("The goal of antitrust laws, however, unlike that of **[*41]** business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."). Therefore, it is necessary to consider defendants' conduct not only as it relates to plaintiffs, but also as it impacts consumers and competition overall. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. A company engages in predatory behavior when it attempts to "exclude rivals on some basis other than efficiency."*Id.* Thus, exclusionary conduct includes behavior that not only tends to impair the opportunities of rivals, but also fails to further competition or furthers competition in an unnecessarily restrictive manner. *Id. at 605 n.32* (citations omitted).

Plaintiffs have demonstrated a genuine issue of material fact as to whether defendants' alleged conduct is anticompetitive and may have a long-term harmful effect on competition. Defendants engaged in tie-ups that restrained the sale of crab. They also allegedly organized and participated in boycotts of consumers who purchased crab from fishermen not participating in the tie-ups, including Three Captains and J&S. **[*42]** See L. Fortado Decl. at PP5, 7; Schach Decl. at P12. Furthermore, defendants allegedly threatened fishermen and purchasers and committed tortious acts, including cutting Dooley's crab pot lines. See Schach Decl. at P6; L. Fortado Decl. at P5; Dooley Decl. at PP16, 21. These allegations, if true, would have harmed competition by preventing crab from reaching market at a competitive price, by intentionally harming those consumers that purchased crab during the tie-ups, and by attempting to keep northern fishermen who only fished for crab in the relevant market between November 15th and December 1st from competing with local fishermen. Plaintiffs have thus raised a genuine issue of material fact as to whether defendants intended to acquire monopoly power.

4. Antitrust Injury

HN16[] In order to recover under the *Sherman Act*, a plaintiff must demonstrate antitrust injury. *Rebel Oil, 51 F.3d at 1433*; *Gray v. Shell Oil Co., 469 F.2d 742, 748-49 (9th Cir. 1972)*. To prove antitrust injury, plaintiffs must prove that their loss flowed from the defendants' anticompetitive conduct. *Rebel Oil, 51 F.3d at 1433*. The conduct that causes the **[*43]** injury must also adversely affect competition. *Id.* Plaintiffs have demonstrated sufficient evidence of antitrust injury. In particular, plaintiffs have proffered evidence that they incurred approximately $ 218,000 in damages as a result of the losses associated with the cutting of their crab pot lines. Sheer Decl., Exh. Y. Defendants' anticompetitive conduct also caused their injury. Plaintiffs have presented evidence that defendants intended to exclude non-local fishermen from fishing in District 10 and engaged in the tie-ups in order to keep these fishermen out of the relevant market. Dooley Decl. at P21; Whaley Dep. at 47; Cannia Dep. at 33. Based on this evidence, a reasonable factfinder could conclude that defendants cut plaintiffs crab pot lines in order to exclude Dooley from competing with defendants. Such conduct adversely affects competition by limiting the crab available to consumers and thus driving up the price of crab.

5. Standing

While neither Caitlin Ann's crewmembers nor Dooley, as an individual, have standing to bring an antitrust action against defendants, Caitlin Ann LLC does have standing. **HN17**[] In order to maintain an antitrust action, the injured party must **[*44]** be a participant in the same market as the defendants. *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir. 1987)*. While sellers of the crab are considered part of the same market as defendants, individual crewmembers of fishing vessels are not. *See id.* The crewmembers lack standing to bring an antitrust action.

Dooley also lacks standing to sue in his capacity as an individual or as a shareholder of Caitlin Ann LLC. **HN18**[] "A shareholder of a corporation injured by an antitrust violation does not have standing to sue." *Vinci v. Waste Management, Inc., 80 F.3d 1372, 1375 (9th Cir. 1996)*. "This rule applies even if the injured shareholder is the sole shareholder or if the shareholder alleges that the antitrust violations were intended to drive the individual out of the industry." *Id.* (citations omitted).

D. Claim for Violation of *Section 1 of the Sherman Act*

HN19[] *Section 1 of the Sherman Act* prohibits parties from entering into agreements and conspiracies that unreasonably restrain trade. *15 U.S.C. § 1*; *Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 767-68, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. **HN20**[] Courts analyze agreements or **[*45]** conspiracies to restrain trade under either the "per se rule" or the "rule of reason." *Thurman Indus., 875 F.2d at 1373*. Courts evaluate concerted activity under *section 1* more rigorously than under *section 2*, and may hold that certain agreements are so inherently anticompetitive that they are illegal per se without further inquiry into the harm they have actually caused. *Copperweld Corp., 467 U.S. at 768*.

Plaintiffs have raised a genuine issue of material fact as to whether defendants' conduct is per se illegal under *section 1 of the Sherman Act* because defendants fixed prices and attempted to exclude competing fishermen from the market. [17] **[*47]** *Local 36 of Int'l Fishermen & Allied Workers of America v. United States, 177 F.2d 320 (9th Cir 1949)*, presents a set of facts highly analogous to the present situation. In that case, a fishermen's cooperative conspired to fix and maintain noncompetitive prices for fresh fish and to exclude non-cooperative members from the market. *Id. at 327*. The cooperative used coercive means to accomplish these objectives, including the use of picketing, boycotting and unconcealed threats **[*46]** of violence and pressure. *Id. at 328*. The Ninth Circuit held that "where a complaint charges that defendants have engaged in price fishing, or have concertedly refused to deal with nonmembers of an association . . . the amount of commerce involved is immaterial because such restraints are per se illegal." *Id. at 331*. The court concluded not only that the conspiracy to fix prices constituted a per se violation of *section 1*, but also that the exclusion of other fishermen from the market violated the statute. *Id. at 331*. [18]

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[17] Because the court concludes that a reasonable factfinder could find that defendants' acts were per se illegal, the court need not engage in a "rule of reason" analysis. *See Local 36 of Int'l Fishermen & Allied Workers of America, 177 F.2d at 331*. The court notes in addition that plaintiffs have demonstrated a genuine issue of material fact under the rule of reason analysis, because a jury could conclude that defendants' anticompetitive conduct restrained competition within the relevant market. See *Thurman Indus., 875 F.2d at 1373*; *Morgan, Strand, Wheeler & Biggs, 924 F.2d at 1489*.

[18] Other cases have also held that associations of fishermen that combined to fix the price of fish violated *section 1 of the Sherman Act*. See e.g., *Hinton v. Columbia River Packers Ass'n, Inc., 131 F.2d 88, 89 (9th Cir. 1942)* (holding that a union of fishermen violated *section 1* by combining to fix the price of fish and control the sale of fish because such actions deprived consumers of "the advantages which accrue to them from free competition in the market"); *Manaka v. Monterey Sardine Ind.,*

Like the fishermen's cooperative in *Local 36*, the CBOA, FMABB and HMBFMA combined and voted to fix the price of crab. They also allegedly engaged in "tie-ups" designed to increase the price of crab in the market, and used both unconcealed threats and violence to exclude plaintiffs from the market. In particular, **[*48]** defendants allegedly threatened plaintiffs and their customers, and cut plaintiffs crab pot lines. A reasonable jury could find that these acts constitute per se violations of *section 1 of the Sherman Act* because they deprive consumers of fair prices for crab and adversely affect competition within the fresh crab market. [19]

[*49] E. State Antitrust Claims

Defendants claim that plaintiffs' state ***antitrust law*** claim under *section 16750* of the California Business and Professions Code (the "Cartwright Act") fails for the same reasons the federal antitrust claim fails. ***HN21***[] "The Cartwright Act is patterned after the *Sherman Act*, and 'federal cases interpreting the *Sherman Act* are applicable to problems arising under the Cartwright Act.'" *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1092 (9th Cir. 2000)* (citing *Marin County Bd. of Realtors v. Palsson, 16 Cal. 3d 920, 130 Cal. Rptr. 1, 549 P.2d 833 (1976))*. Neither party contends that the analysis under state ***antitrust law*** differs from the analysis under the *Sherman Act*. Thus, defendants' motion for summary judgment in regard to plaintiffs' *section 16750* claim fails for the same reasons stated by the court in sections I(C) and I(D).

F. *California Business and Professions Code Section 17200* Claim

Defendants claim that plaintiffs have not presented any evidence indicating that they engaged in "unfair, unlawful or fraudulent" business practices in violation of *section 17200* of the California Business **[*50]** and Professions Code. ***HN22***[] "*Section 17200* borrows violations from other laws by making them independently actionable as unfair competitive practices." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* (citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*. An action may also be deemed unfair even if it does not amount to a violation of some other law. *Id.* Defendants argue that plaintiffs' *section 17200* claim fails because plaintiffs have not presented sufficient evidence to support either its RICO or federal antitrust claims or otherwise demonstrated that defendants engaged in unfair business practices. They also argue that the damages requested by plaintiffs are not recoverable under *section 17200*. Plaintiffs claim a total of $ 218,292 in compensatory damages as a result of not being able to fish due to the cutting of their crab pot lines. ***HN23***[] Under California's Unfair Competition Laws, damages are limited to restitution. *Id. at 1144*. Thus, even if plaintiffs could demonstrate a genuine issue of material fact as to defendants' violation of *section 17200*, their request for compensatory **[*51]** relief would not be recoverable. The court therefore grants defendants motion for summary judgment as to plaintiffs *section 17200* claim.

G. State Tort Claims

Inc., 41 F. Supp. 531, 534 (N.D. Cal. 1941) (Fee, J.) (holding that an association of sardine fishermen could be held liable under the antitrust laws for fixing the price at which sardines were to be sold and excluding non-local competitors from the market).

[19] Defendants claim that they are not liable under *section 1 of the Sherman Act* because the activity of the associations should be considered the activity of a single firm under the Fisherman's Collective Marketing Act ("FCMA"), *15 U.S.C. §§ 521-22*. Defendants cite *Maryland and Virginia Producers Assoc., Inc. v. United States, 362 U.S. 458, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)*, for the proposition that they should not be liable under that Act. While that Act does give individual fishermen joining in a cooperative or association the same rights as other business entities, it does not provide them with immunity for antitrust violations. *Maryland and Virginia Producers Assoc., 362 U.S. at 466-67* ("In the event that associations authorized by this bill shall do anything forbidden by the *Sherman Antitrust Act*, they will be subject to the penalties imposed by that law."). Nor does it allow them to join collectively so as to use a monopoly position to suppress competition. *Id. at 472* ("We hold that the privilege the *Capper-Volstead Act* grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors."); see also *Hinton v. Columbia River Packers Ass'n, Inc., 131 F.2d 88, 89 (9th Cir. 1942)* (holding that fishermen acting together as a union to fix prices were not exempt from *section 1 of the Sherman Act* by virtue the FCMA).

Plaintiffs bring four state tort claims: (1) intentional interference with contractual relations; (2) intentional interference with prospective economic advantage; (3) conversion; and (4) trespass to chattels. The court will address each in turn.

1. Intentional Interference With Contractual Relations

Plaintiffs claim that defendants unlawfully and intentionally interfered with their contract with Exclusive Fresh. ***HN24***[] Intentional interference with contractual relations requires that the plaintiff demonstrate (1) a valid contract between the plaintiff and a third party; (2) defendants knowledge of the contract; (3) intentional acts designed to induce breach or disrupt the contractual relationship; (4) actual breach or disruption of the relationship; and (5) resulting damage. *Pacific Gas and Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*. While plaintiffs have demonstrated that they had a contract with Exclusive Fresh and that defendants interfered with this contract, **[*52]** see Bruno Decl. at PP2, 7, they have not presented evidence of damages flowing from the loss of the contract. With regard to damages, plaintiffs' evidence is limited to damages suffered as a result of lost crab pots and gear. See Sheer Decl., Exh. Y. These damages do not relate directly to the breach of plaintiffs' contract with Exclusive Fresh. Plaintiffs have failed to demonstrate a genuine issue of material fact as to this claim because they have not presented sufficient evidence of resulting damages. Therefore, the court grants defendants' motion for summary judgment on plaintiffs' claim for intentional interference with contractual relations.

2. Intentional Interference with Prospective Economic Advantage

Plaintiffs claim that defendants intentionally interfered with plaintiffs prospective sales of crab in the San Francisco Bay Area. ***HN25***[] Intentional interference with prospective economic advantage requires (1) an existing economic relationship or one containing the probability of future economic benefit; defendants' knowledge of the relationship; (2) acts designed to disrupt the relationship; (3) actual disruption of the relationship; and (4) damages proximately caused **[*53]** by the defendants. *Accuimage Diagnostics Corp. v. Terarecon, Inc.. 260 F. Supp. 2d 941, 956 (N.D. Cal. 2003)* (Patel, J.) (citing *Della Penna v. Toyota Motor Sales, U.S.A., 11 Cal. 4th 376, 380 n.1, 391-92, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995))*. A plaintiff must demonstrate that defendants' conduct was wrongful by some legal measure; it is not sufficient to prove merely interference itself. *Della Penna, 11 Cal. 4th at 393*. A plaintiff may prove that a defendants' conduct was independently wrongful by presenting evidence that defendants' actions fell outside of the realm of legitimate business transactions. *Gemini Aluminum Corp. v. California Custom Shapes, Inc., 95 Cal. App. 4th 1249, 1258, 116 Cal. Rptr. 2d 358 (Cal. Ct. App. 2002)*. In this case, plaintiffs have presented sufficient evidence upon which a reasonable factfinder could conclude that defendants engaged in wrongful acts by participating in coercive tie-ups; threatening prospective customers, fishermen and others; and utilizing allegedly violent tactics to pressure competitors to abide by prices set by the associations. Furthermore, defendants intentionally interfered with plaintiffs' contract with Exclusive **[*54]** Fresh. However, while plaintiffs have produced evidence that they suffered damages as a result of the cutting of their crab pot lines, they have presented no evidence of damage to prospective economic relationships. Plaintiffs have failed to demonstrate a genuine issue of material fact as to this claim. Thus, the court grants defendants' motion for summary judgment with respect to plaintiffs' claim for intentional interference with prospective economic advantage.

3. Conversion & Trespass to Chattels

Defendants argue that they are not liable for conversion or trespass to chattels because plaintiffs have not demonstrated that any of the associations or individual defendants were responsible for cutting plaintiffs' crab pot lines. In order to succeed on a claim of conversion, a plaintiff must demonstrate that defendants actually interfered with plaintiffs' dominion or control over her property. 5 Bernard E. Witkin, Summary of California Law § 610 (9th ed. 1990). Trespass to chattels, although rarely applied in California, requires a plaintiff to show that defendants' intentional interference with personal property proximately caused injury. Id. at § 627(A). In this case, **[*55]** plaintiffs have presented evidence that Whaley cut plaintiffs crab pot lines. Whaley Dep. at 50-51; Cannia Dep. at 38, 39; Sheer Decl., Exh. Z. Plaintiffs suffered financial losses as a result of losing their crab gear. Sheer Decl., Exh. Y. Based on this evidence, a reasonable factfinder could conclude that Whaley is liable for either conversion or trespass to chattels. Plaintiffs have not demonstrated that any other defendant involved in this suit proximately caused plaintiffs injuries stemming from the cutting of plaintiffs' crab pot lines. Thus, the court denies defendants' motion for summary judgment with respect to Whaley and grants defendants' motion with respect to all other defendants.

II. HMBFMA's Counterclaims

HMBFMA alleges that counterdefendants engaged in unlawful or unfair business practices pursuant to the California Unfair Competition Act ("UCA"), *Cal. Bus. & Prof. Code § 17200 et seq.*, by (1) engaging in predatory pricing in violation of *section 17043* of the California Business and Professions Code; and (2) procuring a permit for a fishing vessel equipped with a trawling net in violation of *section 8280.1* of the California **[*56]** Fish and Game Code. [20]

A. Predatory Pricing

HN26[] To succeed on a claim of predatory pricing under *section 17043* of the California Business and Profession Code, a plaintiff must prove both that the seller (1) sold its product below cost, and (2) had the purpose of injuring competitors or destroying competition. *Cal. Bus. & Prof. Code § 17043*. To meet the cost requirement, the vendor must have sold below his or her own fully allocated or fully distributed cost. *Turnbull & Turnbull v. ARA Transp., Inc., 219 Cal. App. 3d 811, 819-20, 268 Cal. Rptr. 856 (1990)*. Cost includes the cost of raw materials, labor and all overhead expenses. *Cal. Bus. & Prof. Code § 17026* **[*57]** . Overhead expenses include labor, rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, deliver costs, credit losses, all types of licenses, taxes, insurance and advertising. *Cal. Bus. & Prof. Code § 17029*. California's fully allocated cost standard includes both fixed and variable costs attributable on an average basis to each unit of output. *Pan Asia Venture Capital Corp. v. Hearst Corp., 74 Cal. App. 4th 424, 432, 88 Cal. Rptr. 2d 118 (Cal. Ct. App. 1999)*. Stated simply, cost includes "the initial expense of producing the article together with its share of the load of carrying on the business through which it is sold."*Id.* Determination of cost is an issue of fact. Id. To meet the purpose requirement, the vendor "must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 175, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Where the plaintiff proves both below cost sales and injurious effect, the court may infer an intent to injure competitors or destroy competition. *Cal. Bus. & Prof. Code § 17071* **[*58]** . ***HN27***[] Whether the sale was "conducted with the purpose of injuring competitors" and "had the tendency or capacity to injure the plaintiff" are usually questions of fact. *Fisherman's Wharf Bay Cruise Corp. v. Superior Court, 114 Cal. App. 4th 309, 327, 7 Cal. Rptr. 3d 628 (Cal. Ct. App. 2003)*.

While HMBFMA has presented evidence that counterdefendants sold crab below cost, they have not raised a genuine issue of material fact as to whether counterdefendants intended to injure competitors or destroy competition. Counterdefendants claim that for the years 1999 to 2001, the Caitlin Ann sold crab for a profit, earning $ 108,166.68 in 1999, $ 45,820.55 in 2000, and $ 20,845.53 in 2001. In response, HMBFMA has presented evidence that counterdefendants did not include all fixed costs in their expenses related to fishing for crab because Dooley believed the primary business to be pollock fishing in Alaska, and only intended to operate the vessel in the crab fishery to earn a profit above variable costs. Dooley Decl. P6. HMBFMA has presented evidence that counterdefendants operated at a loss, based on their fully-allocated cost, for the years 1999 to 2001. Greene Decl. P3, Exh. C. HMBFMA's evidence **[*59]** suggests that counterdefendants' variable and allocated fixed costs exceeded revenues by $ 16,670 in 1999, $ 50,223 in 2000 and $ 81,371 in 2001. Id. HMBFMA's estimation of costs appears to be reasonable.

Even if HMBFMA's figures are correct, however, a reasonable juror could not determine that counterdefendants engaged in predatory pricing because HMBFMA has not presented sufficient evidence to show that counterdefendants intended to injure competitors or destroy competition. While intent may be presumed from below cost sales and evidence of an injurious effect on competition, HMBFMA has presented no evidence that counterdefendants were capable of injuring competition. See *Cal. Bus. & Prof. Code § 17071*. HMBFMA claims that

[20] In defendants' opposition papers, HMBFMA states that it no longer intends to pursue its claim that Dooley fished in a wantonly wasteful and destructive manner in 1999 or that he threatened to harm and actually did harm defendants' fishing gear by trawling of the coast off Central California.

counterdefendants injured competition by depleting the ocean of available crab. While they have put forward evidence that counterdefendants sold approximately 150,000 pounds of crab over the course of a three-year period (1999 to 2001), Greene Decl., Exh. B, they have not shown that this amount of crab constitutes a substantial amount of market share. In fact, counterdefendants have demonstrated that they had only a negligible **[*60]** market share within the San Francisco crab market and that they only fished for crab during the beginning of the season. Dooley Decl. at PP4, 7. Even if the court were to assume that counterdefendants sold all of the crab caught between 1999 and 2001 below cost, HMBFMA has failed to show how this would negatively impact competition. Caitlin Ann is only one boat out of three hundred, and there are, of course, other crabs in the sea. Because HMBFMA has not demonstrated that counterdefendants were capable of injuring competitors or destroying competition they have not raised a genuine issue of material fact in regard to their predatory pricing claim. [21]

[*61] B. Violation of Permit Requirements

HN28[] A business practice violates the UCA if it violates another provision of California law. [22] **[*62]** *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal. 4th 553, 560, 71 Cal. Rptr. 2d 731, 950 P.2d 1086 (1998)*. HMBFMA alleges that counterdefendants engaged in unlawful business practices when they violated *section 8280.1* of the California Fish and Game Code by procuring and renewing a permit for Dungeness crab with a vessel that was equipped with a trawling net. [23] HMBFMA also alleges that counterdefendants transferred the permit from Dooley to Caitlin Ann LLC in violation of *section 8280.1*. A Dungeness crab permit may be issued to someone with a commercial fishing license that has not been suspended or revoked who is, "at the time of application, the owner of a fishing vessel that is not equipped for trawling with a net." *Cal. Fish & Game Code § 8280.1(b)(3)*. A fisherman may have only one Dungeness crab permit, and that permit is nontransferable. Id.

HMBFMA has not produced sufficient evidence to create a genuine issue of material fact with regard to whether counterdefendants violated *section 8280.1*. In its previous order, the court ordered HMBFMA to submit declarations explaining the reasonable basis for its unlawful business practices allegations. HMBFMA's has produced a declaration by Duncan Maclean, in which he states that he observed the Caitlin Ann was equipped with a trawl net. Maclean Decl. at P5. Neither the United States Coast Guard documents attached to Maclean's declaration nor the California Fish and Game Records submitted by Dooley support HMBFMA's claim that counterdefendants violated the statute. Maclean Decl., Exh. 7; Dooley Decl., Exh. 1. HMBFMA has presented no other evidence that the vessel was equipped with a trawl net at the time Dooley applied for the permit for the Caitlin Ann. [24] Therefore, HMBFMA has not demonstrated a genuine issue of material fact in regard **[*63]** to whether Dooley procured or renewed a permit in violation of *section 8280.1*.

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[21] In their moving papers, counterdefendants argued that any below cost sales were made in a good faith effort to meet the price of competitors. See *Cal. Bus. & Prof. Code § 17050(d)*. The Court need not address this defense in light of the conclusion that HMBFMA has failed to demonstrate a genuine issue of material fact with regard to its predatory pricing claim.

[22] *Section 17200* also prohibits unfair business practices. *Cal. Bus. & Prof. Code § 17200*. HMBFMA has not demonstrated that counterdefendants' conduct was unfair within the meaning of the statute because they have not presented any evidence that counterdefendants' alleged procuring of a permit or transferring of that permit threatened an incipient violation of the antitrust laws or violated the policy or spirit of the law in a way that is comparable to a violation of the law or otherwise significantly threatened or harmed competition. See *Cel-Tech Communications, Inc., 20 Cal. 4th at 187*.

[23] It is undisputed that the Caitlin Ann had a Dungeness crab permit, issued by the Department of Fish and Game, for 1999, 2000 and 2001. Dooley Decl., Exh. 1.

[24] As this court noted in its prior order:

> To the extent HMBFMA alleges that counterdefendants' crab fishing without a valid permit was an unlawful business practice, this is not a separate cognizable claim. *Section 8280.1* does not prohibit fishing for crab with a vessel that has a trawl net. The unlawful business practice at issue is procuring a permit for a vessel that at the time has a trawl net, in violation of *section 8280.1*.

Furthermore, HMBFMA has not demonstrated a genuine issue of material fact as to whether Dooley unlawfully transferred the permit. They allege that the permit was originally issued to Dooley and that the permit must have been illegally transferred to the Caitlin Ann LLC, based on the statement in plaintiffs' complaint that "Caitlin Ann is the registered owner of the fishing vessel F/V CAITLIN ANN." Dooley is the managing member of the Caitlin Ann LLC. HMBFMA has not presented any evidence that **[*64]** Dooley and Caitlin Ann LLC are separate entities for purposes of the permit. Even if HMBFMA had presented such evidence, such a distinction would not alter the fact that the Dooley had a valid permit to fish for Dungeness Crab with the Caitlin Ann for the years 1999, 2000 and 2001. HMBFMA has not presented sufficient evidence to demonstrate that counterdefendants violated*section 8280.1 of the California Fish and Game Code*. Therefore, HMBFMA has not raised a genuine issue of material fact as to whether counterdefendants violated *section 17200* of the California Business and Professions Code. [25]

CONCLUSION

Defendants' motions for summary judgment are GRANTED in part and DENIED in part. Counterdefendants' motion for summary judgment is GRANTED. In particular, the court holds as follows:

1. Defendants' motions for summary judgment **[*65]** with respect to plaintiffs' claim that defendants violated *section 1962(c) of Title 18 of the United State Code* are GRANTED with respect to Todd Whaley, Jim Salter, Robert N. Miller, Michael McHenry, David Bettencourt, Larry Collins, William Wise, and George Boos. The motions are DENIED with respect to CBOA, FMABB, HMBFMA, John Morgan, Morgan Fish Company, Inc., Michael McHenry, and John T. Tarantino.

2. Defendants' motions for summary judgment with respect to plaintiffs' claim that defendants violated *section 1962(d) of Title 18 of the United State Code* are GRANTED with respect to Robert N. Miller, Larry Collins, William Wise, and George Boos. The motions are DENIED with respect to all other defendants.

3. Defendants' motions for summary judgment with respect to plaintiffs' *Sherman Act* claims are DENIED with respect to all defendants.

4. Defendants' motions for summary judgment on plaintiffs' *California Business and Professions Code sections 17043and 17200* claims and on plaintiffs' claims for intentional interference with contract and prospective economic advantage are GRANTED with respect to all defendants.

5. Defendants' motions **[*66]** for summary judgment on plaintiffs' conversion and trespass to chattels claims are DENIED with respect to Todd Whaley and GRANTED with respect to all other defendants.
6. Counterdefendants' motion for summary judgment is GRANTED with respect to all of HMBFMA's counterclaims.

IT IS SO ORDERED.

Dated: April 26, 2004

/s/

MARILYN HALL PATEL

Chief Judge

United States District Court

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[25] Defendants have also failed to present any evidence of damages resulting from plaintiffs' alleged violation of *section 17200* that would be compensable under the UCA.

Northern District of California

LexisNexis®

Commonwealth Elec. Inspection Servs. v. Town of Clarence

Supreme Court of New York, Appellate Division, Fourth Department

April 30, 2004, Decided ; April 30, 2004, Entered

CA 03-01710

Reporter

6 A.D.3d 1185 *; 776 N.Y.S.2d 687 **; 2004 N.Y. App. Div. LEXIS 6152 ***; 2004-1 Trade Cas. (CCH) P74,394

In the Matter of Commonwealth Electrical Inspection Services, Inc., et al., Appellants, v. Town of Clarence et al., Respondents. (Appeal No. 1.)

Subsequent History: Subsequent appeal at *Commonwealth Elec. Inspection Servs. v. Town of Clarence, 6 A.D.3d 1187, 775 N.Y.S.2d 723, 2004 N.Y. App. Div. LEXIS 6154 (N.Y. App. Div. 4th Dep't, Apr. 30, 2004)*

Core Terms

dismiss a petition, summary judgment motion, respondents', state ***antitrust law***, alleged violation, anti trust law, court properly, municipalities, ordinance

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN1[] **Regulated Practices, Monopolies & Monopolization**

Federal antitrust claims are within the exclusive jurisdiction of the federal courts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

See *N.Y. Gen. Bus. Law § 340(1)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Public Enforcement, State Civil Actions**

The statutory term "arrangement," in *N.Y. Gen. Bus. Law § 340(1)*, like the statutory terms "contract," "agreement," and "combination," refers to bilateral conduct and does not connote "a one-sided practice."

Headnotes/Summary

Headnotes

Courts--Jurisdiction.--Proceeding to invalidate certain actions undertaken by municipalities dismissed insofar as it alleged violation of federal ***antitrust law*** since federal antitrust claims are within exclusive jurisdiction of federal courts.

Monopolies--Donnelly Act.--Proceeding to invalidate certain actions undertaken by municipalities dismissed insofar as it alleged violation of state ***antitrust law***, known as Donnelly Act (*General Business Law § 340 et seq.*) since petitioners failed to state cause of action for violation of Donnelly Act; action taken by municipalities, consisting of enactment of particular ordinance, was purely unilateral and thus was not accomplished by means of essential statutorily proscribed "contract, agreement, arrangement or combination."

Counsel: ANTHONY J. EMMI, GRAND ISLAND, FOR PETITIONERS-APPELLANTS.

BENNETT, DI FILIPPO & KURTZHALTS, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Judges: Present--Green, J.P., Wisner, Hurlbutt, Kehoe and Lawton, JJ.

Opinion

[*1185] [687]** Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Robert E. Whelan, J.), entered December 5, 2002 in a proceeding pursuant to *CPLR article 78*. The judgment granted respondents' motion for summary judgment dismissing the petition.

It is hereby ordered that the judgment so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Petitioners commenced this *CPLR article 78* proceeding seeking to invalidate certain actions undertaken by two municipalities on the ground that the actions violated **[**688]** federal and state ***antitrust law***. Petitioners appeal from a judgment granting the motion of respondents for summary judgment dismissing the petition on the merits and with prejudice. In addition, Supreme Court in its written decision concluded "that respondents **[***2]** are [permitted] to enact such ordinances as are necessary to limit electrical inspection and certification services to a single entity such as the New York Board of Fire Underwriters."

We conclude that the court properly granted that part of respondents' motion for summary judgment dismissing the petition insofar as it alleges a violation of federal ***antitrust law***, but for a different reason. ***HN1***[] Federal antitrust claims are within the **[*1186]** exclusive jurisdiction of the federal courts (*see Marrese v American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379-380, 84 L. Ed. 2d 274, 105 S. Ct. 1327 [1985], reh denied 471 U.S. 1062 [1985]*; *Freeman v Bee Mach. Co., 319 U.S. 448, 451 n 6, 87 L. Ed. 1509, 63 S. Ct. 1146 [1943], reh denied 320 U.S. 809, 88 L. Ed. 489, 64 S. Ct. 27 [1943]*; *General Inv. Co. v Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286-288, 67 L. Ed. 244, 43 S. Ct. 106, 1 Ohio Law Abs. 162 [1922]*; *Simpson Elec. Corp. v Leucadia, Inc., 72 N.Y.2d 450, 456-458, 530 N.E.2d 860, 534 N.Y.S.2d 152 [1988]*; *Capital Tel. Co. v Pattersonville Tel. Co., 81 A.D.2d 970, 971, 439 N.Y.S.2d 759 [1981], affd 56 N.Y.2d 11, 436 N.E.2d 461, 451 N.Y.S.2d 11 [1982]*; *Theatre Confections v Andrea Theatres, 126 A.D.2d 969, 511 N.Y.S.2d 744 [1987]*). Although the issue was not raised by the litigants or addressed **[***3]** by the court, we address the exclusively federal nature of the claim sua sponte inasmuch as it goes to the subject matter jurisdiction of the court (*see Matter of Fry v Village of Tarrytown, 89 N.Y.2d 714, 718, 680 N.E.2d 578, 658 N.Y.S.2d 205 [1997]*; *Matter of Reis v Zimmer, 263 A.D.2d 136, 144, 700 N.Y.S.2d 609 [1999], amended 270 A.D.2d 968, 710 N.Y.S.2d 259 [2000]*; *see generally CPLR 3211 [a] [2]*).

We further conclude that the court properly granted that part of respondents' motion for summary judgment dismissing the petition insofar as it alleges a violation of state ***antitrust law***, known as the Donnelly Act (*General Business Law § 340 et seq.*), but again for a different reason. Petitioners have failed to state a cause of action for violation of the *Donnelly Act* (*see CPLR 3211 [a] [7]*; *North Atl. Util. v Keyspan Corp., 307 A.D.2d 342, 343, 762 N.Y.S.2d 820 [2003]*, *lv denied 1 N.Y.3d 503, 807 N.E.2d 893, 775 N.Y.S.2d 780 [2003]*; *Pharmacists' Assn. of W. N.Y. v Blue Cross of W. N.Y., 112 A.D.2d 728, 729, 492 N.Y.S.2d 221 [1985]*). *General Business Law § 340 (1)* provides that ***HN2***[] "[e]very contract, agreement, arrangement or combination" is illegal **[***4]** and void insofar as it establishes and maintains a monopoly or restrains competition or trade. We conclude that the action taken by each of the municipalities in this case, consisting of the enactment of a particular ordinance, was purely unilateral and thus was not accomplished by means of the essential statutorily proscribed "contract, agreement, arrangement or combination" (*id.*; *see State of New York v Mobil Oil Corp., 38 N.Y.2d 460, 464, 344 N.E.2d 357, 381 N.Y.S.2d 426 [1976]*; *see also Hall Heating Co. v New York State Elec. & Gas Corp., 180 A.D.2d 957, 958, 580 N.Y.S.2d 528 [1992]*; *Pharmacists' Assn. of W. N.Y., 112 A.D.2d at 729*; *cf. Englert v City of McKeesport, 872 F.2d 1144, 1149-1152 [1989]*, *cert denied 493 U.S. 851, 107 L. Ed. 2d 108, 110 S. Ct. 149 [1989]* [interpreting analogous provisions of federal ***antitrust law*** in circumstances identical to those at bar]). We note that ***HN3***[] the statutory term "arrangement," like the statutory terms "contract," "agreement," and "combination," refers to bilateral conduct and does not connote "a one-sided practice" **[**689]** such as that challenged by petitioners in this case (*Mobil Oil Corp., 38 N.Y.2d at 464*).

In view of our determination, **[***5]** we do not address the parties' **[*1187]** remaining contentions.

Present--Green, J.P., Wisner, Hurlbutt, Kehoe and Lawton, JJ.

Harrison Aire, Inc. v. Aerostar Int'l, Inc.

United States District Court for the Eastern District of Pennsylvania

April 30, 2004, Decided ; April 30, 2004, Filed; May 3, 2004, Entered

CIVIL ACTION NO. 02-1258

Reporter

316 F. Supp. 2d 186 *; 2004 U.S. Dist. LEXIS 8431 **; 2004-2 Trade Cas. (CCH) P74,475

HARRISON AIRE, INC., Plaintiff, v. AEROSTAR INTERNATIONAL, INC., and RAVEN INDUSTRIES, INC., Defendants.

Subsequent History: Affirmed by *Harrison Aire, Inc. v. Aerostar Int'l, 2005 U.S. App. LEXIS 19903 (3d Cir. Pa., Sept. 16, 2005)*

Disposition: Defendants' motion for summary judgment was granted.

Core Terms

fabric, balloon, replacement, Defendants', Aerostar, manufacturer, envelope, hot air, repair, third-party, Airworthiness, antitrust, anti trust law, replacement part, Instructions, regulations, immunity, manual, anticompetitive, hot air balloon, summary judgment, aircraft, Custom, monopoly, parties, air, buy, monopolization, Limitations, aviation

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN1[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A parent company and its wholly owned subsidiary are incapable of conspiring with each other for antitrust purposes.

Transportation Law > Air & Space Transportation > Airships, Balloons & Blimps

Transportation Law > Air & Space Transportation > Aviation Certificates > Airworthiness Certificates

Transportation Law > Air & Space Transportation > Maintenance & Safety

Transportation Law > Air & Space Transportation > US Federal Aviation Administration > Authorities & Powers

HN2[] **Air & Space Transportation, Airships, Balloons & Blimps**

The language of Federal Aviation Administration (FAA) regulations makes clear the FAA has created a mechanism by which third-parties can be approved to manufacture and sell replacement parts for hot air balloons. The Federal Rules of Aviation do not mandate that replacement fabric has to be of the same manufacture as the balloon, nor could any manufacturer impose such a requirement in their Instructions for Continued Airworthiness manuals (ICAs), given that the ICAs need not be followed strictly by their owners.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN3[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. A factual dispute is "material" if it might affect the outcome of the case under governing law.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4[] **Summary Judgment, Burdens of Proof**

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

On a motion for summary judgment, where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by pointing out to the district court that there is an absence of evidence to support the non-moving party's case. After the moving party has met its initial burden, the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

HN6[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN7[] **Summary Judgment, Entitlement as Matter of Law**

Under *Fed. R. Civ. P. 56*, the court must view the evidence presented on the motion in the light most favorable to the opposing party.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN8[] **Regulated Practices, Private Actions**

A plaintiff's claim is viable under the federal antitrust provisions only if suit is commenced within four years after the cause of action accrued, *15 U.S.C.S. § 15(b)*, plus any additional number of years during which the statute of limitations is tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

To succeed on a fraudulent misrepresentation claim, the plaintiff must demonstrate that the defendants fraudulently concealed their own unlawful activities and that the plaintiff did not discover these facts despite the exercise of due diligence.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN10[] **Statute of Limitations, Time Limitations**

Generally, a cause of action accrues - and the statute of limitations begins to run - when a defendant commits an act that injures a plaintiff.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Regulated Practices, Private Actions**

In the context of a continuing antitrust violation, each time a plaintiff is injured by the act of the defendant, a cause of action accrues to the plaintiff to recover damages caused by that act. However, a suit may be brought more than four years after the events that initially created the cause of action if the defendant commits an act that by its very nature constitutes a "continuing antitrust violation." An act constitutes a "continuing antitrust violation" if it injures the plaintiff over a period of time. ***Antitrust law*** provides that in the case of a continuing antitrust violation each overt act that is part of the violation and that injures the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. A new cause of action may arise from later overt acts in furtherance of a challenged conspiracy or from each injury resulting from a continuing violation. However, to trigger a new cycle of the limitations period, the overt act must specifically affect the plaintiff and not be merely a continuation of the conspiracy. If the plaintiff suffered injury at the beginning of the continuing conspiracy but not thereafter, the plaintiff may not enjoy the benefits of an extended limitations period.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN12[] **Regulated Practices, Private Actions**

In the context of a continuing antitrust violation, each overt act starts the statutory period running again regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

The doctrine of implied immunity arises where an alleged violator of the law has acted pursuant to congressional or regulatory authority that conflicts with conduct alleged to be in violation of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN14[] Exemptions & Immunities, Parker State Action Doctrine

An express exemption to antitrust liability exists wherever Congress explicitly states that the antitrust laws will not apply to the conduct authorized by the legislation, either in general, or under the specific circumstances enumerated in the legislation. By contrast, where a Congressional statute mandates certain behavior, but omits to exempt the behavior expressly from the purview of the antitrust laws, an exemption might need to be implied in order to preserve Congress's regulatory intentions.

Banking Law > Regulators > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Conduct of Parties

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

HN15[] Banking Law, Regulators

Defendants have a heavy burden to prove an implied immunity. Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Implied antitrust immunity is restricted only to the activity challenged, and will not extend to conduct otherwise overseen by the regulatory agency. In conformance with these principles, while the United States Supreme Court has recognized implied immunity from certain prosecutions under the antitrust laws, the Court has steadfastly held that the Federal Aviation Act does not completely displace the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Exemptions & Immunities, Parker State Action Doctrine

Only where Congress has invested pervasive supervisory authority in a regulatory agency should a court conclude that Congress intended to ease liability under the Sherman Act.

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] Transportation, Common Carriers

Implied immunity from the antitrust laws is to be sparingly inferred from the enactment of a regulatory statute.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN18[] Antitrust & Trade Law, Sherman Act

The Federal Aviation Act overall does not completely displace the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > Conduct of Parties

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Antitrust

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

HN19[] Exemptions & Immunities, Parker State Action Doctrine

Immunity is implied only where the challenged conduct is subject to a regulatory scheme that expressly directs the agency to consider antitrust policies in the context of the regulated industry.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Business & Corporate Law > ... > Actual Authority > Implied Authority > General Overview

Governments > Federal Government > US Congress

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

HN20[] Exemptions & Immunities, Parker State Action Doctrine

A defendant wishing to invoke implied antitrust immunity must demonstrate that the regulatory agency was authorized by Congress to consider the anticompetitive implications of its actions and enact regulations that essentially "trumped" the antitrust laws. Under those circumstances, Congress intended the regulatory scheme to operate as a more refined, but functionally equivalent, substitute for the standard antitrust regime, and that to penalize the challenged conduct would be an invasion of the regulatory agency's competence.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN21[] Exemptions & Immunities, Parker State Action Doctrine

Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN22[] Monopolies & Monopolization, Actual Monopolization

The offense of monopoly under *15 U.S.C.S. § 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN23[] Sherman Act, Claims

In order to prevail on an attempted monopolization claim under the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power. In order to determine whether there exists a dangerous probability of achieving monopoly power, a court must inquire into the relevant product and geographic market and the defendant's economic power in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN24[] Monopolies & Monopolization, Attempts to Monopolize

A monopolist, or person attempting to monopolize, can be found liable in regard to distribution of its own product if it is (1) illegally attempting to destroy competition by refusing to deal or (2) controlling an essential service or bottleneck.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN25[] Summary Judgment, Entitlement as Matter of Law

Conclusory statements, hearsay, and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN26[] Monopolies & Monopolization, Actual Monopolization

In the context of a monopoly claim, it is the reasonable perception of the purchasers in the marketplace that are relevant in determining interchangeability.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN27[] Monopolies & Monopolization, Actual Monopolization

In the context of a monopoly claim, a plaintiff's proposed relevant market in a unique and non-interchangeable derivative product or service cannot be defeated on summary judgment by a defendant's assertion that the proposed derivative market is cross-elastic with the primary market, if there is a reasonable possibility that the defendant's assertion about cross-elasticity is factually incorrect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN28[] Tying Arrangements, Clayton Act

A tying claim can be made under both 15 U.S.C.S. §§ 1, 2.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN29[] Price Fixing & Restraints of Trade, Tying Arrangements

In a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product. The antitrust concern over tying arrangements is limited to those situations in which the seller can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN30[] Price Fixing & Restraints of Trade, Tying Arrangements

In the context of a tying claim, relevant markets generally cannot be limited to a single manufacturer's products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN31[] Price Fixing & Restraints of Trade, Tying Arrangements

There cannot be an illegal tie without monopoly power over the tying product.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN32[] **Private Actions, Remedies**

Under the antitrust laws, a plaintiff can only sue for injuries sustained as a result of that forbidden by the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN33[] **Antitrust & Trade Law, Sherman Act**

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some person. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN34[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN35[] **Private Actions, Remedies**

As part of its prima facie antitrust case, a plaintiff must show that the conduct of the defendant restrained competition generally, in addition to causing plaintiff harm. The United States Court of Appeals for the Third Circuit has said, mindful that ***antitrust law*** aims to protect competition, not competitors, the court must analyze the antitrust injury question from the viewpoint of the consumer.

Counsel: **[**1]** For Plaintiff, HARRISON AIRE, INC.: JOHN K. WESTON, SACKS WESTON SMOLINSKY, ALBERT & LUBER, LLC, PHILADELPHIA, PA.

For Defendant, AEROSTAR INTERNATIONAL, INC.: JEFFREY A. OSHIN, SPRINGFIELD, NJ. JOHN F. MC KEON, SPRINGFIELD, NJ.

For RAVEN INDUSTRIES, INC.: JEFFREY A. OSHIN, SPRINGFIELD, NJ. JOHN F. MC KEON, SPRINGFIELD, NJ.

Judges: Baylson, J.

Opinion by: Baylson

Opinion

[*188] *MEMORANDUM*

Baylson, J.

April 30, 2004

I. Jurisdiction, Procedural Background, and Summary

Plaintiff Harrison Aire, Inc., an owner and operator of hot air balloons, filed this action on March 12, 2002, alleging that Defendants Aerostar International, Inc. and Raven Industries, Inc. (Aerostar's corporate parent) operated their hot air balloon business in violation of *Sections 1and 2* of the federal antitrust laws. *15 U.S.C. §§ 1* &*2*. Plaintiff also makes state law allegations of fraud and negligence. This Court has jurisdiction over Plaintiff's claims under *28 U.S.C. §§ 1331*,*1332*, and*1337* and *15 U.S.C. § 15*. Venue is proper under *28 U.S.C. § 1391(b)*. Presently before the Court is Defendants' Motion for Summary Judgment **[**2]** (Docket No. 12). The Court held oral argument on January 27, 2004, and the parties submitted supplemental briefs on April 2, 2004.

Defendants move for summary judgment on three grounds. For the reasons which follow, Defendants' motion will be granted, and the Court summarizes its rulings as follows:

One: Defendants' contention that Plaintiff's antitrust claim is barred by the four-year statute of limitations applicable to antitrust claims is rejected as presenting an issue of fact. (*See infra* pp. 27-32.)

Two: Defendants claim that summary judgment is warranted upon application of implied immunity to Plaintiff's antitrust claims is rejected as a matter of law. (*See infra* pp. 33-46.)

Three: Defendants argue that Plaintiff cannot succeed in proving the requisite elements for its antitrust, fraud, or negligence claims, thus justifying summary judgment against Plaintiff. The Court concludes that Plaintiff has not adduced sufficient facts to warrant a trial on its antitrust claims and the Court will grant summary judgment for Defendants, as to Counts I and II. (*See infra* pp. 46-67.)

II. Factual Background

A. Description of Parties and Ballooning Industry [1] **[**3]**

Plaintiff Harrison Aire, Inc. is a New Jersey corporation in the business of providing commercial balloon hot air rides, aircraft maintenance, and pilot training for hot air balloons and fixed wing aircraft. (Defs.' Undisputed Facts P2.) Its sole owner and proprietor is Terry Harrison. [2] **[**5]** **[**4]** **[*189]** Defendant Aerostar International, Inc. is a hot air balloon manufacturer located in South Dakota. Aerostar International is a wholly owned subsidiary of Raven Industries. [3] Raven Industries preceded Aerostar International in the manufacture of hot air balloons, but formed

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[1] The record on Defendants' Motion consists of excerpts of depositions of Plaintiff's President, Defendants' employees, three Federal Aviation Administration officials, and three other witnesses with experience in the hot air balloon industry. Defendants have submitted excerpts of their hot air balloon maintenance manuals, some correspondence between the FAA and a third party (Ronald DiGiovanni), a recent company newsletter, and a letter subsequently sent to the newsletter's mailing list that listed corrections to the newsletter. Defendants also have filed two affidavits both sworn by Mark West, President of Aerostar. Plaintiff has submitted an actuarial-economic consultants' report. Plaintiff has not filed any affidavit.

[2] Mr. Harrison has been involved in aviation for several decades. He holds a variety of licenses and certifications qualifying him to fly hot air balloons and fixed wing aircraft. Mr. Harrison is a former flight engineer and co-pilot for Eastern Airlines. He is a licensed FAA Airframe and Powerplant mechanic with inspection authority. This certification authorizes him to perform maintenance work on many types of aircraft, including hot air balloons. He served ten years as an accident prevention counselor and designated pilot examiner. (Harrison Dep., Defs.' Ex. B, at 12-16; Defs.' Undisputed Facts P3.)

Aerostar International in 1986 for the purposes of undertaking the hot air balloon aspect of the company's business. (*Id.* P6.) Raven Industries has not manufactured hot air balloons since February 1986; rather, Aerostar International, as its wholly owned subsidiary, has fulfilled that role. (Compl. P14.) During the 1970s and 1980s, Harrison Aire purchased hot air balloons for its flight operations from Raven Industries, and subsequently from Aerostar Industries.

Hot air balloons are comprised of three principal components: the basket (which contains the balloon's instruments and occupants); the fuel and heater system (which produces the hot air); and the envelope (which contains the hot air). (Compl. P10.) With use and age, balloon envelopes deteriorate, with the top hemisphere of the envelope deteriorating much more quickly than the lower hemisphere. (*Id.* P12.) After approximately 300-500 hours of use (actual mileage may vary), because of this deterioration, at least the upper portion of the envelope must be replaced in order to continue piloting safely. (*Id.*) This replacement typically extends the life of the envelope for another 200-300 hours. (*Id.*) In general, replacement of **[**6]** the fabric in the upper hemisphere of the envelope is significantly less costly than replacement of the entire envelope. Because of design and wear patterns, replacement of up to 80% of the envelope fabric (somewhat more than the top half of the envelope) is generally most practical and economical. (*Id.* P13.)

B. Federal Regulations Applicable to Hot Air Ballooning

At the heart of this case are issues regarding replacement fabrics for the envelope for Raven/Aerostar hot air balloons. Although these issues were present in the 1980s, the present case centers on events beginning in late 1995 or early 1996. Plaintiff needed to buy replacement fabric for one of its Raven/Aerostar balloons, and believed the balloon's accompanying manual restricted its abilities to purchase replacement fabric. The plaintiff contends that the defendants issued fraudulent statements that purportedly required the users and owners of Defendants' hot air balloons to buy replacement fabric from the defendants, whose fabric was more expensive than third-party fabric. The defendants, on the other hand, assert that federal regulations did require that owners of Raven/Aerostar hot air balloons had to **[**7]** purchase replacement fabric from either Defendants or a limited number of entities that made replacement fabric in satisfaction of Defendants' standards. Thus, in **[*190]** understanding the regulatory parameters of this case, the Court first sets out the federal regulations at issue.

1. Manufacturer-Provided Instructions for Balloon Owners: Instructions for Continued Airworthiness and Airworthiness Limitations Section

Ballooning in the United States is regulated by the Federal Aviation Administration, which has promulgated regulations - the Federal Aviation Regulations or the Federal Rules of Aviation ("FARs") - that apply *inter alia* to the replacement of balloon envelope fabric. The regulations generally require that major balloon repairs, such as the replacement of significant areas of envelope fabric, be performed by a repairman or mechanic certified by the FAA. Since 1980, FAA regulations require balloon manufacturers to publish a maintenance manual for their product; this manual is known as "Instructions for Continued Airworthiness" ("ICA"). *14 C.F.R. § 31.82*. [4] **[**9]** *Section 31.82* provides:

> The applicant must prepare Instructions for Continued **[**8]** Airworthiness in accordance with Appendix A to this part that are acceptable to the Administrator. The instructions may be incomplete at type certification if a program exists to ensure their completion prior to delivery of the first balloon or issuance of a standard certificate of airworthiness, whichever occurs later.

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[3] Although no suggestion has been made that Aerostar and Raven have conspired to violate the antitrust laws, the Court notes that ***HN1***[] a parent company and its wholly owned subsidiary are incapable of conspiring with each other for antitrust purposes. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

[4] The regulations cited within this section have been in effect since 1980 or earlier.

Id. [5] A hot air balloon manufacturer must provide this model-specific ICA to each purchaser of its product. *14 C.F.R. § 21.50*. *Section 21.50* provides in pertinent part:

> (b) The holder of a design approval, including either the type certificate or supplemental type certificate for an aircraft . . . shall furnish at least one set of complete Instructions for Continued Airworthiness, prepared in accordance with [§ 31.82] to the owner of each type of aircraft . . . upon its delivery, or upon issuance of the first standard airworthiness certificate for the affected aircraft, whichever occurs later, and thereafter make those instructions available to any other person required by this chapter to comply with any of the terms of these instructions.

Id.

Generally, the maintenance standards and procedures specified in the ICA are permissive in nature ("FAA accepted") in that maintenance personnel may substitute other "FAA accepted" maintenance standards and procedures. *14 C.F.R. § 43.13*. *Section 43.13* provides in relevant part:

> (a) Each person performing maintenance, alteration, or **[**10]** preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, *or other methods, techniques, and* ***[*191]*** *practices acceptable to the Administrator, except as noted in § 43.16. . . .*
>
> (b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition . . . .

Id. (emphasis added).

However, if a manufacturer or the FAA chooses to require a particular maintenance standard or procedure, that particular standard or procedure must be published in a separate and distinct portion of the ICA, known as the Airworthiness Limitations Section ("ALS"). Part A31.4 of Appendix A to Part 31 - Instructions for Continued Airworthiness defines the ALS portion and specifies how the manufacturer should present the ALS to the balloon owner. Part A31.4 reads: **[**11]**

> The Instructions for Continued Airworthiness must contain a section titled Airworthiness Limitations that is segregated and clearly distinguishable from the rest of the document. This section must set forth each mandatory replacement time, structural inspection interval, and related structural inspection procedure, including envelope structural integrity, required for type certification. If the Instructions for Continued Airworthiness consist of multiple documents, the section required by this paragraph must be included in the principal manual. This section must contain a legible statement in a prominent location that reads: *"The Airworthiness Limitations section is FAA approved and specifies maintenance required under §§ 43.16 and 91.403 of the Federal Aviation Regulations."*

Id. (emphasis added). In contrast to an ICA's maintenance standards, which may be replaced by other "FAA accepted" maintenance procedures, maintenance personnel are required to adhere strictly to the provisions of an Airworthiness Limitations Section, if one exists. *14 C.F.R. § 43.16*. *Section 43.16* states in relevant part, "Each person performing an inspection or **[**12]** other maintenance specified in an Airworthiness Limitations section of a manufacturer's maintenance manual or Instructions for Continued Airworthiness shall perform the inspection or other maintenance in accordance with that section . . . ." *Id.*

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[5] The aircraft manufacturer holds the "type certificate" for the aircraft, which constitutes the FAA's approval of the design of the aircraft. (Pl.'s Undisputed Facts P49.) The FARs establish the procedure for securing type certification for new aircraft designs, from the manufacturer's own analysis and testing of the design to the FAA's review of those engineering data before determining airworthiness. *14 C.F.R §§ 21.11-21.53*. "Every aircraft that's out there with an airworthiness that's flying around needs to be type certificated or receive a type certificate from the FAA, essentially saying that the design complies with the airworthiness regulation." (Michalik Dep., Pl.'s Ex. D & Defs.' Ex. G, at 9.)

2. Replacement Parts for Hot Air Balloons

The FAA also has instituted a regulatory scheme that governs the manufacture and sale of replacement parts. When the FAA approves an aircraft, it issues a type certificate under Part 23 of its regulations. *14 C.F.R §§ 21.11-21.53*. For example, as a type certificate would be for the whole aircraft (*e.g.*, Waligunda Dep., Pl.'s Ex. F, at 21) [6], Defendants would hold the type certificate for each of their separate hot air balloon designs. The FAA must also approve modifications to a particular aircraft, whether designed by the original manufacturer or a third-party, after which the FAA issues a supplemental type certificate ("STC"). *14 C.F.R. § 21.113*. An STC would enable its holder to manufacture a component or a part for a balloon system, e.g., a balloon envelope. (Waligunda Dep., **[*192]** Pl.'s Ex. F, at 20; DiGiovanni Dep., Pl.'s Ex. B, at **[**13]** 26-27.) Any person, in addition to the original manufacturer, may petition the FAA for a Parts Manufacturer Approval ("PMA"), which allows the holder to manufacture and sell specific replacement parts directly to aircraft owners. *14 C.F.R. § 21.303* ("No person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval . . . ."). A PMA covers a part, such as the balloon fabric itself. (Waligunda Dep., Pl.'s Ex. F, at 21; DiGiovanni Dep., Pl.'s Ex. C, at 27-28.)

The Court concludes **[**14]** that ***HN2***[] the regulatory language makes clear the FAA has created a mechanism by which third-parties can be approved to manufacture and sell replacement parts for hot air balloons. The FARs do not mandate that replacement fabric has to be of the same manufacture as the balloon, nor could any manufacturer impose such a requirement in their ICAs, given that the ICAs need not be followed strictly by their owners. The Court presumes that were a hot air balloon manufacturer to place such restrictions in its ALS, which is not the case here, the balloon's owner then would be obligated to follow that language.

In this case, Defendants' ICA purportedly implied that only replacement parts approved for use by Raven/Aerostar could be used in repairing Raven/Aerostar hot air balloons. [7] As stated above, there is no requirement in the FARs that replacement envelope material be tested in accordance with the *manufacturer's* standards. In fact, before Defendants even published their ICA, the FAA already had set forth its own standards for strength and safety, *14 C.F.R. §§ 31.21-31.27*, which must be met by all manufacturers and replacement parts manufacturers, including holders **[**15]** of STCs and PMAs. As the parties have not submitted copies of Defendants' ALS and as the parties have focused their arguments on perceptions surrounding Defendants' ICA, the Court presumes that any and all allegedly offensive, restrictive language is contained in the ICA and that there are no restrictions on third-party fabric whatsoever in Defendants' ALS.

C. Chronology of Events

1. Plaintiff's Business

[16]** Harrison Aire is a corporation which derives its income from selling hot air balloon rides to members of the general public. (Harrison Dep., Defs.' Ex. B, at 28.) In the late 1970s, Mr. Harrison purchased his first Raven-made balloon. (Harrison Dep., Pl.'s Ex. H, at 154.) In 1986, he purchased the "Big Ride" balloon from Defendants.

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[6] Robert Waligunda was a distributor for Defendants for a number of years. Defendants terminated him allegedly because he "blew the whistle" regarding Defendants' purportedly deceptive manual. (Waligunda Dep., Pl.'s Ex. F, at 66.) Mr. Waligunda is an experienced hot air balloonist, having been involved in the industry for thirty-five years and having logged over 5000 hours in flight. (*Id.* at 19-20.)

[7] Mr. Waligunda testified that sometime before May 1982, concerned that its competitors would produce replacement envelopes for Raven balloons, Raven allegedly "made [its] manual stronger" by seemingly telling Raven owners that they had to buy Raven fabric exclusively. (Waligunda Dep., Pl.'s Ex. F, at 17-19.) Because only the manual's ICA portion was changed - a non-mandatory section - Raven knew that its customers would remain technically free to purchase third-party parts; Raven allegedly hoped, though, that the limitation would appear mandatory to the uneducated person. (*Id.* at 24.)

(Actuarial-Economic Consultants Report, Pl.'s Ex. A, at 2.) [8] Since 1986, Plaintiff has had five or six conversations with Defendants' agents about the language in their ICAs restricting **[*193]** third-party fabric, and each time Defendants responded with the same "buy our fabric" answer. (Harrison Dep., Pl.'s Ex. H, at 159-61.) In the late 1980s, having considered the venture, Mr. Harrison decided not to enter the replacement fabric business himself. (Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 48-49.)

[17]** Plaintiff's "Big Ride" balloon needed repairs to its envelope in 1995, which would have extended the life expectancy of the balloon another ten years. (Pl.'s Undisputed Facts, P8; Defs.' Undisputed Facts P8.) Plaintiff earlier had stockpiled sufficient amounts of Defendants' balloon fabric (purchased at 50% of cost from Raven/Aerostar distributors) for use when any of his balloon envelopes became unairworthy (Defs.' Undisputed Facts P7), but had exhausted his stockpiled resources when his "Big Ride" balloon required repairs. (*Id.* P8; Harrison Dep., Defs.' Ex. B, at 112-13.) Plaintiff claims it could not afford to purchase Defendants' fabric at this time, and instead investigated buying less-expensive third-party parts. (Harrison Dep., Defs.' Ex. C, at 35; Harrison Dep., Defs.' Ex. D, at 67.) According to Robert Waligunda, a former Raven/Aerostar distributor, Defendants' fabric was more expensive than any other fabric on the market. (Waligunda Dep., Pl.'s Ex. F, at 67.)

Plaintiff long had criticized Defendants' ICA for purportedly implying that only replacement parts approved for use by Raven/Aerostar could be used in repairing Raven/Aerostar hot air balloons. In meetings with **[**18]** Defendants and their representatives, Mr. Harrison frequently inquired whether this policy had changed and was repeatedly informed that Defendants' stance remained firm. Regarding Plaintiff's interaction with Raven in particular, Mr. Harrison's deposition proceeded as follows:

> Q. What was your particular complaint to Raven then if you didn't believe it was misleading? What was your particular complaint?
> A. The complaint was if - if the manufacturer is providing or a supplier is providing the same material to Raven, and it's available directly at half the cost to someone else, same fabric, and the same factory is saying, "We make it for Raven, and the same specs coming off the same mills, the same run, the same colors and everything. We'll provide it to you directly."
> Q. Would it be - go ahead. You finish.
> A. And Raven said, "No. You can't do that."
> . . .
> Q. Did you ever get any resolution of that issue that you took with Raven from Raven?
> A. No.

(Harrison Dep., Pl.'s Ex. H, at 157-58.) Regarding Plaintiff's interaction with Aerostar in particular, Mr. Harrison's deposition proceeded as follows:

> Q. When you received your first Aerostar **[**19]** manual, did it have the same type of provision regarding replacement fabric that you complained about with Raven?
> A. Yes.
> . . .
> Q. Do you remember what your specific complaint to [Aerostar] was?
>
> A. I had two or three items, maintenance items that I wanted to discuss that I was having problems with. Then when I brought those items up, I just want to see if their position was still the same on the fabric. . . . So there's probably been through the years five or six conversations that I had over other things, and at the end I always said, "By **[*194]** the way, has your position on fabrics changed?"
> Q. And the answer was?
> A. "As long as you buy the fabric, we don't care what you do," basically. The emphasis, "buy the fabric."
> Q. In any event, is it fair to say that you registered the complaint with Aerostar at its inception or shortly thereafter, within a year or two, that you did with Raven and didn't get any change

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[8] The Court cites this expert report, which is not sworn testimony but is undisputed in the record, to connect Plaintiff's retired "Big Ride" balloon to Defendants. The parties have not identified - and the Court has not located - any sworn testimony that links Plaintiff's balloon with Defendants.

A. Correct.

Q. Okay. And that particular complaint, and correct me if I'm wrong, but the particular complaint was that the manual required you to purchase fabric from Aerostar or Raven before it and only Aerostar or Raven before it?

A. **[**20]** Correct.

(*Id.* at 159-62.)

In 1995, there were only three possible purveyors for fabric sales: Defendants (the manufacturer); Custom Nine Designs, run by Ronald DiGiovanni; [9] and Head Balloons; [10] these were the only lawful market options available to Harrison Aire. (Defs.' Undisputed Facts PP9-10.) Mr. Harrison met with Mr. DiGiovanni in 1995 or 1996 to discuss purchasing replacement fabric for Plaintiff's Raven/Aerostar balloons. (*Id.* P11.) Plaintiff decided not to purchase Mr. DiGiovanni's fabric - which was "much cheaper" than Defendants' own (Waligunda Dep., Pl.'s Ex. F, at 28) - concluding that any purchase would conflict with the Defendants' ICA restrictions on third-party fabric, even though Plaintiff knew the FAA had certified Mr. DiGiovanni to produce and sell Raven/Aerostar fabric. (Defs.' Undisputed Facts PP12-14; Harrison Dep., Defs.' Ex. B, at 124-28.) Mr. Harrison provided two reasons for not purchasing Mr. DiGiovanni's fabric, notwithstanding Mr. DiGiovanni's apparent FAA authorization to sell the replacement parts: One, that Mr. DiGiovanni could not confirm that his fabric was "equal to or better" than Defendants' fabric, as Mr. Harrison believed **[**21]** Defendants' manual required (Harrison Dep., Defs.' Ex. B, at 127); and two, that Mr. DiGiovanni was involved in a "bait and switch" ruse in which he had secured FAA approval with one product, but then switched the product with a substandard "knock off," selling the shoddy substitute to unknowing, less discerning customers (Harrison Dep., Defs.' Ex. D, at 36-37).

Without replacement fabric, Plaintiff retired the "Big Ride" balloon in 1996, never to use **[**22]** it again commercially (Defs.' Undisputed Facts P17), and Plaintiff seeks damages for the alleged inability to use it, due to Defendants' misconduct.

In 2001 or 2002, Plaintiff noticed that the Defendants' manual specifically allowed for third-party replacement fabric, mentioning only that STC holders (but not PMA holders) may repair Raven/Aerostar hot air balloons. (Pl.'s Undisputed Facts P35.) [11]

[23] [*195] 2. Defendants' Business**

Defendants manufacture and sell hot air balloons, cold air inflatables, helium inflatables, remote control blimps, inflatable costumes and mascots, and specialty sewn products. http://www.aerostar.com. In 1981, Raven first made replacement fabric specifically for a competitor's balloon. (Waligunda Dep., Pl.'s Ex. F, at 11.) [12] In 1982, Raven

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[9] In 1994, Ron DiGiovanni started Custom Nine Designs, a competitor of Defendants authorized by the FAA to sell replacement fabric for certain balloons manufactured by Defendants. (Waligunda Dep., Pl.'s Ex. F, at 26.) The record includes excerpts of Mr. DiGiovanni's deposition.

[10] Head Balloons joined the market in approximately 1984. (West Aff. of Nov. 2003 P13.) Head Balloons, run by Tarp Head and based in Georgia, has an STC to produce replacement fabric. (Waligunda Dep., Pl.'s Ex. F, at 21-22.) There is no testimony in the record from Head Balloons.

[11] According to Plaintiff's Statement of Undisputed Facts, "[Mr.] Harrison has testified that he did not realize that he was not required to use Aerostar fabric until [Mr.] DiGiovanni told him about the result in *Braden's [Balloons]*." (*Id.* P84.) *Braden's Balloons* is discussed below at Section II.C.3. However, the Court notes that Plaintiff fails to cite any testimonial evidence supporting this contention, and upon independently reviewing the excerpts of Mr. Harrison's depositions submitted to the Court, the Court concludes that the record does not support this assertion. Notwithstanding this discrepancy, the relevant date for purposes of this Motion, as discussed below in the "Statute of Limitations" section, is the date on which Defendants removed their allegedly restrictive ICA language and not the date on which Plaintiff actually learned about third-party fabric alternatives.

[12] The parties dispute whether Raven's decision conflicted with a gentlemen's agreement among balloon manufacturers not to produce replacement parts for a competitor's product. (Pl.'s Mem. at 5; Defs.' Reply Mem. at 4; *see also* Waligunda Dep., Pl.'s Ex. F, at 13.)

introduced new language into its balloon owners' manual that required owners either to buy replacement fabric from Raven itself or to secure Raven's approval in advance if purchasing third-party fabric. (Waligunda Dep., Pl.'s Ex. F, at 18-19.) Plaintiff complained to Raven, some time before 1986, about the ICA language. (Harrison Dep., Pl.'s Ex. H, at 156-58.) Raven formed Aerostar International in 1986 for the purposes of taking over the hot air balloon aspect of Raven's business. Raven Industries has not manufactured hot air balloons since February 1986; rather, Aerostar International, as its wholly owned subsidiary, has fulfilled that role. (Compl. P14.) After the inception of Aerostar, the Defendants' ICA language read as follows:

> *WARNING*
>
> Only fabric which has been tested and approved according **[**24]** to AEROSTAR (Raven) factory standards may be used for repair of AEROSTAR (Raven) envelopes. *Failure to comply with this requirement constitutes a departure from type design and renders the balloon unairworthy*.

(Defs.' Supplemental Ex. B.) [13]

In 1993, Defendants revised the language in their ICAs. (West Aff. of Nov. 2003 P9.) In 1993, the ICA language read as follows, in pertinent part:

> **6.0 STANDARD PROCEDURES FOR REPAIR AND REPLACEMENT**
> . . .
>
> **WARNING**
>
> **Improper repairs will render the aircraft unairworthy until repaired properly.**
>
> *****
>
> Likewise, repair/replacement materials must be obtained from Aerostar to be considered a "certified part". **[**25]** In the event that repair materials are obtained, the supplying company or the repair station performing the repair must act to "certify" the material and part as equal to or better than the original equipment. [14]
> . . .
>
> **[*196] 6.1.2 Fabric Repair and Replacement**
> . . .
>
> **WARNING**
>
> **Only fabric which has been tested and approved according to AEROSTAR (Raven) factory standards may be used for repair of AEROSTAR (Raven) envelopes. Failure to comply with this requirement constitutes a departure from type design and renders the balloon unairworthy.**
>
> ***** $. . .
>
> **Note**
>
> Fabric replacement is normally limited to 35% of the surface area of the envelope within a period of 100 flight hours or one year, (whichever comes first), except for additional minor patches and repairs. Deviation from this procedure up to 65% total fabric replacement may be approved after consultation with the AEROSTAR (Raven) factory. Such extensive replacement may only be undertaken if approved *in writing* by AEROSTAR (Raven). To

[13] *See supra* text accompanying note 7.

[14] It appears obvious that the two sentences in this paragraph are contradictory. In 1995, the second sentence of this paragraph was changed to read, "In the event that non-Aerostar repair materials are obtained elsewhere, the supplying company or the repair station performing the repair must act to 'certify' the material and part as equal to or better than the original equipment." (West Aff. of Nov. 2003 P9 & Ex. B.) Even with the correction, these two sentences remain contradictory.

> protect the integrity of manufacturers' type designs, "100% rebuilding" of balloon envelopes is expressly prohibited according to FAR 43.13.
>
> FOR APPROVAL **[**26]** TO REPLACE MORE THAN 35% OF THE ENVELOPE FABRIC, please contact:
> Dee M. Rose
> Aerostar International, Inc.
> Customer Service
> 1812 "E" Avenue, PO Box 5057
> Sioux Falls, SD 57117-5057
> 605/331-3500 Fax 605/331-2547

(Defs.' Supplemental Ex. C.)

According to Plaintiff, Defendants again changed their ICA language in 2001, removing the language that required Defendants' permission before replacing more than 35% of the envelope fabric and the "WARNING" that failure to use fabric which has been tested and approved according **[**27]** to Aerostar factory standards would make the balloon unairworthy. (Pl.'s Mem. Opp'n Summ. J. at 13.)

3. *Braden's Balloons* and Ronald DiGiovanni

In 1996, Braden's Balloons Aloft, Inc., an FAA-approved repair station, replaced between 54% and 64% of a Raven/Aerostar balloon's envelope fabric with material from Custom Nine Designs without first obtaining Defendants' written permission. *In re Braden's Balloons Aloft, Inc.*, FAA Docket No. CP99SWO037, at *1 (July 26, 2000) (Defs.' Ex. O) [hereinafter *Braden's Balloons*]. The FAA prosecuted Braden's in an administrative civil penalty action, on the theory that Braden's had violated various regulations by failing to follow Defendants' ICA requirement that maintenance personnel secure written permission before performing the replacement. Even though Mr. DiGiovanni, President of Custom Nine Designs, has no formal legal training, Mr. DiGiovanni represented Braden's in the administrative action.

The Administrative Law Judge dismissed the FAA's complaint, concluding that the FAA had failed to allege facts that, if proved, would have established the elements of the violations of the FARs with which Braden's had **[**28]** been cited. For example, the FAA complained that Braden's failed to comply with Defendants' ICA by replacing the envelope fabric without **[*197]** Defendants' permission, but the FAA had failed to allege that Braden's replaced the fabric in a manner not otherwise acceptable to the FAA, a fatal pleading defect considering that procedures listed in a balloon's ICA (unlike those in the balloon's ALS) may be substituted for other FAA-accepted methods. *Braden's Balloons*, *supra*, at *6. In his opinion supporting dismissal, the ALJ observed:

> The Complaint lists an alleged violation of *FAR § 43.16*. This section requires that, if one performs an inspection or maintenance specified in an Airworthiness Limitations section of a manufacturer's maintenance manual or Instructions for Continued Airworthiness, such an inspection or maintenance must conform to that Airworthiness Limitations section. Thus, unless the requirement that Braden's receive written permission for the extensive envelope repair it performed on N57199, is contained in the Airworthiness Limitations section of the maintenance manual or Instructions Continued Airworthiness promulgated by Aerostar (Raven), Braden's would not be **[**29]** required to comply with such a requirement.
>
> The Complaint does not state whether or not such a requirement is contained in the Airworthiness Limitations section of the maintenance manual or the Instructions for Continued Airworthiness. It merely states that such a requirement is a part of the Instructions for Continued Airworthiness, without making clear, one way or another, whether it is specifically located in the Airworthiness Limitations Section. The difference is important, as whether it is required or not hinges on its location. If located within the Airworthiness Limitations section, it is approved by the Administrator and a person performing an inspection or maintenance must follow its prescription. *See* *14 C.F.R. Part 31, App. A, § A31.4*. However, if not located within the Airworthiness Limitations' section, the inspection and maintenance information is only accepted by the Administrator, and there is no requirement to follow the manufacturer's instructions. A deviation from those instructions will not result in a violation in *§ 43.16* so long as the inspection or maintenance falls under the "other methods,

> techniques, and practices acceptable to the Administrator" language **[**30]** of *FAR § 43.13(a)*. Because the Complaint fails to specifically allege that the requirement, that Braden's consult with Aerostar (Raven) prior to performing the fabric replacement, is found in the Airworthiness Limitations section of the Aerostar (Raven) Instructions for Continued Airworthiness, this claim must also fail.

(*Braden's Balloons*, *supra*, at *7-8) (emphasis removed). Defendants downplay the relevance and applicability of *Braden's Balloons* to the instant case by referring to *Braden's Balloons* as an "irrelevant," "unrelated, insignificant administrative action." (Defs.' Reply Br. at 5 & n.2.) While the Court recognizes that the ALJ dismissed the case for defects within the pleadings, it is important to note the distinction which the ALJ made between the mandatory Airworthiness Limitations Section (ALS), and the Instructions for Continued Airworthiness, which may be substituted by alternate methods, techniques, and practices acceptable to the Administrator. As explained below, this distinction is of great relevance to the claims and issues presented in this case.

Mr. DiGiovanni had taken it upon himself to inform the ballooning community of the case's **[**31]** result and of his interpretation of the case's precedential value, most notably through his privately maintained website, **[*198]** *http://home.earthlink.net/tildeaironon*, which chronicles the *Braden's Balloons* saga. In a September 7, 2000 response to Mr. DiGiovanni's trumpeting, Defendants made the following representation in a letter to Raven/Aerostar owners:

> We are extremely concerned with the recent mailing which claims that the ruling in *FAA v. Bradens* "effectively nullifies the Aerostar Instructions for Continued Airworthiness manual." This is patently false and seems to suggest ignoring the Airworthiness Manual which would pose possible significant risk to balloon owners, operators and passengers. The ruling in this case was, simply, that the FAA had not met the correct technical pleading requirements in its complaint and, accordingly, the complaint was dismissed. The ruling did not nullify the Aerostar Instructions for Continued Airworthiness manual and we urge you to follow the procedures contained in the manual as well as all applicable FAA rules and directives. We have been in contact with various offices within the FAA and have their full agreement, based on the **[**32]** FAR's and the requirements within the FAA Type Certificate Data Sheet that "all inspections, repairs, and replacements must be accomplished in accordance with the latest issue of Aerostar Instructions for Continued Airworthiness."

(Pl.'s Mem. Opp'n Summ. J. at 14-15, emphasis removed; also *available at* *http://home.earthlink.net/tildeaironon/new_page_80.htm*.) According to Plaintiff, Mr. Harrison has testified that he did not realize he was not required to use Aerostar fabric until Mr. DiGiovanni told him about the result in *Braden's Balloons*. (Pl.'s Undisputed Facts P84.) [15]

According to Plaintiff, Defendants changed their ICA language in 2001, removing the language that required Defendants' permission before replacing more than 35% of the envelope fabric and the "WARNING" that failure to use fabric which has been tested and approved according to Aerostar factory standards would make the balloon unairworthy. (*Id.* at 13.) Plaintiff suggests that **[**33]** Defendants undertook these revisions at the stern request of the FAA, supposedly "stung by the result in *Braden's*" and "prodded unmercifully by Custom Nine." (*Id.*, citing Michalik Dep., Pl.'s Ex. D, at 72.)

III. Plaintiff's Allegations

Plaintiff brings four counts against Defendants (Antitrust - Monopolization; Antitrust - Tying Arrangement; Fraud; and Negligence). As stated above, Plaintiff is a corporation that derives its income from selling hot air balloon rides to the public. Plaintiff alleges that Raven Industries consciously developed and implemented several schemes to deceive balloon owners and to convince them that federal law required the exclusive use of Raven Industries fabric in the repair and replacement of hot air balloon envelopes originally purchased from Raven. (Compl. P19; *see also* Waligunda Dep., Pl.'s Ex. F, at 24-25.) Plaintiff alleges that after its incorporation, Aerostar International assumed

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[15] *See supra* text accompanying note 11.

continued responsibility for implementing and maintaining the original schemes, with the full knowledge, participation, and consent of the directors and officers of Raven, its parent corporation. (Compl. P19.) As a direct and proximate result of **[**34]** Defendants' behavior (to be detailed below), Plaintiff claims it could not afford to purchase replacement envelope fabric directly from Defendants for one of its hot air balloons - its "big ride" balloon - and was therefore unable to utilize that particular **[*199]** balloon commercially after 1996. (*Id.* P28.) Plaintiff apparently could have afforded to replace the envelope fabric had Plaintiff thought it was permitted to use third-party fabric, and Plaintiff contends that it would have indeed purchased the third-party fabric if the defendants had not implemented the scheme described above. (*Id.* P29.) Plaintiff claims economic losses totaling $ 35,000 per year (at least) from 1996 continuing through the present. (*Id.* P30; Actuarial-Economic Consultants Report, Pl.'s Ex. A.)

A. Defendants' Alleged Schemes

In its complaint, Plaintiff describes three schemes purportedly undertaken by Defendants that constitute a violation of federal ***antitrust law***.

1. Scheme One

According to Plaintiff, Raven Industries officers expressed their interest and desire in controlling the replacement fabric market at various meetings between Raven Industries and its distributors during the 1980s. **[**35]** At one meeting, shortly before Raven Industries created Aerostar International, Raven Industries officers allegedly advised the attendees, among whom was at least one distributor, that its maintenance manual ("Instructions for Continued Airworthiness" or "ICA") would be changed in order to control the replacement fabric market. (Compl. P20.B; *see also* Waligunda Dep., Pl.'s Ex. F, at 14-19.)

Plaintiff avers that Raven Industries deliberately inserted language into its ICA that appeared to require balloon owners either to use only Raven/Aerostar replacement fabric or to secure Raven/Aerostar approval before obtaining replacement fabric elsewhere. Plaintiff contends that at this meeting, at least one distributor in attendance raised concerns that the proposed manual language would run afoul of federal antitrust laws, and that Raven Industries officers replied that the inserted language would simply "imply" that federal regulations required the owners to use Raven replacement fabric. (Compl. P20.C; *see also* Waligunda Dep., Pl.'s Ex. F, at 23-25.) These officers allegedly told the attendees that because the inserted language appeared in the ICA (which would not require strict compliance), **[**36]** and not in the Airworthiness Limitations Section (which would have required strict compliance), there would be no actual antitrust violation. (*Id.*) Plaintiff claims that this scheme was implemented in 1986, ten days after the incorporation of Aerostar International.

As stated above, *Section 43.13* of the FARs requires that with limited exceptions, all repairs of any type be performed consistent with the ICA. That is, according to this FAR, a hot air balloon repairman should follow the methods listed in the manufacturer's ICA or an alternative method acceptable to the FAA. *14 C.F.R. § 43.13*. Furthermore, this FAR directs a hot air balloon repairman to use materials that equal or surpass the manufacturer-supplied originals in order to create a (repaired) balloon that will be at least equal to its original condition. *Id.*

The parties do not dispute that the FAA has regulated the repairs of hot air balloons. (Tr. at 18.) What the parties do dispute, and what centrally defines Plaintiff's action against Defendants, is whether Defendants acted appropriately in 1993 and 1995 (*see supra* pp. 14-16 and notes 7 & 13) by inserting language that required Raven/Aerostar **[**37]** balloon owners either to use Defendants' own fabric in repairs or to secure Defendants' written permission before using third-party fabric. According to Plaintiff, nothing in the FARs requires a balloon owner to use the manufacturer's **[*200]** own fabric in repairs or to secure the manufacturer's written approval before using third-party fabric. (Compl. P20.F.) Plaintiff criticizes Defendants' WARNING language, which specified that, under penalty of unairworthiness, Raven/Aerostar factory standards were to be applied when testing third-party fabric, especially since the FAA regulations provide separate standards for strength and safety, *14 C.F.R. §§ 31.21-31.27*, which must be met by all manufacturers and replacement parts manufacturers, including holders of STCs and PMAs.

Plaintiff further contends that Defendants inserted language that appeared to require, at penalty of violation of law, that owners get specific approval from Defendants in advance before replacing more than 35% of envelope fabric, and which prohibited replacement of more than 65% of envelope fabric without the defendants' approval. (Compl. P20.E.) Plaintiff alleges that Defendants had arranged the **[**38]** language in such a manner, and with such authority, that it reasonably appeared to balloon owners that federal law and regulations required compliance with these restrictions on envelope fabric replacement. (*Id.* P20.G.)

According to Plaintiff, Defendants purposely misled Mr. Harrison - and, by implication, all other Raven/Aerostar balloon owners (*see, e.g.*, Waligunda Dep., Pl.'s Ex. F, at 25) - regarding his rights and alternatives on the matter of repairing envelope fabric for Raven/Aerostar balloons. Plaintiff contends that in practice, and in furtherance of the foregoing scheme, Defendants refused to approve any replacement that did not utilize Raven/Aerostar fabric. (Compl P20.H.) In order to reinforce its deception of fabric purchasers, Defendants allegedly contacted FAA officials and persuaded them to initiate the administrative prosecution of a certified repairman (Braden's Balloons Aloft, Inc.), who had failed to obtain Defendants' pre-approval before replacing more than 35% of a balloon envelope's fabric. (*Id.* P20.I.)

2. Schemes Two and Three

Next, as Plaintiff contends, in order to deal with balloon owners and repairmen not fooled by the foregoing scheme, **[**39]** Defendants' manuals required that third-party fabric be subjected to highly-destructive "tear testing" before the fabric could be used as replacement fabric on Defendants' balloons; this fabric was later subjected to the same testing procedure annually. (*Id.* P20.J.) Defendants allegedly did not require their own fabric to undergo such testing until it had nearly reached the end of its useful life. (*Id.*) Because the test procedure required that relatively large pieces of fabric be removed for testing and then replaced, both the labor costs involved and the resulting unsightly patches in the envelope deterred owners and repairmen from using third-party fabric, and increased the probability that Aerostar International fabric would be used in the replacement process. (*Id.*)

Third, in order to discourage balloon owners from purchasing third-party fabric, Defendants allegedly defamed at least one third-party manufacturer (Custom Nine Designs, Inc.) by publishing an article in their newsletter reporting fabric strength tests purportedly demonstrating that Custom Nine Designs fabric was unsuitable for use in Raven/Aerostar envelopes. (*Id.* P20.K.) Plaintiff contends that Defendants **[**40]** knew their article was untrue and that Defendants refused to retract or correct the story even when its falsity was brought to their attention. (*Id.*) [16]

[*201] The parties have not developed their contentions regarding Schemes Two and Three in the summary judgment context. Plaintiff does not even explain how these **[**41]** acts would constitute antitrust violations. Therefore, for purposes of this Memorandum, the Court mentions these schemes in the interest of describing Plaintiff's allegations in the entirety, but will focus predominantly on Scheme One, finding that the parties have largely ignored Schemes Two and Three.

B. Plaintiff's Counts Against Defendants

1. Count One: Antitrust - Monopolization

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[16] In either 1999 or 2000, Defendants published their testing standards for fabric in their manual. (West Dep., Pl.'s Ex. G, at 131.) Defendants started subjecting competitors' fabric along with their own to these newly announced testing standards, and published the results in a newsletter mailed to Raven/Aerostar owners in either 1999 or 2000. (*Id.*) A typo in the newsletter misrepresented the results for fabric produced by Ron DiGiovanni and Custom Nine Designs and indicated that that fabric is unsafe for use with Raven/Aerostar balloons. Defendants claims they corrected any error by subsequently mailing a correction letter to the same mailing list three months later. (West Aff. of Jan. 2004 P5.)

Plaintiff asserts that Defendants possessed monopoly power in the Raven/Aerostar hot air balloon replacement fabric market in the United States. (Compl. P32.) In the alternative, even if Defendants had not actually possessed monopoly power in the relevant market, their acts were intended as an attempt to monopolize the Raven/Aerostar envelope replacement fabric market. (*Id.* P34.) Defendants' alleged acts supposedly constituted impermissible exclusionary practices under *Section 2 of the Sherman Act*, practices which were designed by Defendants to strengthen and to perpetuate their monopoly position. According to Plaintiff, Defendants' acts directly and proximately restrained trade, and directly and proximately caused Plaintiff's damages.

2. Count Two: Antitrust - Tying Arrangement

[42]** According to Plaintiff, Defendants possessed monopoly power in the market for the tying product (i.e., hot air balloons) and used this monopoly power to restrain trade in the tied product (i.e., replacement fabric for balloon envelopes). (Compl. P38.) This alleged tying arrangement supposedly substantially affected - and continues to affect - interstate commerce. (*Id.* P39.) Defendants' acts, as alleged, directly and proximately restrained trade, and directly and proximately caused Plaintiff's damages. (*Id.* PP40, 42.)

3. Count Three: Fraud

Defendants allegedly intended that Plaintiff and all other Aerostar International balloon owners rely upon these supposed misrepresentations. (Compl. P44.) Plaintiff contends that it justifiably relied upon these misrepresentations, and that its damages were a direct and proximate result of its justifiable reliance upon the misrepresentations. (*Id.* PP45-46.) Additionally, as represented by Plaintiff, Defendants' conduct was outrageous and warrants the imposition of punitive damages. (*Id.* P47.)

4. Count Four: Negligence

Plaintiff alleges that Defendants' conduct was negligent and that its damages were a direct and proximate **[**43]** result of said negligence. (Compl. PP49-50.)

[*202] IV. Defendants' Motion for Summary Judgment

Defendants have moved for summary judgment. ***HN3***[] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

HN4[] A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* **[**44]** ***HN5***[] Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id. at 325*. After the moving party has met its initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *FED. R. CIV. P. 56(e)*. ***HN6***[] Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*. ***HN7***[] Under *Rule 56*, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson, 477 U.S. at 255*.

Defendants move for summary judgment on three grounds. One: Defendants contend that Plaintiff's antitrust claim is barred by the four-year statute of limitations applicable to antitrust **[**45]** claims. Two: Defendants claim that summary judgment is warranted upon application of implied immunity to Plaintiff's antitrust claims. Three: Defendants argue that Plaintiff cannot succeed in proving the requisite elements for its antitrust, fraud, or negligence claims, thus justifying summary judgment against Plaintiff. The Court will discuss these arguments *seriatim*.

A. First Argument: Statute of Limitations

1. Parties' Contentions

HN8[] A plaintiff's claim is viable under the federal antitrust provisions only if suit is "commenced within four years after the cause of action accrued," *15 U.S.C. § 15(b)*, plus any additional number of years during which the statute of limitations is tolled. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. *Id.* According to Defendants, the four-year limitations period commenced in 1996 when Plaintiff's "big ride" balloon was no longer in service and its commercial losses began to accrue.

Defendants note **[**46]** that Plaintiff did not file its complaint until March 2002, almost six years beyond the time Plaintiff claims to have first suffered a loss. Moreover, Defendants contend that Plaintiff's actual **[*203]** knowledge about the source of any losses - i.e., the "restrictive" manual - well predated the retirement of the big ride balloon. Defendants state that Mr. Harrison repeatedly expressed his complaints about the Raven/Aerostar language in the 1970s, 1980s, and 1990s, and contend that Mr. Harrison should not now be heard regarding damages that would have begun accruing in 1995 and 1996. Further, Defendants argue that given his 1995-1996 visit with its competitor for replacement fabric, Custom Nine Designs, Inc. and Mr. Harrison's general familiarity with the FARs, Plaintiff clearly knew or should have known its legal avenues for fabric replacement as set forth within the FARs.

Defendants emphasize that Mr. Harrison testified that in the late 1980s, he contemplated going into business as a manufacturer of replacement fabric, but did not do so, at least in part due to the allegedly restrictive language within Defendants' ICA. Mr. Harrison opted not to pursue that venture believing that he could **[**47]** not effectively compete with Defendants for business. (Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 48-49.) With Mr. Harrison's longstanding knowledge of Defendants' stance on replacement fabric, Defendants contend that Plaintiff's Complaint - filed more than six years after the retirement of the big ride balloon and decades after his complaints and aborted enterprise - must be dismissed as untimely. Moreover, Mr. Harrison conceded that certain language in Aerostar's ICA indicates that balloon owners could purchase replacement fabric from third-party sources provided that the third-party held an STC or a PMA, [17] and Mr. Harrison testified that such language would imply that third-party fabric, if so certified, was acceptable. (Harrison Dep., Defs.' Ex. B & Pl.'s Ex. H, at 164-65.) While Mr. Harrison stated that he did not first notice this language until 2003, Defendants argue that such language had been printed in their ICA as early as 1993, thus placing Mr. Harrison on constructive notice since that time. Defendants conclude that Mr. Harrison had everything necessary to pursue his claim in 1996.

[48]** Plaintiff alleges that Defendants engaged in fraudulent misrepresentation; ***HN9***[] to succeed on this claim, Plaintiff must demonstrate that Defendants fraudulently concealed their own unlawful activities and that Plaintiff did not discover these facts despite the exercise of due diligence. *E.g.*, *In re Linerboard Antitrust Litig., MDL No. 1261, 203 F.R.D. 197, 2001 U.S. Dist. LEXIS 13862 (E.D. Pa. Sept. 4, 2001)*. Plaintiff claims that equitable tolling applies and would have extended Plaintiff's deadline for suit past its original date. Defendants disagree, arguing that Plaintiff's pre-existing knowledge of the allegedly wrongful conduct defeats its attempt to establish equitable tolling.

[17] As explained above at pages 7-8, a hot air balloon envelope can only be repaired with FAA approved replacement parts (fabric falls under the category of "parts") from either: (a) the manufacturer of the product; (b) the holder of a Supplemental Type Certificate ("STC"); or (c) an entity with Parts Manufacturing Approval ("PMA"). *14 C.F.R. § 21.303*.

Defendants also emphasize that Plaintiff failed to exercise any form of due diligence to pursue the alleged wrong. Plaintiff supposedly did nothing between 1996 and 2002 to pursue its legal remedies following the loss of use of his "big ride" balloon and his alleged inability to have it repaired, notwithstanding his longstanding complaints about the manufacturers' language, notwithstanding changes in the Aerostar ICA which alerted the owner to the validity of other replacements, and **[**49]** notwithstanding Mr. Harrison's knowledge of, and access to, the federal regulations that govern this field. Defendants claim there **[*204]** were no efforts to seek redress with calls to the manufacturer, no calls to the FAA, no independent research, no calls for any form of legal representation or advice. Defendants also argue that Plaintiff cannot display any active conduct by the Defendants which would reveal fraudulent concealment or an intention to mislead. Defendants contend that Plaintiff cannot cite one conversation with the defendants, one passage of deposition testimony, one document, or any other evidence that bespeaks fraudulent intentions.

2. Analysis

HN10[] Generally, a cause of action accrues - and the statute of limitations begins to run - when a defendant commits an act that injures a plaintiff. ***HN11***[] In the context of a continuing antitrust violation, each time a plaintiff is injured by the act of the defendant, a cause of action accrues to the plaintiff to recover damages caused by that act.

> However, a suit may be brought more than four years after the events that initially created the cause of action if the defendant commits "an act that by its very nature constitutes **[**50]** a 'continuing antitrust violation.'" *Zenith Radio Corp. v. Hazeltine Resch., Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 & n.2 (1971)*. An act constitutes a "continuing antitrust violation" if it injures the plaintiff over a period of time. *See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 & n.5 (1968)*. ***Antitrust law*** provides that in the case of a continuing antitrust violation each overt act that is part of the violation and that injures the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 138 L. Ed. 2d 373, 117 S. Ct. 1984 (1997)*; *see also Hanover Shoe, 392 U.S. at 502*.

*In re Linerboard Antitrust Litig., 2000 U.S. Dist. LEXIS 14433, at *16-17, MDL No. 1261 (E.D. Pa. Oct. 5, 2000)*.

> [A] new cause of action may arise from later overt acts in furtherance of a challenged conspiracy or from each injury resulting from a continuing violation. However, to trigger a new cycle of the **[**51]** limitations period, the overt act must specifically affect the plaintiff and not be merely a continuation of the conspiracy. If the plaintiff suffered injury at the beginning of the continuing conspiracy but not thereafter, the plaintiff may not enjoy the benefits of an extended limitations period.

ABA SECTION OF ***ANTITRUST LAW***, ***ANTITRUST LAW*** DEVELOPMENTS 893-94 (5th ed. 2002) (footnotes omitted) [hereinafter ABA ANTITRUST].

Defendants thoroughly chronicle Plaintiff's actions since the 1970s that potentially indicate Plaintiff's longstanding awareness of any allegedly offensive behavior, and Defendants essentially argue that Plaintiff's claim should not be considered timely considering its decades-old knowledge of the offending behavior and overall inactivity until only recently. (Harrison Dep., Defs.' Ex. B & Pl.'s Ex. H, at 150-54, 156-58, 159-62; Harrison Dep., Defs.' Ex. D & Pl.'s Ex. I, at 43-44, 46, 47-48.) Defendants claim that in 1993, their ICA first alerted balloon owners that they could purchase third-party replacement fabric instead of directly from Raven/Aerostar. Therefore, even though Mr. Harrison testified that he had not read this language until 2003, Defendants **[**52]** argue that Plaintiff had been on notice of its expanded alternatives for nearly ten years before filing this suit. In 1993, a portion of the relevant ICA language read, "Repair/replacement **[*205]** materials must be obtained from Aerostar to be considered a 'certified part'. In the event that repair materials are obtained, the supplying company or the repair station performing the repair must act to 'certify' the material and part as equal to or better than the original equipment." (Defs.' Supplemental Ex. C.) The Court cannot conclude that this language necessarily placed Raven/Aerostar balloon owners on notice that they could purchase third-party replacement fabric, given that the first and second sentences appear to contradict each other. As Defendants point out, balloon owners are notified that third-party fabric must be certified before use, thus indicating that third-party fabric is acceptable material; however, the preceding sentence states that only materials supplied by Defendants are considered certified. Given that the Court must give the benefit of the doubt to Plaintiff, as the non-moving party, the Court cannot conclude as a matter of law that this language placed Plaintiff and **[**53]** other Raven/Aerostar balloon owners on notice regarding their ability to purchase third-party fabric.

Here, Plaintiff has presented facts that Defendants' predatory acts continued unabated through 2001, at which time Defendants changed the ICA language. According to Plaintiff, it has been harmed by Defendants' antitrust activity continuously until the ICA change, because the company has lost income which it otherwise would have earned had Plaintiff repaired its most profitable balloon. [18] It is undisputed between the parties that the written change allegedly removing the language offensive to Plaintiff occurred in 2001. Given that Plaintiff filed the instant suit less than four years following Defendants' rewriting of the ICA, there is an issue of fact for trial as to whether the applicable statute of limitations had expired.

[54]** In light of case law such as *Linerboard* and *Klehr*, *supra*, which held that, ***HN12***[] in the context of a continuing antitrust violation, each overt act starts the statutory period running again "regardless of the plaintiff's knowledge of the alleged illegality at much earlier times," *Linerboard, 2000 U.S. Dist. LEXIS 14433, at *17*, even though Plaintiff might have realized that it suffered injury each year, assuming Plaintiff filed this case within four years of its last alleged injury, its case is timely and the statute of limitations will not bar these claims from continuing. The Court cannot resolve this issue as a matter of law at this time. Thus, summary judgment will be denied on these grounds.

B. Second Argument: Implied Immunity

1. Parties' Contentions

HN13[] The doctrine of implied immunity arises where an alleged violator of the law has acted pursuant to congressional or regulatory authority that conflicts with conduct alleged to be in violation of the antitrust laws. *See generally* ABA ANTITRUST, *supra*, at 1238-40. Because the hot air balloon industry is heavily regulated, Defendants argue that their actions and activities **[**55]** undertaken pursuant to congressional or regulatory authority should be entitled to implied immunity from the federal antitrust laws. Defendants assert they developed their ICAs jointly with the FAA, as they were obligated to do by operation of FAA guidelines, **[*206]** and each successive year after this initial acceptance by the FAA, the ICA remained subject to FAA oversight.

In developing and maintaining their ICAs pursuant to the direct obligation imposed by the FAA, and having worked both with and under the direction of the FAA in creating their ICAs, Defendants contend that they cannot now be held liable in antitrust. At a minimum, Defendants claim they had a reasonable belief that their actions vis-a-vis Plaintiff were appropriate if not necessary in complying with regulatory and administrative mandates, confirmed by the FAA itself. According to Defendants, to hold them accountable in antitrust would subject them to severe liability for conduct they took in order to ensure aviation safety for hot air ballooning.

2. Analysis

This case features the friction that occasionally arises when Congress establishes a regulatory regime which appears inconsistent with the vigorous competition **[**56]** also mandated by Congressional statutes. ***HN14***[] An

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[18] Had Plaintiff repaired its "big ride" balloon, the balloon would have remained aloft and commercially viable until 2006, its next anticipated repair date. Plaintiff has submitted an expert report that details the company's economic losses following the retirement of its "big ride" balloon. (Actuarial-Economic Consultants Report, Pl.'s Ex. A.)

express exemption to antitrust liability exists wherever Congress explicitly states that the antitrust laws will not apply to the conduct authorized by the legislation, either in general, or under the specific circumstances enumerated in the legislation. *See generally* ABA ANTITRUST, *supra*, at 1238. By contrast, where a Congressional statute mandates certain behavior, but omits to exempt the behavior expressly from the purview of the antitrust laws, an exemption might need to be implied in order to preserve Congress's regulatory intentions. *Id.* In this case, where the relevant statutes contain no express exemption, Defendants argue that this Court should find that the regulations that mandated their conduct, now challenged by Plaintiff contain an implied exemption that would insulate Defendants' behavior from antitrust liability.

HN15[] Defendants have a heavy burden to prove an implied immunity. "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)*; **[**57]** *see also* *United States v. Phila. Nat'l Bank, 374 U.S. 321, 348, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*. Implied antitrust immunity is restricted only to the activity challenged, and will not extend to conduct otherwise overseen by the regulatory agency. *See generally* ABAANTITRUST, *supra*, at 1238. In conformance with these principles, while the Supreme Court has recognized implied immunity from certain prosecutions under the antitrust laws, the Court has steadfastly held that the Federal Aviation Act does not completely displace the antitrust laws. *Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 387, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973)*; *Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 305, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963)*.

Whether Defendants are entitled to implied antitrust immunity because they developed, drafted, and promulgated their ICAs in conjunction with the FAA appears to be a matter of first impression. ***HN16***[] Only where Congress has invested pervasive supervisory authority in a regulatory agency should a court conclude that Congress intended to ease liability under the *Sherman Act*. **[**58]** *See, e.g.*, *Nat'l Ass'n, supra.* The Court concludes that Defendants have not established a sufficiently coherent and pervasive theory of regulation, nor do they document any congressional intent that companies in the balloon industry are immune from antitrust litigation by virtue of **[*207]** collaboration with the FAA in drafting and promulgating their ICAs.

a. Federal Regulations Applicable to Hot Air Ballooning

As discussed above in Section II.B, there are numerous federal regulations that apply *inter alia* to the manufacture and sale of both hot air balloons and replacement parts. To summarize, balloon manufacturers are required to distribute to their customers ICAs, which are model-specific maintenance manuals that detail standards and procedures to be used during maintenance, alteration, or preventive maintenance of the aircraft. These methods or practices generally may be substituted by other maintenance methods or practices acceptable to the FAA. The ICA might contain a segregated section of additional techniques, known as the ALS, from which maintenance personnel may not deviate. Replacement parts may be manufactured and sold by the aircraft's original manufacturer **[**59]** or by a third-party that holds either an STC or PMA, documents which indicate that the FAA has approved the third-party's product. However, these regulations did *not* require the conduct which Plaintiff contends violated the antitrust laws: for example, no federal regulation requires that a hot air balloon owner first secure the original manufacturer's permission to use third-party fabric before repairing the balloon envelope.

It appears clear from the record that although Defendants' ICA implied that only Defendants-approved replacement parts could be used, there is no requirement in the FARs that replacement envelope material be tested in accordance with the *manufacturer's* standards. In fact, the FAA has set forth its own standards for strength and safety, *14 C.F.R. §§ 31.21-31.27*, which must be met by all manufacturers and replacement parts manufacturers, including holders of STCs and PMAs. Thus the Court concludes that both Plaintiff and Defendants have overstated the case. The regulations do not require the defendants to what they did, and what Plaintiff claims is unlawful under the antitrust laws. Nonetheless, the Court will review the applicable **[**60]** case law.

b. Relevant Case Law

The starting point in the case law on implied immunity are two Supreme Court opinions that hold that ***HN17***[] implied immunity from the antitrust laws is to be sparingly inferred from the enactment of a regulatory statute: *Pan*

American World Airways v. United States, supra, and Hughes Tool Co. v. Trans World Airlines, supra. The Court notes that neither *Pan American* nor *Hughes Tool Co.* give Defendants any specific support regarding ICAs and implied immunity.

In Pan American, supra, the United States brought a civil antitrust action against Pan American World Airways, W.R. Grace & Company, and their jointly-owned subsidiary, Pan American-Grace Airways ("Panagra"). When Pan American and Grace organized Panagra, the companies agreed that Panagra and Pan American would not parallel each other's air routes, a combination and conspiracy allegedly in restraint of trade and monopolization and attempted monopolization of air transportation between the United States and South America. The United States further alleged that Pan American had used its control over Panagra to prevent it from obtaining **[**61]** authority from the Civil Aeronautics Board to extend its route from the Canal Zone to the United States. The district court dismissed the case against Grace and Panagra, finding that none of their practices violated the Sherman Act. Regarding Pan American, however, the lower court concluded that by suppressing **[*208]** Panagra's efforts to extend its route from the Canal Zone to the United States, Pan American had violated the Sherman Act, and ordered Pan American to divest itself of its stock in Panagra.

On direct appeal to the Supreme Court, the Court held that the issues presented had been congressionally entrusted to the Civil Aeronautics Board for resolution, and dismissed the complaint in its entirety. Finding that the limitation of routes and divisions of territories, and the relation of common carriers to air carriers, were fundamental to the regulatory scheme developed by Congress, the Court held that the antitrust violations charged in the complaint had been reserved for the Board's authority "in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers. **[**62]** " Pan American, 371 U.S. at 305. While the Court accordingly ordered the dismissal of all claims against all defendants, the Court was careful to stress the narrowness of its holding; that is, the Federal Aviation Act does not completely displace the antitrust laws, but only those segments necessarily implicated by the particular regulatory scheme enacted by Congress. The Court held, "While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total." *Id.*

In Hughes Tool Co., supra, Trans World Airlines ("TWA") brought an antitrust action against Hughes Tool Company ("Toolco") that challenged Toolco's ability, in exercise of its controlling interest in TWA, to control and dictate how TWA acquired and financed aircraft. Toolco had defended itself claiming that its challenged transactions were under the control and surveillance of the Civil Aeronautics Board ("CAB") and subsequently immune from the antitrust laws by virtue of the Federal Aviation Act of 1958. The district court had entered a default judgment against Toolco, which **[**63]** the Second Circuit Court of Appeals upheld. The Second Circuit had distinguished *Pan American*, concluding that the continuing supervision of the CAB over the Toolco-TWA relationship was general and not related to any specific conduct that would have constituted an antitrust violation. Hughes Tool Co., 409 U.S. at 378. The Supreme Court disagreed and found *Pan American* applicable to the case, especially in consideration of the relevant statute and the several opinions and orders issued by the CAB regarding the Toolco-TWA relationship.

> From 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were "just and reasonable and in the public interest."

409 U.S. at 379. Toolco was forbidden from acquiring control of TWA without CAB approval; under the Federal Aviation Act, **[**64]** the CAB only could have approved the acquisition if it were found consistent with the public interest, id. at 381, and the CAB could not have approved Toolco's actions had there been the possibility of a resultant monopoly which could have restrained competition or jeopardized another air carrier. Id. at 384. As in *Pan American*, the Court in *Hughes Tool Co.* emphasized the narrowness of its holding, namely that **[*209]** while the defendant was entitled to antitrust immunity in this case, ***HN18***[] the Federal Aviation Act overall does not completely displace the antitrust laws. Id. at 389.

According to Defendants, *Scroggins v. Air Cargo, Inc., 534 F.2d 1124 (5th Cir. 1976)*, supports their argument for implied immunity in this case, [19] that Plaintiff's action should be dismissed considering the FAA's participation in the initial drafting of the challenged ICA's and its continued involvement throughout Defendants' revisions thereof. In *Scroggins*, several airlines contractually created a jointly-owned transportation arrangement agency, which was entrusted with such powers as the ability to negotiate contracts with third parties **[**65]** for the pick-up and delivery of air cargo. *534 F.2d at 1126-27*. The Civil Aeronautics Act of 1938 required the airlines to submit these contracts for the approval of the CAB. *Id. at 1127*. The Board expressly found that the agreement was not contrary to the public interest, but also announced an intention to reexamine the arrangement if future circumstances so required. *Id.* Plaintiff was the trustee in bankruptcy for a trucking company which had requested an increase in the rates under its contract with the agency; the agency responded by diverting its business to another trucking company.

The court in *Scroggins* held that the defendant's conduct was immunized from antitrust liability **[**66]** because "(a) the actions complained of were within the contemplation of prior CAB orders which specifically considered effects upon future competition and (b) the CAB has retained an active supervisory jurisdiction to correct anti-competitive developments as they arise." *534 F.2d at 1132*. Concerning the involvement of the regulatory agency in the formulation and oversight of the air cargo contracts, the court in *Scroggins* found it persuasive that the CAB continued to subject contractual amendments to scrutiny in order to determine whether the amendments furthered the public interest. The CAB had been exercising continuing jurisdiction over the affected area of operations, and only approved the revised contracts when found not to be adverse to the public. *Id. at 1131-32*. The court wrote, "The CAB has continued to scrutinize every amendment to the contract which defines ACI's rights and duties, and has approved the revised contracts only when found not to be adverse to the public interest. . . . The Board also announced that it would reconsider its approval if the future development of ACT should so warrant." *Id. at 1132*.

c. Implied [67] Immunity Does Not Apply in This Case**

The Court concludes as a matter of law that Defendants are not entitled either to express or to implied immunity from antitrust prosecution. Defendants contend that they could not have promulgated their ICAs had the FAA not first participated in the drafting and revision of the language and then later approved the language. Defendants suggest that because they have acted in obedience to a regulatory authority, they are impliedly immune from Plaintiff's subsequent charges that their conduct violated the antitrust laws.

The Court rejects Defendants' contentions for two reasons. First, as noted above, Defendants have overstated the thrust of the FAA regulations. Second, **[*210]** Defendants' argument that those industry actors who adhere to a regulatory agency's regulations are thereafter insulated from antitrust liability is incorrect in its breadth. Even if Defendants' theory were generally correct, Supreme Court precedent firmly establishes that the Federal Aviation Act, which created the regulatory agency at issue in this case, does not completely displace the antitrust laws. *Pan American, 371 U.S. at 305*; *Hughes Tool Co., 409 U.S. at 389.* **[**68]** The major theme of those cases is that ***HN19***[] immunity is implied only where the challenged conduct is subject to a regulatory scheme that expressly directs the agency to consider antitrust policies in the context of the regulated industry. There is no evidence to this effect in this case. Defendants correctly contend that the overriding federal interest in aviation safety compels them to adhere to the guidelines and requirements of the regulatory body. But compliance with safety regulations does not lead to antitrust immunity from the antitrust laws.

Defendants' overstatement is argued in their reply brief,

> When companies stray from the mandates and requirements of governmental regulation, people get hurt, people even die. One need go no further than a daily newspaper to recognized [sic] this fact, with commonplace examples such as polluters bypassing regulation by discharging harmful agents into the environment and businesses violating fire codes. So too with the aviation industry.

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[19] Regarding Defendants' implied immunity defense, the parties have not cited any Third Circuit precedent, as the Third Circuit has apparently not yet addressed under what circumstances in the aviation context a defendant would be entitled to implied immunity from the federal antitrust laws.

(Defs.' Reply Br. at 9.) While this Court certainly cannot question the importance of compliance with federal regulations where aviation safety is concerned, the Court notes that Defendants' **[**69]** argument does not support its implied immunity claims. That is, Defendants would have this Court find them impliedly immune from antitrust litigation because the FAA concluded that Defendants' manual - written collaboratively by Defendants and the FAA - would be effective in promoting and guaranteeing hot air balloon safety. The disconnect is obvious.

What Defendants neglect to show, with any evidence, is that the FAA, in collaborating with Defendants, specifically considered the potential alleged anticompetitive consequences of the ICA and nonetheless approved or accepted the language. Defendants have only presented evidence that the primary concern of the FAA was aviation safety, which this Court obviously should not question or second-guess. In a December 1998 letter to Mr. DiGiovanni, submitted to the Court by Defendants, Ava L. Mims of the FAA stated, "*It is not the responsibility* of the FAA to monitor antitrust issues, which are a matter for the civil courts." (Defs.' Ex. K.) Mark West, President of Aerostar International, Inc., stressed that the Defendants and the FAA were cooperating with aviation safety (and not the anticompetitive consequence) as their chief consideration, **[**70]** stating that:

> The overall goal of both Raven and the FAA was to promote aviation safety through language which instructed the aircraft owner as to how and when the aircraft would no longer be airworthy, i.e., when and how repairs were required so that the aircraft could be legally, and safely, flown.

(West Aff. of Nov. 2003 P7; *see also id.* PP4, 8.) Demonstrating further that the Defendants and the FAA were primarily concerned with fostering and ensuring aviation safety, Mr. West also stated, "The language of the ICA was not the product of any effort by defendants to limit or restrict the market, rather, it was a function of Raven and Aerostar's compliance with the Federal laws and the Federal **[*211]** Agency empowered to enforce those laws in the interest of aviation safety." (*Id.* P11.) That the FAA had not considered the anticompetitive consequences of Defendants' ICA is no surprise, especially upon consideration that nothing in the ICA outright forbids the use of third-party replacement fabric.

However, under*Pan American* and*Hughes Tool Co.*, it is clear that ***HN20***[] a defendant wishing to invoke implied antitrust immunity must demonstrate that the regulatory agency **[**71]** was authorized by Congress to consider the anticompetitive implications of its actions and enact regulations that essentially "trumped" the antitrust laws. Under those circumstances, Congress intended the regulatory scheme to operate as a more refined, but functionally equivalent, substitute for the standard antitrust regime, and that to penalize the challenged conduct would be an invasion of the regulatory agency's competence. The Court in *Pan American, supra*, concluded that the plaintiff's complaint should have been dismissed because the relevant statute explicitly gave the regulatory agency broad power to investigate and halt unfair practices and unfair methods of complaint - including those alleged in the complaint - and because if the courts later were to intrude, imposing their own interpretation of the antitrust laws, the two regimes potentially would collide. Similarly in *Hughes Tool Co., supra*, the Court concluded that the defense of implied immunity was applicable because the regulatory agency, pursuant to statutes that empowered it to permit only those acquisitions of control that were not inconsistent with the public interest and **[**72]** that would not have resulted in a monopoly, had considered the anticompetitive consequences of the defendant's every acquisition and lease of aircraft. Along these lines, the court in *Scroggins, supra*, held that the defendant's conduct was immunized from antitrust liability because "(a) the actions complained of were within the contemplation of prior CAB orders which specifically considered effects upon future competition and (b) the CAB has retained an active supervisory jurisdiction to correct anti-competitive developments as they arise." *534 F.2d at 1132*.

d. The Evidence in This Case Does Not Show FAA Consideration of Anticompetitive Consequences

The deposition testimony in evidence shows that the FAA reviewed Defendants' ICAs in order to promote and preserve aviation safety. There is nothing in the record demonstrating that the FAA considered the antitrust laws and weighed the anticompetitive effects, if any, of its approval of Defendants' ICA language. Gregory Michalik is the FAA Senior Aerospace Engineer and Program Manager in charge of FAA oversight for the Aerostar program on behalf of the FAA, and it is on his testimony Defendants rely for their **[**73]** contention that the relationship between Defendants and the FAA is a formal, collaborative process to ensure aviation safety from which Defendants may not deviate. The Court finds that Mr. Michalik's testimony demonstrates the overarching safety concern in drafting the ICAs. When asked whether he knew the purpose of the particular provision that required approval to replace up to the maximum 65 percent of the hot air balloon envelope, Mr. Michalik testified, "My understanding is to maintain the structural integrity of the envelope and so it would be a safe vehicle to fly." (Michalik Dep., Defs.' Ex. G, at 38; *see also id.* at 42-43.) Mr. Michalik's deposition proceeded as follows in pertinent part:

> [Defense Counsel]: What were you conveying to Mr. DiGiovanni in [a letter **[*212]** addressed to him], what were you telling him?
> [Mr. Michalik]: It was that if you need to replace more than 35 percent of your fabric that a request should be sent to Aerostar. Aerostar will then evaluate the request, see where the damage is, help them with putting together a repair, and provide them with the necessary instructions and documents in order to complete that repair.
>
> Q: Is the **[**74]** reason for that because that's what the ICA said?
> A: Yes.
> Q: And on behalf of the FAA you were making it your position that the ICA's instructions were to be followed by the balloon owner, correct?
> A: Yes.
> Q: What would be the underlying purpose of that instruction?
> A: To insure that the repaired balloon would be in a safe condition for flight.

(*Id.* at 55-56.) Mr. Michalik stated that in drafting the ICA language alongside Defendants, the predominant consideration of the parties was aviation safety (*see, e.g.*, *id.* at 46), and nowhere does Mr. Michalik even hint that the FAA contemplated the anticompetitive consequences of its collaboration with Defendants. In addition to Mr. Michalik, Michael Gallagher and William Timberlake - FAA Small Plane Directorate Manager and FAA Manager, respectively - also testified that FAA acceptance of ICA language is a formal, *safety-driven* process undertaken by all manufacturers before they can place their aircraft and parts on the market. (Gallagher Dep., Defs.' Ex. I, at 32; Timberlake Dep., Defs.' Ex. J, at 82-83.)

Defendants have not argued that the FAA considered the anticompetitive ramifications **[**75]** of its approval or acceptance of their ICA language, nor does the evidence of record support this Court independently finding as a matter of law that the FAA had actually contemplated and condoned, as was its administrative prerogative, the effects of its imprimatur on competition within the hot air balloon industry. Instead, in their papers and arguments submitted to the Court, Defendants consistently have contended that the FAA approved or accepted their manuals in the interest of aviation safety, and not in the interests of promoting competition within the industry. Defendants argued that "at all times, the defendants operated within the strictures of a statutory scheme developed and maintained by the FAA *for the primary purpose of ensuring air safety*." (Defs.' Mem. Supp. Mot. Summ. J. at 31) (emphasis added).

As Defendants stated in their reply brief, "each FAA representative has testified that these considerations are grounded in *safety* considerations, the FAA's primary charge to the public, implemented by regulating manufacturers in the market . . . ." (Defs.' Reply Br. at 9) (emphasis added).

The Court cannot conclude as a matter of law that exposing Defendants to **[**76]** antitrust liability stemming from a challenged safety manual written in collaboration with a regulatory agency would interpose a second, potentially adverse construction of the antitrust laws, as proscribed by *Pan American* and *Hughes Tool Co.*, where the regulatory agency at issue is not demonstrated to have authorized (or ever considered) the possible anticompetitive consequences, nor even alleged to have such regulatory power. ***HN21***[] "Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct." *Phonetele, Inc. v. AT&T Co., 664 F.2d 716, 729 (9th Cir. 1981)*.

[*213] The Court concludes that Defendants have not satisfied their burden to succeed on this argument of their motion for summary judgment.

C. Third Argument: Whether Plaintiff Has Presented Sufficient Facts to Prove a *Prima Facie* Case

1. § 2 Monopoly Claim

a. Parties' Contentions

Count I of Plaintiff's complaint charges monopolization and attempted monopolization, and alleges that the relevant product market is "the Raven/Aerostar balloon replacement fabric market in the U.S." (Compl. **[**77]** P32.) Defendants argue again, as an alternative to immunity, not only that Plaintiff cannot demonstrate that their conduct was anticompetitive, (because their actions in formulating and maintaining their ICAs were taken while acting pursuant to a regulatory system that obligated them to take the very actions at issue in this case), but also, that Plaintiff can display nothing other than a highly subjective, personal opinion that the defendants' conduct was anticompetitive. According to Defendants, all the objective evidence - as derived from other parties, from the ICAs and FARs, and from the FAA itself, through the testimony of Mr. Mickalik - indicates that Defendants were acting under the auspices of the FAA and the FARs, and solely in the interest of promulgating air safety for hot air balloonists within the confines of a regulatory system.

Defendants also argue that the evidence of record does not indicate any anticompetitive activity by them. According to Defendants, the evidence reveals that even if they are not immune, the market for replacement fabric is a function of the extreme regulatory measures placed upon any person or entity wishing to participate in the market. As **[**78]** Defendants emphasize, until the mid-1980s, Raven/Aerostar was the only participant in this market and has only since been joined by two other companies able to secure regulatory preapproval. (West Aff. of Nov. 2003 P13.) Defendants argue that their standing in the market is not a function of anticompetitive activity, but of natural market forces within a highly regulated industry. (*Id.*)

b. Analysis

Plaintiff acknowledges that Defendants' early prominence in the market largely was due to FAA regulations and prerequisites no other company had satisfied. (Pl.'s Mem. at 32.) Plaintiff argues that after attaining such status, Defendants took full advantage of its monopoly position to discourage any competition by implying through its ICAs, as discussed above, that use of any other company's fabric would render the balloons "unairworthy". Defendants allegedly placed further restrictions upon how much fabric could be replaced without first obtaining its permission to make the repair, and informed all owners and repairmen that these restrictions were "expressly" authorized by law. [20]

[79]** **[*214]** The Court requested both parties to submit supplemental briefs on the leading Supreme Court decision on the interplay between the antitrust laws and replacement products, *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. In this case, the district court had granted summary judgment for Kodak on allegations that Kodak unlawfully monopolized and attempted to monopolize the sale of service and parts for copy and micro-graphic equipment manufactured by Kodak and had also engaged in an alleged tying arrangement. The plaintiffs were independent service organizations (ISO's) which asserted that Kodak's policies to limit the availability of replacement parts for its equipment to ISO's, and to make it more difficult for ISO's to compete with Kodak in servicing such equipment, violated the antitrust laws. The Ninth Circuit had reversed the summary judgment for Kodak and the Supreme Court affirmed.

The Court will follow the order established by Plaintiff's Complaint and first consider Plaintiff's claims under *Section 2*. The Supreme Court has defined monopoly as follows:

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[20] The most notable example of this behavior was the September 7, 2000 letter Defendants mailed to their hot air balloon customers in the wake of the *Braden's Balloons* litigation, in which Defendants wrote, in pertinent part:

> We have been in contact with various offices within the FAA and have their full agreement, based on the FAR's and the requirements within the FAA Type Certificate Data Sheet that "all inspections, repairs, and replacements must be accomplished in accordance with the latest issue of Aerostar Instructions for Continued Airworthiness."

(Pl.'s Mem. Opp'n Summ. J. at 15, emphasis removed; *see also supra* p. 19.)

> HN22[] The offense of monopoly under § [**80] 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Kodak, 504 U.S. at 481 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). [21]

[81]** In *Kodak*, the Supreme Court, in an opinion by Justice Blackmun, rejected Kodak's contention that as a matter of law, there could not be a separate product market for the replacement parts of one manufacturer. In *Kodak*, the Supreme Court held that although there was evidence that there was substantial competition in the sale of copiers, there could be relevant markets confined to the servicing of Kodak copiers (as opposed to servicing of all copiers) and confined to the sale of Kodak's spare parts, because there were facts in the record to support the ISOs' contention that the parts and servicing of Kodak copiers were unique. *See* 504 U.S. at 481-82. [22]

[82] [*215]** In Plaintiff's submission on *Kodak*, as to the claim of monopolization, Plaintiff asserts that *Kodak* squarely rejects any concept that a defendant with a natural monopoly cannot be guilty of monopolization. However, Plaintiff goes on to argue that the Defendants' marketing strategy was similar to Kodak's and that Defendants used their control over the contents of their air worthiness manuals (the ICAs) to expand their control into the replacement fabric market, and that Defendants, as Kodak, utilized the monopoly they initially enjoyed as a result of having created a new product in order to perpetuate their monopoly improperly and to destroy competition.

Plaintiff also asserts that the testimony of Mr. Waligunda (Pl.'s Ex. F, at 17-19, 23-25) establishes that Defendants intended to utilize its market power to gain a competitive advantage and to destroy a competitor. Plaintiff argues that the *Kodak* decision requires this Court to defer to a jury trial for resolution of Defendants' assertion that their exclusionary practices were necessary to maintain service for sophisticated equipment, and to ensure safety of balloon owners and riders.

Defendants' submission on *Kodak* **[**83]** acknowledges the holding, but attempts to distinguish the facts, which have been reviewed above. Defendants assert that the facts of this case do not rise to the level which the Supreme Court found in *Kodak* to require a trial on either monopolization or the tying claim, and that Plaintiff's claim must be considered economically senseless, once again relying on the federal regulation and/or oversight as negating any conceivable antitrust theory.

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[21] Plaintiff also alleges attempted monopolization. HN23[] In order to prevail on an attempted monopolization claim under the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power. *See, e.g.*, Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp., 185 F.3d 154, 157 (3d Cir. 1999). In order to determine whether there exists a dangerous probability of achieving monopoly power, a court must inquire "into the relevant product and geographic market and the defendant's economic power in that market." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)). In light of the Court's disposition of Plaintiff's monopolization claim, the Court need not separately consider the claim of attempted monopolization.

[22] There are many cases in which other district courts have found replacement markets limited to the products of a single supplier where they are unique and have no reasonably interchangeable substitutes. *See, e.g.*, U.S. Anchor Mfg., Inc. v. Rule Indus., 7 F.3d 986, 997-98 (11th Cir. 1993) (considerably more expensive anchor excluded from broader market of functionally interchangeable but up to 50 less expensive anchors), *cert. denied*, ***512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 837 (1994)***; ***Woods Exploring & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1305-07 (5th Cir. 1971)*** (concluding that single natural gas field constituted relevant market), *cert. denied*, ***404 U.S. 1047, 92 S. Ct. 701, 30 L. Ed. 2d 736 (1972)***; Hewlett-Packard Co. v. Arch Assocs. Corp., 908 F. Supp. 265, 270 (E.D. Pa. 1995) (complaint adequately pleaded relevant product market, even where market limited to distribution of Hewlett-Packard computer printers); Nat'l Communications Ass'n, Inc. v. AT&T Co., 808 F. Supp. 1131, 1135 (S.D.N.Y. 1992) (denying motion to dismiss because HN24[] "a monopolist, or person attempting to monopolize, can be found liable in regard to distribution of its own product if it is (1) illegally attempting to destroy competition by refusing to deal or (2) controlling an essential service or bottleneck").

Based on*Kodak* and its progeny, this Court is unable to hold as a matter of law that there cannot be, in the abstract, for *Section 2* monopolization charges, a separate product market limited to Raven/Aerostar balloon envelope replacement fabrics. [23] However, that does not end the Court's inquiry as to whether plaintiff has submitted sufficient evidence, in opposition to Defendants' Motion for Summary Judgment, to warrant a trial on the issue of monopolization.

[84]** In *Kodak*, looking from the perspective of Kodak equipment owners, the Supreme Court concluded that the relevant market was composed only of those companies that serviced Kodak machines, as the service and parts for Kodak equipment were not interchangeable with service and parts for the original equipment of other manufacturers. *Kodak, 504 U.S. at 482*.

This Court concludes that there is insufficient evidence in the record to support such a finding. First, the record is undisputed that Defendants did not have any monopoly power in the sale of balloons, as there were a number of manufacturers of balloons (consisting of the entire balloon, that is the "basket" and the "envelope"). Gregory Michalik, quoted by both parties as a knowledgeable FAA official, identified Cameron Balloons, U.S., and Lindstrand U.S.A. as competing hot air balloon manufacturers. **[*216]** (Michalik Dep., Defs.' Ex. G, at 12.) Mr. DiGiovanni identified Balloon Works and Thunder & Colt as competing hot air balloon manufacturers. (DiGiovanni Dep., Pl.'s Ex. B, at 23-24.) Mr. Waligunda identified Picard as another competing hot air balloon manufacturer. (Waligunda Dep., Pl.'s Ex. F, at 16.) It is unclear **[**85]** from the record whether Harrison Aire had purchased any balloons from any third-party manufacturers. There was nothing to prevent him from doing so.

Although there is evidence in the record that Defendants may have misrepresented the facts by implying that owners or users of their balloons had to purchase replacement envelopes from Defendants (*see* discussion above), the evidence is clear that this was not a requirement of the FAA. Plaintiff had reason to know Defendants' statements were not FAA-mandated, as Mr. Harrison testified that the FAA authorized third-parties to sell Raven/Aerostar replacement parts through the PMA and STC processes. (Harrison Dep., Pl.'s Ex. H, at 164.) Mr. Harrison testified that he believed the FARs required total compliance with Defendants' manual (Harrison Dep., Defs.' Ex. C, at 51), but his interpretation overlooks the distinction, well articulated in this record, and discussed above, between the ICA and the ALS portions. Mr. Harrison also testified that he knew, back when the "big ride" balloon required repairs to remain flyable, that Head Balloons and Custom Nine Designs sold replacement balloon envelopes (Harrison Dep., Defs.' Ex. D, at 13; Harrison **[**86]** Dep., Defs.' Ex. B, at 124-28.) Mr. Harrison's testimony does not indicate any awareness that other operators of balloons purchased replacement fabrics from entities other than the manufacturer of the balloon, but other witnesses' testimony describes purchases from third-parties. (*E.g.*, Waligunda Dep., Pl.'s Ex. F, at 28.) Thus, the *Kodak* facts do not fit.

Further, in *Kodak*, there was additional anticompetitive conduct by Kodak which the Supreme Court held required a trial on the overall issue of monopolization. *See* *504 U.S. at 483* ("Respondents have presented evidence that Kodak took exclusionary action to maintain its party monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market."). There is insufficient evidence in the record to show that defendants achieved monopoly power in the replacement market, by virtue of conduct illegal under *Section 2*.

Thus, the record shows only that Plaintiff had the subjective belief that it thought it had to purchase replacement envelopes from Defendants. However, this subjective belief does not, in and of itself, entitle Plaintiff to a trial on this issue. ***HN25***[] "Conclusory statements, **[**87]** hearsay, and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence." *Frosty Bites, Inc. v. Dippin' Dots, Inc., 2003 U.S. Dist. LEXIS 8472, at *8, No. 3-01-CV-1532-M (N.D. Tex. May 19, 2003)*; *see also* McKnight v. Sch. Dist. of Phila., 171 F. Supp. 2d 446, 448 (E.D. Pa. 2001) ("Unsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence.") (quotation omitted). There is no objective evidence in the record that supports Plaintiff's misunderstanding or misconception of the requirements for replacement fabric. If, as Plaintiff contends, the Defendants had a plan of persuading all other balloon owners that they had to buy replacement fabric for Defendants' balloons only from Defendants, the plan did not succeed.

[23] There does not appear to be any dispute that the geographic market is the entire United States.

There is abundant testimony in the record that other balloon owners knew they could buy replacement fabric from entities other than the manufacturer, and that they **[*217]** did so. The record shows that other balloon owners knew they were not obligated to purchase Defendants' replacement fabric in repairing their Raven/Aerostar hot air balloons; other balloonists purchased **[**88]** third-party fabric for their Raven/Aerostar hot air balloons. While one replacement fabric competitor (Head Balloons) had not been advertising too heavily, Custom Nine Designs had been loudly promoting itself by sending letters to Defendants' distributors and advertising its services in industry magazines. (Waligunda Dep., Pl.'s Ex. F, at 27-28.) Mr. Waligunda, a distributor for Defendants, testified that Defendants sought to put Custom Nine Designs out of business because "from a competitor's standpoint, [Custom Nine Designs] was hurting [Defendants'] sales." (*Id.* at 28.) This statement implies that other hot air balloon owners were buying replacement fabric from others. Moreover, in their newsletter sent to Raven/Aerostar balloon owners, Defendants published test data that purportedly demonstrated the superiority of Defendants' own fabrics compared to those of their competitors in order to convince their readership to remain loyal to Defendants' product line. (West Aff. of Jan. 2004, Ex. A, at 5.) Defendants would not have published these comparisons had they not felt commercially threatened by the presence and availability of these competing fabrics. Mr. Harrison himself **[**89]** testified that he had contemplated purchasing less expensive third-party fabric from Colvin Rouse and other distributors, but never did so, believing that Defendants' ICA forbade him from using other replacement fabrics. (Harrison Dep., Defs.' Ex. D, at 43-44.)

The Court finds that Defendants' ICA did not forbid Plaintiff from purchasing other manufacturers' fabric and that a reasonable investigation on this point by Plaintiff would have disclosed, accurately, the relevant regulatory environment and that Plaintiff could buy replacement fabric from anyone who manufactured them to the FAA standards.

This Court concludes it would be error to transform Defendants' statements in their ICA into an antitrust violation. Further probing by Plaintiff, rather than mere reliance on the admitted ambiguity of Defendants' ICA, would have revealed that there was no bar to Plaintiff's securing replacement fabric from other sources. Plaintiff cites no case allowing mere ambiguities or misrepresentations to become an antitrust violation.

Returning to the concept of market power in a relevant market, there is no dispute that Raven/Aerostar was one of several manufacturers of hot air balloons. (*See,* **[**90]** *e.g.*, Michalik Dep., Defs.' Ex. G, at 12, identifying Cameron Balloons, U.S., and Lindstrand U.S.A as market competitors; DiGiovanni Dep., Pl.'s Ex. B, at 23-24, identifying Balloon Works and Thunder & Colt; Waligunda Dep., Pl.'s Ex. F, at 16, identifying Picard.) As noted above, there is no evidence whatsoever that Defendants had a monopoly share of the sales of hot air balloons themselves. Assuming *arguendo* that Plaintiff reasonably believed replacement parts for Defendants' hot air balloons had to be purchased from Defendants alone, that does not necessarily make Defendants monopolists in the sale of replacement parts. The Supreme Court in *Kodak* did state that a market is defined with reference to reasonable interchangeability. *504 U.S. at 481-82*. In *Kodak*, the Supreme Court held that the market for repair parts and services for Kodak photocopiers was a valid relevant market because repair parts and services for Kodak machines are not interchangeable with the service and parts used to fix other copiers. *Id.* As the Supreme Court said, ***HN26***[↑] it is the reasonable perception of the purchasers in the marketplace that **[*218]** are relevant in determining interchangeability.

[91]** In this case, the objective evidence is clear that replacement fabrics manufactured by others are interchangeable with Defendants' replacement fabric for Raven/Aerostar hot air balloons. Both Head Balloons and Custom Nine Designs were authorized by the FAA to sell replacement parts specifically for Defendants' hot air balloons. (*E.g.*, Waligunda Dep., Pl.'s Ex. F, at 21-22, 26.) There is no evidence in the record, other than Plaintiff's own mistaken beliefs, to support finding a lack of interchangeability. Indeed, it is not the fact of interchangeability that is in dispute here, but it is only that Defendants are alleged to have misrepresented the fact of interchangeability. However, the misrepresentations do not themselves become antitrust violations because there is no evidence that the Defendants had market power in the sale of hot air balloons themselves, or in the overall sale of replacement fabric.

It would not be an antitrust violation for Defendants falsely to assert that the purchaser of their hot air balloons should use only Defendants' replacement parts. In *Queen City Pizza, Inc. v. Domino's Pizza, Inc., supra*, the Third

Circuit affirmed summary **[**92]** judgment dismissal of an antitrust complaint where the plaintiff had alleged an illegal tie in the sale of products associated with a pizza franchise and required by the contractual documents existing between the parties. On the issue of the relevant product market, the court said the inquiry must be

> whether pizza makers in general might use such products interchangeably. Clearly, they could. Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract or franchise tying agreement would support a claim for violation of the antitrust laws.

124 F.3d at 438. Applying that holding to his case, the Court cannot conclude that, assuming Defendants made misrepresentations in their marketing efforts, these misrepresentations can alter what the market realities were in terms of defining the relevant product market.

The Third Circuit distinguished *Kodak* as follows:

> *Kodak*, we believe, held that ***HN27***[] a plaintiff's proposed relevant market in a unique and non-interchangeable derivative product **[**93]** or service cannot be defeated on summary judgment by a defendant's assertion that the proposed derivative market is cross-elastic with the primary market, if there is a reasonable possibility that the defendant's assertion about cross-elasticity is factually incorrect. . . . Here, it is uncontroverted that Domino's approved supplies and ingredients are fully interchangeable in all relevant respects with other pizza supplies outside the proposed relevant market. For this reason, dismissal of the plaintiffs' claim as a matter of law is appropriate.

124 F.3d at 439-40.

The Court also notes that there is no evidence in this record of some of the other indicia of a monopoly, such as increasing prices, reduced competition, or difficulty of entry into the marketplace. The evidence is uncontradicted that several other hot balloon manufacturers became active competitors of Defendants during the time period, and also the market for replacement fabrics expanded, and other entities became involved in selling replacement fabrics for different manufacturers' balloons. (*See, e.g.*, West Aff. Of Nov. 2003 P13; Waligunda Dep., Pl.'s Ex. F, at 21-22, 26.) Furthermore, any evidence **[**94]** on **[*219]** pricing is minimal. Plaintiff contends that Defendants priced its replacement fabric at a higher price than available elsewhere, but there is no other indication of any other pricing behavior by the Defendants or price levels in the market in the record.

2. *Section 1* Tying Claim

Count II of Plaintiff's complaint charges an antitrust tying arrangement, and alleges in paragraph 38, "Defendants possessed monopoly power in the market for the tying product (Aerostar hot air balloons) and used this monopoly power to restrain trade in the tied product (replacement fabric for Aerostar balloon envelopes)." Plaintiff's tying charges are not specifically identified to either *Section 1* or *Section 2*, but the law is clear that ***HN28***[] a tying claim can be made under both *Sections 1and 2*. [24] *Ortho Diagnostic Sys. v. Abbott Lab., 920 F. Supp. 455, 472 n.26 (S.D.N.Y. 1996)*, *Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1328 (D. Utah 1999)*, *In re Indep. Serv. Orgs. Antitrust Litig., 114 F. Supp. 2d 1070, 1082 n.6 (D. Kan. 2000)*. In *Kodak*, the tying claim was clearly brought under *§ 1*. [25]

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[24] The Court notes some pleading issues relating to the tying claims in Plaintiff's complaint. In paragraph 4, Plaintiff asserts that it brings this case "by reason of Defendants' violation of *§ 1 of the Sherman Act*, *15 U.S.C. § 1*." Because Plaintiff has cited both *Sections 1and 2* in his complaint, and given the requirements of liberal construction of pleadings under the Federal Rules, the Court will consider Plaintiff's tying claims as brought under both *Sections 1and 2*.

[25] In Plaintiff's brief on the *Kodak* issue, the Plaintiff also seeks to cite Section 3 of the Clayton Act, *15 U.S.C. § 14*, as support for the tying claim. However, because there is no mention of *Section 3 of the Clayton Act* in Plaintiff's complaint, the Court will, therefore, not consider it. However, this is not prejudicial to Plaintiff as such a statutory basis for a tying claim would be redundant to the claims stated under *Sections 1and 2* of the Sherman Act.

[95]**

Defendants deny there was any condition that Defendants' replacement fabric had to accompany the purchase of a new balloon from Defendants, nor any condition that replacement parts be purchased only from Defendants.

b. Analysis

HN29[] "In a tying arrangement, the seller sells one item, known as the tying product, on the condition that the buyer also purchases another item, known as the tied product." *Allen-Myland, Inc. v. IBM Corp., 33 F.3d 194, 200 (3d Cir. 1994)*. "The antitrust concern over tying arrangements **[**96]** is limited to those situations in which the seller can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market." *Id.*

In support of their argument that Plaintiff cannot establish its prima facie case for a tying arrangement. Defendants cite Mr. Harrison's deposition testimony that he had options to purchase balloon fabric from any number of Aerostar distributors, and at times did so at half price. (Harrison Dep., Defs.' Ex. B, at 112-13.) Defendants contend that Plaintiff also had PMA and STC options, *14 C.F.R. § 21.303*, but opted not to pursue them. Defendants contend that there is no evidence that indicates that Aerostar controlled a particular market share within what is clearly a market which is subject to significant regulation. Plaintiff responds that its tying arrangement allegation remains viable as Defendants required purchasers to accept burdensome terms that could not be exacted in a competitive market: i.e., to search for fabric that had been "tested and approved **[*220]** according to Raven factory standards," or to obtain **[**97]** permission before performing a top-half fabric replacement.

Under the tying allegation, the Court first notes that the Complaint alleges that the defendant possessed monopoly power in the market for the tying product (Aerostar Hot Air Balloons) (Compl. P38), but there is no evidence in the record to support a single brand market of hot air balloons. ***HN30***[] "Relevant markets generally cannot be limited to a single manufacturer's products." ABA ANTITRUST, *supra*, at 566 (noting exception only for some after-market cases). *See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 479 (3d Cir.)* (en banc), *cert. denied*, *506 U.S. 868, 113 S. Ct. 196, 121 L. Ed. 2d 139 (1992)*. The evidence shows, to the contrary, that Defendants had several competitors in the sales of balloons. (Michalik Dep., Defs.' Ex. G, at 12.) As noted above in the *Section 2* discussion, there is no evidence that Defendants had monopoly power in the sale of the balloons, usually defined as a large percentage of the relevant market. ***HN31***[] There cannot be an illegal tie without monopoly power over the tying product. *Kodak, 504 U.S. at 464*. [26]

[98]** In the *Kodak* case, Kodak urged that because it did not have a monopoly in the sale of original equipment, it could not be liable for tying its replacement parts and the tied product service. The Supreme Court concluded that in *Kodak* the record showed that the ISOs were facing Kodak market power in the service and parts markets, and that the evidence allowed an inference that Kodak had market power to raise prices and drive out competition in the after-markets, and had presented evidence that Kodak did exactly that. This evidence consisted of noting that market power existed because of locked-in customers, high information costs and discriminatory pricing. *504 U.S. at 477-78*.

To the contrary, the record in this case does not disclose any relation between parts and service, or other industry-wide anticompetitive practices, such as increasing market shares, locked-in customers, high information costs or any evidence about pricing other than Plaintiff's limited evidence that replacement fabric available from Defendants was priced higher than replacement fabric available from other purveyors. There is no evidence in the record that the quality was exactly the same. **[**99]** The record would only allow an inference that Defendants charged more for their replacement fabric because Plaintiff (and perhaps other potential customers who owned or operated hot air

[26] It is important to note that in *Kodak* the plaintiffs did not allege that the tying product was Kodak copiers, but alleged that service and parts are two distinct markets, and that Kodak had used its monopoly power over the parts market as the tying product, to compel the owners and users of Kodak equipment to use Kodak's own service personnel, rather than ISOs.

balloons) thought they had to buy the replacement fabric from Defendants. But the record does not allow an inference this higher price was due to an illegal tie.

In *Kodak*, the Supreme Court noted evidence that Kodak had agreed to sell parts to third parties only if they had agreed not to buy service from the ISOs. There were also many other restrictions instituted by Kodak as to the sale of replacement parts, all designed to put economic pressure on users of Kodak copiers to use Kodak's own service personnel. In the present case, there are no issues or contentions concerning service.

In *Kodak*, the Supreme Court held that there was a factual issue for trial as to **[*221]** whether Kodak had appreciable economic power in the tying market, i.e., the market for replacement *parts* for Kodak copiers. In *Kodak*, the Court related in detail why there could be a separate product market for replacement parts for Kodak copiers. In fact, in *Kodak*, there was really no dispute that replacement parts for **[**100]** Kodak machines were unique and not interchangeable with other copiers.

In the present case, this product distinctiveness is lacking. There is no evidence that only Defendants' replacement fabric could be used on Defendants' hot air balloons. Although Defendants did claim at various times that the owner of their balloons should use their replacement fabric, and even asserted that the FAA required this, there is nothing in the record to show that, in fact, for scientific, safety or any other reason, only Defendants' replacement fabric could be used on Defendants' hot air balloons.

The Court notes in passing that the Complaint alleges two separate markets. The market alleged in Count I for *Section 2*, as noted above, is the "Raven/Aerostar hot air balloon replacement fabric market" whereas under Count II, charging tying, the tying product is alleged to be Aerostar hot air balloons, but the tied product is, with only slightly different descriptive language, alleged to be the same market as in Count I, charging monopolization and attempted monopolization. [27]

[101]** As noted above, the Supreme Court rejected as a matter of law Kodak's contention that a single brand of product or service can never be a relevant market, holding "the relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners." *504 U.S. at 481-82*. The Court accepted as a fact, based on the record in *Kodak*, that parts for Kodak equipment are not interchangeable with other manufacturers' parts, and thus, there was an issue of whether Kodak used its parts sales as a tie to service its equipment owners to use Kodak service. Thus, the relevant market from the Kodak equipment owners perspective is composed of only those companies that service Kodak machines. *Id.*

The evidence in this case does not allow the Court to reach such a conclusion, because there is an acknowledgment running throughout the case that the replacement envelopes manufactured by any company and meeting standards are in fact interchangeable with Defendants' replacement fabric, and that some balloon owners realized this, and purchased replacement envelopes from competing manufacturers. (*See supra* pp. 52-54.) The record discloses that it was only because **[**102]** of the alleged fraud by Defendants toward Plaintiff that Plaintiff believed that it had to buy replacement envelopes from Defendants. For this reason, the Court concludes that Plaintiff's evidence does not show a "tie."

3. Whether Plaintiff Has Been Injured by Reason of Defendants' Violation of the Antitrust Laws

The Court notes another defect with Plaintiff's claims. ***HN32***[] Under the antitrust laws, a plaintiff can only sue for injuries sustained as a result of that forbidden by the antitrust laws. Here, Plaintiff's damages, if any, arise out of fraud, **[*222]** not out of the abuse of market power by Defendants. Thus, the Court concludes Plaintiff has not suffered "antitrust injury."

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[27] There is a certain inconsistency in Plaintiff's definitions. If Defendants indeed have a monopoly of the replacement fabric market, as alleged in Count I for monopolization purposes, it is hard to understand how Defendants would need the help of a "tie", i.e., the forced sale of replacement fabric, as a "tied" product. However, inconsistent contentions, particularly in the summary judgment context, are not fatal.

Mr. Harrison testified during his May 13, 2003 deposition regarding his opinion whether Defendants' manuals were deliberately misleading and what effect the manuals had on his behavior. Mr. Harrison stated "that Raven clearly in their manuals said that you could not use anything other than Raven fabric." (Harrison Dep., Pl.'s Ex. H, at 151.) Mr. Harrison testified:

> There was fabric available on the outside market that was also being represented as being the same manufacturer [sic] of Raven, and that **[**103]** it was available to the . . . balloon public, if you wanted to - if you wanted to buy it. . . . But when I came up with any - brought the question up to Aerostar - or Raven, they said if it doesn't come from us, if you don't have an invoice from us . . . it's not Raven fabric, and it's in violation of the FAA 43, and it's unairworthy.

(*Id.* at 152-53.) His deposition continued as follows, in pertinent part:

> Q. What was your particular complaint to Raven then if you didn't believe it was misleading? What was your particular complaint?
> A. The complaint was if - if the manufacturer is providing or a supplier is providing the same material to Raven, and it's available directly at half the cost to someone else, same fabric, and the same factory is saying, "We make it for Raven, and the same specs coming off the same mills, the same run, the same colors and everything. We'll provide it to you directly."
> Q. Would it be - go ahead. You finish.
> A. And Raven said, "No. You can't do that."

(*Id.* at 157.) Mr. Harrison thought he ought to be able to purchase fabric from another source and he believed that the particular guidelines set forth in the Raven **[**104]** manual forbade him from doing so. (*Id.* at 158.) Mr. Harrison testified that he had contemplated purchasing less expensive third-party fabric from Colvin Rouse and other distributors, but never did so, believing that Defendants' ICA restricted him from using other people's fabrics. (Harrison Dep., Defs.' Ex. D, at 43-44.)

Mr. Harrison testified that he had frequently asked Defendants' representatives whether the policy regarding replacement fabric had changed, and, according to Mr. Harrison, the representatives responded, "'As long as you buy the fabric, we don't care what you do,' basically. The emphasis, 'buy the fabric.'" (Harrison Dep., Pl.'s Ex. H, at 161.) As Mr. Harrison testified, even though Plaintiff would have preferred using third-party fabric, because it believed that federal law required its compliance, Plaintiff continued purchasing Raven/Aerostar fabric:

> Q. Did you believe Raven was requiring you to purchase fabric only from Raven?
> A. Yes.
> Q. Did you believe that they had the authority to do that?
> A. Yes.
> Q. Did you make any investigation with the FAA or any other source as to whether or not they indeed had the authority to do that?
>
> A. **[**105]** It was an FAA document that said you have to do that.
> Q. What FAA document said that they had to do it?
> A. The manual said if you don't use Raven, Aerostar fabric your balloon is unairworthy. It's on an FAA document.

[*223] (*Id.* at 163.) The "FAA document" to which Mr. Harrison refers is Defendants' ICA itself, which, as stated above, is only reviewed by the FAA before publication and promulgation. Mr. Harrison continued to believe that the FAA had authorized Defendants to forbid its customers from patronizing third-party suppliers until he received a forwarded copy of an FAA letter, contradicting Defendants' position. (*Id.* at 162.) This "letter from Gallagher," as Mr. Harrison referred to it, does not appear in the exhibits submitted to the Court. As noted above, Mr. Harrison's belief was simply unfounded. That his belief was caused by Defendants' misrepresentation does not establish antitrust injury. In addition to his presumed inability to purchase third-party replacement fabric, Mr. Harrison testified that he abandoned plans to design and replace his own balloon fabric and to sell his excess fabric to other balloonists, because he independently concluded that **[**106]** this venture would have been professionally difficult given

Defendants' ICA language limiting use of third-party fabric, but he could not say that an FAA representative had told him he could not pursue the venture unless Defendants retracted their ICA. (Harrison Dep., Defs.' Ex. D, at 48-50.)

Plaintiff has submitted evidence (including an expert's report) that it has suffered damages due to Defendants' allegedly fraudulent misrepresentations, but Plaintiff has not supported its antitrust claims with evidence that it suffered injury of the type that the antitrust laws were intended to prevent, and that flows from that which makes the defendants' acts unlawful, as required by the landmark ruling in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. In *Brunswick*, independent bowling centers brought an antitrust action against the Brunswick Corporation, then one of the two largest bowling equipment manufacturers and the largest operator of bowling centers. Brunswick had been selling bowling equipment to the plaintiffs' competitors on credit, and had started acquiring the financially unstable alleys when they defaulted **[**107]** in payments. The *Brunswick* plaintiffs claimed that Brunswick's acquisitions might substantially lessen competition or tend to create a monopoly under *Section 7 of the Clayton Act*, which prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."

The issue in *Brunswick* was "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying [the plaintiffs] an anticipated increase in market shares." *429 U.S. at 484*. The parties did not contest the lower court's determination that the acquisitions were unlawful; nor did the parties contest the lower court's determination that had Brunswick not acquired these properties that the moribund companies would have gone out of business, thus increasing the plaintiffs' income. *Id.* However, the Court concluded that the lower court had erred in determining that once a merger occurred in violation of *Section 7*, that all dislocations caused thereby are automatically actionable, regardless of whether the consequences had anything to do with the reason the merger was condemned. *Id. at 487.* **[**108]** As the Court explained, ***HN33***[] "Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some person. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Id.*

Regarding the instant case, this Court only can conclude that Plaintiff has not presented sufficient evidence to show a **[*224]** genuine issue of fact that he suffered any ***HN34***[] *antitrust* injury, "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id. at 489*. Assuming *arguendo* that Plaintiff established liability, Plaintiff has not produced anything of record that would demonstrate that its injury reflects the anticompetitive effect either of the violation, or of anticompetitive acts made possible by the violation. *Id.* Simply put, Plaintiff has adduced no evidence demonstrating that its damages followed an antitrust violation and were caused by that characteristic which made the violation one sounding in antitrust.

The Third Circuit has applied the **[**109]** *Brunswick* rule in several cases. In *Alberta Gas Chemicals, Ltd. v. E.I. Du Pont Nemours & Co., 826 F.2d 1235 (3d Cir. 1987)*, the Third Circuit affirmed a grant of summary judgment on *Brunswick* grounds, holding that plaintiffs must prove more than harm causally linked to an illegal presence in the market, but that antitrust injury must reflect the anticompetitive effect, either of the violation or anticompetitive acts made possible by the violation. *826 F.2d at 1240*. In this case, Plaintiff's injuries have nothing to do with Defendants' market power, but rather relate to the contention that Defendants misrepresented the FAA regulations in its ICAs, and made (at least) Plaintiff, as a prospective purchaser, believe that Plaintiff had to buy its replacement fabric from Defendants. Any injuries that Plaintiff suffered would have come from Defendants' misrepresentations, not from any market power, abuse of market power or other anticompetitive conduct. *See also Int'l Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318 (3d Cir. 1992)* (granting summary judgment on this ground, albeit with different facts).

4. Whether Plaintiff [110] Has Shown Any Impact on Competition Generally**

It is axiomatic that ***HN35***[] as part of its *prima facie* case, a plaintiff must show that the conduct of the defendant restrained competition generally, in addition to causing plaintiff harm. *See generally* ABA ANTITRUST, *supra*, at 61-73. The Third Circuit has said, "mindful that ***antitrust law*** aims to protect competition, not competitors, we must analyze the antitrust injury question from the viewpoint of the consumer. *Alberta Gas Chems., Ltd., 826 F.2d at*

1242. In this case, evidence showing a diminution of competition from the viewpoint of the consumer is sparse. However, the Court need not consider the issue in view of the holdings above.

V. Conclusion

The Court concludes that whether the applicable statute of limitations had expired before Plaintiff filed its Complaint remains an issue of fact for trial. The Court also rejects Defendants' argument that summary judgment is warranted upon application of implied immunity to Plaintiff's antitrust claims. However, as the Court concludes that Plaintiff has failed to substantiate its *prima facie* case regarding its monopoly and tying arrangement allegations, **[**111]** the Court will grant Defendants' Motion for Summary Judgment. As to Plaintiff's negligence and fraud claims, the defendants' Brief did not discuss or refute them. Therefore, the Court cannot grant summary judgment on these claims. In light of the holdings above, the Court will have a final pre-trial conference on the state law claims promptly.

An appropriate order follows.

ORDER

AND NOW, this 30th day of April, 2004, upon consideration of Defendants' Motion **[*225]** for Summary Judgment (Docket No. 12), it is hereby ORDERED that Defendants' Motion is GRANTED as to Counts I and II. The Court will have a final pre-trial conference on the remaining claims on Friday, May 7, 2004, at 2 p.m. by telephone.

BY THE COURT:

MICHAEL M. BAYLSON, U.S.D.J.

Am. Chiropractic v. Trigon Healthcare

United States Court of Appeals for the Fourth Circuit

February 24, 2004, Argued ; May 6, 2004, Decided

No. 03-1675

Reporter

367 F.3d 212 *; 2004 U.S. App. LEXIS 8906 **; 2004-1 Trade Cas. (CCH) P74,393

AMERICAN CHIROPRACTIC v. TRIGON HEALTHCARE TRIGON. TRIGONHEALTHCARE,INCORPORATED; u TRIGON INSURANCE COMPANY; TRIGON ADMINISTRATORS; MID-SOUTH INSURANCE COMPANY; TRIGON HEALTH. HEALTH AND LIFEINSURANCE y COMPANY, Defendants-Appellees, and BLUE CROSSAND BLUE SHIELD ASSOCIATION,. ASSOCIATION, Defendant. ASSOCIATION, INCORPORATED, a nonprofit corporation; VIRGINIA CHIROPRACTIC ASSOCIATION, INCORPORATED; GEORGE W. CHIRIKINIAN, D. C.; DOUGLAS M. COX, D. C.; WILLIAM R. THEISIER, D. C.; JOHN C. WILLIS, D. C.; JERRY R. WILLIS, D. C.; SARAH ELIZABETH ALLEN; LANA KAY BALL; MARGARET BYRNE; ROGER DALTON; MARY SUE DEAN; HARVIE LEE FRENCH, JR.; PATRICIA. PATRICIA HERMAN; CINDY LINKENHOKER; SANDRA PHILLIPPI; DARLENE REQUIZO; DAVID RUSSOTTO; GLORIA JEAN SMITH; LYNN D. WAGNER; ANDREA WALLACE; PATRICIA WHITTINGTON; BENIS D. WOOD; RICHARD D. WORLEY; DALE DUKE YONTZ; DOUGLAS F. AMBROSE; GEORGE C. MCCLELLAND; JAMES M. PORTER; LARRY L. STINE; WENDY HOLDEN WILLIS; STEVEN W. YATES; KEVIN J. WESTBY; GREGORY WALTER; JEFFERSON K. TEASS, Plaintiffs-Appellants, v. TRIGON HEALTHCARE, INCORPORATED; TRIGON INSURANCE COMPANY; TRIGON ADMINSTRATORS; MID-SOUTH INSURANCE COMPANY; TRIGON HEALTH AND LIFE INSURANCE COMPANY, Defendants-Appellees, and BLUE CROSS AND BLUE SHIELD ASSOCIATION, Defendant.

Subsequent History: US Supreme Court certiorari denied by *Am. Chiropractic Ass'n v. Trigon Healthcare, 2004 U.S. LEXIS 7418 (U.S., Nov. 8, 2004)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Virginia, at Abingdon. (CA-00-113-1). James P. Jones, District Judge.

Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 258 F. Supp. 2d 461, 2003 U.S. Dist. LEXIS 6961 (W.D. Va., 2003)

Disposition: Affirmed.

Core Terms

Chiropractic, district court, chiropractors, Guideline, medical doctor, conspiracy, reimbursement, discovery, manipulation, conspired, provider, policies, argues, spinal, mail, intracorporate, coverage, doctrine of immunity, state law, documents, medical association, private right of action, insurance business, wire fraud, patients, insurance company, summary judgment, impair, direct evidence, racketeering

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews the grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN2[] **Public Enforcement, State Civil Actions**

The Virginia Civil Conspiracy Act does not create liability absent a violation of the federal antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

HN3[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Sherman Act, Claims**

To establish a *15 U.S.C.S. § 1* violation, a plaintiff must show: (1) a contract, combination or conspiracy; (2) that imposed an unreasonable restraint of trade. It is incontestable that concerted action in restraint of trade lies at the heart of a violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. In other words, *§ 1* does not reach conduct that is wholly unilateral.

Antitrust & Trade Law > Sherman Act > General Overview

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

In the context of *15 U.S.C.S. § 1*, proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. Thus, it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

15 U.S.C.S. § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. Accordingly, a parent and its wholly owned subsidiary are legally incapable of conspiring with each other for purposes of *§ 1*. A parent and a wholly owned subsidiary always have a unity of purpose or a common design so the law's concern with a sudden joining of independent interests is not present in such a case.

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Hospital Privileges > Professional Review

Healthcare Law > Business Administration & Organization > Hospital Privileges > Restrictions

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN7[] **Peer Review, Organizations**

The court has applied the "intracorporate immunity" doctrine articulated in Copperweld to hold that a hospital lacked the capacity to conspire with its peer review committee for purposes of *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN8[] Antitrust & Trade Law, Sherman Act

The court has continued to recognize the existence of one narrow exception to the intracorporate immunity doctrine--the independent personal stake exception. An exception to the intracorporate immunity doctrine may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective. If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis. Put differently, to give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

In the context of *15 U.S.C.S. § 1*, a plaintiff can offer direct or circumstantial evidence to prove concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Antitrust law limits the range of permissible inferences from ambiguous evidence in a *15 U.S.C.S. § 1* case. Direct evidence is extremely rare in antitrust cases and is usually referred to as the smoking gun. Direct evidence in this context is explicit and requires no inferences to establish the proposition or conclusion being asserted. Mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence of an anticompetitive conspiracy.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN11[] Standards of Review, De Novo Review

The appellate court reviews a grant of summary judgment de novo.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN12[] Commercial Interference, Prospective Advantage

Virginia law permits recovery for tortious interference where a party can show (1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) the defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damages to plaintiff. Proof of the existence of the first and third elements of the tort must meet an objective test, and mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action. Instead, a plaintiff must establish a probability of future economic benefit, not a mere possibility. When a plaintiff is alleging that a third party has interfered with a business expectancy rather than with an actual contract, the plaintiff must show that the defendant interfered by employing improper methods. Improper methods are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules.

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Dismissal of Appeals > General Overview

HN13[] **Standards of Review, De Novo Review**

The appellate court reviews the dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)* de novo. On appeal from an order granting a *Rule 12(b)(6)* motion to dismiss, the court accepts as true the facts as alleged in the complaint, views them in the light most favorable to the plaintiff, and recognizes that dismissal is inappropriate unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN14[] **Industry Practices, Insurance Company Operations**

By their clear terms, *Va. Code Ann. §§ 38.2-2203*, *38.2-4221*, *38.2-4312* do not apply to a for-profit stock corporation that operates in the field of accident and sickness insurance.

Governments > Legislation > Statutory Remedies & Rights

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN15[] **Legislation, Statutory Remedies & Rights**

Virginia would not recognize a private cause of action under *Va. Code Ann. § 38.2-3408*.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN16[] **Industry Practices, Insurance Company Operations**

See *Va. Code Ann. § 38.2-3408*.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN17[] **Industry Practices, Insurance Company Operations**

See *Va. Code Ann. § 38.2-200*.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN18[] **Industry Practices, Insurance Company Operations**

Va. Code Ann. § 38.2-221 grants the State Corporation Commission the power to levy and enforce penalties against insurers for violations of the insurance code. *Va. Code Ann. § 38.2-221*. That section, however, also states that the power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of the Commonwealth.

Governments > Legislation > Statutory Remedies & Rights

HN19[] **Legislation, Statutory Remedies & Rights**

Federal courts should be reluctant to read private rights of action into state laws where state courts and state legislatures have not done so. Without clear and specific evidence of legislative intent, the creation of a private right of action by a federal court abrogates both the prerogatives of the political branches and the obvious authority of states to sculpt the content of state law.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN20[] **Regulated Practices, Trade Practices & Unfair Competition**

The Virginia Unfair Trade Practices Act (UTPA) does not create a private cause of action because it lacks explicit language creating such an action.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Unfair Trade Practices Acts

Governments > Legislation > Interpretation

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN21[] **Unfair Business Practices, Unfair Trade Practices Acts**

Like the Virginia Unfair Trade Practices Ac (UTPA), *Va. Code Ann. § 38.2-3408* does not create a private right of action because it does not contain any specific statutory language creating such an action. The existence of *§ 38.2-221* does not evince a legislative intent to create private rights of action under the insurance code. Rather, that statutory provision only leaves in place pre-existing statutory and common-law rights of action.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN22[] **Complaints, Requirements for Complaint**

Federal notice pleading standards require that the complaint be read liberally in favor of the plaintiff.

Insurance Law > ... > Savings Clause > Business of Insurance Test > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN23[] **Savings Clause, Business of Insurance Test**

The McCarran-Ferguson Act provides that no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance. *15 U.S.C.S. § 1012(b)*. The McCarran-Ferguson Act does not apply to federal laws that are specifically targeted at the business of insurance. For a federal law to be preempted by McCarran-Ferguson: (1) the state law in question must be enacted for the purpose of regulating the business of insurance; (2) the federal law must not be specifically related to the business of insurance; and (3) the federal law must invalidate, impair or supersede the state law in question.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN24[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act is not a law that specifically relates to the business of insurance.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN25[] **Industry Practices, Insurance Company Operations**

Va. Code Ann. tit. 38.2 is a set of laws enacted for the purpose of regulating the business of insurance. Statutes aimed at protecting or regulating the relationship between insurer and insured, directly or indirectly are laws regulating the "business of insurance." The focus of the McCarran-Ferguson Act is upon the relationship between the insurance company and its policyholders. Accordingly, the McCarran-Ferguson Act encompasses laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance. Applying these standards, Va. Code Ann. tit. 38.2, specifically *Va. Code Ann. §§ 38.2-200*, *38.2-221*, *38.2-3408* is a set of laws enacted for the purpose of regulating the business of insurance. Va. Code Ann. tit. 38.2 is limited to insurance companies and creates a comprehensive network of statutory provisions aimed at controlling and managing the business of insurance.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN26[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of whether the Racketeer Influenced and Corrupt Organizations Act has invalidated, impaired or superseded Nevada's laws regulating insurance, the U.S. Supreme Court has defined "invalidate" as to render ineffective, generally without providing a replacement rule or law, and "supersede" as to displace (and thus render ineffective) while providing a substitute rule.

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN27[] **Industry Practices, Federal Regulations**

When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a state's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN28[] **Industry Practices, Insurance Company Operations**

See *Va. Code Ann. § 38.2-221*.

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN29[] **Motions to Dismiss, Failure to State Claim**

Although the appellate court disagrees with the reasoning of the district court, it can affirm the dismissal of the complaint on any basis fairly supported by the record.

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

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN30[] Motions to Dismiss, Failure to State Claim

See *18 U.S.C.S. § 1962(a)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN31[] Private Actions, Racketeer Influenced & Corrupt Organizations

See *18 U.S.C.S. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN32[] Private Actions, Racketeer Influenced & Corrupt Organizations

A plaintiff bringing a civil Racketeer Influenced and Corrupt Organizations Act (RICO) action under *18 U.S.C.S. § 1964(c)* must adequately plead at least two predicate acts of racketeering that form a pattern of racketeering. *18 U.S.C.S. § 1961(5)*. Private civil RICO suits may be brought regardless of whether the government chooses to prosecute the criminal RICO violation.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN33[] Private Actions, Racketeer Influenced & Corrupt Organizations

Mail fraud, wire fraud, and extortion all qualify as "racketeering activity," *18 U.S.C.S. § 1961(1)*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

HN34[] Claims, Fraud

The federal mail and wire fraud statutes prohibit the use of the mails or interstate wires in furtherance of schemes to defraud. *18 U.S.C.S. §§ 1341*, *1343*. For the government to obtain a conviction for mail or wire fraud it must prove (1) a scheme disclosing an intent to defraud; and (2) the use, respectively, of the mails or interstate wires in furtherance of the scheme. In a prosecution for mail or wire fraud, the government is not required to show reliance on any misrepresentation. To recover civil Racketeer Influenced and Corrupt Organizations Act (RICO) damages, however, an individual must also allege that he was injured "by reason of" the pattern of racketeering activity. *18 U.S.C.S. § 1964(c)*. To meet this burden with respect to mail fraud and wire fraud, a plaintiff must plausibly allege both that he detrimentally relied in some way on the fraudulent mailing or wire and that the mailing or wire was a proximate cause of the alleged injury to his business or property. The alleged fraud must be a classic one, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation.

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

Evidence > Rule Application & Interpretation

HN35[] Motions to Dismiss, Failure to State Claim

Although as a general rule extrinsic evidence should not be considered at the *Fed. R. Civ. P. 12(b)(6)* stage, the court has held that when a defendant attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the complaint if it was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

HN36[] Private Actions, Racketeer Influenced & Corrupt Organizations

To withstand a motion to dismiss for failure to state a Racketeer Influenced and Corrupt Organizations Act claim, a plaintiff must plausibly allege at least two predicate acts of racketeering.

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

Civil Procedure > Discovery & Disclosure > General Overview

HN37[] Standards of Review, Abuse of Discretion

The appellate court affords substantial discretion to a district court in managing discovery and reviews discovery rulings only for abuse of that discretion.

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

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN38[] **Entitlement as Matter of Law, Appropriateness**

If a party believes that more discovery is necessary for it to demonstrate a genuine issue of material fact, the proper course is to file a *Fed. R. Civ. P. 56(f)* affidavit.

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN39[] **Pretrial Matters, Continuances**

See *Fed. R. Civ. P. 56(f)*.

Counsel: ARGUED: George P. McAndrews, MCANDREWS, HELD & MALLOY, LTD., Chicago, Illinois, for Appellants.

Howard Feller, Bryan Alan Fratkin, MCGUIREWOODS, L.L. P., Richmond, Virginia, for Appellees.

ON BRIEF: Steven J. Hampton, Patrick J. Arnold, Jr., Peter J. McAndrews, Ronald A. Dicerbo, MCANDREWS, HELD & MALLOY, LTD., Chicago, Illinois; William G. Shields, THORSEN & SCHER, Richmond, Virginia, for Appellants.

Judges: Before WILLIAMS and MICHAEL, Circuit Judges, and William D. QUARLES, Jr., United States District Judge for the District of Maryland, sitting by designation. Judge Williams wrote the opinion, in which Judge Michael and Judge Quarles joined.

Opinion by: WILLIAMS

Opinion

[*217] WILLIAMS, Circuit Judge:

In this appeal, we consider whether Trigon Healthcare, Virginia's largest for-profit health insurance company, and its affiliated companies (collectively, Trigon), [1] **[**3]** were engaged in an anticompetitive conspiracy with medical

[1] Trigon Healthcare was recently purchased by Anthem Healthcare, an Indiana based health insurance company. To be consistent with the district court's usage and the factual record developed below, we refer to the corporation as "Trigon."

doctors and medical associations whose purpose was to harm chiropractors. American Chiropractic [2] filed this eight **[**2]** count complaint alleging violations of federal antitrust laws, the *Racketeer Influenced and Corrupt Organizations Act (RICO)*, and various state laws, claiming that Trigon and the medical doctors and associations were engaged in a conspiracy that used Trigon's reimbursement policies and treatment guidelines to limit severely the flow of insurance dollars to chiropractors and steer those monies toward **[*218]** medical doctors. Trigon argues that no conspiracy exists, and that it implemented its coverage policies unilaterally based on market supply and demand. The district court agreed with Trigon, dismissing two counts of the complaint for failure to state a claim and disposing of the remaining counts by granting Trigon's motion for summary judgment. Although we apply different reasoning than the district court in some areas, we affirm its disposition of the case in favor of Trigon.

I.

Trigon is a for-profit, publicly-traded health insurance company located in Virginia. Trigon's business consists of selling individual and group healthcare benefit plans to its subscribers. Generally, these healthcare benefit plans list the benefits and services covered by Trigon under the plan and describe any services that are excluded from the plan or are the subject of coverage limitations. Trigon makes a network of healthcare providers, including medical doctors, hospitals, pharmacies, chiropractors, and therapists, available to plan members to provide the services covered under the plan. Trigon creates this network of healthcare providers by entering into contracts with providers who are willing to abide by Trigon's terms and conditions, as set forth in Trigon's provider agreements. Simply put, "Trigon is essentially purchasing services from the healthcare **[**4]** providers who agree to become participating providers in Trigon's [provider] networks." (J.A. at 1344.) Trigon strives to offer "the best coverage at the lowest possible cost," and it endeavors to pay "the lowest possible price" to healthcare providers to ensure low-cost access for plan enrollees. (J.A. at 1597, 4579.) Chiropractic medicine is "a non-pharmaceutical, nonsurgical system of health care based on the self-healing capacity of the body" with the aim of "removing irritants to the nervous system and restoring proper function" to the nervous system. *Dorland's Medical Illustrated Dictionary* 347 (30th ed. 2003). Chiropractic treatment most commonly involves spinal manipulations [3] **[**5]** to relieve musculoskeletal complaints. *Id*. Trigon has provided coverage for chiropractic services since the 1980's, and Trigon "acknowledges that chiropractic care has a health effect, a positive health effect when rendered appropriately." [4] (J.A. at 4186.)

Despite Trigon's coverage of chiropractic services, and the fact that chiropractic medicine is, as the district court noted, a "recognized branch of the healing arts," *see* *American Chiropractic Association v. Trigon Healthcare, Inc., 258 F. Supp. 2d 461, 463 (W.D. Va. 2003)*, there is a history of animus from medical doctors and insurers aimed at chiropractors. Beginning in 1962, the American Medical Association (AMA), aided by the National Association **[*219]** of Blue Shield Plans, **[**6]** [5] **[**7]** began a "lengthy, systematic, successful, and unlawful" national group boycott aimed at destroying chiropractic medicine. *Wilk v. Am. Medical Ass'n., 895 F.2d 352, 371 (7th Cir. 1990)*. As the Seventh Circuit explained:

> In 1963 the AMA formed its Committee on Quackery (" Committee"). The Committee worked diligently to eliminate chiropractic. A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under former Principle 3, it was unethical for medical physicians to

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[2] We refer to the appellants, the American Chiropractic Association, the Virginia Chiropractic Association, certain individual chiropractors and some patients of individual chiropractors, collectively as "American Chiropractic."

[3] Spinal manipulation is defined by the Agency for Health Care Policy and Research, a division of the U.S. Department of Health and Human Services, as "manual therapy in which loads are applied to the spine using short or long lever methods." (J.A. at 5507.)

[4] The use of chiropractors by Trigon's plan enrollees has increased substantially since Trigon began covering chiropractic care. For instance, in 1996 only 26,275 plan enrollees received spinal manipulation treatment from chiropractors, but that number jumped to 74,477 by 2001. The number of chiropractic providers in Trigon's network rose from 513 to 961 during the same time span, and now almost 90% of chiropractors in the Commonwealth of Virginia are in Trigon's provider network. In addition, the total amount of payments from Trigon to chiropractors rose from $ 12,380,737 in 1996 to $ 21,510,503 in 2001.

[5] This organization is now called Blue Cross & Blue Shield Association of America.

> associate with "unscientific practitioners." In 1966, the AMA's House of Delegates passed a resolution labelling chiropractic an unscientific cult.

Id. at 356.

Beginning in 1977, the AMA slowly began to phase out its boycott of chiropractors, and the Seventh Circuit adopted the *Wilk* district court's finding that the boycott became dormant in 1980 when Principle 3 was revised. [6] Id. at 356, 374. Although Trigon is a licensee of Blue Cross & Blue Shield Association of America, there is no record evidence connecting Trigon to this boycott.

American Chiropractic, however, asserts that medical doctors continue to harbor animosity toward chiropractors and have entered into an anticompetitive conspiracy with Trigon to harm chiropractors. American Chiropractic contends that medical doctors and their medical associations have conspired with Trigon to limit the usage of chiropractors by Trigon's plan enrollees and to restrain severely the reimbursement paid to chiropractors for services rendered to plan enrollees. The ultimate goal of this conspiracy, American Chiropractic argues, is to shift insurance dollars away from chiropractors toward medical doctors and harm the business of chiropractors.

In response to this perceived anticompetitive conspiracy, American Chiropractic brought this **[**8]** action in the United States District Court for the Western District of Virginia on August 18, 2000. American Chiropractic's eight-count complaint alleged that Trigon [7] conspired with medical doctors and medical associations to restrain interstate trade in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 1997) (count one); attempted to monopolize the market for treatment of neuromusculoskeletal conditions in violation of § 2 of the Sherman Act, 15 U.S.C.A. § 2 (West 1997) (count two); engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1962 (West 2000) (count three); tortiously interfered with the business enterprise of chiropractors in violations of state common law (count four); conspired to injure chiropractors in their trade or practice in violation of Va. Code Ann. § 18.2-499 (Michie 1996) (count five); committed state common law breach of contract (count six) and conspiracy (count seven); and violated Va. Code Ann. §§ 38.2-2203, *38.2-3408*, 38.2-4221, and **[*220]** 38.2-4312(E) **[**9]** (Michie 2002), referred to as the Virginia insurance equality laws (count eight). The district court exercised supplemental jurisdiction over the state law claims pursuant to 28 U.S.C.A. § 1367 (West 1993).

Trigon moved to dismiss the complaint in its entirety on October 13, 2000. The district court, on July 19, 2001, granted that motion in part and dismissed American Chiropractic's RICO (count three) and Virginia insurance equality (count eight) claims for failure to state claims. The district court held that the RICO claim was preempted by the McCarran-Ferguson Act and that the Virginia insurance equality laws relied upon by American Chiropractic did not create private causes of action.

Following discovery, on August 13, 2002, Trigon filed a motion **[**10]** for summary judgment on the remaining counts in the complaint. American Chiropractic did not file a Rule 56(f) motion requesting further discovery, but it did contest Trigon's motion for summary judgment. After the benefit of oral argument, the district court, on April 25, 2003, granted Trigon's motion for summary judgment on the remaining counts. As to counts one, five, and seven, the district court found that the intracorporate immunity doctrine precluded any conspiracy between Trigon and the medical doctors that served on one of its committees, the Managed Care Advisory Panel, and that American Chiropractic had produced no other evidence of a conspiracy between Trigon and the medical doctors or medical associations. As to American Chiropractic's claim for monopolization (count two), the district court granted summary judgment because Trigon did not possess monopoly power in the relevant market. It also granted Trigon's motion

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[6] Although the Seventh Circuit recognized that the boycott ended in 1980, it affirmed a grant of injunctive relief against the American Medical Association because some of its actions in 1983 "indicated the AMA's likelihood of returning to its old (anti-chiropractic) ways." Wilk v. Am. Medical Ass'n., 895 F.2d 352, 367 (7th Cir. 1990).

[7] The complaint initially named Blue Cross & Blue Shield of America in addition to Trigon Healthcare, Inc. and its affiliated companies. Blue Cross & Blue Shield of America was voluntarily dismissed as a defendant by American Chiropractic.

for summary judgment as to American Chiropractic's state law claims for tortious interference (count four) and breach of contract (count six). American Chiropractic noted a timely appeal of the district court's rulings, and we have jurisdiction under *28 U.S.C.A. § 1291*.

[11]** On appeal, American Chiropractic argues: (1) that the district court erred in holding the intracorporate immunity doctrine applies to this case; (2) that the district court erred in holding that there was insufficient evidence of a conspiracy between Trigon and the medical associations to withstand summary judgment; (3) that the district court erred in granting summary judgment on the tortious interference claim; (4) that the district court erred in dismissing the Virginia insurance equality claim; (5) that the district court erred in dismissing the RICO claim as preempted by the *McCarran-Ferguson Act* ; and (6) that the district court abused its discretion in conducting discovery. [8] We address each contention in turn.

II.

Counts One, Five, and Seven (The Conspiracy Counts)

American Chiropractic first contends that **[**12]** the district court erred in finding that the intracorporate immunity doctrine barred the possibility of a conspiracy between Trigon and its Managed Care Advisory Panel (MCAP) and in granting summary judgment on American Chiropractic's claim under *§ 1 of the Sherman Act* and its state law conspiracy claims. [9] ***HN1***[] **[*221]** We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *See Figgie Int'l, Inc. v. Destileria Serralles, Inc., 190 F.3d 252, 255 (4th Cir. 1999)*. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

[13]** Under its *Section 1* claim, American Chiropractic alleged that Trigon and its MCAP, a committee established by Trigon, created false referral guidelines meant to limit the usage of chiropractors for the treatment of lower back pain and, accordingly, to keep insurance reimbursement monies away from chiropractors. Trigon established the MCAP, composed of six Trigon employees and nine independent medical doctors appointed by professional organizations, [10] to "obtain input and advice from medical doctors on clinical issues such as quality control initiatives." (J.A. at 1348.) The MCAP "was formed and appointed by officers and employees of Trigon." (J.A. at 1352.) Dr. Lawrence Colley, Trigon's Vice President for Corporate Medical Policy during the relevant time period, also served as a member of the MCAP. It is undisputed that the MCAP was never given information regarding specific payment policies and that it lacked any decisionmaking authority.

[14]** American Chiropractic points to the MCAP's approval, in October 1995, of Trigon's practice guideline, titled "Managing Low Back Problems in Adults" (the Low Back Guideline), as evidence of an anticompetitive conspiracy between the members of the MCAP and Trigon. (J.A. at 6119.) This Low Back Guideline was drafted as an informative practice guideline for physicians. The Guideline also did not bear any relation to Trigon's coverage and reimbursement policies. (J.A. at 1539-40.) The Low Back Guideline was written by Trigon's employees, not the MCAP, and was issued in response to a lengthy study by the Agency for Health Care Policy and Research (AHCPR), a division of the U.S. Department of Health and Human Services.

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[8] We note that American Chiropractic does not appeal the district court's grant of summary judgment on its *§ 2 Sherman Act* claim (count two) or the state law breach of contract claim (count six).

[9] Because the state law conspiracy claims follow the same analysis as the *§ 1* claim, we do not address them separately. *See Va. Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 284 (4th Cir. 2002)* ***HN2***[] (noting that the *Virginia Civil Conspiracy Act* does not create liability absent a violation of the federal antitrust laws); *Fox v. Deese, 234 Va. 412, 362 S.E. 2d 699, 708, 4 Va. Law Rep. 1248 (Va. 1987)* (adopting intracorporate immunity doctrine for Virginia conspiracy laws).

[10] These organizations include the Virginia Society of Internal Medicine, the Medical Society of Virginia, the American College of Physicians, the University of Virginia School of Medicine, the Eastern Virginia Medical School and other medical organizations.

The AHCPR study was titled "Acute Low Back Problems in Adults" and was accompanied by a reference guide for treating low back pain. The study recommended spinal manipulation "in place of medication or a shorter trial [of manipulation] if combined with NSAIDS" [11] for the treatment of low back pain. (J.A. at 5653.) The AHCPR study defined "manipulation" as "manual therapy in which loads are applied to the spine using short or long lever methods." (J.A. at 5507.) This definition **[**15]** of manipulation referred to the procedure rendered primarily by chiropractors, as opposed to medical doctors. One medical journal, the *Annals of Internal Medicine*, stated in July 1998 that "the [AHCPR] recently made history when it **[*222]** concluded that spinal manipulative treatment is the most effective and cost-effective treatment for acute low back pain." (J.A. at 4984.) American Chiropractic argues that this AHCPR study "was a boon to chiropractors and a setback for medical doctors." (Appellant's Br. at 22.)

Trigon intended its under ten page Low Back Guideline to be "a shortened and user-friendly format" of the over one-hundred and fifty page AHCPR study for health care providers. (J.A. at 1538.) The Low Back Guideline stated that it was "adapted from the [AHCPR] and … approved and endorsed by Trigon's Managed Care Advisory Panel." (J.A. at 6123.) The MCAP considered the Low Back Guideline, alongside **[**16]** two other practice guidelines, on October 25, 1995. During that meeting, one of the medical doctors on the MCAP asked if the guidelines the MCAP was considering were meant to be referral guidelines. Dr. Colley told them that the guidelines were referral guidelines. [12] The MCAP then adopted and approved the Low Back Guideline without making or suggesting any changes to it.

American Chiropractic argues that the Low Back Guidelines are false and misleading in two principal ways. First, the Low Back Guideline provided that "[a] short trial of manipulation may be as effective as NSAIDs." (J.A. at 6120.) American Chiropractic contends that the AHCPR guideline **[**17]** stands for the proposition that manipulation is *more effective* than NSAIDs. Second, the Low Back Guideline did not define the term "manipulation." According to American Chiropractic, the absence of this definition meant that the Low Back Guideline deterred primary care physicians from referring patients to chiropractors because it failed to identify manipulation practiced by chiropractors as the specific type of manipulation recommended. Dr. Scott Haldeman, one of American Chiropractic's experts and a member of the AHCPR panel, opined that "[b] y omitting the AHCPR's definition of manipulation, Trigon and its Managed CareAdvisory Panel materially altered the recommendations of the AHCPR." (J.A. at 5672.) Because of this omission, according to Dr. Haldeman, Trigon's guidelines would "deprive patients of the benefit from spinal manipulation as practiced by doctors of chiropractic, and …deprive doctors of chiropractic of the opportunity to treat those patients." (J.A. at 5672.)

The district court was not persuaded by American Chiropractic's argument, and held that, under the intracorporate immunity doctrine, Trigon was legally incapable of conspiring with the MCAP. Additionally, **[**18]** the district court then found that American Chiropractic had failed to adduce sufficient evidence of a conspiracy between Trigon and the medical associations who appointed individuals to the MCAP to survive summary judgment. On appeal, American Chiropractic argues that the intracorporate immunity doctrine does not apply, either because the medical doctors on the MCAP lacked a unity of interest with Trigon or because the independent personal stake exception to the doctrine should apply. American Chiropractic also contends that it has produced direct evidence of a conspiracy among Trigon and the medical doctors on the MCAP and the medical associations that appointed those doctors.

[*223] A.

We consider first American Chiropractic's argument that Trigon conspired with the medical doctors who served on the MCAP. [13] *Section 1* of the Sherman Act provides, in relevant part, that ***HN3***[] "[e] very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

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[11] NSAIDs is an abbreviation for non-steroidal anti-inflammatory drugs such as aspirin and ibuprofen.

[12] It is unclear whether Dr. Colley was stating that the Low Back Guideline was a referral guideline, or if he was referencing one of the other guidelines before the Managed Care Advisory Panel. Because this fact does not affect our analysis on American Chiropractic's *Section 1* claim, we will assume that Dr. Colley was referencing the Low Back Guideline.

[13] American Chiropractic did not argue that Trigon conspired with its own employees serving on the MCAP.

foreign nations, is declared to be illegal." *15 U.S.C.A. § 1*. Thus, ***HN4***[] to establish a *§ 1* violation, a plaintiff must show: "(1) a contract, combination **[**19]** or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002)*. "It is incontestable that 'concerted action' in restraint of trade lies at the heart of a *Sherman Act section 1* violation." *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 280 (4th Cir. 2002)*. In other words, *§ 1* "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (internal quotation marks omitted).

HN5[] "Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities." *Oksanen v. Page Memorial Hosp., 945 F.2d 696, 702 (4th Cir. 1991)* (en banc). Thus,

> it is perfectly plain that an internal 'agreement' to implement a single, unitary **[**20]** firm's policies does not raise the antitrust dangers that *§ 1* was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Copperweld, 467 U.S. at 769. Moreover, ***HN6***[] " *§ 1* is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions." *Id. at 770*. "For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1 of the Sherman Act*." *Id. at 771*. Accordingly, the Supreme Court has held that a parent and its wholly owned subsidiary are legally "incapable of conspiring with each other for purposes of *§ 1 of the Sherman Act*." *Id. at 777*. The Court in *Copperweld* noted further that "a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design'" so the law's concern with a sudden joining of independent interests is not present in such a case. *Id. at 771* **[**21]** (emphasis added).

HN7[] We have applied this "intracorporate immunity" doctrine articulated in *Copperweld* to hold that a hospital lacked the capacity to conspire with its peer review committee for purposes of *§ 1*. *See Oksanen, 945 F.2d at 706*.[14] The plaintiff in *Oksanen*, a doctor, contended that the hospital conspired with its peer review committee, composed of staff physicians at the hospital, to limit and then revoke his staff privileges. Although the hospital and its medical staff were "legally separate entities," we held that the intracorporate immunity doctrine applied, explaining that "we must examine the substance, rather than the form, of the **[*224]** relationship between the hospital and the medical staff during the peer review process." *Id. at 703*. We concluded that the hospital and the doctors on the peer review committee possessed a unity of interest: improving the quality of patient care. "Like a corporation delegating authority to its officers, the [hospital] delegated peer review decisionmaking in the first instance to the medical staff." *Id. at 703*. Thus, "[i] n effect, the medical staff was working as the [hospital's] **[**22]** agent." *Id.; see also Detrick v. Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997)* (" The intracorporate immunity doctrine provides that a conspiracy can not exist between the agents of a corporation and the corporation itself."); *ePlus Technology v. Aboud, 313 F.3d 166, 179 (4th Cir. 2002)* ("[A] cts of corporate agents are acts of the corporation itself, and corporate employees cannot conspire with each other or with the corporation."). Moreover, the hospital "retained ultimate responsibility for all of the hospital's credentialing decisions." *Oksanen, 945 F.2d at 704*. The hospital's "ultimate control over peer review decisions enabled it to employ peer review to pursue its interests." *Id*. Finally, we questioned whether hospitals possessed any economic motive for conspiring with some medical doctors to exclude others from the staff: "[i] f a physician is qualified and does not disrupt the hospital's operations, it is in the hospital's interest to include, not exclude, that physician." *Id.; see also* P. Areeda and H. Hovenkamp, ***Antitrust Law*** P 1471b (1999 Supp.).

[23]** ***HN8***[] We have continued to recognize the existence of one narrow exception to the intracorporate immunity doctrine - the independent personal stake exception. In *Greenville Pub. Co. v. Daily Reflector, Inc., 496*

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[14] A lawsuit alleging a conspiracy between a hospital and its peer review committee currently would be barred under the *Health Care Quality Improvement Act of 1986*. *42 U.S.C.A. §§ 11101-11152* (West 1995 & Supp. 2003). That Act was passed after the filing of Oksanen's lawsuit and was not made retroactive to pending cases.

F.2d 391 (4th Cir. 1974), we held that an exception to the intracorporate immunity doctrine "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective." Id. at 399. We declined an invitation to apply the exception in *Oksanen* because the peer review committee lacked the ability to bind the hospital. "If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis." Oksanen, 945 F.2d at 705. Put differently, "[t]o give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself." Pennsylvania Dental Ass'n. v. Medical Serv. Ass'n., 745 F.2d 248, 259 (3d Cir. 1984).

Applying this reasoning here, we agree with the district court that, under the intracorporate immunity doctrine, Trigon lacked the legal capacity **[**24]** to conspire with the medical doctors on the MCAP. American Chiropractic argues that because the medical doctors on the MCAP do not share a unity of interest with Trigon, the MCAP cannot be considered a corporate agent of Trigon. A similar argument was raised and rejected in *Oksanen*. There, the plaintiff had alleged that the medical doctors on the peer review committee did not have a unity of interest with the hospital because the medical doctors would act in their own best interest, not the best interest of the hospital. As mentioned above, we found that the medical doctors, in their role as members of the peer review committee, had a unity of interest with the hospital: ensuring patient care. We believe that *Oksanen's* reasoning is not only instructive but persuasive here.

American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest. That, however, is not the correct inquiry in cases applying the intracorporate immunity doctrine. Instead, **[*225]** we look to whether the medical doctors, in their role as members of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon. **[**25]** We believe that they do.

Because Trigon established the MCAP to offer input on clinical issues faced by Trigon, the individual medical doctors, in their role as members of the MCAP, shared the same interest as Trigon: addressing clinical issues in a manner that would best serve its consumers, the plan enrollees. The MCAP is without question a corporate agent of Trigon, chaired by a Trigon employee, and we believe that the intracorporate immunity doctrine applies to its actions. The decision to consult with doctors on the MCAP does not "represent the sudden joining of economic forces that section one is designed to deter and penalize." Oksanen, 945 F.2d at 703. By creating the MCAP, Trigon did not bring together independent economic forces. Instead, Trigon had "ultimate control" over the MCAP's actions and was able to employ the MCAP to pursue its interests. In fact, we are presented with even stronger reasons for applying the doctrine here than we were in *Oksanen* because, in *Oksanen*, the peer review committee and the hospital were legally distinct entities. The MCAP is not legally distinct from Trigon.

American Chiropractic's argument paints with too broad **[**26]** a brush, and would, in effect, undercut much of the rationale of the intracorporate immunity doctrine by focusing on form over substance. Penalizing "coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits." Copperweld, 467 U.S. at 771. "Far from being a competitor with [Trigon], the [MCAP] was in fact a natural component of [Trigon's] management structure. "Oksanen, 945 F.2d at 703.

Moreover, the independent personal stake exception does not apply because the MCAP did not have the power to bind Trigon; it only made non-binding recommendations and endorsed materials already composed by Trigon employees. In fact, the MCAP did not even recommend changes to the Low Back Guideline. While the MCAP's seal of approval was important to Trigon from a business perspective because it allowed Trigon to market various publications as approved by a panel of medical doctors, American Chiropractic has made no showing that the MCAP itself could rewrite any part of such a publication and make Trigon issue those rewritten publications. **[**27]** The ultimate decision as to the contents of any document before the MCAP always rested with Trigon, and, accordingly, the independent personal stake exception cannot apply. *See* id. at 705.

Thus, we agree with the district court that Trigon lacked the capacity to conspire, within the meaning of § 1, with its corporate agent, the MCAP or its members.

B.

American Chiropractic next argues, assuming that the MCAP did not conspire with Trigon, that the medical associations who placed their members on the MCAP conspired with Trigon to publish the allegedly misleading guidelines and to implement several coverage policies aimed at limiting the usage and reimbursement of chiropractic services. As discussed above, to establish a *§ 1* violation, a plaintiff must show: "(1) a contract, combination, or conspiracy, (2) that imposed an unreasonable restraint of trade." *Dickson, 309 F.3d at 202*. ***HN9***[] A plaintiff can offer direct or circumstantial evidence to prove **[*226]** concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 754, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. American Chiropractic argues on appeal that it provided direct evidence of this conspiracy, **[**28]** in the form of the minutes from the MCAP meeting where the MCAP approved the Low Back Guideline, and the Low Back Guideline itself. These minutes and the Low Back Guideline, American Chiropractic alleges, represent direct evidence of a conspiracy orchestrated between the medical associations and Trigon. Additionally, American Chiropractic argues that it presented direct evidence that Trigon and the medical associations conspired to implement two other coverage policies with the intent to harm chiropractors - a $ 500 cap on spinal manipulations and a reduced reimbursement rate for chiropractors and other limited license providers.

In 1988, Trigon instituted a $ 500 yearly reimbursement cap on spinal manipulations, regardless of "what type of provider renders the services." (J.A. at 5345.) Although this $ 500 reimbursement cap is facially neutral, in that it does not target a specific provider, neither side disputes that chiropractors are the main providers of spinal manipulations. One chiropractor testified that no other insurance company had a cap as harsh as Trigon's, and that a "majority" of insurance companies did not use a hard coverage cap on spinal manipulations. (J.A. at 7900, **[**29]** 7903-04.) This $ 500 annual coverage limit on spinal manipulations has remained in place since 1988.

In 1996, Trigon lowered the reimbursement rate for limited-license practitioners, [15] including chiropractors, to 60% (from 70%) of that received by fully-licensed practitioners performing the same procedure. As explained by Trigon, "the marketplace for third party healthcare coverage is extremely competitive and our customers are extremely price sensitive," making the lower reimbursement rate "appropriate and reasonable." (J.A. at 4636, 6337.)

American Chiropractic argues that both of these policies resulted from a conspiracy between Trigon and the medical associations. The $ 500 annual cap, American Chiropractic asserts, was implemented with the purpose of limiting the utilization of chiropractic services, while the lower reimbursement rate was intended to shift **[**30]** insurance dollars from chiropractors to medical doctors. American Chiropractic argues that, because Trigon recognizes that chiropractic care is effective and inexpensive, policies like these that have an adverse effect on chiropractic care are direct evidence that Trigon is not making an independent economic judgment but rather conspiring to harm chiropractors.

HN10[] "[A] ntitrust law limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Direct evidence is extremely rare in antitrust cases and is usually referred to as the "smoking gun." *InterVest, Inc. v. Bloomberg, L. P., 340 F.3d 144, 159 (3d Cir. 2003)*. We agree with the Third Circuit that direct evidence in this context is "explicit and requires no inferences to establish the proposition or conclusion being asserted." *Id*. (quotation marks omitted); *see* *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 676, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* (Goldberg, J., dissenting) (" Only rarely will there be direct evidence of an express agreement" in conspiracy cases). American **[**31]** **[*227]** Chiropractic's offering falls far short of this standard. At most, the MCAP meeting shows contact between two independent economic actors, but "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy." *Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278, 281 (4th Cir. 1986)*. The two coverage policies are also not direct evidence of a conspiracy because both require the rather large inferential leap that Trigon drafted and implemented the policies only after reaching an agreement with medical doctors and associations.

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[15] Limited-license providers are defined by Trigon to include chiropractors, speech therapists, occupational therapists and physical therapists.

Furthermore, as the district court explained, [16] American Chiropractic has not entered sufficient indirect evidence of a conspiracy to harm chiropractors. It is undisputed that use of chiropractic treatment by Trigon subscribers has substantially increased since the Low Back Guideline was issued in 1996. *See supra* note 4. Since 1996, the amount of money paid to chiropractors by Trigon has also risen substantially, from approximately $ 12 million dollars to over $ 21 million in 2001. The reimbursement policies about which American Chiropractic **[**32]** complains are facially neutral policies that admittedly have an effect on chiropractors. There is, however, no evidence of an effort by Trigon to harm chiropractors apart from these facially neutral reimbursement policies and the Low Back Guideline, and, more importantly, American Chiropractic has failed to show that either the reimbursement policies or the Low Back Guideline was the result of an antitrust *conspiracy*. They have pointed to no evidence that Trigon conspired with any entity in forming its policies. In fact, the only evidence in the record is that all of the actions in dispute were taken unilaterally by Trigon employees. In the face of Trigon's affidavits that it acted unilaterally, American Chiropractic needed more to create a genuine issue of material fact.

[33]** Moreover, American Chiropractic has not explained why Trigon would, as an economic matter, attempt to exclude chiropractors from its provider network or dissuade patients from the use of chiropractic services if chiropractic care is more cost-effective than other medical care. As the district court ably explained, *see Trigon Healthcare, 258 F. Supp. 2d at 466-67*, this alleged conspiracy does not make economic sense from Trigon's perspective. We agree with the district court that, "as a profit-seeking corporation, [Trigon] had no economic motive to prevent referrals to chiropractors." *Id. at 466*.

Accordingly, we affirm the district court's grant of summary judgment on American Chiropractic's claim under *§ 1 of the Sherman Act* (count one) and its state law conspiracy claims (counts five and seven). [17]

[34]** III.

Count Four

(Tortious Interference)

American Chiropractic next challenges the grant of summary judgment **[*228]** in favor of Trigon on its state law claim for tortious interference. ***HN11***[] We review the grant of summary judgment de novo. *Figgie Int'l, 190 F.3d at 255*. ***HN12***[] Virginia law permits recovery for such claims where a party can show "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) the defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damages to plaintiff." *Commercial Bus. Sys., Inc. v. Halifax Corp., 253 Va. 292, 484 S.E. 2d 892, 896 (Va. 1997)* (quotation marks omitted). "[P] roof of the existence of the first and third elements of the tort must meet an objective test," and "mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action." *Id. at 897*. Instead, a plaintiff must "establish a *probability* of future economic benefit, not **[**35]** a mere possibility." *Id*. (emphasis added). When a plaintiff is alleging that a third party has interfered with a business expectancy rather than with an actual contract, the plaintiff must "show that the defendant interfered by employing improper methods." *Peterson v. Cooley, 142 F.3d 181, 186 (4th Cir. 1998)*. Improper methods are "those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules." *Duggin v. Adams, 234 Va. 221, 360 S.E. 2d 832, 836, 4 Va. Law Rep. 820 (Va. 1987)*.

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[16] American Chiropractic also limited its arguments to direct evidence of a conspiracy before the district court, but that court found that American Chiropractic offered no direct evidence of a conspiracy and instead analyzed whether there was circumstantial evidence of a conspiracy.

[17] Because we find that American Chiropractic failed to prove the existence of an anticompetitive conspiracy, we do not consider whether American Chiropractic entered sufficient evidence that Trigon and the medical associations and medical doctors implemented unreasonable restraints on trade.

Under this count, American Chiropractic argues that the $ 500 annual coverage cap on spinal manipulations tortiously interfered with the chiropractors' business expectancy that their patients would continue to seek treatment from them. This argument fails because American Chiropractic has not shown a business expectancy with a probability of future economic benefit. Virginia law requires objective proof of a probability of future economic benefit, not just a hope or a belief that a business relationship will continue. American Chiropractic admitted that patients have the ability and the right to terminate their relationship **[**36]** at any time, and it has not introduced any evidence showing more than a hope or belief that, generally speaking, patients would continue seeking treatment from chiropractors. The chiropractors never had written contracts with their patients, and some patients unilaterally terminated their treatment relationships with the chiropractors. Because American Chiropractic failed to show that it has an objective, valid business expectancy with a probability of future economic benefit, the district court was correct to grant summary judgment to Trigon on this count. [18]

IV.

Count Eight

(Virginia Insurance Equality Statutes)

American Chiropractic also argues that the district court erred in dismissing its claim under the Virginia **[**37]** insurance equality laws for failure to state a claim. ***HN13***[] We review the dismissal of a complaint under *Federal Rule of Civil Procedure 12(b)(6)* de novo. *Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir. 1999)*. On appeal from an order granting a *Rule 12(b)(6)* motion to dismiss, this court accepts as true the **[*229]** facts as alleged in the complaint, views them in the light most favorable to the plaintiff, and recognizes that dismissal is inappropriate "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 n. 4 (4th Cir. 1993)*; *see Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)* (explaining that dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").

In its complaint, American Chiropractic alleged that Trigon violated Virginia's insurance equality laws, found in *Va. Code Ann. §§ 38.2-2203* **[**38]** , *38.2-3408, 38.2-4221*, and *38.2-4312(E)*, because Trigon implemented reimbursement and utilization restrictions targeted only at chiropractors, not medical doctors. The district court found that none of these statutory provisions created private rights of action on their face and declined to read a private right of action into the sections.

As a preliminary note, *§§ 38.2-2203, 38.2-4221 and 38.2-4312* do not apply to Trigon's business, so American Chiropractic cannot state a claim under those code sections. *Section 38.2-2203* deals with "bodily injury liability insurance"; *§ 38.2-4221* applies to non-stock corporations; and *§ 38.2-4312(E)* applies to health maintenance organizations. Trigon is a for-profit stock corporation that operates in the field of accident and sickness insurance. Thus, ***HN14***[] by their clear terms, these statutory provisions do not apply to Trigon's business decisions.

The issue is thus, whether *§ 38.2-3408*, which applies to accident and sickness insurance companies, creates a private cause of action. For the following reasons, we hold that ***HN15***[] Virginia would not recognize a private cause of action under this code section. The section reads, in relevant part, ***HN16***[] "[i] f an **[**39]** accident and sickness insurance policy provides reimbursement for any service that may be legally performed by a person licensed in this Commonwealth as a chiropractor …reimbursement under the policy shall not be denied because the service is rendered by the licensed practitioner." *Va. Code Ann. § 38.2-3408*. The code section itself does not include an enforcement mechanism, but *§ 38.2-200* explains that the ***HN17***[] "[State Corporation] Commission is charged with the execution of all laws relating to insurance and insurers." *Va. Code Ann. § 38.2-200*. ***HN18***[] *Section 38.2-221* grants the Commission the power to levy and enforce penalties against insurers for violations of

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[18] Because we conclude that American Chiropractic lacked a valid business expectancy, we do not address the district court's alternative ground for granting summary on this claim - that Trigon did not use improper means in interfering with the chiropractors' alleged business expectancy.

the insurance code. *Va. Code Ann. § 38.2-221*. That section, however, also states that the "power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of this Commonwealth." *Va. Code Ann. § 38.2-221*.

We have previously stated that ***HN19***[] "federal courts **[**40]** should be reluctant to read private rights of action into state laws where state courts and state legislatures have not done so. Without clear and specific evidence of legislative intent, the creation of a private right of action by a federal court abrogates both the prerogatives of the political branches and the obvious authority of states to sculpt the content of state law." *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 674 (4th Cir. 1986)*. Applying this test, we held that ***HN20***[] the *Virginia Unfair Trade Practices Act* (UTPA) did not create a private cause of action because it lacked explicit language creating such an action. The Virginia **[*230]** UTPA contained a statutory provision similar to *§ 38.2-221*, [19] and we explained that it "[did] not create any new rights of action but instead preserved any existing right of action that an injured person may have against a wrongdoer." *Id. at 674 n. 5*. We have found no Virginia cases since *A & E Supply* that call this understanding into question.

[41]** ***HN21***[] Like the *Virginia UTPA, § 38.2-3408* does not create a private right of action because it does not contain any specific statutory language creating such an action. The existence of *§ 38.2-221* does not evince a legislative intent to create private rights of action under the insurance code. Rather, as we explained in *A & E Supply*, that statutory provision only leaves in place pre-existing statutory and common-law rights of action.

Accordingly, the district court was correct in dismissing American Chiropractic's claim under the Virginia insurance equality laws. V. Count Three (RICO) American Chiropractic's final contention of error relating to the substantive holdings of the district court is that the district court erredin finding that its RICO claim was preempted by the *McCarran-Ferguson Act* and dismissing that claim pursuant to *Rule 12(b)(6)*. [20] As stated above, we review de novo a complaint for failure to state a claim and "take all allegations as admitted and examine whether the plaintiff can prove any set of facts that would entitle him to relief." *Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians, 155 F.3d 500, 505 (4th Cir. 1998).* **[**42]** ***HN22***[] "Federal 'notice' pleading standards require that the complaint be read liberally in favor of the plaintiff." *Id*. For the reasons that follow, we agree that American Chiropractic's claim is not preempted by the *McCarran-Ferguson Act*, but nonetheless affirm the district court's dismissal of this count because American Chiropractic failed to allege a claim for mail fraud or wire fraud and, accordingly, failed to state a claim for a RICO violation.

A.

HN23[] The *McCarran-Ferguson Act* provides that "[n] o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." *15 U.S.C.A. § 1012(b) (West 1997)*. The *McCarran-Ferguson Act* does not apply to federal laws that are specifically targeted at the business of insurance. **[**43]** *Id*. Trigon argues that applying RICO to American Chiropractic's claims would invalidate, impair or supersede Virginia's insurance code, found at Title 38.2 of the Code of Virginia. For a federal law to be preempted by McCarran-Ferguson: (1) the state law in question must be enacted for the purpose of regulating the business of insurance; (2) the federal law must not **[*231]** be specifically related to the business of insurance; and (3) the federal law must invalidate, impair or supersede the state law in question. *Humana, Inc. v. Forsyth, 525 U.S. 299, 307, 142 L. Ed. 2d 753, 119 S. Ct. 710 (1999)*. The second factor is easily satisfied because the Supreme Court has held that ***HN24***[] "RICO is not a law that specifically relates to the business of insurance." *Humana, 525 U.S. at 307* (quotation marks omitted). Thus, we are left to decide whether Title 38.2 is a law enacted

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[19] The provision at issue in *A & E Supply* read that "no order of the Commission under this article shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this Commonwealth." *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 674 n. 5 (4th Cir. 1986)* (quoting Va. Code Ann. § 38.1-57.1)).

[20] As discussed *infra*, in its RICO claim, American Chiropractic alleged that Trigon engaged in a pattern of racketeering activity including mail fraud, wire fraud, and extortion.

for the purpose of regulating the business of insurance and, if so, whether RICO impairs, invalidates or supersedes its operation.

We have little difficulty concluding that ***HN25***[] Title 38.2 is a set of laws enacted for the purpose of regulating the business **[**44]** of insurance. The Supreme Court has stated that "[s] tatutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly are laws regulating the 'business of insurance.'" *SEC v. National Sec., Inc., 393 U.S. 453, 460, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*. "[T] he focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders …." *United States Dep't of Treasury v. Fabe, 508 U.S. 491, 501, 124 L. Ed. 2d 449, 113 S. Ct. 2202 (1993)*. Accordingly, the *McCarran-Ferguson Act* encompasses "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id. at 505*. Applying these standards, Title 38.2 of the Code of Virginia, specifically *§§ 38.2-200, 38.2-221 and 38.2-3408* at issue here, is a set of laws enacted for the purpose of regulating the business of insurance. Title 38.2 is limited to insurance companies and creates a comprehensive network of statutory provisions aimed at controlling and managing the business of insurance. For instance, *§ 38.2-3408*, by requiring insurers to **[**45]** provide reimbursement for all providers of covered services, helps to manage the relationship between the policyholder and the insurance company by ensuring that if a particular service is covered by an insurance company, the policyholder can seek treatment from any provider able to perform that service.

Accordingly, we next must decide whether allowing a RICO claim to proceed against an insurance company would "invalidate, impair, or supersede" Virginia's insurance code. The Supreme Court recently considered a similar question: ***HN26***[] whether RICO invalidated, impaired or superseded Nevada's laws regulating insurance. *Humana, 525 U.S. at 307*. In *Humana*, the Court defined "invalidate" as "to render ineffective, generally without providing a replacement rule or law," and "supersede" as "to displace (and thus render ineffective) while providing a substitute rule." *Id*. Using these definitions, it is clear that, as in *Humana*, RICO's application would neither "invalidate" nor "supersede" Virginia law. [21]

[46]** Thus, the key question, as in *Humana*, is whether RICO's application to Trigon's alleged conduct would "impair" Virginia's law. In holding that RICO did not impair Nevada's law, the Supreme Court stated that

> ***HN27***[] When federal law does not directly conflict with state regulation, and when application **[*232]** of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the *McCarran-Ferguson Act* does not preclude its application.

Id. at 310. The only difference between the Nevada laws considered in *Humana* and the Virginia laws at issue in this case is that the Nevada laws explicitly provided for a private right of action, whereas the Virginia laws, as discussed *supra*, Part IV, do not. The district court found this difference dispositive, holding that application of RICO would convert Virginia's system of public redress into a federal system of private redress and thus that RICO would impair, invalidate, and supersede Virginia law. *Am. Chiropractic Ass'n, 258 F. Supp. 2d at 465*. We disagree.

Instead, we agree with the Tenth Circuit's resolution of this issue in *Bancoklahoma Mortgage Corp. v. Capital Title Co., 194 F.3d 1089 (10th Cir. 1999).* **[**47]** The Missouri insurance laws at issue in that case, like the Virginia insurance laws at issue here, did not provide for a private right of action. The court nonetheless concluded that *Humana* compelled a holding that the RICO claims were not barred by the McCarran-Ferguson Act. *Id. at 1099*. The court held

> RICO "advances" Missouri's "interest in combating insurance fraud" and "does not frustrate any articulated [Missouri] policy." Although Missouri does not provide a private cause of action under its [insurance laws], it

[21] The district court relied heavily on *Ambrose v. Blue Cross & Blue Shield of Va., Inc., 891 F. Supp. 1153 (E.D. Va. 1995)*, *aff'd* ***95 F.3d 41 (4th Cir. 1996)*** (unpublished per curiam opinion). Because *Ambrose* was decided before the Supreme Court's decision in *Humana, Inc. v. Forsyth, 525 U.S. 299, 142 L. Ed. 2d 753, 119 S. Ct. 710 (1999)*, and because the district court in *Ambrose* applied different definitions for the statutory terms than did the *Humana* Court, that decision is not helpful to our decision today.

> does allow causes of action under other state law. *See* Mo. Rev. Stat. 375.944(4) (1991). Therefore, the McCarran-Ferguson Act does not bar [the] RICO claims.

Id. (quoting Humana, 525 U.S. at 314); *see also* Humana, 525 U.S. at 312 (" Moreover, the [Nevada] Act is not hermetically sealed; it does not exclude application of other state laws, statutory or decisional."); Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185 (3d Cir. 1998) (holding that RICO does not impair a state insurance law that permits private rights of action under other state **[**48]** laws). *But see* LaBarre v. Credit Acceptance Corp., 175 F.3d 640 (8th Cir. 1999) (holding that the lack of a private right of action in the state insurance laws was dispositive without considering whether the statute at issue permitted the application of other state laws to the conduct of insurers).

RICO furthers Virginia's interest in policing insurance fraud and misconduct and does not frustrate any declared state policy. Although RICO's damage provisions are admittedly more severe than many state laws, RICO does not interfere with Virginia's administrative scheme. Moreover, as discussed in Part IV, although Virginia's insurance laws do not create private rights of action, § 38.2-221 allows for other state laws to apply to the conduct of insurers.[22] Va. Code Ann. § 38.2-221 ***HN28***[] (The "power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of this Commonwealth."). We agree with the Tenth Circuit that in such a situation, Humana compels a conclusion that American **[**49]** Chiropractic's RICO claim was not barred by the McCarran-Ferguson Act.

B.

HN29[] Although we disagree with the reasoning of the district court, we can affirm the **[*233]** dismissal of the complaint "on any basis fairly supported by the record." *Eisenberg v. Wachovia Bank, N. H., 301 F.3d 220, 222 (4th Cir. 2002)*. Perhaps anticipating our conclusion in Part V. A., Trigon has argued in the alternative that we should affirm the 12(b)(6) dismissal of the RICO claim because American Chiropractic has failed to state a claim under RICO. RICO provides, in pertinent part, that ***HN30***[] "[i] t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity …to use or invest, directly or indirectly, any part of such income, or the proceeds of such income …[in] **[**50]** the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *18 U.S.C.A. § 1962(a)*. ***HN31***[] "Any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue …and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *18 U.S.C.A. § 1964(c)*.

HN32[] A plaintiff bringing a civil RICO action under *§ 1964(c)* must adequately plead at least two predicate acts of racketeering that form a "pattern of racketeering." *18 U.S.C.A. § 1961(5)*. Private civil RICO suits may be brought regardless of whether the government chooses to prosecute the criminal RICO violation. *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 493, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*. Here, American Chiropractic's complaint stated that Trigon committed ***HN33***[] mail fraud, wire fraud, and extortion.[23] All three qualify as "racketeering activity," *see 18 U.S.C.A. § 1961(1)*, but Trigon contends that American Chiropractic cannot state a claim for any of those **[**51]** predicate acts.

We consider first the alleged mail and wire fraud. ***HN34***[] The federal mail and wire fraud statutes prohibit the use of the mails or interstate wires in furtherance of schemes to defraud. *18 U.S.C.A. §§ 1341, 1343 (West 2000)*. For the government to obtain a conviction for mail or wire fraud it must prove (1) a scheme disclosing an intent to defraud; and (2) the use, respectively, of the mails or interstate wires in furtherance of the scheme. *See Chisolm v.*

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[22] For example, in this case American Chiropractic asserted state law claims for tortious interference with a business relationship, common law and statutory conspiracy, and breach of contract.

[23] American Chiropractic also alleged the predicate act of securities fraud in its complaint, but it did not pursue that claim because Trigon previously had not been convicted of securities fraud, as required by *18 U.S.C.A. § 1964(c) (West 2000)*.

Transouth Fin. Corp., 95 F.3d 331, 336 (4th Cir. 1996). In a prosecution for mail or wire fraud, the government is not required to show reliance on any misrepresentation.

To recover civil RICO damages, however, an individual must also allege **[**52]** that he was injured "by reason of" the pattern of racketeering activity. *Id.; see also* 18 U.S.C.A. § 1964(c). To meet this burden with respect to mail fraud and wire fraud, a plaintiff must "*plausibly* allege both that [he] detrimentally relied in some way on the fraudulent mailing [or wire] …and that the mailing [or wire] was a proximate cause of the alleged injury to [his] business or property." Chisolm, 95 F.3d at 337 (emphasis added). The alleged fraud "must be a 'classic' one[,] …the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id*. American Chiropractic's complaint states that Trigon committed mail and wire fraud by representing, in its "Ancillary Professional Provider Agreement," that it reimburses healthcare providers pursuant to the Federal Resource Based Relative Value Scale (RBRVS). [24] The complaint stated that **[*234]** chiropractors justifiably relied upon this alleged misrepresentation in deciding to enter into provider agreements with Trigon and that the chiropractors were injured because Trigon does not, in fact, reimburse chiropractic services pursuant **[**53]** to the RBRVS. [25] Trigon entered the Ancillary Professional Provider Agreement in full to support its motion to dismiss.

HN35[] Although as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, we have held that when a defendant attaches a document to its motion to dismiss, "a court may consider it in determining whether to dismiss the complaint [if] **[**54]** it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity." Phillips v. LCI Int'l Inc., 190 F.3d 609, 618 (4th Cir. 1999); *see also* Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998). As the Third Circuit has explained

> The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint - lack of notice to the plaintiff - is dissipated "[w] here plaintiff has actual notice …and has relied upon these documents in framing the complaint." What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997) (quotation marks omitted).

As stated above, American Chiropractic explicitly referred to the Ancillary Professional Provider Agreement, and its mail **[**55]** and wire fraud claims are based on the alleged misrepresentation made in that document. In addition, American Chiropractic does not contest the authenticity of the documents. Accordingly, we can consider those documents at the 12(b)(6) stage of the litigation.

The Ancillary Professional Provider Agreement states, in part, that "[m]ost Trigon fees are based upon external benchmarks of relative value, for example, the [RBRVS]." (J.A. at 156.) Thus, American Chiropractic alleges, Trigon has misled chiropractors into believing that their reimbursement would be based upon Medicare's reimbursement system. In full, however, the Ancillary Professional Provider Agreement states that

> *Trigon's fee schedules represent the maximum Allowable Charge for each covered service that corresponds to a single service code*. The preponderance of valid service codes [are] from Current Procedural Terminology (CPT), HCFA Common Procedural Coding System (HCPCS), American Dental Association (ADA), or National Drug Codes (NDC). For *covered services represented by a single code, the maximum Allowable Charge is the fee schedule amount determined by Trigon in its sole discretion* or your usual **[**56]** charge for the service, whichever is less. *Most Trigon fees are **[*235]** based upon external benchmarks* or relative value, for example, the Federal Resource Based Relative Value Scale (RBRVS), Average Wholesale Price (AWP),

[24] The RBRVS is the relative value scale used by Medicare in setting its reimbursement rates for providers under that program.

[25] At oral argument before this court, counsel for American Chiropractic also alleged that Trigon committed mail fraud by telling its plan enrollees that healthcare providers were reimbursed in accordance with Medicare rates. The district court previously had held that American Chiropractic lacked standing to advance the claims of individual patients, and American Chiropractic did not appeal that ruling. Thus, the argument that Trigon committed mail fraud against its enrollees is not properly before this court.

> American Society of Anesthesiologists (ASA), relative value and Medicare's laboratory and Durable Medical Equipment (DME) fees.

(J.A. at 156 (footnote omitted) (emphases added).)

The Agreement comes with Trigon's fee schedule attached. Relevant here, Trigon's fee schedule includes the maximum allowable charge for the four service codes associated with spinal manipulations. The fee schedule discloses that Trigon reimburses providers who perform spinal manipulations the same amount regardless of how many "regions" of the spine are manipulated. The RBRVS, however, provides a higher reimbursement when more spinal regions are manipulated. It is undisputed that Trigon began this reimbursement practice in 1997.

We conclude that American Chiropractic, as a matter of law, could not justifiably rely on the statement that "most" Trigon fees are based on the RBRVS for two reasons. First, the statement only provides that "*most*" fees are based on the external benchmark **[**57]** of the RBRVS. The term "most" indicates that some of Trigon's reimbursement payments were not based upon the RBRVS. Second, the remainder of the document clearly explains that Trigon's fee schedule represents the maximum allowable charge for a service. Moreover, the fee schedule discloses that Trigon does not follow the RBRVS when reimbursing for spinal manipulations. Because the fee schedule discloses that Trigon does not reimburse for spinal manipulation services according to the RBRVS, American Chiropractic could not have justifiably relied on Trigon's alleged misrepresentation that most of Trigon's fees were based on the RBRVS. Accordingly, American Chiropractic has failed to plausibly allege that it justifiably relied on a misrepresentation by Trigon.

HN36[] To withstand a motion to dismiss for failure to state a RICO claim, a plaintiff must plausibly allege at least two predicate acts of racketeering. As noted above, American Chiropractic's complaint alleged three predicate acts - mail fraud, wire fraud, and extortion. Because we have held that American Chiropractic failed to state a claim for mail or wire fraud, it has failed to allege at least two predicate acts of racketeering, **[**58]** and we need not address whether it properly alleged a claim of extortion.

Although, in light of *Humana, Inc v. Forsyth*, American Chiropractic's claim is not preempted by the *McCarran-Ferguson Act*, we affirm the dismissal of this count because American Chiropractic failed to state a claim for a RICO violation.

VI.

Finally, American Chiropractic argues that the district court abused its discretion in handling discovery in this case by refusing to extend the temporal scope of discovery to include events prior to 1996 and by failing to lengthen discovery after Trigon turned over documents relating to the MCAP in a tardy manner. [26] ***HN37***[] "We afford **[*236]** substantial discretion to a district court in managing discovery and review discovery rulings only for abuse of that discretion." *United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002)*, *cert. denied*, *538 U.S. 1012, 123 S. Ct. 1929, 155 L. Ed. 2d 848 (2003)*.

[59]** Discovery commenced in September 2001, soon after the district court addressed Trigon's motion to dismiss, and the parties agreed in writing to limit discovery requests to events occurring after January 1, 1996. [27] Discovery lasted ten months, concluding on June 28, 2002. On June 14, 2002, just prior to the close of discovery, Trigon turned over documents relating to Dr. Colley and his involvement with the MCAP. Trigon admitted that

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[26] American Chiropractic raises four other arguments relating to the conduct of discovery. Those arguments are that the district court abused its discretion by: (1) failing to require Trigon to produce the identity of all medical doctors employed by Trigon; (2) refusing to compel Trigon to turn over information regarding any service code that paid a lower reimbursement amount to limited-license practitioners than to medical doctors; (3) by refusing to compel Trigon to turn over more of Dr. Colley's file; and (4) by refusing to allow American Chiropractic to conduct another *Rule 30(b)(6)* deposition. We have examined these issues carefully and conclude that they are without merit; thus, we affirm those rulings as well.

[27] The parties agreed that this time limit could be revised by negotiations in good faith if American Chiropractic could show a valid basis for requesting additional information.

despite its efforts to locate the documents, they had been "overlooked" and offered to cure the late production by allowing American Chiropractic to depose Dr. Colley after the stated discovery deadline passed. Trigon also permitted American Chiropractic to depose two representatives of medical societies with members on the MCAP after the close of discovery.

American Chiropractic's first assertion is **[**60]** that the district court abused its discretion by limiting the scope of discoverable materials to those created after January 1, 1996. By doing so, American Chiropractic contends, the district court rendered American Chiropractic unable to pursue key avenues of investigation in the case, including the $ 500 coverage cap instituted in 1988 and the MCAP meeting from October of 1995 where the Low Back Guideline was approved. Unfortunately for American Chiropractic, this limitation was imposed not by judicial fiat, but by the mutual agreement of the parties. The record shows that American Chiropractic and Trigon agreed, in writing, to limit discovery to events arising after January 1, 1996 unless, in good faith, a more expansive time period was necessary. American Chiropractic failed to contact Trigon to discuss expanding the time period and did not mention the limiting nature of the agreement to the district court until June 18, 2002, a mere ten days before the close of discovery. The district court found that expanding the time period to events before January 1, 1996, would be "overly burdensome" to Trigon and refused American Chiropractic's invitation to do so. (J.A. at 1137.) We cannot **[**61]** say the district court abused its discretion by refusing, at such a late date, to expand the scope of discovery beyond that mutually agreed to by the parties.

Next, American Chiropractic contends that the district court abused its discretion by refusing to extend the end-date of discovery when Trigon turned over documents relating to the Low Back Guideline and the MCAP's October 25, 1995 meeting just before the close of discovery. Trigon does not dispute that it was dilatory in turning over those particular documents; in a letter to American Chiropractic, it admitted that "despite Trigon's good faith efforts to produce all of the relevant documents, these documents were not found and were overlooked during the previous document productions. This was admittedly a mistake by Trigon." (J.A. at 5296.) Despite this admitted mistake, the district court denied American **[*237]** Chiropractic's request for more discovery and found that "any mistakes on Trigon's part have not caused prejudice." (J.A. at 1131.)

While we are not sure that Trigon's late production of these documents did not have the potential to cause prejudice, two factors lead us to conclude that the district court did not abuse its **[**62]** discretion in refusing to extend discovery. First, Trigon offered to cure the late production by allowing American Chiropractic to conduct an additional deposition of Dr. Colley after the close of discovery. Second, Trigon allowed American Chiropractic to take depositions of two of the medical societies with members on the MCAP after the close of discovery as well.

Additionally, if American Chiropractic felt that it had insufficient time to conduct discovery given the late production of documents, and/or that Trigon was not negotiating in good faith an agreement for further discovery, it could have filed a *Rule 56(f)* motion in response to Trigon's motion for summary judgment. [28] We have held that ***HN38***[] "[i] f a party believes that more discovery is necessary for it to demonstrate a genuine issue of material fact, the proper course is to file a *Rule 56(f)* affidavit." *Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 244 (4th Cir. 2002)*. This American Chiropractic did not do. In sum, we find that the district court did not abuse its discretion in its discovery rulings.

[63]** VII.

In conclusion, we affirm the district court's grant of summary judgment on American Chiropractic's *§ 1 Sherman Act* claim, Virginia civil and common law conspiracy claims, and tortious interference claim. We also affirm the district court's dismissal of American Chiropractic's claim under the Virginia insurance equality laws for failure to state a claim. Although we disagree with the district court's holding that American Chiropractic's RICO claim is preempted

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[28] *Federal Rule of Civil Procedure 56(f)* provides that ***HN39***[] "[s] hould it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavits facts essential to justify the party's opposition, the court may …order a continuance to permit …discovery to be had."

by the *McCarran-Ferguson Act*, we affirm the district court's dismissal of that claim because American Chiropractic has failed to state a claim for a RICO violation. We also find that the district court's discovery rulings were not an abuse of discretion.

AFFIRMED

Schecher v. Purdue Pharma L.P.

United States District Court for the District of Kansas

May 6, 2004, Decided

Case No. 04-4015-JAR

Reporter

317 F. Supp. 2d 1253 *; 2004 U.S. Dist. LEXIS 8571 **; 2004-1 Trade Cas. (CCH) P74,431

BOB SCHECHER, et al., Plaintiff, v. PURDUE PHARMA L.P., PURDUE PHARMA COMPANY, PURDUE FRANKLIN COMPANY, P.F. LABORATORIES, INC., Defendants.

Prior History: *Purdue Pharma L.P. v. Endo Pharms., Inc., 2004 U.S. Dist. LEXIS 2276 (S.D.N.Y., Feb. 13, 2004)*

Disposition: [1]** Defendants' Motion to Transfer (Doc. 11) GRANTED. Plaintiff's Motion to Remand (Doc. 16) DENIED. Defendants' Motion to Stay (Doc. 41) DENIED.

Core Terms

patents, fraudulently obtain, federal patent law, generic, district court, defendants', motion to transfer, federal question, parties, subject matter jurisdiction, choice of forum, manufacturer, allegations, witnesses, cases, patent infringement, plaintiff's claim, antitrust, motion to stay, federal court, counterclaims, asserting, questions, thwart, venue, substantial question, interest of justice, civil action, transferring, well-pleaded

LexisNexis® Headnotes

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN1[] **Federal Venue Transfers, Convenience Transfers**

The venue statute, *28 U.S.C.S. § 1404(a)*, does not vest courts with unlimited power to transfer a civil action to any federal district; rather, *§ 1404(a)* limits transfer of a civil action to any other district or division where it might have been brought. A district or division is one where the action might have been brought if, among other things, when the action began the proposed transferee district court would have had subject matter jurisdiction over the action.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

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

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

HN2[] **Preliminary Considerations, Venue**

Neither venue nor personal jurisdiction is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Limited Jurisdiction

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Elements for Removal > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN3[] **Removal, Specific Cases Removed**

A civil action is removable to federal district court only if a plaintiff could have originally brought the action in federal court. *28 U.S.C.S. § 1441(a)*. The court is required to remand if at any time before final judgment it appears that the district court lacks subject matter jurisdiction. *28 U.S.C.S. § 1447(c)*. Because federal courts are courts of limited jurisdiction, the law imposes a presumption against federal jurisdiction. The rule is inflexible and without exception, and requires a court to deny its jurisdiction in all cases where such jurisdiction does not affirmatively appear in the record. Accordingly, the court must strictly construe the federal removal statute, *28 U.S.C.S. § 1441*.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Exclusive Federal Jurisdiction

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

HN4[] **Subject Matter Jurisdiction, Federal Questions**

Federal district courts have original federal question jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. *28 U.S.C.S. § 1331*. Additionally, district courts have exclusive original jurisdiction over actions arising under any Act of Congress relating to patents. *28 U.S.C.S. 1338(a)*. The Supreme Court uses the same standard to evaluate the "arising under" language in both *28 U.S.C.S. §§ 1331* and *1338(a)*, that is, the presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. A defense is not part of a plaintiff's well pleaded statement of his claim. Thus, a case may not be removed to federal court on the basis of a federal defense even if the defense is anticipated in the plaintiff's complaint and even if both parties admit that the defense is the only question truly at issue in the case.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

HN5[] **Removal, Specific Cases Removed**

Under the well-pleaded complaint rule, a plaintiff as "master of his complaint," can generally control the possibility of removal to federal court by asserting only state law claims in the complaint. Consequently, the majority of federal cases will be those in which federal law creates the cause of action. A corollary rule, however, provides that a plaintiff may not defeat removal jurisdiction by omitting to plead necessary federal questions in a complaint. Even though state law creates a party's cause of action, its case might still arise under the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law. Thus, merely because a claim makes no reference to federal law does not necessarily mean that the claim does not arise under federal law. However, jurisdiction does not exist if only one of plaintiff's alternate theories for its claim requires resolution of a federal question.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > Infringement Actions > General Overview

HN6[] **Bad Faith, Fraud & Nonuse, Fraud**

Fraud on the U.S. Patent & Trademark Office (PTO) is distinct from mere inequitable conduct because a fraud finding requires higher threshold showings of both intent and materiality than does a finding of inequitable conduct. Indeed, federal patent law bars the imposition of liability for conduct before the PTO unless a plaintiff can show that the patent holder's conduct amounted to fraud or rendered the patent application process a sham. Thus, by pleading fraud in the PTO process and reliance on fraudulently obtained patents as the only basis for an alleged unlawful restraint of trade and a monopoly, a plaintiff raises substantial questions of federal patent law, which would support federal question jurisdiction over the action.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN7[] **Bad Faith, Fraud & Nonuse, Fraud**

Inequitable conduct is an equitable defense in a patent infringement action and serves as a shield, while a more serious finding of fraud potentially exposes a patentee to antitrust liability and thus serves as a sword.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

HN8[] **Intellectual Property, Ownership & Transfer of Rights**

Where a patent has been lawfully acquired, subsequent conduct under the patent laws cannot trigger any liability under the ***antitrust law***.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Parties

Civil Procedure > ... > Venue > Motions to Transfer > Convenience of Witnesses

Civil Procedure > ... > Venue > Motions to Transfer > Interests of Justice

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Evidence > Burdens of Proof > General Overview

HN9[] **Federal Venue Transfers, Convenience Transfers**

The purpose of *28 U.S.C.S. § 1404(a)* is to permit easy change of venue within a unified federal judicial system. Pursuant to *§ 1404(a)*, a court may transfer a case to any other district or division where it might have been brought originally for the convenience of parties and witnesses and in the interest of justice. Reference to an action as a potential tag-along action in its transfer order does not limit a court's power to enter further procedural orders, including a motion to transfer. The party seeking the transfer bears the burden of demonstrating that transfer is appropriate and that the balance of considerations tilts strongly in its favor.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN10[] **Venue, Federal Venue Transfers**

See J.P.M.L.R.P. 7.4.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN11[] **Venue, Federal Venue Transfers**

See J.P.M.L.R.P. 1.5.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN12[] **Judges, Discretionary Powers**

The decision whether to grant a party's motion to transfer is within the sound discretion of the district court. A court has the discretion under U.S.C.S. *§ 1404(a)* to adjudicate transfer motions according to an individualized, case-by-case consideration of convenience and fairness. Among the factors to be considered by a court are: the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. In considering a motion for transfer, the trial court is called upon to carefully weigh the competing equities relied upon by the parties for changing the place of trial.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN13[] **Venue, Federal Venue Transfers**

The pendency of related litigation in another forum is a proper factor to consider in resolving choice of venue questions.

Civil Procedure > Preliminary Considerations > Venue > Multidistrict Litigation

HN14[] **Venue, Multidistrict Litigation**

See J.P.M.L.R.P. 1.1.

Civil Procedure > ... > Service of Process > Service of Summons > Content & Form

Governments > Courts > Authority to Adjudicate

HN15[] **Service of Summons, Content & Form**

The Southern District of New York can compel the appearance of anyone within 100 miles of New York. *Fed. R. Civ. P. 4(k)(1)(B)*.

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN16[] **Venue, Federal Venue Transfers**

The court must normally give great weight to a plaintiff's choice of forum. However, when a plaintiff is a class representative, that weight is diminished and factors other than plaintiff's choice must necessarily take on increased significance. The weight accorded a plaintiff's choice of forum is also reduced when the plaintiff does not reside in the forum. Additionally, when the facts giving rise to a lawsuit have no material relation or significant connection to plaintiff's chosen forum, plaintiff's choice of forum is given reduced weight on motion to transfer.

Counsel: For Bob Schecher, Plaintiff: Peter S. Obetz, LEAD ATTORNEY, Bartimus Frickleton Robertson & Obetz, P.C., Leawood, KS.

For Purdue Pharma LP, Purdue Pharma Company, Purdue Franklin Company, P.F. Laboratories Inc, Defendant: Christopher N. Sipes, LEAD ATTORNEY, Paul W. Schmidt, LEAD ATTORNEY, Timothy C. Hester, LEAD ATTORNEY, Covington & Burling -- Washington, Washington, DC.

For Purdue Pharma LP, Purdue Pharma Company, Purdue Franklin Company, P.F. Laboratories Inc, Defendant: John L. Oliver, Jr., LEAD ATTORNEY, Oliver, Oliver and Waltz, PC, Cape Girardeau, MO.

For Purdue Pharma LP, Purdue Pharma Company, Purdue Franklin Company, P.F. Laboratories Inc, Defendant: Lynn Weddle Judkins, LEAD ATTORNEY, Foland Wickens Eisfelder Roper & Hofer PC, Kansas City, MO.

For Purdue Pharma LP, Purdue Pharma Company, Purdue Franklin Company, P.F. Laboratories Inc, Defendant: Mark H. Lynch, LEAD ATTORNEY, Covington & Burling, Washington, DC.

Judges: Julie A. Robinson, Judge, United States District Judge.

Opinion by: Julie A. Robinson

Opinion

[*1255] MEMORANDUM [2] AND ORDER**

This matter comes before the Court on defendants' Motion to Transfer (Doc. 11), plaintiff's Motion to Remand (Doc. 16) and defendants' Motion to Stay (Doc. 41). Defendants Purdue Pharma, L.P., Purdue Pharma Company, Purdue Frederick Co., [1] and P.F. Laboratories, Inc. seek transfer of this case to the Southern District of New York. Plaintiff Bob Schecher opposes transfer and has filed a Motion to Remand the case to state court for lack of subject matter jurisdiction. Additionally, defendants have filed a Motion to Stay plaintiff's remand motion, pending resolution of the motion to transfer. For the reasons stated below, defendants' motion to transfer is granted, plaintiff's motion to remand is denied, and defendants' motion to stay is denied.

I. Background

This antitrust litigation was originally filed by plaintiff in the District Court of Shawnee **[**3]** County, Kansas, on January 13, 2004, as a class action on behalf of all persons or entities in the United States who purchased OxyContin(R) other than for re-sale or distribution from 1995 to the present. Plaintiff also sought to represent a subclass of individuals within Kansas who purchased OxyContin(R). In his Complaint, plaintiff asserts violations of the *Kansas Restraint of Trade Act*, K.S.A. *§§ 50-101, 50-112and 50-117*. Plaintiff alleges that Defendants "fraudulently obtained" its patents and relied on those fraudulently obtained patents "to thwart generic competition for OxyContin(R)" and that, as a result, plaintiff Bob Schecher and the other members of the class paid more for OxyContin(R) than they would have paid if generic competitors had been allowed to enter the market.

This action follows on the heels of a separate, but related patent action [2] in the United States District Court for the Southern District of New York that defendants brought against Endo Pharmaceuticals (Endo). Following an eleven-day bench trial, Judge Stein issued a memorandum opinion holding that Endo's products infringed upon defendants' OxyContin(R) Tablets, but that the patents were unenforceable **[**4]** due to defendants' inequitable conduct before the U.S. Patent and Trademark Office (PTO). [3] Further, in its answer to the patent action, Endo asserted antitrust counter-claims and alleged, among other things that defendants had monopolized the market. Fact discovery on the antitrust counterclaims is complete and expert reports have been exchanged, but the counterclaims have yet to be substantively resolved.

Plaintiff's case is not the only related case which followed the New York decision. On April 22, 2004, the Judicial Panel on Multidistrict Litigation entered a Transfer Order which consolidated two actions filed in the District of Connecticut with similar actions pending in the Southern District of New York. The Order states that in addition to

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[1] Although plaintiff named the Purdue Franklin Company in his caption, the parties agree he intended to name the Purdue Frederick Company.

[2] Indeed, plaintiff quotes from the opinion issued in the case in his Complaint.

[3] *Purdue Pharma L.P., v. Endo Pharms., Inc., 2004 U.S. Dist. LEXIS 10, 2004 WL 26523 (S.D.N.Y. January 5, 2004)*.

the consolidated actions, forty-one related actions have been filed. [4] Twenty-three **[**5]** of these actions are pending in the Southern District of New York and eighteen actions are pending in other districts, including "one action . . . in the . . . District of Kansas." **[*1256]** Though the Transfer Order does not identify the "one action" pending in the District of Kansas by docket number, the Panel's reference was surely to this case, because this case was the only Kansas case included in a list of eighteen related matters pending in judicial districts, which the Panel notified the Court of in mid-March. The Order indicated that "these and any other related actions will be treated as potential tag along actions." To the Court's knowledge, the Panel has yet to issue a transfer order in this case.

II. Discussion

Defendants contend that the Court should transfer this case to the Southern District of New York and stay plaintiff's motion to remand to allow Judge Stein to resolve the remand issues **[**6]** in all the removed cases simultaneously. Conversely, plaintiff asserts that the threshold jurisdictional issue raised by the remand motion should be addressed before the motion to transfer venue, and that the motion to stay is without merit.

HN1[] The venue statute, *28 U.S.C. § 1404(a)*, does not vest courts with unlimited power to transfer a civil action to any federal district; rather, *§ 1404(a)* limits transfer of a civil action to "any other district or division where it might have been brought" [5] **[**7]** A district or division is one where the action "might have been brought" if, among other things, when the action began the proposed transferee district court would have had subject matter jurisdiction over the action. [6] Because a court may only transfer a case to a venue where the case could have been brought originally, this Court must necessarily address plaintiff's contention that subject matter jurisdiction is lacking before reaching the motion to transfer.

A. Motion to Stay

Although defendants suggest that it would more efficient to stay plaintiff's pending remand motion to allow Judge Stein to rule on the remand issues at once, the Court disagrees. Judge Vratil recently addressed this precise issue and determined:

> While staying the proceedings might allow a single district court to rule on the jurisdictional issue in the various cases, a stay would not affect the law that applies to the present case and little would be gained by a stay of decision on the motion to remand. The **[**8]** parties would still be subject to Kansas law. No great judicial economy will be realized from a delay. The parties will not save time, for they have already briefed the remand issue. The Court is well versed in both Kansas and federal law, while the transferor court would need to apply the law of different states to different claims. For purposes of judicial economy, the jurisdictional issue should be resolved immediately. If federal jurisdiction does not exist, the case can be remanded before federal resources are further expended. In the Court's view, judicial economy dictates a present ruling on the remand issue. [7]

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[4] Defendants have informed the Court that, at the latest tally, fifty-five related actions have been filed.

[5] *28 U.S.C. 1404(a)*; ***Hoffman v. Blaski, 363 U.S. 335, 343-44, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960)***.

[6] ***U.S. Sprint Communications Co. v. Boran, 716 F. Supp. 505, 507 (D. Kan. 1988)***; *U.S. Telecom, Inc. v. Hubert, 678 F. Supp. 1500, 1504 (D. Kan. 1987)*; *see also* *Leroy v. Great W. United Corp., 443 U.S. 173, 180, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)* ***HN2***[] ("Neither venue nor personal jurisdiction is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.")

[7] *Aetna U.S. Healthcare v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1047 (D. Kan. 1999)*.

[*1257] The Court agrees that there is no benefit to be gained from staying the remand motion.

B. Motion to Remand

Plaintiff alleges that defendants illegally removed this action and that remand is proper because this court lacks subject matter jurisdiction. ***HN3***[] A civil action **[**9]** is removable only if plaintiffs could have originally brought the action in federal court. [8] The Court is required to remand "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." [9] Because federal courts are courts of limited jurisdiction, the law imposes a presumption against federal jurisdiction. [10] The rule is inflexible and without exception, and requires a court to deny its jurisdiction in all cases where such jurisdiction does not affirmatively appear in the record. [11] Accordingly, the Court must strictly construe the federal removal statute. [12]

[10]** Defendants allege that federal subject matter jurisdiction exists because plaintiff's claims arise under federal patent law creating federal question jurisdiction, diversity jurisdiction is present, and plaintiff's claims are completely pre-empted by ERISA.

1. Federal Question Jurisdiction

Plaintiff argues that he has pleaded only state law claims that do not arise under federal law; consequently, federal question jurisdiction is lacking. On the other hand, defendants claim federal jurisdiction is proper because plaintiff's claims "necessarily depend on resolution of a substantial question of patent law" and each of plaintiff's factual allegations can only be resolved as a matter of federal patent law.

HN4[] Federal district courts have original federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." [13] Additionally, district courts have exclusive original jurisdiction over actions "arising under any Act of Congress relating to patents . . . ." [14] The Supreme Court uses the same standard to evaluate the "arising under" language in both *§§ 1331and 1338(a)*, [15] that is, "the presence or absence of federal- **[**11]** question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." [16] A defense is not part of a plaintiff's well pleaded statement of his claim. [17] Thus, "a case may not be

[8] *28 U.S.C. § 1441(a)*.

[9] *28 U.S.C. § 1447(c)*.

[10] *Frederick & Warinner v. Lundgren, 962 F. Supp. 1580, 1582 (D. Kan. 1997)* (citing *Basso v. Utah Power & Light Co., 495 F.2d 906, 909 (10th Cir. 1974))*.

[11] *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)*.

[12] *Fajen v. Found. Reserve Ins. Co., Inc., 683 F.2d 331, 333 (10th Cir. 1982)*.

[13] *28 U.S.C. § 1331*.

[14] *28 U.S.C. 1338(a)*.

[15] *See Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808-09, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)*.

[16] *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*.

[17] *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)*.

removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint and even if both parties admit that the defense is the only question truly at issue in the case." [18]

[12]** *HN5*[] **[*1258]** Under the well-pleaded complaint rule, the plaintiff as "master of his complaint," can generally control the possibility of removal by asserting only state law claims in the complaint. [19] Consequently, the majority of federal cases will be those in which "federal law creates the cause of action." [20] **[**13]** A corollary rule, however, provides that "a plaintiff may not defeat removal jurisdiction by omitting to plead necessary federal questions in a complaint." [21] "Even though state law creates [a party's] cause of action, its case might still arise under the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." [22] Thus, "merely because a claim makes no reference to federal patent law does not necessarily mean that the claim does not arise under patent law." [23] However, jurisdiction does not exist if only one of plaintiff's alternate theories for its claim requires resolution of a federal question. [24]

Defendants argue that plaintiff's claims require the resolution of substantial questions of federal patent law because all of plaintiff's allegations are based on defendant's conduct in obtaining and enforcing their patent rights. In his Complaint, Plaintiff refers to two types of misconduct by defendants: that defendants made material misrepresentations to the PTO to fraudulently obtain the patents, and that defendants sued for patent infringement, relying on the "fraudulently obtained patents to thwart generic competition." These allegations are the basis of the plaintiff's state law claims that defendants engaged in misconduct to create an unlawful trust in restraint of trade and to obtain and enforce a monopoly.

Plaintiff's complaint demonstrates that he cannot prove his state law claims without resolving **[**14]** substantial questions of federal patent law. [25] **[**15]** The alleged submission of misrepresentations to the PTO to fraudulently procure patents necessarily involves questions of patent law, including what information the patent applicant had a duty to disclose and what information was material to the patent application. [26] Similarly, the allegation that defendants "relied on its fraudulently obtained patents to thwart generic competition" through litigation **[*1259]** necessarily turns on questions of federal patent law because the allegation depends on what constitutes a

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[18] *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)*.

[19] *Caterpillar Inc., 482 U.S. at 392*.

[20] *Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)*.

[21] *Franchise Tax Bd. of Cal., 463 U.S. at 22*.

[22] *City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 118 S. Ct. 523, 529, 139 L. Ed. 2d 525 (1997)*.

[23] *Christianson, 486 U.S. at 809 n.3*.

[24] *Id. at 810*.

[25] Indeed, Judge Donald reached this same conclusion with identical facts in *Coker v. Purdue Pharma Co., 314 F. Supp. 2d 777, 2004 U.S. Dist. LEXIS 6988, No. 04-2145-DP, 2004 WL 870661 at *4*, although there the plaintiff also alleged a collateral estoppel theory, which allowed the plaintiff to prove that Defendants made material misrepresentations to the PTO without involving the resolution of substantial questions of federal patent law. *2004 U.S. Dist. LEXIS 6988 at *5*. No such collateral estoppel theory was presented by plaintiff in this case.

[26] *See, e.g.*, *37 C.F.R. § 1.56* (discussing the duty to disclose information material to patentability); *Rohm & Haas Co. v. Brotech Corp., 770 F. Supp. 928, 934 n.2 (D. Del. 1991)* (noting that allegations of fraudulent procurement of a patent involve fundamental issues of patent law which are logically related to infringement issues. "For example, to determine whether an applicant had practiced fraud on the PTO, the factfinder must assess what evidence must be presented to the PTO to obtain legitimate approval of a given patent application.")

fraudulently obtained patent under federal patent law. [27] Thus, the sole assertions in plaintiff's well-pleaded Complaint to support his charge of an unlawful trust and a monopoly depend on whether defendants fraudulently obtained the OxyContin(R) patents.

[16]** After asserting that his case involves only state law antitrust claims and is divorced from federal patent law, plaintiff curiously suggests that "the patent issues the defendants claim require resolution here have already been resolved by Judge Stein . . . who, after conducting a bench trial, issued a lengthy opinion including detailed findings of fact that Defendants obtained their patents for OxyContin(R) by fraud." However, Judge Stein did not conclude that defendants fraudulently obtained their permits. Instead, Judge Stein analyzed whether the patents were infringed and whether the equitable defense of inequitable conduct barred enforcement of those patents. ***HN6***[] Fraud on the PTO is distinct from mere inequitable conduct because a fraud finding requires "higher threshold showings of both intent and materiality than does a finding of inequitable conduct." [28] Indeed, "federal patent law bars the imposition of liability for conduct before the PTO unless the plaintiff can show that the patent holder's conduct amounted to fraud or rendered the patent application process a sham." [29] By pleading fraud in the PTO process and reliance on fraudulently obtained patents as his only basis for **[**17]** an alleged unlawful restraint of trade and a monopoly, plaintiff has raised substantial questions of federal patent law which have not yet been resolved. Thus, plaintiff's own assertions serve to strengthen the case for federal question jurisdiction.

Finally, plaintiff argues that *Aetna U.S. Healthcare v. Hoechst Aktiengesellschaft* [30] dictates that his case be remanded **[**18]** to state **[*1260]** court for lack of federal subject matter jurisdiction. However, Aetna is clearly distinguishable from the instant case. In *Aetna*, the defendant branded drug manufacturer had previously brought a patent infringement suit against a proposed generic manufacturer, which then brought antitrust counterclaims. [31] Before the court came to resolve the patent infringement issue, the generic and branded manufacturer entered into a stipulation agreement, by which the generic manufacturer agreed to drop its counterclaims in the patent infringement suit in return for quarterly payments of $ 10 million, and to diligently prosecute its claim for FDA approval and assert its right as first in line against other potential producers of generic drugs. [32] Subsequently, the two drug manufacturers did not actively pursue the patent infringement suit and the generic drug manufacturer did

[27] *See e.g., Hunter Douglas, Inc., v. Harmonic Design, Inc., 153 F.3d 1318, 1329 (Fed. Cir. 1998)* (holding that a state law action for injurious falsehood depended on the resolution of a question of federal patent law where defendant's stated assertion of exclusive patent rights could only be false if the patents were in fact invalid and unenforceable), *overruled on other grounds by Midwest Indus., Inc. v. Karavan Trailers, Inc., 175 F.3d 1356 (Fed. Cir. 1999)*; *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc., 986 F.2d 476, 477-78 (Fed. Cir. 1993)* (holding that *§ 1338(a)* provided jurisdiction over a claim for business disparagement involving false accusations of infringement); ***Baxa Corp. v. McGaw, Inc., 996 F. Supp. 1044, 1054 (D. Colo. 1997)*** ("A patent is presumed valid. *35 U.S.C. 285* Therefore, to the extent Excelsior relies on . . . fraud on the PTO to support its [state law] claims . . . it must prove . . . fraud and . . . knowledge thereof by clear and convincing evidence.")

[28] *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1070-71 (Fed. Cir. 1998)* ***HN7***[] (Inequitable conduct is an equitable defense in a patent infringement action and serves as a shield, while a more serious finding of fraud potentially exposes a patentee to antitrust liability and thus serves as a sword.)

[29] *Hunter Douglas, Inc., 153 F.3d at 1336*; *In re Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1479, 1488-89 (D. Kan. 1997)* (noting that ***HN8***[] "where a patent has been lawfully acquired, subsequent conduct under the patent laws cannot trigger any liability under the ***antitrust law***").

[30] *54 F. Supp. 2d 1042 (D. Kan. 1999)*. Plaintiff cites other cases which he claims mandate remand, many of which involve the same facts and law the *Aetna* court encountered, but in none of those cases was a court faced with the precise issue this Court faces. In the only decision interpreting identical facts, *Coker, 2004 U.S. Dist. LEXIS 6988, 2004 WL at *4*, Judge Donald determined that but for a collateral estoppel argument, federal question jurisdiction existed because plaintiff's claims involved substantial questions of federal patent law.

[31] *Id. at 1046*.

[32] *Id.*

not begin to sell its generic product. [33] Producers of competing generic products were thus barred from entering the market and unable to compete. [34] On behalf of a class of Kansas plaintiffs, *Aetna* filed suit in state court alleging that the branded and generic manufacturers had harmed members of the **[**19]** public by preventing production of a lower-cost generic drug. [35]

The *Aetna* court held that plaintiff's complaint did not raise substantial issues of federal patent law because "plaintiffs . . . do not seek to litigate the validity of the [] patents." [36] The court reasoned that "plaintiffs' claims do not depend on whether **[**20]** the patents were valid," because plaintiffs allege only that the drug manufacturer "had an impure heart when it filed [the patent infringement] suit." [37] Additionally, the court noted that "regardless [of] whether the patent is valid, plaintiffs allege that defendants committed other acts of unfair competition -- such as the stipulation agreement." [38] In this case, however, plaintiffs claims require litigation of the validity of the patents. Indeed, plaintiff rests his unfair competition and monopoly claims on the fact that defendants "fraudulently obtained" the patents and "relied on the fraudulently obtained patents" to thwart generic competition, issues of federal patent law. Nor are allegations of other acts of unfair competition present, such as a stipulation agreement, as in *Aetna*. For all of these reasons, *Aetna* is not controlling.

Because **[**21]** the Court concludes that federal question jurisdiction is present, it need not address whether diversity of the parties or ERISA preemption might also confer subject matter jurisdiction.

B. Motion to Transfer Venue

In addition to arguing that this case belongs in federal court, defendants suggest that transfer to the Southern District of New York is appropriate. ***HN9***[] The purpose of *28 U.S.C. § 1404(a)* is to permit easy change of venue within a unified federal judicial system. [39] **[**22]** Pursuant to *§ 1404(a)*, a court may transfer a case to **[*1261]** any other district or division where it might have been brought originally for "the convenience of parties and witnesses" and "in the interest of justice." [40] The Panel's reference to this action as a potential tag-along action in its Transfer Order does not limit the Court's power to enter further procedural orders, including a motion to transfer. [41] But, the

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[33] *Id. at 1046-47*.

[34] *Id. at 1047*.

[35] *Id.*

[36] *Aetna U.S. Healthcare, Inc., 54 F. Supp. 2d at 1053*.

[37] *Id. at 1053-54*.

[38] *Id. at 1054*.

[39] *Hill's Pet Prods. v. A.S.U., Inc., 808 F. Supp. 774, 776 (D. Kan. 1992)* (citing *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981))*.

[40] *28 U.S.C. 1404(a)*.

[41] *See* J.P.M.L. Rule 7.4 ***HN10***[] ("Upon learning of the pendency of a potential tag-along action . . . an order may be entered by the Clerk of the Panel transferring that action to the previously designated transferee district court . . . ." (internal quotations omitted); J.P.M.L. Rule 1.5 ***HN11***[] ("The pendency of a . . . conditional transfer order . . . before the Panel concerning transfer . . . of an action pursuant to *28 U.S.C. 1407* does not affect or suspend orders and pretrial proceedings in the district court where the action is pending and does not in any way limit the pretrial jurisdiction of that court.")

party seeking the transfer bears the burden of demonstrating that transfer is appropriate and that the balance of considerations tilts strongly in its favor. [42]

HN12[] The decision whether to grant a party's motion to transfer is within the sound discretion of the district court. [43] A court has the discretion under § 1404(a) to adjudicate transfer motions according to an individualized, case-by-case consideration of convenience and fairness. [44] Among the factors to be considered by a court are:

> the **[**23]** plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical. [45]

In considering a motion for transfer, "the trial court is called upon to carefully weigh the competing equities relied upon by the parties for changing the place of trial." [46]

[24]** The Court concludes that the balance of equities favors transferring this case to the Southern District of New York because any inconvenience caused to the plaintiff by transfer is far outweighed by the interest of justice, and plaintiff's choice of forum is not entitled to blind deference.

1. The Interest of Justice

The interest of justice clearly favors transfer. First, the allegations of plaintiff and those at issue in the pending patent litigation are closely related. HN13[] "The pendency of related litigation in another forum is a proper factor to consider in resolving choice of venue questions." [47] Plaintiff argues that defendants used fraudulently obtained patents to thwart generic competition for OxyContin(R), issues that overlap significantly with matters **[*1262]** already heard before Judge Stein in the patent case. Moreover, this case raises nearly identical issues to those raised in Endo's antitrust counterclaims. Namely, Endo claimed, *inter alia*, that defendants wrongfully enforced its patents and attempted monopolization, just as plaintiff now claims defendants attempted to stymie competition through fraudulently obtained patents.

[25]** In addition, this action raises legal and factual issues that are related to forty other actions pending in federal court, all of which the Judicial Panel on Multidistrict Litigation has termed "potential tag-along actions." By definition, "[a] HN14[] tag-along action refers to a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407." [48] Because of the similarities in this action and other pending actions, transfer to the Southern District of New York is warranted to both facilitate the interest of justice and avoid inconsistent results. Indeed, were this Court not to transfer the case, "two different federal district courts would be simultaneously litigating claims involving virtually the same parties and the same issues, certainly not a desirable outcome from the standpoint of either judicial efficiency or convenience to the parties and witnesses."

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[42] Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1992).

[43] Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567 (10th Cir. 1978).

[44] Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1516 (10th Cir. 1991).

[45] Id.

[46] Hustler Magazine, Inc., v. United States Dist. Ct. for the Dist. of Wyoming, 790 F.2d 69, 71 (10th Cir. 1986).

[47] Hill's Pet Prods., 808 F. Supp. 774, 777 (D. Kan. 1992).

[48] J.P.M.L. Rule 1.1.

Albeit unsuccessfully, plaintiff attempts to distinguish this **[**26]** case from those cases already pending in the New York court in a bid to avoid transfer. First, plaintiff argues that "none of the cases pending in the S.D.N.Y. assert claims under Kansas law on behalf of indirect purchasers of OxyContin(R) in the State of Kansas." But, this argument is simply incorrect as plaintiff's class is the same as eighteen purported classes of indirect purchasers pending in the Southern District of New York. In addition, plaintiff states that the pending New York cases do not support transfer because they "allege violations of federal ***antitrust law***, not Kansas state law." However, a number of the cases currently pending in the Southern District of New York expressly include claims under the same Kansas law that plaintiff invokes. Hence, plaintiff's argument only bolsters the reasons for transfer.

For the same reason, plaintiff's argument that the Kansas courts' familiarity with Kansas law weighs against transferring this case to New York fails. This Court has already determined that plaintiff's well-pleaded case raises substantial issues of federal patent law, giving federal courts exclusive jurisdiction over plaintiff's claims. Thus, the only remaining decision **[**27]** is whether this Court or Judge Stein, who is intimately familiar with the facts upon which this case is based, is best equipped to resolve plaintiff's claims. Because cases invoking Kansas law are currently before the New York court, Judge Stein is already familiar with Kansas law. In any event, the Court is confident Judge Stein can properly apply Kansas law.

2. The Convenience of the Parties and Witnesses

The Court finds that because nearly all the events giving rise to the Complaint occurred in New York, the convenience of the parties and witnesses would be best served by transferring this case to the Southern District of New York. Defendants have no facilities in Kansas, and no witnesses with knowledge of the prosecution of the patents are located in Kansas. Rather, OxyContin(R) was developed and the patents were prosecuted in New York and Connecticut. Moreover, all of the defendants' witnesses who testified in the previous patent infringement lawsuit reside in the New York metropolitan area and are within the Court's subpoena power. [49] **[*1263]** Although plaintiff alleges that his Complaint pertains to defendants' conduct in Kansas, the root of his Complaint stems from the defendants' **[**28]** reliance on the fraudulently obtained patents to thwart competition and the effect such monopolization had upon the Kansas market, which are both inexorably linked to the New York litigation.

3. Plaintiff's Choice of Forum

HN16[] The Court must normally give great weight to a plaintiff's choice of forum. [50] **[**29]** However, when a plaintiff is a class representative, that weight is diminished and factors other than plaintiff's choice must necessarily take on increased significance. [51] The weight accorded a plaintiff's choice of forum is also reduced when the plaintiff does not reside in the forum. [52] Additionally, when the facts giving rise to a lawsuit have no material relation or significant connection to plaintiff's chosen forum, plaintiff's choice of forum is given reduced weight on motion to transfer." [53]

Plaintiff chose Kansas as his forum and the Court must give some deference to his choice, but this deference need not be blind. Plaintiff brings this action as a class representative so the weight normally given to his choice of forum is diminished. Moreover, while plaintiff resides in Kansas, he seeks to represent a nationwide class of plaintiffs in his lawsuit. According to plaintiff's Complaint, "there are hundreds of thousands of members of the Class and the

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[49] ***HN15***[] The Southern District of New York can compel the appearance of anyone within 100 miles of New York. *See* *Fed. R. Civ. P. 4(k)(1)(B)*.

[50] *KCJ Corp. v. Kinetic Concepts, Inc., 18 F. Supp. 2d 1212, 1214 (D. Kan. 1998)*.

[51] *Shapiro v. Merrill Lynch & Co., 634 F. Supp. 587, 589 (S.D. Ohio 1986)*.

[52] *Id.*

[53] *Cook v. Atchison, Topeka & Santa Fe Ry. Co., 816 F. Supp. 667, 669 (D. Kan. 1993)*.

Kansas Class who are geographically dispersed throughout Kansas and the United States." Furthermore, the facts giving rise to this lawsuit, i.e, the fraudulent procurement of patents, occurred in New York and Connecticut, not Kansas so that such facts have no significant connection to plaintiff's chosen forum other than the fact that plaintiff is a Kansas resident. Thus, the Court concludes that the balance of equities, **[**30]** even after taking into account plaintiff's choice of forum, require that this case be transferred to the Southern District of New York.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' Motion to Transfer (Doc. 11) is GRANTED.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff's Motion to Remand (Doc. 16) is DENIED.

IT IS FURTHER ORDERED BY THE COURT THAT defendants' Motion to Stay (Doc. 41) is DENIED.

IT IS SO ORDERED.

Dated this 6th day of May, 2004.

S/

Judge Julie A. Robinson

United States District Court

In re Relafen Antitrust Litig.

United States District Court for the District of Massachusetts

May 12, 2004, Decided

MASTER FILE NO. 01-12239-WGY

Reporter

221 F.R.D. 260 *; 2004 U.S. Dist. LEXIS 8539 **; 2004-1 Trade Cas. (CCH) P74,405

IN RE RELAFEN ANTITRUST LITIGATION

Subsequent History: Later proceeding at *In re Relafen Antitrust Litig., 225 F.R.D. 14, 2004 U.S. Dist. LEXIS 22003 (D. Mass., 2004)*

Prior History: *In re Relafen Antitrust Litig., 2004 U.S. Dist. LEXIS 28801 (D. Mass., Apr. 9, 2004)*

Disposition: [1]** Plaintiffs' motion for class certification granted in part and denied in part.

Core Terms

payor, purchasers, class action, generic, consumers, plaintiffs', indirect, certification, courts, damages, antitrust, brand, state law, class certification, class member, exemplar, patent, consumer protection, nabumetone, proposed order, predominance, adequacy, entities, unjust enrichment, anti trust law, injunctive relief, limitations, policies, insured, named plaintiff

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN1[] **Class Actions, Certification of Classes**

On a motion for class certification, a district court must conduct a rigorous analysis of the prerequisites established by *Fed. R. Civ. P. 23*. This analysis should not involve a preliminary hearing into the merits, but rather an inquiry into whether the requirements of *Rule 23* are met. The moving party bears the burden of establishing the elements necessary for class certification: the four requirements of *Rule 23(a)* and one of the several requirements of *Rule 23(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN2[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a) imposes four threshold requirements applicable to all class actions: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN3[] Class Actions, Certification of Classes

In addition to the requirements of *Fed. R. Civ. P. 23(a)*, a party seeking class certification must establish the elements of *Rule 23(b)(1)*, *(2)*, or *(3)*. *Rule 23(b)(2)* permits a class action when the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. *Rule 23(b)(3)* permits a class action when common questions predominate over any question affecting only individual members, and class resolution is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN4[] Prerequisites for Class Action, Predominance

Matters pertinent to evaluating predominance and superiority under *Fed. R. Civ. P. 23(b)(3)* include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. This list of pertinent factors is nonexhaustive.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5[] Class Actions, Prerequisites for Class Action

Numerosity is established if the size of a proposed class, even if inexactly determined, is sufficiently large as to make joinder impracticable, given the relevant circumstances.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN6[] Class Actions, Prerequisites for Class Action

Where each of the plaintiffs claims injuries resulting from the same alleged conduct, resolving these common questions collectively will advance the litigation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] Class Actions, Prerequisites for Class Action

The element of typicality requires that the named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent class members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN8[] Class Actions, Prerequisites for Class Action

The adequacy requirement establishes as an essential prerequisite to certification that the court be certain the named plaintiffs will protect the interests of the class.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Mootness > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN9[] **Justiciability, Standing**

Once a class is properly certified, statutory and U.S. Const. art. III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs. This flexible inquiry acknowledges that in the nontraditional context of class actions, the purpose of the standing requirement -- limiting judicial power to disputes capable of judicial resolution (that is, disputes involving sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions) -- may be served even absent a personal stake held by the named plaintiff. The assurance of vigorous advocacy may be provided instead by the collective interest of the class, advanced by the named representative serving as a sort of private attorney general. The focus of the standing inquiry is therefore appropriately directed toward the class rather than its representative.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN10[] **Class Actions, Prerequisites for Class Action**

Plaintiffs seeking class certification must establish the two parts of the adequacy inquiry: first, an absence of potential conflict and second, an assurance of vigorous prosecution.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] **Class Actions, Prerequisites for Class Action**

Where any uncertainty regarding certification of classes concerns the amount rather than the fact of injury, it should not preclude recovery, particularly where the uncertainty stems from delay that the plaintiffs attribute to the defendant's wrongful conduct. It does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN12[] **Class Actions, Prerequisites for Class Action**

A court may not, at the preliminary stage of a class certification inquiry, weigh conflicting expert evidence or engage in statistical dueling of experts.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Remedies > Injunctions > General Overview

HN13[] Remedies, Damages

Claims for injunctive relief under § 16 of the Clayton Act, 15 U.S.C.S. § 26, do not undermine the indirect purchaser rule but rather fall properly outside its scope. Section 4 of the Clayton Act, 15 U.S.C.S. § 15, prevents indirect purchasers from seeking antitrust damages except in certain limited circumstances. The indirect purchaser rule does not apply to claims brought under § 16 of the Clayton Act, 15 U.S.C.S. § 26, which permits injured parties to seek injunctive relief rather than money damages. The concerns motivating the indirect purchaser rule are simply inapplicable to claims for injunctive relief. The risk of exposure to multiple liability, the difficulty in tracing the allocation of the overcharge among different levels of purchasers, and the general desirability of symmetrical application of the pass-on theory to plaintiffs and defendants are wholly unrelated to the issue whether a party should be entitled to sue for injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN14[] Private Actions, Remedies

Antitrust plaintiffs seeking injunctive relief must demonstrate threatened loss or damage by a violation of the antitrust laws. 15 U.S.C.S. § 26. This requirement is satisfied by a showing of significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15[] Prerequisites for Class Action, Predominance

To establish predominance under Fed. R. Civ. P. 23(b)(3), the end payor plaintiffs must demonstrate that the proposed class is sufficiently cohesive to warrant adjudication by representation. In the First Circuit, this requirement is satisfied where, notwithstanding individualized concerns, a sufficient constellation of common issues binds class members together. After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] Private Actions, State Regulation

Under both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff's damages.

Where an alleged antitrust violation relates solely to a defendant's conduct, it constitutes a common issue subject to common proof in a class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Prerequisites for Class Action, Predominance**

The amount of damages is invariably an individual question and does not defeat class action treatment. Courts are generally willing to find the predominance requirement to be satisfied even if individual damages issues remain.

Contracts Law > Remedies > Equitable Relief > General Overview

HN18[] **Remedies, Equitable Relief**

Unjust enrichment actions rest on the equitable principle that a person who is unjustly enriched at the expense of another is required to make restitution to the other. Consistent with this principle, claims for unjust enrichment share a core of common elements: the plaintiff conferred a benefit upon the defendant, the defendant appreciated or knew of the benefit, and the defendant accepted or retained the benefit under such circumstances as to make non-payment inequitable. Although claims for unjust enrichment often accompany and supplement those for breach of contract, they may also accompany and supplement those for tortious injury. A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Purchasers, Indirect Purchasers**

A court's approach to certification of indirect purchaser classes may depend in part on the nature of the jurisdiction's indirect purchaser statute. Several courts have denied class certification after concluding that their states' indirect purchaser statutes require proof of injury to each class member.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN20[] **Purchasers, Direct Purchasers**

The courts of Florida, Maine, Michigan, and Minnesota have interpreted their respective indirect purchaser statutes with a skeptical view of antitrust policies and remedies. The skeptical view values deterrence over compensation, efficiency over equity, and accuracy over approximation. Courts adopting this view question their ability to apportion overcharges between direct and indirect purchasers, finding that the realities of the evidentiary issues, as opposed to theoretical models, are difficult for courts to resolve accurately. The indirect purchaser statutes of Florida, Maine, Michigan, and Minnesota require a somewhat stronger and more precise showing of individual impact.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN21[] **Regulated Practices, Trade Practices & Unfair Competition**

Under California law, a challenge to unilateral conduct does not state a cognizable antitrust claim. However, the scope of the unfair competition statute, *Cal. Bus. & Prof. Code §§ 17200* -17208, is broad. The statutory language referring to any unlawful, unfair or fraudulent practice makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN22[] **Public Enforcement, State Civil Actions**

Although broad and undeveloped by case law, the Kansas Monopolies and Unfair Trade Act, *Kan. Stat. Ann. § 50-132*, by its terms prohibits combinations and conspiracies only.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] **Public Enforcement, State Civil Actions**

See *Kan. Stat. Ann. § 50-132*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN24[] **Regulated Practices, Trade Practices & Unfair Competition**

Actions brought under the Kansas Consumer Protection Act, *Kan. Stat. Ann. §§ 50-623* to -644, are subject to a three-year statute of limitations.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN25[] Class Actions, Certification of Classes

A necessity for individualized statute-of-limitations determinations invariably weighs against class certification under *Fed. R. Civ. P. 23(b)(3)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN26[] Public Enforcement, State Civil Actions

The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101*, declares the following anticompetitive conduct to be against public policy: all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article. None of these terms appears to include unilateral conduct.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN27[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

Although modeled after the Federal Trade Commission Act, the Tennessee Consumer Protection Act, *Tenn. Code Ann. §§ 47-18-101* to -108, differs in one significant respect: unlike the federal provision, which prohibits both unfair methods of competition and unfair or deceptive acts or practices, the Tennessee statute prohibits only unfair or deceptive acts or practices. The Tennessee Court of Appeals has interpreted this difference to reflect a conscious choice to exclude unfair methods of competition from the scope of the Tennessee Act.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

HN28[] Class Actions, Prerequisites for Class Action

Under New York law, an action to recover a penalty imposed by statute may not be maintained as a class action unless the statute imposing the penalty specifically authorizes class recovery. N.Y. C.P.L.R. 901(b). For purposes of this rule, the treble damages permitted by the New York antitrust statute, N.Y. Gen. Bus. Law §§ 340-347 (the Donnelly Act), are deemed a penalty. Because the Donnelly Act imposes a mandatory penalty but does not specifically authorize class recovery, New York courts have dismissed class actions brought under the act as impermissible.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN29[] Class Actions, Prerequisites for Class Action

On its face, Fed. R. Civ. P. 23 merely establishes the procedures for pursuing a class action in the federal courts. It sets forth the circumstances under which one or more members of a class may sue or be sued as representative parties, but makes no reference to the remedies that representative parties may seek.

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

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN30[] Federal & State Interrelationships, Erie Doctrine

Fed. R. Civ. P. 23, like all federal rules, must be interpreted with sensitivity to important state interests and regulatory policies that may be frustrated by the application of federal procedures.

Governments > Legislation > Statutory Remedies & Rights

HN31[] Legislation, Statutory Remedies & Rights

N.Y. C.P.L.R. 901(b) expresses a state interest in avoiding annihilatory punishment by discouraging multiple recoveries of statutory penalties.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

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

HN32[] Class Actions, Prerequisites for Class Action

Under N.Y. Gen. Bus. Law § 349(h), private plaintiffs may recover actual damages, a statutory minimum, or up to treble damages if the court finds a willful or knowing violation. Because this section does not specifically authorize class recovery, N.Y. C.P.L.R. 901(b) bars class claims for minimum or treble damages. Class claims for actual damages, in contrast, are not similarly barred. Accordingly, a class action may be maintained to recover actual damages and injunctive relief pursuant to *N.Y. Gen. Bus. Law § 349(h)*. Yet bringing such an action requires named plaintiffs to waive their claims to minimum and treble damages.

Contracts Law > Remedies > Equitable Relief > General Overview

HN33[] **Remedies, Equitable Relief**

Under North Carolina law, to establish a claim for unjust enrichment, a party must have conferred a benefit that was consciously accepted by the defendant. The benefit must be neither officious nor gratuitous, and it must be measurable. In addition to these things, the benefit must be direct.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN34[] **Prerequisites for Class Action, Predominance**

The requirement of superiority, like that of predominance, ensures that resolution by class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. With its focus on individuals' interests in conducting separate lawsuits, the superiority requirement directly addresses the vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. This concern is particularly compelling where protection of the public depends upon vigorous private enforcement of state laws but the small size of individual claims renders such enforcement unlikely.

Counsel: For Eon Labs, Inc., Consolidated Plaintiff: William Alper, LEAD ATTORNEY, Richard D Margiano, Cohen, Pontani, Lieberman & Pavane, New York, NY.

For Walgreen Company, Consolidated Plaintiff: Richard A. Arnold, LEAD ATTORNEY, Kenny Nachwalter Seymour Arnold Critchlow & Spector, PA, Miami, FL.

For Direct Purchaser, Consolidated Plaintiff: Michael J. Boni, Kohn, Swift & Graf, Philadelphia, PA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Michael M. Buchman, LEAD ATTORNEY, Milbert, Weiss, Bershad, Hynes & Lerach, LLP, New York, NY.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Safeway, Inc., Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Patrick E. Cafferty, LEAD ATTORNEY, Miller, Faucher and Cafferty, LLP, Ann Arbor, **[**2]** MI.

For Smithfield Foods, Inc., Louise Houchins, Consolidated Plaintiffs: Glen DeValerio, LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston, MA.

For Louise Houchins, Consolidated Plaintiff: Kathleen M. Donovan-Maher, LEAD ATTORNEY, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston, MA.

For Eon Labs, Inc., Consolidated Plaintiff: Ruth T. Dowling, Thane D. Scott, LEAD ATTORNEYS, Palmer & Dodge, LLP, Boston, MA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Daniel E. Gustafson, Samuel D. Heins, LEAD ATTORNEYS, Heins Mills & Olson, P.L.C., Minneapolis, MN.

For Direct Purchaser, Elliot Franklin, Consolidated Plaintiffs: Theodore M. Hess-Mahan, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA.

For Teva Pharmaceutical Industries LTD, Teva Pharmaceuticals USA, Inc., Consolidated Plaintiffs: Elizabeth J. Holland, Steven J. Lee, LEAD ATTORNEYS, Kenyon & Kenyon, William H. Rooney, David M. Stark, LEAD ATTORNEYS, Willkie Farr & Gallagher, Archana Tamoshunas, LEAD ATTORNEY, Garwin, **[**3]** Bronzaft, Gerstein & Fisher, New York, NY.

For Teamsters Local No. 35 Heath Plans, Elliot Franklin, Patrick J. Lynch, Consolidated Plaintiffs: Mayme A. Holt-Brown, David P. Smith, LEAD ATTORNEYS, Percy, Smith, Foote, & Gadel, LLP, Alexandria, LA.

For Barbara Brown, Consolidated Plaintiff: Michael J. Kane, Ann D. White, LEAD ATTORNEYS, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Theodore M. Leiverman, LEAD ATTORNEY, Spector, Roseman & Kodroff, Philadelphia, PA.

For Barbara Brown, Consolidated Plaintiff: Lester L. Levy, LEAD ATTORNEY, Wolf, popper, Ross, Wolf & Jones, New York, NY.

For Teva Pharmaceutical Industries LTD, Teva Pharmaceuticals USA, Inc., CVS Meridian, Inc., Rite Aid Corp., Consolidated Plaintiffs: James W. Matthews, Robert J. Muldoon, Jr., Pamela A. Zorn, LEAD ATTORNEYS, Sherin and Lodgen LLP, Boston, MA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Safeway, Inc., Sheet Metal **[**4]** Workers Local 441 Health & Welfare Plan, Barbara Brown, Jennifer Kravitz, End-Payor Plaintiffs, Consolidated Plaintiffs: Edward Notargiacomo, LEAD ATTORNEY, Hagens Berman LLP, Boston, MA.

For Teva Pharmaceutical Industries LTD, Teva Pharmaceutical USA, Inc., Consolidated Plaintiffs: Joseph Opper, LEAD ATTORNEY, Garwin, Bronzaft, Gerstein & Fisher, New York, NY.

For Teva Pharmaceutical Industries LTD, Teva Pharmaceuticals USA, Inc., Consolidated Plaintiffs: Margaret H. Paget, LEAD ATTORNEY, Sherin & Lodgen, Boston, MA.

For Teva Pharmaceutical Industries LTD, Tava Pharmaceuticals USA, Inc., Consolidated Plaintiffs: David K. Park, LEAD ATTORNEY, Willkie Farr & Gallagher, New York, NY.

For Tyler Fox, Consolidated Plaintiff: David Pastor, LEAD ATTORNEY, Gilman and Pastor, LLP, Saugus, MA.

For Teamsters Local No. 35 Heath Plans, Walgreen Company, Elliot Franklin, Patrick J. Lynch, CVS Meridian, Inc., Direct Purchaser, Consolidated Plaintiffs: Douglas H. Patton, LEAD ATTORNEY, Dewsnup, King & Olsen, Salt Lake City, UT.

For Albertson's, Inc., Eckerd Corporation, Hy-Vee, Inc., Kroger Co., The, Walgreen Company, Consolidated Plaintiffs: Scott E. Perwin, LEAD ATTORNEY, **[**5]** Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, Miami, FL.

For CVS Meridian, Inc., Consolidated Plaintiff: Barry L. Refsin, LEAD ATTORNEY, Hangley, Aronghick, Segal & Pudlin, Philadelphia, PA.

For A.F. of L.-A.G.C. Building Trades Welfare Plan, End-Pavor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: J. Douglas Richards, LEAD ATTORNEY, Milberg Weiss Bershad Hynes & Lerach, LLP, New York, NY.

For Direct Purchaser, Consolidated Plaintiff: Richard M. Volin, LEAD ATTORNEY, Thompson & Loughran, L. Kendall Satterfield, Finkelstein, Thompson & Loughran, Washington, DC.

For Direct Purchaser, Teva Pharmaceutical Industries LTD, Teva Pharmaceuticals USA, Inc., Consolidated Plaintiffs: Stephen H. Schwartz, LEAD ATTORNEY, Garwin, Bronzaft, Gerstein & Fisher, New York, NY.

For CVS Meridian, Inc., Consolidated Plaintiff: Steve D. Shadowen, LEAD ATTORNEY, Hangley, Aronchick, Segal & Pudlin, Harrisburg, PA.

For Direct Purchaser, Consolidated Plaintiff: Jay B. Shapiro, LEAD ATTORNEY, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson,P.C.

For Teamsters **[**6]** Local No. 35 Heath Plans, Elliot Franklin, Patrick J. Lynch, Consolidated Plaintiffs: Thomas G. Shapiro, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Thomas M. Sobol, LEAD ATTORNEY, Hagens Berman LLP, Boston, MA.

For A.F. of L. - A.G.C. Building Trades Welfare Plan, End-Payor Plaintiffs, Hy-Vee, Inc., IBEW - NECA Local 505 Health & Welfare Plan, Sheet Metal Workers Local 441 Health & Welfare Plan, Consolidated Plaintiffs: Eugene A. Spector, LEAD ATTORNEY, Spector & Roseman, Philadelphia, PA.

For Meijer Distribution, Inc., Meijer, Inc., Plaintiffs: Michael J. Boni, Kohn, Swift & Graf, Neill Clark, Eric Cramer, Peter Kohn, Berger & Montague, Philadelphia, PA.

For Meijer Distribution, Inc., Meijer, Inc., Plaintiffs: Richard J. Kilsheimer, LEAD ATTORNEY, Robert N. Kaplan, Kaplan, Fox & Kilsheimer LLP, Jacqueline E. Bryks, Linda P. Nussbaum, Cohen, Milstein, Hausfeld & Toll, New York, NY.

For Meijer Distribution, Inc., Meijer, Inc., Plaintiffs: **[**7]** Nancy F. Gans, LEAD ATTORNEY, Moulton & Gans, PC, Boston, MA.

For Meijer Distribution, Inc., Plaintiff: Bernard Persky, Hollis L. Salzman, LEAD ATTORNEYS, Goodkind, Labaton, Rudoff & Sucharow, LLP, New York, NY.

For Meijer Distribution, Inc., Meijer, Inc., Direct Purchaser, Plaintiffs: Thomas G. Shapiro, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA.

For Glaxosmithkline PLC, Smithkline Beecham Corporation, Defendants: Bernard J. Bonn, III, LEAD ATTORNEY, Abbey Gardy & Squitieri, New York, NY.

For Glaxosmithkline PLC, Smithkline Beecham Corporation, Defendants: George G. Gordon, Kevin T. Kerns, Joseph A. Tate, Dechert LLP, Philadelphia, PA.

For Glaxosmithkline PLC, Smithkline Beecham Corporation, Defendants: Timothy C. Hester, Christopher N. Sipes, Covington & Burling, Washington, DC.

For Glaxosmithkline PLC, SmithKline Beecham Corporation, Carl J. Rose, Defendants: Matthew A. Porter, LEAD ATTORNEY, Dechert LLP, Boston, MA.

For Beecham Group PLC, Consolidated Defendant: Timothy C. Hester, Christopher N. Sipes, Covington & Burling, Washington, DC.

For Richard K. Anderson, Consolidated Defendant: Matthew A. Porter, LEAD ATTORNEY, Dechert LLP, **[**8]** Boston, MA.

For SAJ Distributors, Inc., Stephen L. LaFrance Holdings. Inc., Interested Parties: Dianne M. Nast, LEAD ATTORNEY, Roda & Nast, P.C., Lancaster, PA.

Judges: WILLIAM G. YOUNG, CHIEF JUDGE.

Opinion by: WILLIAM G. YOUNG

Opinion

[*263] MEMORANDUM

YOUNG, C.J.

I. INTRODUCTION

On November 21, 2003, this Court issued an order allowing the End Payor Plaintiffs' Motion for Class Certification with respect to two exemplar classes certified under *Rule 23(b)(3)*. Order of 11/21/03 [Doc. No. 168]. This memorandum details the analysis that led to that order.

II. BACKGROUND

This case presents a consolidated action against SmithKline Beecham Corporation and GlaxoSmithKline PLC (collectively "Smithkline") for violations of the antitrust laws related to its patent for the chemical compound nabumetone, which it sells commercially as "Relafen." Parties who purchased Relafen from sources other than SmithKline [1] for purposes other than resale (the "end payors" or "end payor plaintiffs") here moved for class certification under *Federal Rule of Civil Procedure 23(b)(2)and (3)*. [Doc. No. 126].

[**9] A. FACTUAL BACKGROUND

[2]

On December 13, 1983, SmithKline received U.S. Patent No. 4,420,639 (the "'639 **[*264]** patent") for the compound nabumetone, a non-steroidal anti-inflammatory drug. SmithKline commenced commercial sales of nabumetone under the brand name Relafen in February 1992. In August and December of 1997, Copley Pharmaceutical, Inc. ("Copley"), Teva Pharmaceutical Industries, Ltd. and Teva Pharmaceuticals USA ("Teva"), and Eon Laboratories, Inc. ("Eon") sought approval from the Food and Drug Adminsitration (the "FDA") to market generic nabumetone products. Upon commencement of SmithKline's lawsuits to enforce the '639 patent, however, the FDA stayed approval of the generic drugs for **[**10]** thirty months. On August 8, and December 24, 1998, respectively, the FDA issued tentative approval to Teva's and Eon's generic nabumetone products, but withheld final approval until the conclusion of the thirty-month stay period. That stay period terminated in May 2000.

SmithKline filed the patent suits in question on October 27, 1997 (against Copley), November 13, 1997 (against Teva), and February 17, 1998 (against Eon). The three suits were consolidated and tried before Judge Lindsay of this District. On August 14, 2001, Judge Lindsay issued a sixty-seven-page opinion, which held, inter alia, that (1) claims 2 and 4 of the '639 patent were invalid as anticipated by prior art; and (2) the '639 patent was unenforceable because of SmithKline's inequitable conduct before the Patent Office. *In re '639 Patent Litig., 154 F. Supp. 2d 157, 194-95 (D. Mass. 2001)* (Lindsay, J.). On August 15, 2002, the Federal Circuit affirmed the District Court's decision

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[1] Parties who purchased Relafen directly from SmithKline ("direct purchasers") also moved for class certification. The direct purchasers' motion was discussed in *In re Relafen Antitrust Litig., 218 F.R.D. 337 (D. Mass. 2003)*.

[2] Unless otherwise indicated, these facts are drawn from the Court's Memorandum and Order, issued October 1, 2003, that discussed the parties' motions based on the statute of limitations and the doctrine of collateral estoppel. *In re Relafen Antitrust Litig., 286 F. Supp. 2d 56 (D. Mass. 2003)*.

as to the invalidity of the '639 patent, but did not reach the issue of inequitable conduct. *Smithkline Beecham Corp. v. Copley Pharm., Inc., 45 Fed. Appx. 915, 917 (Fed. Cir. 2002)* (unpublished opinion). [3]

[11]** Essentially, the plaintiffs claim that but for SmithKline's wrongful filing of patent lawsuits, consumers could have begun purchasing nabumetone in a competitive market -- comprising both Relafen and its generic alternatives -- as early as September 1998. Because of the pending litigation, however, the generic alternatives did not become available until after the stay period terminated and Smithkline's patent was invalidated. Teva [4] began marketing its generic products in August 2001, with Eon following suit in February 2002.

B. Procedural Background

On February 11, 2003, the end payor plaintiffs filed a consolidated class action complaint against SmithKline. [Doc. No. 68 in Teva Pharm. v. Smithkline Beecham, Civil Action No. 01-12222-WGY]. The lead end payor plaintiffs, on behalf of themselves and other consumers and health benefit providers, asserted claims under federal and state antitrust laws, state unfair competition **[**12]** statutes, and state consumer protection statutes. Compl. P 1. On September 16, 2003, the end payor plaintiffs moved for class certification under *Federal Rule of Civil Procedure 23(b)(2)and (3)*. [Doc. No. 126] After hearing oral argument, the Court tentatively denied the motion under *Rule 23(b)(2)* and allowed the motion under *Rule 23(b)(3)* subject to review of the end payor plaintiffs' proposed order. See 10/23/03 Hr'g Tr. [Doc. No. 156] at 24. The end payor plaintiffs then submitted a proposed order denying the motion under *Rule 23(b)(2)*, and allowing the motion under *23(b)(3)* with respect to the following exemplar class:

> All persons or entities who purchased and/or paid for Relafen(R) (known generically as nabumetone) or generic versions of Relafen(R) in the states of Arizona, California, Florida, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Carolina, Tennessee and Vermont ("the Exemplar States") during the period February 1, 1992 through and including June 30, 2003 (the ["] Class Period") for **[*265]** consumption by themselves, their families, or their members, employees, insureds, participants or beneficiaries **[**13]** (the "Class").

Proposed Order at 1. The end payor plaintiffs' proposed exemplar class excluded governmental entities, SmithKline and its Officers, Subsidiaries, and affiliates; persons or entities who purchased Relafen or its generic equivalents directly from SmithKline or its affiliates; persons or entities who purchased Relafen or its generic equivalents for purposes of resale; persons or entities who continued to purchase Relafen after generic equivalents became available for purchase in August 2001; and persons who, under the terms of their third-party health insurance plans, pay the same fixed price for brand-name and generic prescription drugs. Id. The Court examines the terms of the end payor plaintiffs' proposed order below.

C. Federal Jurisdiction

Having denied certification with respect to the end payor plaintiffs' federal law claims, see Order of 11/21/03, at 2 (holding that these claims were inappropriate for injunctive relief), this Court nevertheless retains supplemental jurisdiction over the remaining state law claims. *28 U.S.C. § 1367(a)*. The advanced stages of other actions forming part of the same controversy, including **[**14]** those brought by a separately certified class of direct purchaser plaintiffs, individual drugstore plaintiffs, and a generic manufacturer, [5] urged the Court to exercise rather than

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[3] Under the Local Rules for the Federal Circuit, unpublished decisions are not to be cited as precedent, but may be relied upon in asserting "claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like." ***Fed. Cir. R. 47.6(b)***.

[4] Teva acquired Copley (and its generic nabumetone products) in August 1999.

[5] The fact that these actions have now settled, see Order of 2/13/04 [Doc. No. 286]; Order of 2/13/04 [Doc. No. 62 in Eon Labs., Inc. v. Beecham Group PLC, Civil Action No. 03-10506-WGY], present action is now sufficiently advanced to counsel against

decline jurisdiction. Because the Court has chosen to exercise supplemental jurisdiction, it need not address the end payer plaintiffs' assertion of diversity jurisdiction, see 10/23/03 Hr'g Tr. at 9, at length. The Court notes only that the end payor plaintiffs have not established the amount in controversy, with the reference to either the named representatives or the members of the end payor class. See *Spielman v. Genzyme Corp., 251 F.3d 1, 7 n.5 (1st Cir. 2001)* (noting, but not deciding, the question whether the holding in *Zahn v. International Paper Co., 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973)* -- "that courts may not exercise supplemental jurisdiction over the claims of class action plaintiffs who do not separately meet the jurisdictional minimum" -- remains good law); *Payne v. Goodyear Tire & Rubber Co., 229 F. Supp. 2d 43, 48 (D. Mass. 2002)* (discussing the "opposite results" reached by the courts in this District that have addressed the question). **[**15]**

III. DISCUSSION

A. Legal Standard

HN1[] On a motion for class certification, "[a] district court must conduct a rigorous analysis of the prerequisites established by *Rule 23*." *Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003)* (citing *General Telephone Co. v. Falcon, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982))*. This analysis should not involve a "preliminary hearing into the merits," *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*, but rather an inquiry into "whether **[**16]** the requirements of *Rule 23* are met," *id. at 178* (quoting *Miller v. Mackey International, Inc., 452 F.2d 424, 427 (5th Cir. 1971))* (internal quotation marks omitted). The moving party bears the burden of establishing the elements necessary for class certification: the four requirements of *Rule 23(a)* and one of the several requirements of *Rule 23 (b)*. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*; *Guckenberger v. Boston Univ., 957 F. Supp. 306, 325 (D. Mass. 1997)* (Saris, J.).

Rule 23 (a) ***HN2***[] imposes four four "threshold requirements" applicable to all class actions:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the **[*266]** representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a); *Amchem, 521 U.S. at 613*. ***HN3***[] In addition to the requirements of *Rule 23(a)*, the **[**17]** moving party must establish the elements of *Rule 23(b)(1), (2), or (3)*. *Amchem, 521 U.S. at 614*. The end payor plaintiffs here sought certification under *Rule 23(b)(2)and (3)*. *Rule 23(b)(2)* permits a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed. R. Civ. P. 23(b)(2)*.

Rule 23(b)(3) permits a class action when common questions "predominate over any question affecting only individual members," and class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. ***HN4***[] Matters "pertinent" to evaluating predominance and superiority include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability **[**18]** of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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declining jurisdiction. See, e.g., Order of 11/21/03 (specifying the form of notice) ; Order of 2/18/04 (directing that notice be provided to the end payor plaintiffs' class).

Fed. R. Civ. P. 23(b)(3). This list of pertinent factors is "nonexhaustive." *Amchem, 521 U.S. at 615-16*.

B. Class Period

Before considering the requirements of *Rule 23*, the Court addreses the period for which class damages may be claimed. The end payor plaintiffs proposed that the class period run from "February 1, 1992 through and including June 30, 2003." Proposed Order at 1. They contended that at least with respect to their unjust enrichment claims, "damages could accrue as early as February 1992, when Defendants entered the market under the banner of a patent procured by fraud." End Payor Pls.' Proposed Order Reply [Doc. No. 155] at 3. SmithKline responded that the "Class Period cannot possibly begin before December 1998," the date on which Teva received tentative FDA approval to market generic nabumetone. Defs.' Proposed Order Opp'n [Doc. No. 152] at 3.

The Court notes that at least as a general matter, entry into the marketplace for branded and generic **[**19]** drugs is governed by the FDA rather than the Patent Office. See Rebecca S. Eisenberg, Lecture, Patents, Product Exclusivity and Information Dissemination, *72 Fordham L. Rev. 477, 488 (2003)* (discussing the relationship between the legal regimes administered by the FDA and the Patent Office regarding biomedical research and product development, and describing the FDA's role as a "market gatekeeper"). Accordingly, any profits that SmithKline earned during its initial period of market exclusivity are more properly attributed to the fact that generic competitors lacked FDA approval than to the fact that SmithKline had obtained the '639 patent. See *21 C.F.R. 314.108* (providing a period of exclusive FDA approval for "new drug products" -- such as Relafen). Eon and Teva obtained tentative FDA approval to market their generic nabumetone products on August 8, and December 24, 1998, respectively. *Relafen, 286 F. Supp. 2d at 60*. The end payor plaintiffs have offered no evidence to suggest that these manufacturers could have received earlier approval in the absence of SmithKline's alleged conduct. [6] For this reason, the Court **[**20]** determined that the class period should run from the date of tentative FDA approval, which in the interest of consistency **[*267]** was set, as it was for the direct purchaser plaintiffs' class action, at September 1, 1998.

C. *Rule 23(a)*

To satisfy *Rule 23(a)*, the end payor plaintiffs must establish **[**21]** numerosity, commonality, typicality, and adequacy. *Amchem, 521 U.S. at 613-14*. ***HN5***[] Numerosity is established if the size of a proposed class, even if inexactly determined, is sufficiently large as to make joinder impracticable, given the relevant circumstances. See *McAdams v. Mass. Mut. Life Ins. Co., 2002 U.S. Dist. LEXIS 9944, No. Civ. A. 99-30284-FHF, 2002 WL 1067449, at *3 (D. Mass. May 15, 2002)* (Freedman, J.); *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 334-35 (E.D. Mich. 2001)*. The end payor plaintiffs have established such impracticability here. Pharmaceutical data indicates that more than four million units of Relafen were dispensed between January and October 2000, and more than three million additional units were dispensed between January and December 2001. Cafferty Decl. [Doc. No. 128], Exs. 1-2 (excerpts from 2001 Red Book (Medical Economics Staff ed., 2001) and 2002 Red Book (Medical Economics Staff ed., 2002)); see *Cardizem, 200 F.R.D. at 335* (concluding, under analogous circumstances, that national data recording thirteen million prescriptions for the branded drug provided a sufficient basis for the assumption that **[**22]** "there are thousands of class members in Michigan" such that "joinder would be impracticable").

The end payor plaintiffs have identified a number of common questions, the resolution of which will "affect all or a substantial number of the class members." *Duhaime v. John Hancock Mut. Life. Ins. Co., 177 F.R.D. 54, 63 (D.*

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[6] In its separate action, Eon asserted that it could have filed its abbreviated new drug application as early as December 24, 1996. Am. Compl. [Doc. No. 74] P 51. Yet in support of this assertion, Eon explained only that SmithKline's "sham Orange Book listing [of the '639 patent]" and "malicious Sham Infringement Action" resulted in thirty-month stay periods (the earliest of which was triggered in September 1997), and a subsequent 180-day "Generic Exclusivity Period" (which was triggered in August 2001). See id. PP 29, 51-54. Neither of these periods account for the fact that the first applications, filed not by Eon, but by Copley and Teva, were not filed until August 1997. See Compl. P 52(a)-(b).

Mass. 1997) (O'Toole, J.) (quoting Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986)). The questions common to all class members' claims include whether SmithKline engaged in the alleged conduct and whether SmithKline is shielded from liability for any resulting injuries. See End Payor Pls.' Mem. [Doc. No. 127] at 3 (citing Compl. P 89); Cardizem, 200 F.R.D. at 335 (determining that the plaintiffs had established commonality by identifying as common questions "whether Defendants' conduct caused injury to Plaintiff class members" and, if it did, how to determine appropriate damages). **HN6**[] Because each of the end payor plaintiffs claims injuries resulting from the same alleged conduct, resolving these common questions collectively will "advance the litigation." Cardizem, 200 F.R.D. at 335 **[**23]** (citing Sprague v. General Motors Corp., 133 F.3d 388, 397 (6th Cir. 1998)).

HN7[] The element of typicality requires that the "named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent [class] members." Duhaime, 177 F.R.D. at 63 (alteration in original) (quoting Burstein v. Applied Extrusion Technologies, Inc., 153 F.R.D. 488, 491 (D. Mass. 1994) (Collings, M.J.)) (internal quotation marks omitted). As stated above, the claims of each of the end payor plaintiffs, including those of the proposed representatives for the class, arise from the same course of conduct: SmithKline's alleged efforts to delay generic competition. End Payor Pls.' Mem. at 4. Accordingly, the claims of the named plaintiffs are typical of those asserted by other members of the class.

HN8[] The adequacy requirement establishes as an "essential prerequisite" to certification that this Court be certain the named end payor plaintiffs will protect the interests of the class. 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1765. Before addressing the specific inquiries encompassed **[**24]** by the adequacy analysis, the Court turns to SmithKline's more general argument that the named end payor plaintiffs' lack of standing renders them inadequate representatives. Defs.' Opp'n [Doc. No. 130] at 34-35.

SmithKline asserted that the named end payor plaintiffs, Louise Houchins of California, Tyler Fox of Massachusetts, and Emily Feinberg of Massachusetts, having purchased Relafen or its generic alternatives in only some of the specified states, lacked standing to assert the claims of, or to serve as adequate representatives for, class members who made their purchases in the remaining states. See id. The end payor plaintiffs rejected this challenge as improperly **[*268]** conflating the standing requirements of Article III with the class certification standards of Rule 23. End Payor Pls.' Reply [Doc. No. 132] at 33.

In support of its standing challenge, SmithKline cited *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365 (S.D. Fla. 2001)*, an antitrust action involving analogous allegations of delayed generic entry. There, the United States District Court for the Southern District of Florida allowed the defendants' motion to dismiss **[**25]** claims arising under the laws of states in which no named plaintiffs resided or purchased the branded drug. *Id. at 1372*. In doing so, the court explained that under Eleventh Circuit precedent, "a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." Id. (quoting Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987)); accord Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) (characterizing this requirement as "well-settled").

The lower courts in this circuit, however, are bound by no such precedent. Indeed, in Mowbray v. Waste Management Holdings, Inc., 189 F.R.D. 194 (D. Mass. 1999), this Court concluded that a single named plaintiff with a contract claim arising under the law of Illinois could adequately represent class members with similar claims arising under the laws of California, Georgia, Pennsylvania, Maryland, Michigan, New York, Texas, Virginia, and Wisconsin. Mowbray, 189 F.R.D. at 195, 199, 202. The First Circuit subsequently affirmed the certification order but did not specifically **[**26]** discuss the adequacy or standing of the named plaintiff. See Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000).

The approach ofMowbray is consistent with that adopted by several other courts, which have interpreted Supreme Court precedent to direct consideration of class certification issues before those of standing, at least under certain circumstances. See, e.g., Payton v. County of Kane, 308 F.3d 673, 680, 682 (7th Cir. 2002); James v. City of Dallas, 254 F.3d 551, 562 & n.9 (5th Cir. 2001); In re Buspirone Patent & Antitrust Litig., 185 F. Supp. 2d 363, 377 (S.D.N.Y. 2002); Clark v. McDonald's Corp., 213 F.R.D. 198, 204-05 (D.N.J. 2003); In re Pharmaceutical Industry

Average Wholesale Price Litig., 263 F. Supp. 2d 172, 193-94 (D. Mass. 2003) (Saris, J.). These courts note that the Supreme Court's decision in Ortiz v. Fibreboard Corp., 527 U.S. 815, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999), created an exception to ordinary jurisdictional principles for circumstances in which class certification is "logically antecedent to Article III concerns" and therefore **[**27]** "should be treated first." Ortiz, 527 U.S. at 831 (quoting Amchem, 521 U.S. at 612) (internal quotation marks omitted). The Supreme Court in Amchem characterized as "logically antecedent" issues that "would not exist but for the [class action] certification." Amchem, 521 U.S. at 612 (alteration in original).

The Fifth and Seventh Circuits have interpreted Ortiz to favor a "nuanced approach" for consideration of standing challenges. Linda S. Mullenix, Standing, Nat'l L.J., June 16, 2003, at 43, col. 1. [7] In Rivera v. Wyeth-Ayerst Laboratories, 283 F.3d 315 (5th Cir. 2002), the Fifth Circuit described the Ortiz exception as applicable where class certification creates the jurisdictional issue. Id. at 319 n.6. Where, however, "the standing question would exist whether [the class representative] filed her claim alone or as part of a class," the court "must decide standing first." Id. at 319 & n.6; accord Payton, 308 F.3d at 680, 682 (7th Cir. 2002) (noting that where "putative representatives were personally injured," Ortiz directs courts to "consider **[**28]** issues of class certification prior to issues of standing").

As between the conflicting approaches of the Eleventh Circuit on the one hand, and the Fifth and Seventh Circuits on the other, this Court adopts the latter, finding it more **[*269]** consistent with the policies of Ortiz, other Supreme Court decisions, and the class action rule. In Payton, the Seventh Circuit explained that Ortiz "rest[s] on the long-standing rule that, ***HN9***[] once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with **[**29]** reference to the individual named plaintiffs." Payton, 308 F.3d at 680. Ortiz thus builds upon the reasoning reflected in certain, but not all, of the Supreme Court's prior determinations of standing in class actions. See Jean Wegman Burns, Standing and Mootness in Class Actions: A Search for Consistency, 22 U.C. Davis L. Rev. 1239, 1240 (1989). In Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975), for example, the Supreme Court established that an Article III controversy "may exist … between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." Sosna, 419 U.S. at 402; accord United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980). But see, e.g., Warth v. Seldin, 422 U.S. 490, 502, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."). The flexible inquiry described in Sosna **[**30]** and Geraghty acknowledges that in the "nontraditional" context of class actions, the purpose of the standing requirement -- "limiting judicial power to disputes capable of judicial resolution" (that is, disputes involving "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions") -- may be served even absent a personal stake held by the named plaintiff. Geraghty, 445 U.S. at 396, 403. The assurance of vigorous advocacy may be provided instead by the collective interest of the class, advanced by the named representative serving as a sort of "private attorney general." See id. at 403. The focus of the standing inquiry is therefore appropriately directed toward the class rather than its representative.

This flexible, functional standing inquiry also proves consistent with the policies served by class action procedure. See Burns, supra, at 1287-88 (urging the Supreme Court "to acknowledge that the peculiar class-action beast requires a different, and more flexible, standing-and-mootness analysis"). The more traditional inquiry, which under the Eleventh Circuit's and SmithKline's **[**31]** interpretation, would require class counsel to identify representatives from each state involved in a multi-state class action, would render class actions considerably more cumbersome to initiate, and in turn, less effective in overcoming a lack of incentives to prosecute individual rights and in "achiev[ing] economies of time, effort, and expense." Amchem, 521 U.S. at 615-17 (quoting Fed. R. Civ. P. 23 Advisory Committee's Note); see also Gratz v. Bollinger, 539 U.S. 244, 268 & n.17, 156 L. Ed. 2d 257, 123 S. Ct. 2411

[7] Mullenix contrasts the "nuanced" approach of the Fifth and Seventh Circuits with the "restrictive" rule observed by other courts, which "prevents review of [all] standing challenges prior to the class certification decision." Mullenix, supra. Because this Court finds deferral of SmithKline's standing challenge appropriate even under the approach of the Fifth and Seventh Circuits, it need not address this distinction.

(2003) (observing that the challenged class action, which involved a named representative with an arguably different claim but the "same set of concerns" as the members of the class, "save[d] the resources of both the courts and the parties" (alteration in original) (quoting Califano v. Yamasaki, 442 U.S. 682, 701, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979)); Payton, 308 F.3d at 681 (permitting named representatives to represent plaintiffs from other counties in part because "the class action device may be superior to 19, or 102, different cases in each Illinois county challenging the effects **[**32]** of the same state statute").

Here, adopting the approach of the Fifth and Seventh Circuits, the Court defers consideration of SmithKline's standing challenge until after certification of the end payor class. Certification is in this case "logically antecedent" because SmithKline's challenge would not arise but for the proposed certification. Amchem, 521 U.S. at 612. Specifically, SmithKline did not challenge the representatives' standing to assert personal claims under the laws of states in which they resided or purchased medication. See Defs.' Opp'n at 34. Rather, Smithkline challenged only their standing to "represent a class of **[*270]** indirect purchasers of Relafen in the other 16 Indirect Purchaser jurisdictions." Id. Accordingly, the Court applies theOrtiz exception to defer consideration of SmithKline's standing challenge and to address the remaining issues of certification first. See Rivera, 283 F.3d at 319 n.6 (explaining that the Ortiz exception applies only when class certification "creates the jurisdictional issue"); Clark, 213 F.R.D. at 204-05 (deferring consideration of the argument that the plaintiff lacked **[**33]** standing to assert claims on behalf of class members regarding restaurants or states that he had not visited).

Aside from standing, the end payor ***HN10***[] plaintiffs must establish the two parts of the adequacy inquiry: first, an absence of potential conflict and second, an assurance of vigorous prosecution. See Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). But see Linda S. Mullenix, Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes 19-23, 26-27 (unpublished manuscript) (advocating what the author concedes is a minority view: that in evaluating the adequacy of class representatives, courts should consider not only potential conflicts of interest, but also other characteristics including familiarity with the action, financial stake, and moral character). With respect to the first element, the Court notes that shortly after the parties submitted their memoranda and argued this motion, the Eleventh Circuit issued an opinion in Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 350 F.3d 1181 (11th Cir. 2003), a class action involving analogous allegations of delayed generic **[**34]** marketing. See id. at 1183-84. There, the Eleventh Circuit interpreted the adequacy requirement to preclude certification where evidence suggested that certain direct purchasers of the branded drug experienced a net economic benefit from the lack of generic competition while other direct purchasers did not. Id. at 1193. The court reasoned that "this economic reality," while not relevant to the direct purchasers' standing to sue, was relevant to defining their "interests and objectives," which in that case were likely "divergent" from those of named representatives who experienced no net benefit. Id. at 1193.

Finding this reasoning persuasive, the Court concluded that the injured named representatives could not adequately represent the interests of class members who had not suffered similar economic injury. [8] The Court accordingly excluded from the end payor plaintiff classes "all persons or entities who suffered no economic harm as a result of SmithKline's alleged conduct." Order of 11/21/03, at 3 & n.l. Such persons and entities include, for example, those who under the terms of their health insurance plans, owe the same co-payment **[**35]** for brand-name or generic drugs, or are reimbursed in full for all drug purchases. See Defs.' Opp'n at 14-15; Cardizem, 200 F.R.D. at 347 (excluding from an analogous class of indirect purchasers alleging delayed generic entry "consumers whose out-of-pocket expenditures do not vary with the cost of their prescription drugs" because they "cannot show that they suffered an economic injury").

[8] The Court notes that Valley Drug identified a conflict between direct purchasers who benefit from generic delay versus those who were injured, a conflict arguably different from -- and more serious than -- that between end payors who were not injured by generic delay versus those who were. Indeed, in contrast to the direct purchasers ofValley Drug, the end payor plaintiffs here might be characterized as uniformly "not benefitted." Yet this superficial uniformity would not imply uniformity of economic interests. With respect to settlement, for example, an uninjured end payor might be willing to accept a far lesser sum than would an injured end payor with an entirely different economic situation.

[36]** The Court is aware of at least one decision, Goda v. Abbott Laboratories, No. 01445-96, 1997 WL 156541 (D.C. Super. Feb. 3, 1997), which reached a different conclusion regarding fixed co-pay and full reimbursement consumers. The Goda court rejected the argument that such consumers could not demonstrate economic injury, explaining that although "the injury is absorbed by the managed care plan or an insurance company," "there is nevertheless an injury." Id. at *9. The court referenced the collateral source rule applied to personal injuries, and reasoned that antitrust injuries should similarly fall upon defendants **[*271]** rather than insured plaintiffs: "It is better here to benefit the injured than the wrongdoer …. Effective enforcement of the antitrust laws is thus promoted." Id. Significantly, however, the Goda court also acknowledged that these insured consumers "deserve special and separate treatment" and divided the class accordingly. Id. The court indicated that the "collateral source problems" raised by the subclass of insured consumers would be "sorted out" at a later administrative stage. Id. at *9-*10.

In contrast to the plaintiffs in **[**37]** Goda, who moved to certify a class of consumers who purchased branded drugs "in the District," id. at *3, the end payor plaintiffs in the present action moved to certify a class of consumers who purchased Relafen or its generic equivalent "throughout the United States and its territories." End Payor Pls.' Mem. at 1. In light of the additional complexity and problems of manageability presented by the proposed multi-state class, see *Amchem, 521 U.S. at 624*, the Court opted to exclude fixed co-pay and full reimbursement consumers from the exemplar classes rather than create subclasses requiring "separate scrutiny." Goda, 1997 WL 156541, at *9. This decision appears consistent with the rationales discussed in Goda. Because these classes, unlike that proposed in Goda, expressly include insurers as "third-party payors," Compl. PP 8-15, the Court was otherwise assured of benefits for the injuredand effective antitrust enforcement. Moreover, as in Valley Drug, the Court's determination regarding certification of the exemplar classes did not affect the potential right of these consumers to recover individually or in a separate class **[**38]** action, see *Valley Drug, 350 F.3d at 1193*; *In re Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 259 (D. Del. 2002)*, although any recovery may be subject to claims for indemnification by their insurers.

The Court found more persuasive Goda's alternative argument that the insured consumer does in fact suffer injury, simply in the future rather than in the past: "Although copayments and/or premiums may be stabilized for one year, they will surely rise in the next to the detriment of the consumer/beneficiary." Goda, 1997 WL 156541, at *9 n.13. The Court nevertheless concluded that the injuries suffered by this class of insured consumers differed materially -- in time, amount, and certainty -- from those suffered by other members of the end payor plaintiff classes. Cf. *Amchem, 521 U.S. at 626, 628* (discussing the divergence between the goals and awareness of plaintiffs with current versus future asbestos claims); *Ortiz, 527 U.S. at 856-59* (explaining that Amchem requires structural protections against the conflicts arising between plaintiffs with claims arising in the past versus the future, **[**39]** and before versus after the expiration of the defendant's insurance policy). But see *Warfarin, 212 F.R.D. at 259* (permitting fixed co-pay consumers to share in a settlement fund in light of two concerns not present here -- the fact that the settlement would deprive the consumers of their right to seek injunctive relief, and the difficulty of providing, at that late stage, additional notice and an opportunity to opt-out). Consumers who felt "no pinch" from delayed generic entry, Goda, 1997 WL 156541, at *9, were therefore excluded from the end payor plaintiff classes.

In contrast, several other classes of end payors challenged by SmithKline were not excluded. SmithKline asserted that plaintiffs who purchased only branded Relafen -- those who purchased Relafen before generic entry but purchased neither Relafen nor generic nabumetone after generic entry ("pre-generic purchasers"), and those who purchased Relafen both before and after generic entry ("brand loyalists") -- suffered no injury. Defs.' Opp'n at 15-17. With respect to pre-generic purchasers, the end payor plaintiffs emphasized that patients "are bound by the limits of their doctor's prescription. **[**40]** " End Payor Pls.' Reply at 17. Patients with prescriptions for Relafen were, prior to August 2001, limited to Relafen "because no substitute drug substitutes entered the market, the end payor plaintiffs estimated that nearly 90 percent of Relafen sales were lost to generic nabumetone. End Payor Pls.' Reply at 11 (citing Rebuttal Declaration of Raymond S. Hartman ("Hartman Rebuttal Decl.") [Doc. No. 133] P 26). Given the high likelihood of "switching," the Court **[*272]** declined -- at least at this preliminary stage -- to exclude pre-generic purchasers, who were never presented with the opportunity to switch. The Court acknowledges that the amount of damages suffered by pre-generic purchasers is somewhat uncertain, but concludes that SmithKline overstated the uncertainty. [9] See Defs.' Proposed Order Opp'n at 4 ("There is simply no way of knowing whether such persons would have availed themselves of a generic alternative had one been on the market prior to August 2001 ...."). Moreover, the end payor plaintiffs alleged that even consumers who would not have switched, like the brand loyalists discussed below, suffered injury resulting from overcharges on Relafen. ***HN11***[] Any uncertainty accordingly **[**41]** concerns the amount rather than the fact of injury, and therefore should not preclude recovery, particularly where the uncertainty stems from delay that the end payor plaintiffs attribute to SmithKline's wrongful conduct. See *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* ("It does not come with very good grace for the wrong doer to insist upon specific and certain proof of the injury which it has itself inflicted." (citation and internal quotation marks omitted)).

In contrast to the purchases by pre-generic purchasers, the purchases of brand loyalists may reflect their "conscious choices." [10] End Payor Pls.' Proposed Order Reply at 155. For these consumers, health insurance plans again become relevant. If the amount that brand loyalists owed varied according to the price of Relafen -- for example, insured brand loyalists who owed percentage **[**42]** of the price, and uninsured brand loyalists who owed the entire price -- the end payor plaintiffs allege economic injury based on the allegedly inflated price of Relafen in the actual world. See End Payor Pls.' Resp. [Doc. No. 144] at 1 (citing Dr. Hartman's observation that "although brand prices still rise at retail, they do no rise as quickly as they had in the actual world, prior to generic launch"); cf. *In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 2004 U.S. Dist. LEXIS 6176, No. 99-MDL-1317, 2004 WL 828997, at *18 (S.D. Fla. Apr. 8, 2004)* (excluding all brand loyalists because the plaintiffs failed to establish that these consumers existed or had suffered an injury). Although SmithKline's expert vigorously contested the allegation of inflated prices, see, e.g., Defs.' Opp'n at 16, ***HN12***[] the Court may not at this preliminary stage "weigh conflicting expert evidence or engage in 'statistical dueling' of experts." *Wal-Mart Stores, Inc. v. Visa USA Inc. (In re Visa Check/MasterMoney Antitrust Litig.), 280 F.3d 124, 135 (2d Cir. 2001)*.

[43]** If, on the other hand, the amount that brand loyalists owed did not vary according to the price of Relafen, but instead varied only with the choice between branded and generic drugs -- for example, insured brand loyalists who owed a fixed copayment for branded drugs and a different fixed copayment for generic drugs -- the end payor plaintiffs can identify no economic injury. For these brand loyalists, there was no difference between the cost associated with Relafen in the actual versus the but-for world. Brand loyalists whose direct costs did not vary according to the price of Relafen were accordingly excluded from the end payor plaintiff **[*273]** classes. [11] **[**44]** The test, as described above, is whether the end payor suffered economic injury as a result of SmithKline's alleged conduct. [12]

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[9] The Court could imagine, for example, discounting the damages to account for the probability of non-switching.

[10] The Court assumes that consumers who continued to choose Relafen in the actual world would have done so in the but-for world -- that is, even if generic nabumetone had become available in August 1998 rather than August 2001. This assumption is continued purchasing Relafen after generic entry, but only because they were reluctant to switch after starting treatment with the branded drug. Had generic alternatives been available earlier, such consumers might have started with and continued purchasing generic nabumetone rather than Relafen. The Court nevertheless excludes such consumers because identifying them would require the sort of individualized inquiries that would render class certification inappropriate. See *Cardizem, 200 F.R.D. at 343* (distinguishing between switchers, for whom "there is no need for individual analysis of switching behavior," and non-switchers, for whom there is such a need); cf. *Basic, Inc. v. Levinson, 485 U.S. 224, 242, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988)* (recognizing that requiring proof of an individualized issue such as reliance "effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones").

[11] A similar analysis applies to consumers who purchased only generic nabumetone. See Defs.' Proposed Order Opp'n at 4. Consumers whose costs varied according to the price of generic nabumetone were injured by what the end payor plaintiffs allege were artificially inflated prices. See End Payor Pls.' Mem. at 1. Consumers whose costs did not vary according to the price of generic nabumetone were not injured and were accordingly excluded from the end payor plaintiff classes.

[12] Under this test, patients who were first prescribed Relafen after August 1998 -- the date of generic entry in the but-for world -- were not excluded from the end payor plaintiff classes. That these patients might not have been prescribed Relafen in the but-for world, see Defs.' Opp'n at 19 (asserting a probable decline in prescriptions because SmithKline would have ceased its promotion

With the class limited as described above, the Court determined that no potential conflicts existed. With respect to the second element of the adequacy inquiry, the Court notes the considerable class action experience of the firms appointed co-lead counsel: Milberg Weiss Bershad Hynes & Lerach LLP; Spector, Roseman & Kodroff, P.C.; Miller Faucher and Cafferty LLP; and Heins Mills & Olson, P.L.C. At least one of these firms has represented classes of end payors in actions involving analogous claims of delayed generic entry. See e.g., *Warfarin, 212 F.R.D. at 235* **[**45]** (listing Miller Faucher and Cafferty LLP among plaintiffs' counsel); *Cardizem, 200 F.R.D. at 330* (same). Moreover, class counsel advocated vigorously in favor of its motion for certification. For these reasons, the Court concluded that the named representatives and their counsel would adequately protect the interests of the class. With the elements of *Rule 23(a)* thus established, the Court proceeds to consider the elements of *Rule 23(b)(2)and (b)(3)*.

D. *Rule 23(b)(2)*

Rule 23(b)(2) permits a class action when the Court may fashion "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. The plaintiffs asserted that SmithKline's " continuing unlawful acts of monopolization … thereaten continuing harm to all Class members," entitling them not only to damages, but also to an injunction preventing SmithKline from acquiring and maintaining a future monopoly. End Payor Pls.' Mem. at 6. SmithKline contended that this "ill-defined prayer," -- merely a "thinly veiled attempt to make an end run around *Illinois Brick Co. [v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)]* **[**46]** " -- was an inappropriate basis for certification "because the redress plaintiffs seek is predominantly monetary." Defs.' Opp'n at 36-37.

As an initial matter, the lower courts that have addressed the issue have held that ***HN13***[] claims for injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*, do not undermine Illinois Brick, but rather fall properly outside its scope. See e.g., *Mid-West Paper Prods. Co. v. Continental Group, 596 F.2d 573, 589-94 (3d Cir. 1979)*; accord *Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998)*; *Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998)*; *In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979)*. In Illinois Brick, the Supreme Court considered an antitrust action brought by governmental entities that had purchased concrete blocks indirectly from the manufacturer defendants. *Illinois Brick, 431 U.S. at 726* (explaining that the concrete blocks passed from the manufacturer to masonry contractors to general contractors before reaching the governmental entities). **[**47]** In rejecting the action for lack of standing, the Supreme Court interpreted Section 4 of the Clayton Act, *15 U.S.C. § 15*, to prevent indirect purchasers from seeking antitrust damages except in certain limited circumstances. See id., *431 U.S. at 728-29*. The Third Circuit subsequently concluded that the "indirect purchaser rule" of Illinois Brick does not apply to claims brought under *Section 16 of the Clayton Act*, which permits injured **[*274]** parties to seek injunctive relief rather than money damages. See *Mid-West Paper, 596 F.2d at 594*. The Third Circuit reasoned that the concerns motivating the indirect purchaser rule were simply inapplicable to claims for injunctive relief:

> Obviously, the risk of exposure to multiple liability, the difficulty in tracing the allocation of the overcharge among different levels of purchasers, and the general desirability of symmetrical application of the pass-on theory to plaintiffs and defendants are wholly unrelated to the issue whether a party should be entitled to sue for injunctive relief. Nor does the position taken in Illinois Brick, that effective enforcement of the antitrust **[**48]** laws requires that only direct purchasers be permitted to sue for treble damages, have validity in the context of *[§] 16* …. With respect to injunctive relief, … the entitlement of one group to sue does not diminish the incentive of another group to sue.

Id. at 592. [13] If applied here, the Third Circuit's reasoning would permit the end payor plaintiffs to assert their claim for injunctive relief notwithstanding their status as indirect purchasers. See *Relafen, 218 F.R.D. at 344* (explaining that branded drugs typically pass from manufacturers to pharmaceutical wholesalers and then to end payors).

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of Relafen upon generic entry), does not change the fact that they were prescribed Relafen in the actual world and therefore suffered economic injury.

[49]** Yet even assuming their standing, the end payor ***HN14***[] plaintiffs must also demonstrate "threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. The Supreme Court has held that this requirement is satisfied by a showing of "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. Here, however, the end payor plaintiffs alleged a violation of the antitrust laws based on SmithKline's "obtaining, and continually listing with the Food and Drug Administration, a fraudulent and unenforceable patent," bringing "objectively baseless patent infringement suits," and "blocking generic nabumetone tablets from the market." End Payor Pls.' Mem. at 1. Each of these activities has terminated. Specifically, SmithKline's patent has been declared invalid, its infringement suits have been terminated with judgment for the defendants, and generic nabumetone tablets have entered the market. See *SmithKline Beecham, 45 Fed. Appx. at 917*; End Payor Pls.' Mem. **[**50]** at 1. Under these circumstances, it is difficult to imagine how Smithkline's violation might recur. See also Greenhalgh Decl. P 13 (discussing additional competition from a new type of branded anti-inflammatory drug). Nor have the end payor plaintiffs asserted other violations that might "fairly be anticipated from the defendant's conduct." *Zenith Radio, 395 U.S. at 132* (quoting *NLRB v. Express Publishing Co., 312 U.S. 426, 435, 85 L. Ed. 930, 61 S. Ct. 693 (1941))* (internal quotation marks omitted). For this reason, the Court found injunctive relief inappropriate. See *id. at 133* (explaining that while a district court may restrain related unlawful acts, it "may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws"). The end payor plaintiff's motion for class certification was accordingly DENIED with respect to *Rule 23(b)(2)*.

E. *Rule 23(b)(3)*

Certification under *Rule 23(b)(3)* requires that common questions "predominate" over individual questions, such that class treatment is "superior" to other methods of resolution. *Fed. R. Civ. P. 23(b)(3)*; see also **[**51]** *Tardiff v. Knox County, 365 F.3d 1, 2004 WL 758407, at *3 (1st Cir. 2004)* (describing *subsection (b)(3)* as "the cute tiger cub that has grown into something unexpectedly fearsome in civil rights and mass tort litigation"). The Court begins its discussion with predominance, the requirement SmithKline most vigorously contests.

1. Predominance

HN15[] To establish predominance under *Rule 23(b)(3)*, the end payor plaintiffs must demonstrate **[*275]** that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*. The First Circuit has held that this requirement is satisfied where, notwithstanding individualized concerns, "a sufficient constellation of common issues binds class members together." *Waste Mgmt., 208 F.3d at 299*; accord *Smilow, 323 F.3d at 39 (1st Cir. 2003)* ("After all, *Rule 23(b)(3)* requires merely that common issues predominate, not that all issues be common to the class."). The end payor plaintiffs asserted that their unjust enrichment and antitrust claims focused primarily on common issues, specifically SmithKline's conduct, SmithKline's **[**52]** profits, and the classes' aggregate damages. End Payor Pls.' Mem. at 7-16. Accordingly, the end payors contended, these common issues predominated. Id. SmithKline challenged this contention as too simplistic, citing "overwhelming" individualized and complex questions regarding impact and governing state law. Defs.' Opp'n at 13-33.

a. Impact

As an initial matter, the Court emphasizes that the end payor plaintiffs' claims for damages and restitution arise solely under state law. Compl. PP 3-4. In contrast to federal ***antitrust law***, see *Illinois Brick, 431 U.S. at 728-29*, certain state antitrust and consumer protection laws permit indirect purchasers to assert claims for damages. Each of the twelve states listed in the end payor plaintiffs' proposed order authorizes such suits, under statutes either

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[13] In a more recent decision, the Supreme Court explained, consistent with the Third Circuit's view, that the indirect purchaser rule is applied to claims for money damages to "eliminate the complications of apportioning overcharges," "eliminate multiple recoveries," and "promote the vigorous enforcement of the antitrust laws." *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 208, 212, 214, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990)*.

passed explicitly to repeal Illinois Brick, or interpreted to depart from it. See Notice of Proposed Order [Doc. No. 150], Schedule B; Kevin J. O'Connor, Is the Illinois Brick Wall Crumbling?, 15 Antitrust 34, at 34-35 & nn. 3-4 (Summer 2001) (listing the thiry-six states that "provide for some sort of right of action on behalf of **[**53]** some or all indirect purchasers."). The Supreme Court has recognized this type of state statute as independent of, and not preempted by, federal ***antitrust law***. See *California v. ARC America Corp., 490 U.S. 93, 101-02, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)*. The Supreme Court has stated further that "no clear purpose of Congress" indicates that the states are barred from imposing antitrust liability "over and above that authorized by federal law." *Id. at 105*. There may, however, be state policies against such double recovery. See, e.g., *Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 206 Ariz. 9, 75 P.3d 99, 108 (2003)*.

HN16[] Under both federal and state law, the essential elements of a private antitrust action are the same: proof of a violation by the defendant, a demonstration of injury to the plaintiff, and an approximation of the plaintiff's damages. See, e.g., *Bell Atlantic Corp. v. AT & T Corp., 339 F.3d 294, 302 (5th Cir. 2003)* (discussing the elements necessary to demonstrate civil liability under federal law); *Bunker's Glass, 206 Ariz. 9, 75 P.3d at 102* (affirming the substantive parallels between federal law and Arizona **[**54]** law). Here, as in many antitrust class actions, the nature of the first and third elements was not in serious dispute. The alleged antitrust violation relates solely to SmithKline's conduct, and as such, constitutes a common issue subject to common proof. See *Bell Atlantic, 339 F.3d at 302* ("Proof of these elements [of an antitrust violation] will necessarily be identical for the members of both proposed classes …."); *Advocate Health Care v. Mylan Labs., Inc. (In re Lorazepam & Clorazepate Antitrust Litig.), 202 F.R.D. 12, 29 (D.D.C. 2001)* ("As is true in many antitrust cases, the alleged violations of the antitrust laws at issue here respecting price fixing and monopolization relate 'solely to Defendants' conduct, and as such proof for these issues will not vary among class members.'" (quoting *In re Potash Antitrust Litig., 159 F.R.D. 682, 694 (D. Minn. 1995)))*. In contrast, the amount of class members' damages depends in part upon the amount of Relafen or generic nabumetone purchased, and as such, is an individualized issue requiring individualized proof. *Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975)* ***HN17***[] ("The amount of damages is invariably an individual **[**55]** question and does not defeat class action treatment."); *Smilow, 323 F.3d at 40* (citing Blackie as an example of courts' general willingness to "find the predominance requirement to be satisfied even if individual damages issues remain").

In relation to the first and third element discussed above, the second element of the **[*276]** end payor plaintiffs' action -- a demonstration of injury -- requires closer scrutiny. On the one hand, each class member has, by definition, both "purchased and/or paid for Relafen(R) (known generically as nabumetone) or generic versions of Relafen(R)," and suffered resulting economic harm. Proposed Order at 1. The end payor plaintiffs alleged that overcharges on Relafen and nabumetone can be demonstrated through "generalized evidence," including a government study of the pharmaceutical industry, SmithKline's statements regarding competition between branded and generic drugs, empirical data regarding the prices of Relafen and generic nabumetone, and expert testimony interpreting the industry and market data. See End Payor Pls.' Reply at 7-12. Except as it applies to those consumers excluded above, who experienced no economic harm from SmithKline's **[**56]** alleged conduct, see Defs.' Opp'n at 14-17, the end payor plaintiffs' assertion of common injury appears persuasive. Several courts have found or presumed class-wide injury cognizable under federal law under analogous circumstances. See, e.g., *Visa Check/MasterMoney, 280 F.3d at 137-38* (affirming the district court's determination that injury could be proven on a class-wide basis where "every single class member[] overpa[id] for off-line debit cards"); *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977)* ("If, in this case, a nationwide conspiracy is proven, … an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.").

Yet even assuming that these decisions interpreting federal ***antitrust law*** would be otherwise persuasive, but see, e.g., 7B Wright, Miller & Kane, supra, § 1781 (cautioning that "although many courts have certified antitrust suits under *Rule 23(b)(3)*, certification is not always appropriate"), the Court must examine the end payor plaintiffs' claims under governing state law. As emphasized **[**57]** above, state law defines the elements of the end payor plaintiffs' claims and in turn, proves relevant to determining the demonstration of common injury necessary for certification. See William H. Page, The Limits of Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick, 67 Antitrust L.J. 1, 27 (1999); cf. *Windham v. American Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977)* (rejecting class-wide proof of damages as inconsistent with the terms of the Clayton Act). The Court accordingly turns to SmithKline's second and related objection: that "significant variations" in state law predominate here. Defs.' Opp'n at 25; see also *Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996)* (concluding that the district court erred by failing to consider how variations in state law affected predominance and superiority).

b. Governing State Law

The Court begins by acknowledging that federal appellate courts have viewed class actions governed by the law of multiple states with serious skepticism. See, e.g., *In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002)* (collecting **[**58]** cases in which the Seventh Circuit has held that certification of a nationwide class was inappropriate due to variations in states' laws governing warranties, fraud, and products liability); *In re American Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996)* (characterizing the task of instructing a jury as "impossible" where state laws differ). The end payor plaintiffs offered two responses, however.

First, they contended that "because SKB is based in Pennsylvania, the Court could also apply Pennsylvania law to the entire Class." End Payor Pls.' Mem. at 8 n.9. Because state antitrust, consumer protection, and unjust enrichment laws vary on such issues as prohibited practices and limitations periods, see, Section III.E.1.b.ii-iv, infra, this Court must determine if Pennsylvania has a "significant contact or significant aggregation of contacts" to this litigation that would justify the application of its law over the various laws of other states. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*. *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)* (quoting *Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981)* **[**59]** (plurality opinion)). Clearly, Pennsylvania has a substantial **[*277]** connection to SmithKline and some, though not all, of its alleged conduct. See End Payor Pls.' Mem. at 1 (discussing, in addition to internal strategizing, which presumably took place in Pennsylvania, SmithKline's prosecution, listing, and enforcement of the '639 patent, which took place in Washington, D.C. and Massachusetts); see also *ATX ATX II & Wilderness Tires Prods. Liab. Litig. v. Bridgestone/Firestone Inc. (In re Bridgestone/Firestone Inc.), 205 F.R.D. 503, 513 (S.D. Ind. 2001)* (applying the laws of the defendants' principal places of business, in which substantial conduct relevant to the plaintiffs' products liability and breach of warranty claims took place), rev'd sub nom. *In re Bridgestone/Firestone, Inc., 288 F.3d 1012*. Yet the primary aim of antitrust and consumer protection laws generally -- and those of indirect purchaser states particularly -- is compensating consumers, not policing corporate conduct. See, e.g., *Bunker's Glass, 206 Ariz. 9, 75 P.3d at 110* (choosing to "afford greater protection to Arizona citizens [than federal law does]" by recognizing indirect purchaser standing under the state's **[**60]** antitrust statute); *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 66-67, 762 N.E.2d 303 (2002)* ("We read the language of *G.L. c. 93A* as a clear statement of legislative policy to protect Massachusetts consumers through the authorization of such indirect purchaser actions."); *Restatement (Second) of Conflict of Laws § 6(2)* (1971) (listing "the basic polices underlying the particular field of law" among the factors relevant to a choice of law). Accordingly, the Court considers the more significant contact in this context to be the location of the injury -- that is, the location of the sales to the end payor plaintiffs.

By definition, the sales at issue in this litigation did not involve SmithKline or its Pennsylvania location. See Proposed Order at 1 (excluding from the proposed class persons or entities who purchased Relafen or its generic equivalents directly from SmithKline). Rather, many -- if not most -- of the relevant sales took place wholly outside Pennsylvania, between out-of-state direct purchasers, see *Valley Drug, 350 F.3d at 1191 & n.18* (identifying the three existing national wholesalers, two of which **[**61]** are headquartered outside Pennsylvania, and noting that the national wholesalers' purchases constituted more than fifty percent of the plaintiff class's claims), and out-of-state end payors. Applying Pennsylvania law to these wholly out-of-state transactions would be at best a "novelty," and at worst a violation of constitutional limitations. *Bridgestone/Firestone, 288 F.3d at 1016*; *Shutts 472 U.S. at 822*; *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 613 (7th Cir. 1997)* (stating that under federal constitutional limits, "[a] state cannot regulate sales that take place wholly outside it.").

In the alternative, the end payor plaintiffs argue that "even if the law of multiple states must be applied," the laws governing the classes' antitrust, consumer protection, and unjust enrichment claims reveal 'no significant conflict.'" End Payor Pls.' Mem. at 17. As an initial matter, the Court must determine whether the "law of multiple states" must in fact be applied. Both Massachusetts and Pennsylvania [14] have adopted a flexible or "functional choice of law approach," under which courts consider "the interests of the **[**62]** parties, the States involved, and the interstate system as a whole." *Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 631, 473 N.E.2d 662 (1985)*; see *Griffith v. United Air Lines, Inc., 416 Pa. 1, 21-23, 203 A.2d 796 (1964)* (permitting "analysis of the policies and interests underlying the particular issue before the court"). As stated above, "the basic policies underlying the particular field of law," *Restatement, supra, § 6(2)(e)*; see *Griffith, 416 Pa. at 24* (considering the policies that "apparently underlie" the conflicting statute), are those of consumer protection, suggesting that any balancing of the parties' contacts or expectations, see *Restatement, supra, § 6(2)(d)*, should be weighted toward those of **[*278]** consumers. The location of consumers' purchases thus assumes special significance. Appropriate consideration must also be given to the "relative interests of … states." *Restatement, supra, § 6(2)*; see *Griffith, 416 Pa. at 24* (comparing the interests of the place of injury and the domicile of the defendant). States have a strong interest in protecting consumers with respect to sales within their borders, **[**63]** see, e.g., *Bunker's Glass, 206 Ariz. 9, 75 P.3d at 109* (discussing the protection from anti-competitive practices guaranteed to Arizona citizens by the state constitution), but they have a relatively weak interest, if any, in applying their policies to consumers or sales in neighboring states, see *BMW of North America, Inc. v. Gore, 517 U.S. 559, 571, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)* ("It is clear that no single State could … impose its own policy choice on neighboring States."). For these reasons, the Court concluded that Massachusetts and Pennsylvania choice of law rules would select the various states in which consumers' purchases were made, rather than Pennsylvania law.

[64]** This fact alone, however, does not necessarily defeat certification. Indeed, this Court has previously certified a class of plaintiffs whose claims were governed by the laws of several states. *Mowbray, 189 F.R.D. at 202*. In doing so, the Court rejected the defendant's argument that differences in the states' statutes of limitations would predominate over common issues. *Id. at 200*. On appeal, the First Circuit affirmed, stating that the individualized limitations determinations were relevant but not necessarily fatal to certification. *Waste Mgmt., 208 F.3d at 296* (noting that the Court "acknowledged the lack of uniformity, and explained why the limitations problems nonetheless appeared to be inconsequential"). As it did in Mowbray, the Court proceeds to consider whether variations in state law are sufficiently significant to negate predominance. *Mowbray, 189 F.R.D. at 199-201*. In light of its previous statements to counsel and the subsequent proposed order, see 10/23/03 Hr'g Tr. at 30, the Court limits its consideration to the twelve states suggested as "Exemplar States": Arizona, California, Florida, **[**65]** Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Carolina, Tennessee, and Vermont. Proposed Order at 1.

A. Standing

As stated above, each of the exemplar states permits indirect purchaser actions under its antitrust, consumer protection, or unfair trade practices statutes. [15] **[**68]** See *Bunker's Glass, 206 Ariz. 9, 75 P.3d 99, 102*; *Cal. Bus. & Prof. Code § 17203*; *Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 103 (Fla. Dist. Ct. App. 1996)*; *Kan. Stat. Ann. §§ 50-624(j), 50-626(a)*; [16] *Me. Rev. Stat. Ann. tit. 10, § 1104(1)*; *Ciardi, 436 Mass. at 58-59*; *Mich. Comp.*

[14] One of the cases consolidated in this action was transferred from the Eastern District of Pennsylvania, see Twin Cities Bakery Workers Health & Welfare Fund v. SmithKline Beecham Corp., No. 02-CV-985 (E.D. Pa. filed 2002), and therefore requires application of Pennsylvania's choice of law rules. see van *Dusen v. Barrack, 376 U.S. 612, 639, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964)*.

[15] The fact that the exemplar states have recognized indirect purchaser actions brings the present claims out from under "the long shadow of Illinois Brick." ***Terazosin, 160 F. Supp. 2d at 1372***. Unlike states that have adopted the Illinois Brick prohibition, the exemplar states have not expressed a policy against indirect purchaser actions that might otherwise be undermined by the end payor plaintiffs' present claims.

[16] See ***Cole v. Hewlett Packard Co., 84 P.3d 1047, 2004 WL 376471, at *6 (Kan. App. 2004)*** (unpublished table decision) ("Based on the plain wording of *K.S.A. 2003 Supp. 50-624(j)*, Cole, the consumer, did not need to deal directly with HP, the

Laws Ann. § 445.778(2); Minn. Stat. Ann. § 325D.57; N.Y. Gen. Bus. Law § 349(h); Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 584, 473 S.E.2d 680 (1996); Blake v. Abbott Lab., 1996 Tenn. App. LEXIS 184, C.A. No. 03A01-9509-CV-00307, 1996 WL 134947, at *4 (Tenn. Ct. App. Mar. 27, 1996); Vt. Stat. Ann. tit. 9, § 2465(b). With respect to substantive matters -- as opposed **[**66]** to procedural concerns such as standing -- these state statutes uniformly parallel their federal counterparts, the Sherman Act and the Federal Trade Commission Act. See Bunker's Glass, 206 Ariz. 9, 75 P. 3d at 106; Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 185, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999); Mack, 673 So. 2d at 104 (Florida); Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1081 (1st Cir. 1993) (Maine) (noting the manner in which "the Maine antitrust **[*279]** statutes parallel the Sherman Act"); Mass. Gen. Laws ch. 93A, § 2(b); Mich. Comp. Laws Ann. § 445.778 Mich cmt.; Minnesota Twins Partnership v. State ex rel. Hatch, 592 N.W. 2d 847, 851 (Minn. 1999); R. Givens, Practice Commentaries, N.Y. Gen. Bus. Law § 349 (McKinney's 1996); Hyde, 123 N.C. App. at 584; Tenn. code Ann. § 47-18-115; Vt. Stat. Ann. tit. 9 § 2453(b). As SmithKline notes, the remedies available under the state statutes differ, Defs.' Opp'n at 27-30, but "the individuation of damages in consumer **[**67]** class actions is rarely determinative under Rule 23(b)(3)." Smilow, 323 F.3d at 40. Nor do the individual damages issues appear "especially complex or burdensome," at least not with respect to the five exemplar states listed in the Court's certification order. Order of 11/21/03; see Ariz. Rev. Stat. § 44-1408(B), Mass. Gen. Laws ch. 93A, § 11, Vt. Stat. Ann. tit. 9, § 2465 (permitting the recovery of up to treble damages, plus fees and costs, if available, as determined by the court); Cal. Bus. & Prof. Code § 17203, Browder v. Hite, 602 S.W.2d 489, 492 (Tenn. App. 1980) (establishing restitution as the appropriate remedy for unfair competition under California law and unjust enrichment under Tennessee law).

In addition to these statutory causes of action, each of the exemplar states recognizes a cause of action for unjust enrichment. Murdock-Bryant Constr., Inc. v. Pearson, 146 Ariz. 48, 52, 703 P.2d 1197 (1985); First Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1662, 15 Cal. Rptr. 2d 173 (1992); Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 577 (Fla. Dist. Ct. App. 1994); A.F.A.B., Inc. v. Town of Old Orchard Beach, 610 A.2d 747, 749 (Me. 1992); Keller v. O'Brien, 425 Mass. 774, 778, 683 N.E.2d 1026 (1997); Kammer Asphalt Paving Co. v. East China Township Sch., 443 Mich. 176, 185, 504 N.W.2d 635 (1993); **[**69]** Youngstown Mines Corp. v. Prout, 266 Minn. 450, 475-76, 124 N.W.2d 328 (1963); Parsa v. State, 64 N.Y.2d 143, 148, 474 N.E.2d 235, 485 N.Y.S.2d 27 (1984); Booe v. Shadrick, 322 N.C. 567, 570, 369 S.E.2d 554 (1988); Paschall's, Inc. v. Dozier, 219 Tenn. 45, 54, 407 S.W.2d 150 (Tenn. 1966); Legault v. Legault, 142 Vt. 525, 531, 459 A.2d 980 (1983). ***HN18***[] Such actions rest on the equitable principle that "[a] person who is unjustly enriched at the expense of another is required to make restitution to the other." *Restatement (Third) of Restitution and Unjust Enrichment § 1*. Consistent with this principle, claims for unjust enrichment share a core of common elements: [17] the plaintiff conferred a benefit upon the defendant, the defendant appreciated or knew of the benefit, and the defendant accepted or retained the benefit under such circumstances as to make non-payment inequitable. See City of Sierra Vista v. Cochise Enters., Inc., 144 Ariz. 375, 381, 697 P.2d 1125 (Ariz. Ct. App. 1984); Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726, 91 Cal. Rptr. 2d 881 (2000); Hillman Constr., 636 So. 2d at 577 (Florida); J.W. Thompson Co. v. Welles Prods. Corp., 243 Kan. 503, 512, 758 P.2d 738 (1988); **[**70]** A.F.A.B., 610 A.2d at 749 (Maine) (quoting Estate of White, 521 A.2d 1180, 1183 (Me. 1987)); Keller, 425 Mass. at 778; B & M Die Co. v. Ford Motor Co., 167 Mich. App. 176, 181, 421 N.W.2d 620 (1988); First Nat'l Bank of St. Paul v. Ramier, 311 N.W.2d 502, 504 (Minn. 1981); Lake Minnewaska Mountain Houses Inc. v. Rekis, *259 A.D.2d 797, 798, 686 N.Y.S.2d 186 (N.Y. App. Div. 1999)*; Booe, 322 N.C. at 570; Browder, 602 S.W.2d at 492; Morrisville Lumber Co. v. Okcuoglu, 148 Vt. 180, 184, 531 A.2d 887

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supplier, for the sale of the 882C printer in order for her and HP to be involved in a consumer transaction. As a result, this transaction falls within the KCPA [Kansas Consumer Protection Act].").

[17] To be sure, there are variations in states' definitions of unjust enrichment. As examples, SmithKline cites differences in the conduct required and the availability of equitable defenses. See Defs.' Opp'n at 31-32. Yet with the exception of the variation discussed below, see Section III.E.1.b.v, infra, such differences prove largely irrelevant. As the end payor plaintiffs note, the conflict between states that require illegal conduct and those that do not is "immaterial … because Plaintiffs here do allege unlawful conduct." End Payor Pls.' Reply at 32. Similarly, although states may "vary significantly in the requirements necessary to establish the defense [of unclean hands]," Lilly v. Ford Motor Co., 2002 U.S. Dist. LEXIS 5698, No. 00 C 7372, 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002) (citation omitted), there is no suggestion here that SmithKline could establish any set of relevant requirements.

(1987). Although claims for unjust enrichment often accompany and supplement those for breach of contract, they may also -- as here -- accompany and supplement those for tortious injury. **[*280]** See *Restatement (Third) of Restitution § 3* ("A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.").

[71]** Notwithstanding these commonalities, the laws of certain exemplar states incorporate variations that counsel against certification. These variations are the subject of the discussion below. As a general matter, the Court considered statutory and common law claims asserted under the laws of the same state as a pair. Accordingly, if variations between state laws required excluding statutory claims raised under the laws of State *A,* equitable claims raised under the laws of State *A* were also excluded. The Court concluded that a contrary approach would be inconsistent with the requirements of adequacy and superiority. To the extent that a judgment in this action would be claim preclusive, including State *A* equitable claims would effectively waive State *A* statutory claims, raising adequacy concerns for end payors who might prefer to litigate their statutory claims individually or as part of a State *A* class. See *Clement v. American Honda Fin. Corp., 176 F.R.D. 15, 23-24 (D. Conn. 1997)* (denying certification where as a condition of class treatment, members were forced to forego their claims for unfair trade practices and minimum statutory damages); **[**72]** see also David A. Dana, "Adequacy of Representation" in Time 3 (Apr. 2004) (unpublished manuscript) (urging courts to evaluate adequacy in class action settlements by examining the relief that a class member receives "in return for ceding her legal claims"). To the extent that a judgment in this action would not be claim preclusive, including State *A* equitable claims would leave open the possibility of individually litigating State *A* statutory claims, suggesting that individual actions, or more likely, a class action limited to State *A* end payors, would provide more complete and efficient resolution.

B. Individual Injury

As stated above, the second element of the end payor plaintiffs' antitrust claims -- demonstration of injury -- warrants special scrutiny. State courts have differed significantly in their consideration of this element, prompting one commentator to observe: "The most important determinant of class certification of indirect purchaser suits appears to be where the suit is filed." Page, supra, at 21; compare, e.g., Bellinder v. Microsoft Corp., Nos. 00-C-0855, 00-C-00092, 99CV17089, 2001 WL 1397995 (Kan. Dist. Ct. Sept. 7, 2001), **[**73]** with *A & M Supply Co. v. Microsoft Corp., 252 Mich. App. 580, 654 N.W.2d 572 (Mich. App. 2002)* (granting and denying, respectively, certification of virtually identical classes of indirect purchasers based on virtually identical evidence including affidavits submitted by the same opposing experts). Differences in state certification decisions reflect, at least to some degree, differences in substantive state law. See Page, supra, at 27 (explaining that ***HN19***[] a court's approach to certification of indirect purchaser classes "may depend in part on the nature of the jurisdiction's indirect purchaser statute"). The Goda court, for example, certified a class of indirect purchasers after noting that the District of Columbia Antitrust Act explicitly provides for class-wide proof of injury: "The fact of injury and the amount of damages sustained by members of the class may be proven on a class-wide basis, without requiring proof of such matters by each individual member of the class." Goda, 1997 WL 156541, at *5 (quoting *D.C. Code Ann. § 28-4508(c)*).

In contrast, several other courts have denied class certification after concluding that their **[**74]** states' indirect purchaser statutes, unlike the District of Columbia's, require proof of injury to each class member. In *Execu-Tech Business Systems, Inc., v. Appleton Papers Inc., 743 So. 2d 19 (Fla. Dist. Ct. App. 1999)*, the Florida District Court of Appeal affirmed the denial of certification where the plaintiffs "had failed to meet their burden to come forward with a methodology by which they would be able to show by generalized proof that the alleged price-fixing conspiracy had impacted each class member individually." *Id. at 21-22*. The Execu-Tech plaintiffs' proposed methodology, an "incidence analysis" performed by an expert economist, was rejected by the court below as dependent on "simplifying assumptions that have **[*281]** little support in the real world." *Execu-Tech, 743 So. 2d at 22* (internal quotation marks omitted); compare In re Florida Microsoft Antitrust Litig., No. 99-27340, 2002 WL 31423620, at *11 (Fla. Cir. Ct. Aug. 26, 2002) (permitting certification where, unlike Execu-Tech, the conclusions of the plaintiffs' economist were supported by those of other experts, including economists employed by **[**75]** the

Department of Justice during the previous action brought by the United States, who also identified methodologies for demonstrating the individual impact of Microsoft's behavior).

In Melnick v. Microsoft Corp., Nos. CV-99-709, CV-99-752, 2001 WL 1012261 (Me. Super. Aug. 24, 2001), the Maine Superior Court similarly declined to certify a proposed class of indirect purchasers. Id. at *16. Noting that Maine's indirect purchaser statute "does not change the plaintiffs' burden of proof on a motion for class certification," the court required "an entirely separate level of evidence and proof" demonstrating that overcharges had been passed on to consumers. Id. at *6 & n.7 (citing *Karofsky v. Abbott Laboratories, Inc., CV-95-1009, 1997 Me. Super. LEXIS 316 (Oct. 15, 1997)*, which rejected expert testimony regarding impact as uncertain and incomplete). The court determined the plaintiffs had failed to produce such evidence, relying on "general, untried economic theory" rather than "real world facts" regarding Maine consumers. Id. at *16.

Michigan courts have declined to certify indirect purchaser classes on four occasions. See *A & M Supply, 252 Mich. App. at 616-32* **[**76]** (reviewing the certification decisions of Michigan trial courts). The Appeals Court in A & M Supply gathered from prior denials that "Michigan's trial courts tend to interpret MARA [*Michigan Antitrust Reform Act*] and our state court rules as requiring a rigorous analysis" of individual impact. *Id. at 635*. The A & M court agreed with this approach, holding that it was "mandate[d]" by MARA's requirement of "actual damages." Id. The court accordingly rejected the affidavits sworn by the plaintiffs' expert, whose methodologies "failed to bridge the gap between economic theory and the reality of economic damages." *Id. at 640*. Citing what Judge Posner termed the "central insight of Illinois Brick" -- that the proportion of pass-on will be difficult to determine in imperfect markets -- the Court found the expert's theories, "generalized slogans," and "vague promises for future analysis" simply insufficient to meet the plaintiffs' burden. *Id. at 638-42* (quoting *Illinois ex rel Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 894 (7th Cir. 1988)*, overruled on other grounds sub nom. *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991)).* **[**77]** But see *Cardizem, 200 F.R.D. at 349-51* (concluding, on the basis of exclusively federal decisions, that a lesser burden applied to a class of indirect purchasers asserting claims under Michigan law).

In Gordon v. Microsoft Corp., No. 00-5994, 2001 WL 366432 (Minn. Dist. Ct. Mar. 30, 2001), the Minnesota District Court noted the "consistency" with which Minnesota courts have denied class certification motions in indirect purchaser cases. Id. at *4 (citing five such denials). In *Keating v. Philip Morris, Inc., 417 N.W.2d 132 (Minn. App. 1987)*, for example, the Court of Appeals agreed that class certification was inappropriate where the calculation of cigarette retailers' individual damages presented an "unmanageable, if not impossible, task." *Id. at 137*. The court foresaw "thousands of trials" examining "hundreds of thousands of transactions between thousands of retailers, wholesalers, distributors and manufacturers." Id. In Gordon, apparently the only Minnesota decision to certify a class of indirect purchasers, 2001 WL 366432, at *2, the court considered its case "different" from "each of **[**78]** the prior cases," in which plaintiffs had "failed to propose a viable method for proving class-wide fact of injury, amount of individual damages, or both," id. at *6 (internal citations omitted). Unlike those plaintiffs, the plaintiffs in Gordon had "actually produced a time-consuming but apparently workable method for calculating damages." Id. More importantly, the Gordon court declared at the beginning of its analysis that "standards for class certification should be interpreted if at all possible **[*282]** in a fashion that indirect purchasers can meet." Id. at *4.

The above decisions suggest that ***HN20***[] these courts have interpreted their respective indirect purchaser statutes with a more "skeptical view" of antitrust policies and remedies. See Page, supra, at 17. [18] As Professor Page has explained: "The skeptical view, typified by the Illinois Brick majority, values deterrence over compensation, efficiency over equity, and accuracy over approximation." Id. Courts adopting this view question their ability to apportion overcharges between direct and indirect purchasers, finding that "the realities of the evidentiary

[18] Certainly, the denials of certification also reflect other factors. See e.g., Gordon, 2001 WL 366432, at *6 (considering prior denials "different," not only because those plaintiffs lacked workable methods for calculating damages, but also because they had sued more defendants, bought more products, and made more purchases). The Court simply notes that views regarding antitrust policies and proof are among the relevant factors, and in some cases, are the most significant among them. See *A & M Supply, 252 Mich. App. at 633, 642* (finding certification inappropriate on facts "virtually identical" to those of Gordon based on a more skeptical review of the evidence).

issues, as opposed to theoretical models, **[**79]** are difficult for courts to resolve accurately." Id. Finding these decisions a persuasive "indication of what state law is," 19 Wright, Miller & Cooper, supra, § 4507, the Court concludes that the indirect purchaser statutes of Florida, Maine, Michigan, and Minnesota require a somewhat stronger and more precise showing of individual impact. But see *Terazosin, 2004 U.S. Dist. LEXIS 6176, 2004 WL 828997, at *25, *28* (certifying classes of indirect purchasers from Florida, Maine, Michigan, and Minnesota without reference to or analysis of state court interpretations of their respective statutes).

[80]** The end payor plaintiffs have not made such a showing. Rather, they rely on the declarations of Raymond S. Hartman ("Dr. Hartman"), an economist who proposes methodologies "potentially available to calculate damages of the Class on an aggregate basis." End Payor Pls.' Mem. at 15. Specifically, Dr. Hartman discusses the "top-down" method, which would trace but-for and actual prices from SmithKline down to end payors, the "bottom-across" method, which would compare but-for and actual prices paid by end payors at the bottom of the distribution chain, and a hybrid version "making use of the most reliable components of each method." Hartman Decl. P 23. Although these methods are "aimed at estimation of aggregate class-wide overcharge damages," Dr. Hartman asserts that they can also be applied to specific groups or individuals to "differentiate[e] and allocate[e] damages." Id. P 25. He does not, however, go further toward differentiating or allocating damages based on, for example, the unique characteristics of various states' markets or consumers. In fact, in response to SmithKline's objection, Dr. Hartman states: "It is my understanding that the formulaic methods … must provide **[**81]** a sufficiently accurate calculation of aggregate damages. At this stage of the litigation, it is unnecessary that I calculate individual damages to each and every Class member." Hartman Rebuttal Decl. P 10 (emphasis in original). More significantly, none of Dr. Hartman's proposed methods demonstrates individual impact to members of the end payor plaintiffs' classes. See also Defs.' Opp'n, Ex. 3 (Hartman Dep.) at 93:10-93:16 (A: "Well, there has been a different -- there has been different quanta of effects for different class members and some of those quanta for certain purchasers are zero and they're the ones you're identifying." Q: "How will you identify those people?" A: "This report doesn't go after that.").

Because the end payor plaintiffs had not made the stronger showing deemed necessary under the indirect purchaser statutes of Florida, Maine, Minnesota, and Michigan, end payor plaintiffs from these states were excluded from the exemplar classes.

iii) Unilateral Monopolies

In addition to the "skeptical" interpretations discussed above -- which some might describe as differences "in nuance," *In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995)* **[**82]** -- an examination of state antitrust laws also reveals differences in their terms. For example, the antitrust statutes of several states extend only to concerted conduct, not to unilateral conduct of the **[*283]** sort alleged here. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (discussing the rationale for "treat[ing] concerted behavior more strictly than unilateral behavior" under the analogous federal statute: "Concerted activity inherently is fraught with anticompetitive risk."). For these states, discussed below, the Court considers the alternative statutory and equitable claims asserted by the end payor plaintiffs.

HN21[] Under California law, a challenge to unilateral conduct does not state a cognizable antitrust claim. See *Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986)* (stating that a challenge to unilateral conduct is "not cognizable under the *Cartwright Act*, for it fails to allege any combination"), modified on other grounds, *810 F.2d 1517 (9th Cir. 1987)*. In addition to the Cartwright Act, the end payor plaintiffs cite the unfair competition statute, *Cal. Bus. & Prof. Code §§ 17200-17208* **[**83]** . Compl. P 102(b). As interpreted by the California Supreme Court, the scope of this statute is broad: "The statutory language referring to 'any unlawful, unfair *or* fraudulent' practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The end payor plaintiffs thus may assert that SmithKline's unilateral conduct, even if permissible under the Cartwright Act, is actionable under the unfair competition statute. See *Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 741, 162 Cal. Rptr. 543 (1980)* (concluding that the plaintiff adequately stated a claim of unfair competition even though it had not alleged "any agreement, understanding, or conspiracy to restrain trade"). As stated above, the California unfair competition statute, like those of other exemplar states, parallels *Section 5 of the Federal Trade Commission Act* with regard to prohibited practices. See *Cel-Tech Communications, 20 Cal. 4th at 185*. The Court accordingly included plaintiffs from California **[**84]** in the end payor plaintiff classes, concluding that claims asserted under the unfair competition statute, notwithstanding their more limited remedies, *id. at 179* (stating that prevailing plaintiffs generally may seek injunctive and restitutionary remedies only), are sufficiently similar to those asserted under the statutes of other exemplar states.

HN22[] Although "broad and undeveloped by case law," *Bergstrom v. Noah, 266 Kan. 829, 842, 974 P.2d 520 (1999)*, the Kansas Monopolies and Unfair Trade Act, *Kan. Stat. Ann. § 50-132*, by its terms prohibits combinations and conspiracies only. See *Kan. Stat. Ann. § 50-132* ***HN23***[] ("No person, servant, agent or employee of any person doing business within the state of Kansas shall conspire or combine with any other persons, within or without the state for the purpose of monopolizing any line of business ...." (emphasis added)). In addition to the Monopolies and Unfair Trade Act, the end payor plaintiffs cite the Consumer Protection Act, *Kan. Stat. Ann. §§ 50-623 to -644*. ***HN24***[] Actions brought under the Consumer Protection Act are subject to a three-year statute **[**85]** of limitations. *Alexander v. Certified Master Builders Corp., 268 Kan. 812, 824, 1 P.3d 899 (2000)*. This Court previously determined that the end payor plaintiffs' claims accrued for statute of limitations purposes on August 8, 1998. *Relafen, 286 F. Supp. 2d at 64* (holding that the plaintiffs' claims were timely under the four-year statute of limitations applied to federal antitrust actions). The earliest of the end payor plaintiffs' complaints was filed on January 30, 2002, more than three years after the date of accrual. See Lynch Compl. [Doc. No. 1 in Lynch v. SmithKline Beecham Corp., Civil Action No. 02-CV-10163]. Because claims asserted under the Kansas Consumer Protection Act are subject to an individualized limitations defense, end payor plaintiffs from Kansas were excluded from the exemplar classes. [19] See *Waste Mgmt., 208 F.3d at 296* ***HN25***[] ("[A] necessity for individualized statute-of-limitations determinations invariably weighs **[*284]** against class certification under *Rule 23(b)(3)* ....").

[86]** The Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101*, ***HN26***[] declares the following anticompetitive conduct to be "against public policy": "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article." Id. (emphasis added). None of these terms appears to include unilateral conduct. See 6 Julian O. von Kalinowski, Antitrust Laws and Trade Regulation § 116.03 (2d ed. 2003). The end payor plaintiffs also allege violations of the Consumer Protection Act, *Tenn. Code Ann. §§ 47-18-101 to - 108*. Compl. P 102(u). ***HN27***[] Although modeled after the Federal Trade Commission Act, the Tennessee Consumer Protection Act differs in one significant respect: unlike the federal provision, which prohibits both unfair methods of competition and unfair or deceptive acts or practices, the Tennessee statute prohibits only unfair or deceptive acts or practices. *Sherwood v. Microsoft Corp., 2003 Tenn. App. LEXIS 539, No. M2000-01850-COA-R9-CV, 2003 WL 21780975, at *31 (Tenn. Ct. App. July 31, 2003)* **[**87]** . The Tennessee Court of Appeals has interpreted this difference to reflect a conscious choice to exclude unfair methods of competition from the scope of the Tennessee Act:

> This history makes clear that by the time Tennessee adopted its Consumer Protection Act, its drafters and the legislators considering it had the benefit of the federal act and experience under it, the proposed Uniform Trade Practices Act and Consumer Protection Law, the statutory language adopted in many other states, and the evaluations of a number of authors of learned articles and treatises. We cannot presume other than that the Tennessee General Assembly knowingly chose not to include antitrust or anticompetitive conduct as actionable under the TCPA.

*Id. 2003 Tenn. App. LEXIS 539, [WL] at *32*. Because neither of their statutory claims is cognizable under state law, end payors from Tennessee were included in the exemplar classes with respect to their claims for unjust enrichment only. [20]

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[19] In so excluding the Kansas plaintiffs, the Court makes no comment on the validity of the end payor plaintiffs' previously asserted claim of fraudulent concealment. See *Relafen, 286 F. Supp. 2d at 64 n.4*. It merely finds the claim inappropriate for class treatment.

[88] iv) Restrictions on Remedies**

HN28[] Under New York law, "an action to recover a penalty … imposed by statute may not be maintained as a class action" unless the statute imposing the penalty "specifically authorizes" class recovery. *N.Y. C.P.L.R. 901(b)*. For purposes of this rule, the treble damages permitted by the New York antitrust statute, *N.Y. Gen. Bus. Law §§ 340-347* (the "Donnelly Act"), have been deemed a "penalty." *Asher v. Abbott Labs., 290 A.D.2d 208, 737 N.Y.S.2d 4, 4 (N.Y. App. Div. 2002)*; *Cox v. Microsoft Corp., 290 A.D.2d 206, 737 N.Y.S.2d 1, 2 (N.Y. App. Div. 2002)*. Because the Donnelly Act imposes a "mandatory" penalty but does not "specifically authorize" class recovery, New York courts have dismissed class actions brought under the Act as impermissible. See *Asher, 737 N.Y.S.2d at 4*; *Cox, 737 N.Y.S.2d at 2*. These decisions suggest that *C.P.L.R. 901(b)*, if applicable, would bar the end payor plaintiffs from pursuing their claims under the Donnelly Act in the present class action.

It is not, however, completely clear that *C.P.L.R. 901(b)* ought **[**89]** be applied by federal courts. But see *In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 727 (D. Md. 2001)* (concluding that *C.P.L.R. 901(b)* required dismissal of the plaintiffs' class action claims without considering whether the state rule applied in federal courts). Under *Hanna v. Plumer, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965)*, if the law of the relevant state is in "direct collision" with a valid Federal Rule of Civil Procedure, *id. at 472*, the "Federal Rule applies regardless of contrary state law." *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 n.7, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996)* (citing *Hanna, 380 U.S. at 469-74*). The Court's initial inquiry, then, is whether *C.P.L.R. 901(b)* directly conflicts **[*285]** with the applicable Federal Rule, *Rule 23*. See 19 Wright, Miller & Cooper, supra, § 4504.

HN29[] On its face, *Rule 23* "merely establishes the procedures for pursuing a class action in the federal courts." *Wade v. Danek Med., Inc., 182 F.3d 281, 290 (4th Cir. 1999)*. It sets forth the circumstances under which "one or more members of a class may sue or be sued as representative **[**90]** parties," but makes no reference to the remedies that representative parties may seek. See *Fed. R. Civ. P. 23*. In addition, *Rule 23*, *HN30*[] like all Federal Rules, must be interpreted "with sensitivity to important state interests and regulatory policies" that may be frustrated by the application of federal procedures. *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 428 n.7, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996)*.

Here, *C.P.L.R. 901(b)* *HN31*[] expresses a state interest in avoiding "annihilatory punishment" by discouraging multiple recoveries of statutory penalties. See *Lennon v. Philip Morris Cos., Inc., 189 Misc. 2d 577, 734 N.Y.S.2d 374, 380 (N.Y. Sup. 2001)* (quoting Joseph M. McLaughlin, Practice Commentaries, C901:7, *N.Y. C.P.L.R. 901(b)* (McKinney)). As one commentator explains: "The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counter-productive to statutory policies." Developments in the Law -- Class Action, 89 Harv. L. Rev. 1329, 1361 (1976). With regard to statutory policies, **[**91]** the Court considers it significant that "since enacting the Donnelly Act, the New York State Legislature has twice considered the indirect purchasers' right to bring suit," but has adopted "no express language[] … which authorizes the maintenance of a class action." *Lennon, 734 N.Y.S.2d at 381*. In light of the text and policies of the provisions, the Court declines to interpret *Rule 23* so broadly as to control the remedial issues governed by *C.P.L.R. 901(b)* and the Donnelly Act. Accordingly, the Court discerns no direct conflict between the state law and the Federal Rule. See *United States v. Dentsply Int'l, Inc., 2001 U.S. Dist. LEXIS 9057, Nos. Civ. A. 99-005-SLR, 99-255-SLR, 99-854-SLR, 2001 WL 624807, at *16 (D. Del. Mar. 30, 2001)* (distinguishing the scope of *Rule 23* from that of *C.P.L.R. 901(b)*); but cf. *Bridgestone/Firestone,* *205 F.R.D. at 516*, rev'd in part on other grounds sub nom. *In re Bridgestone/Firestone, Inc., 288 F.3d 1012* (refusing to apply the reasoning of Dentsply International, and concluding that a Michigan provision limiting class action plaintiffs to those residing or injured in the state conflicts with *Rule 23*).

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[20] Although Tennessee courts have required that unjust enrichment plaintiffs first exhaust their legal remedies, see *Paschall's Inc. v. Dozier, 219 Tenn. 45, 57-58, 407 S.W.2d 150 (1966)*, such exhaustion would be futile here as the Tennessee plaintiffs' statutory claims are not cognizable under the state's antitrust or consumer protection laws.

[92]** Because it found no "direct collision" between the state and federal provisions, the Court's decision whether to apply *C.P.L.R. 901(b)* was guided not by Hanna, but by the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 19 Wright, Miller & Cooper, supra, § 4504 (quoting *Hanna, 380 U.S. at 468*); see *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 11 Ohio Op. 246 (1938)*. Significant to the Court's Erie analysis was the fact that New York courts consistently apply *C.P.L.R. 901(b)* to bar class actions brought under the Donnelly Act. See *Cox, 737 N.Y.S.2d at 2*; *Asher, 737 N.Y.S.2d at 4*; *Lennon, 734 N.Y.S.2d at 380* ("Even where treble damages are discretionary and need not be sought by the injured party, it is this Court's understanding that no New York court has sustained such a claim either under the Donnelly Act or any other statutory provision."). For this reason, declining to apply *C.P.L.R. 901(b)* would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the "substantial **[**93]** advantages" of class actions. See *Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 & n.9, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980)* (discussing the increased fees and decreased costs associated with class actions). In addition, permitting Donnelly Act class actions exclusively in federal court would inequitably injure plaintiffs unable to demonstrate diversity of citizenship. See *Walker v. Armco Steel Corp., 446 U.S. 740, 753, 64 L. Ed. 2d 659, 100 S. Ct. 1978 (1980)* (finding it inequitable that an action barred in the state courts should proceed to judgment in the federal courts "solely because of the fortuity that there is diversity of citizenship between the litigants"); *Dornberger v. Metropolitan Life Ins. Co., 182 F.R.D. 72, 84 (S.D.N.Y. 1998)* **[*286]** (applying *C.P.L.R. 901(b)* because it would be "patently unfair" not to). Accordingly, the Court determined that *C.P.L.R. 901(b)* should be applied and that the end payor plaintiffs' claims under the Donnelly Act are therefore barred.

The Court's application of *C.P.L.R. 901(b)* does not, however, necessarily bar the end payor plaintiffs' claims under the New York consumer protection act, *N.Y. Gen. Bus. Law § 349* **[**94]** . Compl. P 102(q). ***HN32***[] Under *Section 349(h)*, private plaintiffs may recover actual damages, a statutory minimum, or up to treble damages if the court finds a willful or knowing violation. *N.Y. Gen. Bus. Law § 349(h)*. As with the Donnelly Act, because this Section does not "specifically authorize" class recovery, *C.P.L.R. 901(b)* bars class claims for minimum or treble damages. *Super Glue Corp. v. Avis Rent A Car Sys., Inc., 132 A.D.2d 604, 517 N.Y.S.2d 764, 767 (N.Y. App. Div. 1987)*. Class claims for actual damages, in contrast, are not similarly barred. Id. Accordingly, "the weight of authority holds that a class action may be maintained to recover actual damages and injunctive relief pursuant to *General Business Law § 349(h)*." Id.

Yet bringing such an action requires named plaintiffs to waive their claims to minimum and treble damages. See id.; *Burns v. Volkswagen of Am., Inc., 118 Misc. 2d 289, 460 N.Y.S.2d 410, 413 (N.Y. Sup. Ct. 1982)*. Such waiver necessarily casts doubt on the named plaintiffs' fitness to represent class members who might prefer to pursue statutory or punitive remedies individually. See *Burns, 460 N.Y.S.2d at 413*; **[**95]** cf. *Molski v. Gleich, 318 F.3d 937, 956 (9th Cir. 2003)* (finding representation of the settlement class inadequate where the terms of the consent decree "waived practically all of the class members' claims without compensation and allowed the defendants to escape with little penalty"); *Arch v. American Tobacco Co., 175 F.R.D. 469, 480 (E.D. Pa. 1997)* ("Indeed, named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class.").

Nor are the Court's concerns lessened because "any class member wish[ing] to pursue his or her statutory right to minimum and treble damages … may opt out of the class." *Super Glue Corp., 517 N.Y.S.2d at 767*. Scholars have recognized that as a practical matter, the opportunity to opt out is "unevenly distributed," with far lesser opportunity held by plaintiffs like those here, who have small rather than independently viable claims, and who receive "best practicable" rather than individual notice. See Michael A. Perino, Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions, **[**96]** *46 Emory L.J. 85 (1997)*; John Bronsteen & Owen Fiss, The Class Action Rule, *78 Notre Dame L. Rev. 1419, 1435 (2003)* (discussing the importance of notice in "rendering viable the right of unnamed class members … to intervene or to opt out of the lawsuit"); Theodore Eisenberg & Geoffrey P. Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues (Mar. 23, 2004) (unpublished manuscript) (testing scholars' conclusions against empirical data and reporting that "opt-out rates vary by case type," with consumer class actions having a relatively low mean opt-out rate of less than 0.2 percent). In light of these adequacy concerns regarding their consumer protection act claims, plaintiffs from New York were excluded from the exemplar classes.

v) Direct Benefit

HN33[] Under North Carolina law, "to establish a claim for unjust enrichment, a party must have conferred a benefit" that was "consciously accepted" by the defendant. Booe, 322 N.C. at 570. The benefit must be neither officious nor gratuitous, and it must be measurable. Id. The North Carolina Court of Appeals has suggested that in **[**97]** addition to these things, the benefit must be direct. See Effler v. Pyles, 94 N.C. App. 349, 353, 380 S.E.2d 149 (1989). But see Terazosin, 2004 U.S. Dist. LEXIS 6176, 2004 WL 828997, at *23 n.40 (concluding, without reference to Effler, that the standard for evaluating unjust enrichment claims is "virtually identical" across various states including North Carolina). In Effler, the court affirmed the entry of summary judgment against a plaintiff who failed **[*287]** to show that she had conferred a benefit directly on the defendant:

> Linda Pyles received title to the property through her husband. Although he had previously acquired his interest in this property with plaintiff's assistance, this does not satisfy plaintiff's burden of showing that she conferred a benefit directly on defendant Linda Pyles.

94 N.C. App. at 353

The end payor plaintiffs have similarly failed to satisfy this burden. Any enrichment that SmithKline received was conferred more directly by pharmaceutical wholesalers than by end payors, who by definition purchased Relafen from sources other than SmithKline. Proposed Order at 1. Moreover, as in Effler, the fact that many pharmaceutical **[**98]** wholesalers passed on and in fact benefitted from the overcharges paid by end payors, see Valley Drug, 350 F.3d at 1193, does not change the Court's analysis. Accordingly, because North Carolina plaintiffs would be subject to an individualized defense regarding the "direct benefit" element of their unjust enrichment claims, [21] they were excluded from the exemplar classes.

[99]** After thus limiting the exemplar classes to account for differences in state law, the Court concluded that the end payor plaintiffs had demonstrated the predominance of common issues for the remaining class members. The Court accordingly turned to superiority, the final requirement of Rule 23.

2. Superiority

As stated by the Supreme Court in Amchem, **HN34**[] the requirement of superiority, like that of predominance, ensures that resolution by class action will "achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Amchem, 521 U.S. at 615 (alteration in original) (quoting Advisory Committee's Note on Fed. R. Civ. P. 23) (internal quotation marks omitted). With its focus on individuals' interests in conducting separate lawsuits, the superiority requirement directly addresses the Advisory Committee's core concern: the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Id. at 617 **[**100]** (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)) (internal quotation marks omitted).

The Advisory Committee's core concern was particularly compelling here, where protection of the public depends upon vigorous private enforcement of state laws but the small size of individual claims renders such enforcement unlikely. See Hartman Decl., tbl. 2 (documenting differences between branded and generic prices that range from $ 0.35 to $ 1.21 per pill); Bronsteen & Fiss, supra, at 1419 ("The most compelling [use of the class action] occurs

[21] In an unpublished opinion, the Fourth Circuit suggested that on different facts, North Carolina courts adopt "a broader approach to unjust enrichment than is indicated by Effler's 'direct benefit' rule." Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd., 72 Fed. Appx. 916, 921 (4th Cir. 2003). This Court makes no comment on the end payor plaintiffs' ability to distinguish the present facts from those of Effler. It merely concludes that any attempt to do so would be inappropriate for consideration in the present class action. The Court also notes that citation of unpublished opinions is disfavored in the Fourth Circuit. See 4th Cir. R. 36(c).

when someone Inflicts a small harm on each member of a large group of people."); cf. *Illinois Brick, 431 U.S. at 745* (discussing, with respect to the analogous federal statute, the "important weapon" of private enforcement and selecting the direct purchaser rule in part to ensure adequate incentives to sue). Moreover, given the predominance of common questions, resolution of the end payor plaintiffs' numerous claims by class action would provide substantial savings in time, effort, and expense. See 7B Wright, Miller & Kane, . supra, § 1781 ("Since antitrust actions **[**101]** typically present many complicated issues, the courts should utilize these [class action] provisions to settle the common issues on a representational basis to avoid congesting the courts with separate actions requiring the repetitive adjudication of the same matters.").

Turning now to the pertinent factors identified in *Rule 23(b)(3)*, the Court emphasizes **[*288]** again that small size of the end payor plaintiffs' claims suggests that class members' "interest ... in individually controlling the prosecution or defense of separate actions," *Fed. R. Civ. P. 23(b)(3)(A)*, is limited -- if not nonexistent. See *McIntosh v. Irwin Union Bank & Trust, Co., 215 F.R.D. 26, 35 (D. Mass. 2003)* ("It cannot be reiterated too strongly that denial of class certification is the effective death knell of this litigation."). In addition, the Court is not aware of any other "litigation concerning the controversy," *Fed. R. Civ. P. 23(b)(3)(B)*, that might create a threat of "multiplicity" or "inconsistent adjudications," 7A Wright, Miller & Kane, supra, § 1780. In fact, the consolidation of several related claims **[**102]** -- including those of a generic manufacturer and a separately certified class of direct purchasers -- before this Court suggested that consistency would best be served by "concentrating the litigation" in this forum. *Fed. R. Civ. P. 23 (b)(3)(C)*.

As in most multi-state class actions, potential "difficulties likely to be encountered in the management of" this action, *Fed. R. Civ. P. 23(b)(3)(D)*, posed a more serious concern. See *Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001)* (observing that "nagging issues of choice of law, commonality, and manageability" beset a proposed national class action); *In re LifeUSA Holding Inc., 242 F.3d 136, 148 (3d Cir. 2001)* (declaring that an adjudication that involved individual determinations of, inter alia, state law "would not only be inordinately time consuming and difficult, but it would impermissibly transgress upon the required standards of fairness and efficiency"). Nevertheless, having thoroughly examined the relevant statutes, the Court concluded that the remaining states' laws are neither so varied nor **[**103]** so numerous as to render this action unmanageable. See *Waste Mgmt., 208 F.3d at 296-97* (affirming certification notwithstanding variations in states' statutes of limitations where "the limitations problems nonetheless appeared to be inconsequential"). The Court acknowledges that difficulties might later arise concerning, for example, the availability of certain remedies, see Defs.' Opp'n at 28-30, but the Court concluded that any damages-related difficulties could be more appropriately dealt with as they arose. *Yaffe v. Powers, 454 F.2d at 1365 (1st. Cir. 1972)*; see also *Visa Check/MasterMoney, 280 F.3d at 140-41* (citing Yaffe and describing the several "management tools available to a district court to address any individualized damages issues that might arise in a class action"). The Court accordingly concluded that the end payor plaintiffs had established superiority as required under *Rule 23(b)(3)*.

IV. CONCLUSION

For the foregoing reasons, the End Payor Plaintiffs' Motion for Class Certification [Doc. No. 119] was ALLOWED in part and DENIED in part. The motion was DENIED under *Rule 23(b)(2)*, and ALLOWED **[**104]** under *Rule 23(b)(3)* for the following exemplar classes:

With respect to their antitrust and consumer protection claims --

All persons or entities who purchased Relafen or its generic alternatives in the states of Arizona, California, Massachusetts, or Vermont during the period of September 1, 1998 through June 30, 2003 for consumption by themselves, their families, members, employees, insureds, participants, or beneficiaries.

and with respect to their unjust enrichment claims --

All persons or entities in the United States who purchased Relafen in the states of Arizona, California, Massachusetts, Tennessee, or Vermont during the period September 1, 1998 through June 30, 2003 for consumption by themselves, their families, members, employees, insureds, participants, or beneficiaries.

Excluded from both classes were governmental entities; SmithKline and its officers, directors, management, employees, subsidiaries, and affiliates; persons or entities who purchased Relafen for purposes of resale; and persons or entities who purchased Relafen directly from SmithKline or its affiliates.

/s/

WILLIAM G. YOUNG

CHIEF JUDGE **[**105]**

End of Document

Euromodas, Inc. v. Zanella, Ltd.

United States Court of Appeals for the First Circuit

May 17, 2004, Decided

No. 03-1712

Reporter

368 F.3d 11 *; 2004 U.S. App. LEXIS 9550 **; 2004-1 Trade Cas. (CCH) P74,406

EUROMODAS, INC., Plaintiff, Appellant, v. ZANELLA, LTD. AND CLUBMAN, INC., Defendants, Appellees.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Jay A. Garcia-Gregory, U.S. District Judge.

Euromodas, Inc. v. Zanella, Ltd., 253 F. Supp. 2d 201, 2003 U.S. Dist. LEXIS 5431 (D.P.R., 2003)

Disposition: Affirmed.

Core Terms

summary judgment, vertical, manufacturer, antitrust, concerted action, material fact, district court, terminated, dealer, trousers, movant's, genuine, retail, summary judgment motion, summary judgment record, restraint of trade, antitrust case, opposing party, conspiracy, deposition, pants

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Supporting Materials**

The District of Puerto Rico promulgated former U.S. Dist. Ct., D.P.R., R. 311.12 to aid in the task of identifying genuine issues of material fact that might affect the entry of summary judgment.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] Opposing Materials, Accompanying Documentation

Former U.S. Dist. Ct., D.P.R., R. 311.12 requires that a party who moves for summary judgment submit, in support of the motion, a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record. The rule requires a party opposing a summary judgment motion to include with its opposition a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, with proper record citations. The penalty for failure is that the facts delineated in the movant's statement will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN3[] Summary Judgment, Supporting Materials

Former U.S. Dist. Ct., D.P.R., R. 311.12, as written, does not always require that a party opposing summary judgment put forth its version of the facts in a separate statement. The rule requires only that the nonmovant identify any facts in the movant's statement with which it takes issue.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN4[] Standards of Review, De Novo Review

An appellate court affords de novo review to orders granting or denying summary judgment. It need not adopt the trial court's reasoning, but may sustain its decree on any ground made manifest in the record.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

HN5[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination or conspiracy, in restraint of trade or commerce. There are two prerequisites for a successful *§ 1* claim. First, there must be concerted action. Second, the actors' agreement must involve either restrictions that are per se illegal or restraints of trade that fail scrutiny under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical restraint is a restraint of trade involving a combination of persons at different levels of the market structure. While vertical restraints may reduce intra-brand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote inter-brand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products. Thus, vertical restraints often have both pro-competitive and anti-competitive effects. For this reason, such restraints generally are not deemed per se illegal, but, rather, are tested under a rule of reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN7[] **Vertical Restraints, Price Fixing**

Vertical price-fixing agreements are a special subset of vertical restraints. As such, they qualify for different treatment. A vertical price-fixing agreement that establishes a minimum price normally is regarded as a naked restraint of trade and, thus, as illegal per se.

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

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

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

An appellate court must examine a district court's ruling on summary judgment in light of the full record. In carrying out that task, a court remains cognizant that the proper office of summary judgment is to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for a trial. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN9[] **Summary Judgment, Opposing Materials**

In considering the evidence on a summary judgment motion, a court must array it in the light most hospitable to the party opposing the motion, indulging all reasonable inferences in that party's favor. To avoid summary judgment, the evidence upon which the nonmovant relies to create a genuine issue of material fact must be significantly probative, not merely colorable.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN10[] **Standards of Review, De Novo Review**

Where parties file cross-motions for summary judgment, a reviewing court examines each motion independently, applying the summary judgment principles.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN11[] **Remedies, Damages**

A special constraint applies to summary judgment rulings in vertical restraint cases. Antitrust liability is strong medicine (it exposes a defendant to treble damages, *15 U.S.C.S. § 15*), and thus *§1* of the Sherman Act, *15 U.S.C.S. § 1*, is interpreted to limit the inferences that may be drawn from ambiguous evidence. In a vertical restraint case, conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Thus, a *§ 1* antitrust case predicated upon an alleged vertical restraint can survive summary judgment only if the evidence relied upon by the nonmovant suffices to show a bona fide dispute about a fact that has the potential of affecting the outcome of the case under the applicable law.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

To create a trialworthy issue in a vertical restraint case brought pursuant to *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must make two showings: concerted action and harm to the competitive process.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

To satisfy the "concerted action" requirement of a claim brought under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. Phrased another way, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. *Section 1* is not intended to prohibit entrepreneurial action, and a manufacturer, acting independently, ordinarily has a right to sell (or not to sell) to whichever customers it chooses.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN14[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In an antitrust case, the burden is on the accuser to make at least a prima facie showing of concerted action. Thus, a court inquires whether the plaintiff has presented evidence that reasonably tends to prove that the manufacturer and others conspired to achieve an illicit objective.

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Antitrust & Trade Law, Sherman Act

In Sherman Act cases the permissible inferences that can be drawn from ambiguous evidence are quite limited. If the evidence shows conduct that is as consistent with lawful competition as it is with an illicit conspiracy, it cannot be said to support an inference of concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN16[] Antitrust & Trade Law, Sherman Act

The raw fact that a distributor's actions are an attempt to pressure a manufacturer into terminating a distribution relationship with a price-cutting competitor is not enough either to show concerted action or to defeat summary judgment dismissal of a claim brought under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN17[] Antitrust & Trade Law, Sherman Act

In a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the fact that a dealer was terminated from its dealership in response to complaints from competing dealers is insufficient, without more, to survive a motion for summary judgment.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Sherman Act > General Overview

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

HN18[] Price Fixing & Restraints of Trade, Vertical Restraints

An agreement to terminate a price-cutter to placate another dealer does not constitute a per se violation of *§ 1* of the Sherman Act, , *15 U.S.C.S. § 1*. To render such an agreement illegal per se, there must be a further agreement on the price or price levels to be charged by the remaining dealer. Without an agreement as to a specific minimum price or price level, a vertical restraint is unlawful only if it fails a rule of reason analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN19[] **Price Fixing & Restraints of Trade, Vertical Restraints**

In a vertical restraint case, liability under the rule of reason analysis requires a showing of harm to the competitive process.

Counsel: Armando Llorens, with whom Dora Penagaricano and McConnell Valdes were on brief, for appellant.

Jose L. Barreto-Rampolla, with whom Rivera, Barreto & Torres Marcano was on brief, for appellee Clubman, Inc.

Edna Hernandez-Arroyo, with whom Maria Luisa Martinez-Lopez, Avila, Martinez & Hernandez, PSC, Lawrence Fechner, and Jaffe, Segal & Ross were on brief, for appellee Zanella, Ltd.

Judges: Before Selya, Circuit Judge, Coffin, Senior Circuit Judge, and Lipez, Circuit Judge.

Opinion by: SELYA

Opinion

[*13] SELYA, *Circuit Judge*. This antitrust case, which requires us to clarify what sort of evidence a plaintiff must adduce to make out a trialworthy claim for a vertical restraint of trade, presents a question of first impression in this circuit. We turn to this question mindful that vertical restraints have "provoked more reconsideration of established rules, or more disagreement between courts and commentators" than most other areas of ***antitrust law***. Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 11.1, at **[**2]** 441 (2d ed. 1999).

I

We begin with the cast of characters. Plaintiff-appellant Euromodas, Inc. is a corporation engaged in the retail sale of men's clothing. Defendant-appellee Clubman, Inc. is engaged in the same business. The two retailers are direct competitors in San Juan, Puerto Rico. Defendant-appellee Zanella, Ltd. is an Italian manufacturer of fine men's clothing. Until 1997, both Euromodas and Clubman sold Zanella trousers. What happened thereafter propelled the parties from the marketplace to the federal courthouse.

Euromodas alleges that Clubman, which operates a large number of stores in Puerto Rico, used its market power to force **[*14]** Zanella into a minimum resale price maintenance scheme. Euromodas claims that this scheme was in part intended to -- and did -- restrict its access to Zanella pants. Because this appeal arises in an unusual posture, *see infra* Part II, we defer further development of the background facts until we reach the merits of the antitrust claim.

For the nonce, it suffices to say that Euromodas, endeavoring to regain its competitive footing, sued both Clubman and Zanella in the federal district court. It alleged a violation of section 1 of **[**3]** the Sherman Act, *15 U.S.C. § 1*. After pretrial discovery had been completed, all three parties moved for summary judgment. The district court granted the defendants' motion and denied the plaintiff's cross-motion. *Euromodas, Inc. v. Zanella, Ltd., 253 F. Supp. 2d 201 (D.P.R. 2003)*.

The district court's decision comprised three discrete but interdependent rulings. Initially, the court determined that the plaintiff -- Euromodas -- had not complied with local procedural rules. *Id. at 203-04*. This determination shaped the court's conception of which parts of the record could be considered on summary judgment. Viewing the case through that prism, the court ruled that the plaintiff had not adduced sufficient evidence of concerted action to fix prices and, thus, had failed to make out an antitrust violation. *Id. at 205-06*. Along the way, the court denied the plaintiff's cross-motion for summary judgment on the ground that it did not comply with the court's local rules. *Id. at 204 n.5* (discussing D.P.R.R. 311.12).

This appeal followed. In it, the plaintiff (i) challenges the district court's resolution **[**4]** of the procedural issue; (ii) assigns error to the court's entry of summary judgment for the defendants; and (iii) protests the denial of its cross-motion for brevis disposition.

II

Our logical starting point is the procedural issue, for its resolution will determine what facts properly comprised the summary judgment record and, thus, what facts the lower court should have considered in deciding whether to grant summary judgment. This inquiry centers on D.P.R.R. 311.12. [1] ***HN1***[] The District of Puerto Rico promulgated that rule to aid in the task of identifying genuine issues of material fact that might affect the entry of summary judgment. *See*, *e.g.*, *Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000)*.

The local rule imposes bilateral obligations. **[**5]** ***HN2***[] It requires that a party who moves for summary judgment submit, in support of the motion, "a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record." D.P.R.R. 311.12. In turn, the rule requires a party opposing a summary judgment motion to include with its opposition a short and concise statement "of the material facts as to which it is contended that there exists a genuine issue to be tried," with proper record citations. *Id.* The penalty for failure is potentially harsh; the facts delineated in the movant's statement will be "deemed to be admitted unless controverted by the statement required to be served by the opposing party." *Id.*

Rules such as Local Rule 311.12 were adopted pursuant to a suggestion of this court, *see* *Stepanischen v. Merchants Despatch* ***[*15]*** *Transp. Corp., 722 F.2d 922, 931-32 (1st Cir. 1983)*, and we consistently have upheld their use, *see*, *e.g.*, *Cosme-Rosado v. Serrano-Rodriguez, 360 F.3d 42, 45 (1st Cir. 2004)*; *Ruiz Rivera, 209 F.3d at 28.* **[**6]** Here, however, the issue is not the enforceability of the local rule but, rather, how it applies to oppositions to summary judgment motions. Specifically, the plaintiff questions the way in which the district court, based on its reading of the local rule, restricted its consideration of the plaintiff's evidence in analyzing the defendants' summary judgment motion. [2] In an effort to put matters into perspective, we explain what transpired.

Zanella **[**7]** moved for summary judgment in full compliance with Local Rule 311.12 (Clubman joined Zanella's motion and we need not discuss separately its quest for summary judgment). When the plaintiff served its opposition, it omitted a separate statement listing controverted material facts. The district court perceived this omission as a "blatant disregard" of Local Rule 311.12, proceeded to "deem as admitted the relevant uncontested facts submitted by Zanella with its motion for summary judgment," and limited the summary judgment record to those facts. *Euromodas, 253 F. Supp. 2d at 203-04*.

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[1] The District of Puerto Rico revised, reorganized, and renumbered its compendium of local rules in September of 2003. Because the summary judgment motions in this case were adjudicated prior thereto, we refer throughout to the earlier version.

[2] To be sure, the district court also denied the plaintiff's motion for summary judgment on the basis of the plaintiff's supposed noncompliance, qua movant, with the requirements of D.P.R.R. 311.12. *See* *Euromodas, 253 F. Supp. 2d at 204 n.5* (refusing to "scavenge through the record to pinpoint the facts that would support Euromodas's arguments"). But as our subsequent discussion of the merits reveals, *see infra* Part III, any error in that regard was harmless. Accordingly, we discuss only the district court's treatment of the plaintiff's opposition.

The plaintiff asserts that this approach constituted error. It tells us that it complied with the imperatives of Local Rule 311.12 notwithstanding its failure to formulate a separate statement of controverted material facts. Therefore, its thesis runs, the district court, while entitled to deem the defendants' assertions of fact admitted, also should have taken the facts identified in the plaintiff's opposition fully into account.

We conclude that the district court erred in its interpretation of the local rule. The court found Euromodas to have violated Local Rule 311.12 merely because **[**8]** it did not include a separate statement of disputed facts with its opposition. But ***HN3***[] Local Rule 311.12, as written, does not always require that a party opposing summary judgment put forth its version of the facts in a separate statement. The rule requires only that the nonmovant identify any facts *in the movant's statement* with which it takes issue. *See* D.P.R.R. 311.12. In other words, an opposing party is required to file such a statement only if (and to the extent that) it wishes to register and preserve a potential dispute as to one or more of the facts advanced by the movant.

In this instance, Euromodas was content to accept the facts proffered by the defendants, so the district court appropriately treated those facts as admitted. The plaintiff, however, regarded those facts as incomplete, and it desired to augment them with further facts -- facts that it viewed as undisputed and which were neither inconsistent with nor contradictory to those contained in the movants' Local Rule 311.12 statement. The local rule, as it existed at that time, did not require those *additional* facts to be presented in a particular form. [3] Because those additional facts were supported by **[**9]** the record, the **[*16]** lower court should have considered them (while at the same time accepting the facts set forth in the movants' Local Rule 311.12 statement). Its failure to do so constituted error.

III

This error does not necessarily require reversal. After all, ***HN4***[] we afford de novo review to orders granting or denying summary judgment. *Podiatrist Ass'n, Inc. v. La Cruz Azul de P.R., Inc., 332 F.3d 6, 13 (1st Cir. 2003)*; *Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990)*. And, moreover, we are not wedded to the trial court's reasoning, but, rather, may sustain its decree on any ground made manifest in the record. *Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999)*. Consequently, we undertake an examination of the full summary judgment record **[**10]** in order to assess the supportability of the lower court's order. *Accord Rathbun v. AutoZone, Inc., 361 F.3d 62, 70-80 (1st Cir. 2004)* (proceeding in this manner).

A

HN5[] Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. There are two prerequisites for a successful section 1 claim. First, there must be concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Podiatrist Ass'n, 332 F.3d at 12*. Second, the actors' agreement must involve either restrictions that are per se illegal or restraints of trade that fail scrutiny under the rule of reason. *Monsanto, 465 U.S. at 761*; *Podiatrist Ass'n, 332 F.3d at 12*.

In this instance, the plaintiff's case hinges on the interposition of what is alleged to be an illegal vertical restraint. ***HN6***[] A vertical restraint is a restraint of trade involving a combination of persons at different levels of the market structure. *See M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 978 (1st Cir. 1984).* **[**11]** While vertical restraints "may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." *Id.* (quoting *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)* (en banc)). Thus, vertical restraints often have both pro-competitive and anti-competitive effects. For this reason, such restraints generally are not deemed per se illegal, but, rather, are tested under a rule of reason

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[3] The current iteration of this obligation, codified in Local *Rule 56(c)*, is worded somewhat differently. We take no view as to what that language requires. *See supra* note 1.

analysis. *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988).

HN7[] Vertical price-fixing agreements, however, are a special subset of vertical restraints. As such, they qualify for different treatment. A vertical price-fixing agreement that establishes a minimum price normally is regarded as a naked restraint of trade and, thus, as illegal per se. *See* Business Elecs. Corp., 485 U.S. at 724; Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09, 55 L. Ed. 502, 31 S. Ct. 376 (1911); *cf.* State Oil Co. v. Khan, 522 U.S. 3, 22, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997) **[**12]** (holding that a maximum vertical price maintenance scheme is not per se illegal).

Here, the district court concluded that the plaintiff had not adduced enough evidence to sustain a viable section 1 claim under either theory. Euromodas, 253 F. Supp. 2d at 205-06. **HN8**[] We must examine this conclusion in light of the full summary judgment record. *See supra* Part II. In carrying out that task, we remain cognizant **[*17]** that the proper office of summary judgment is to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for a trial. Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 793-94 (1st Cir. 1992). It follows that summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

HN9[] In sifting the evidence, we must array it in the light most hospitable to the party opposing summary judgment (here, the plaintiff), indulging all reasonable **[**13]** inferences in that party's favor. [4] Houlton Citizens' Coalition, 175 F.3d at 184; Garside, 895 F.2d at 48. To avoid summary judgment, the evidence upon which the nonmovant relies to create a genuine issue of material fact must be "significantly probative," not merely colorable. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

In addition to these familiar principles, **HN11**[] a special constraint applies in vertical restraint cases. Antitrust liability is strong medicine (for example, it exposes a defendant to treble damages, *see* 15 U.S.C. § 15), and thus section 1 of the Sherman Act has been authoritatively interpreted **[**14]** to limit the inferences that may be drawn from ambiguous evidence. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). In a vertical restraint case, [5] conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* This means that a section 1 antitrust case predicated upon an alleged vertical restraint can survive summary judgment only if the evidence relied upon by the nonmovant, when viewed through this specially-constructed lens, suffices to show a "bona fide dispute about a fact that has the potential of affecting the outcome of the case under the applicable law." Podiatrist Ass'n, 332 F.3d at 13.

[15]** **HN12**[] To create a trialworthy issue in a vertical restraint case brought pursuant to section 1 of the Sherman Act, a plaintiff must make two showings: concerted action and harm to the competitive process. *See* id. at 12. The plaintiff cannot make either of these showings here.

We need not go beyond the first prong of this two-part test. **HN13**[] To satisfy that requirement, there "must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." Monsanto, 465 U.S. at 764. Phrased another way, there must be "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* (citation and internal quotation marks omitted). This makes perfect sense: section 1 is not

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[4] **HN10**[] The fact that the plaintiff had cross-moved for summary judgment does not alter this methodology. In that circumstance, a reviewing court examines each motion independently, applying the principles articulated above. *See* Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996).

[5] It is abundantly clear that this special constraint -- limiting inferences from ambiguous evidence -- applies in vertical restraint cases. *See, e.g.*, Monsanto, 465 U.S. at 763-64. The proposition may be less clear in horizontal conspiracy contexts, but we need not probe that distinction here.

intended to prohibit entrepreneurial action, and a manufacturer, acting independently, ordinarily has a right to **[*18]** sell (or not to sell) to whichever customer(s) it chooses. *See id. at 761*; *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)*. Thus, absent a showing of concerted action, a *section 1* **[**16]** claim fails as a matter of law.

B

The basic premise of the plaintiff's complaint is that a manufacturer (Zanella) and a dealer (Clubman) conspired to maintain an artificially high retail price for Zanella pants; and that Clubman, to further this scheme, successfully pressured Zanella to stop selling goods to its price-cutting competitor (Euromodas). The question is whether these averments, on the facts of record and under the applicable legal standards, add up to a potential antitrust violation.

As a threshold matter, the plaintiff suggests that we should answer this question in the affirmative because the defendants failed to provide any evidence negating the possibility that they were acting in combination. Appellant's Br. at 32. We reject this resupinate reasoning. ***HN14***[] In an antitrust case, the burden is on the accuser to make at least a prima facie showing of concerted action. *See Monsanto, 465 U.S. at 763*; *Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 911 (4th Cir. 1986)*. Thus, we inquire whether the plaintiff has presented evidence that reasonably tends to prove that the manufacturer and others conspired to achieve an **[**17]** illicit objective. *Monsanto, 465 U.S. at 764*.

We start this phase of our inquiry by rehearsing the facts that were deemed admitted for purposes of summary judgment. *See Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 43-44 (1st Cir. 2001)* (discussing effect of failure to controvert facts contained in movant's statement of material facts not in dispute); *Ruiz Rivera, 209 F.3d at 28* (similar). Both Clubman and the plaintiff sell men's clothing at retail in San Juan. Historically, their wares included Zanella trousers. In mid-1996, Clubman informed Zanella that the plaintiff had sold trousers to a common customer at a sharply discounted price. A face-to-face conversation between officials of Zanella and officials of the plaintiff regarding Clubman's complaints occurred in July of 1996. The next year, Clubman again expressed concern to Zanella about the plaintiff's persistent discounting. Despite Clubman's obvious unhappiness, Zanella continued to supply the plaintiff. Clubman placed no further orders for Zanella pants.

Zanella kept up a dialogue with Clubman during this period of abstinence. At a meeting in New York, held in **[**18]** September of 1997, Zanella informed the plaintiff that Clubman had agreed to create "Zanella corners" in its stores. Although Zanella expressed enthusiasm about this concept, pricing policies were not discussed. In or around April of 1998, however, Zanella told the plaintiff that it would no longer sell to it. Zanella gave no reason for this exclusionary decision. Clubman proceeded to resume the marketing of Zanella trousers and to inaugurate the "Zanella corners."

To these facts we must add the augmentative evidence assembled by the plaintiff. In a deposition, Clubman's chief executive officer (German Ramirez) testified that he had resolved not to handle Zanella pants in the future unless Zanella satisfactorily addressed his concerns about being undersold by the plaintiff. Ramirez discussed this resolve with Zanella's president (Armando DiNatale) and received assurances that Zanella would "take care of" the problem. Ramirez professed neither to know nor to care how Zanella intended to proceed or what action it purposed to take. **[*19]** The plaintiff sees this as "smoking gun" testimony. It asks us to interpret Ramirez's words as showing that Clubman was seeking to have Zanella cut off its **[**19]** (the plaintiff's) supply of Zanella trousers and terminate the preexisting distribution relationship.

The plaintiff also places substantial weight on the testimony of a Zanella vice-president (Thomas Cohan), which corroborates the fact that Clubman threatened to stop buying Zanella pants unless Zanella addressed Clubman's concerns about the plaintiff's pricing practices. Cohan's testimony does not, however, go anywhere near as far as the plaintiff suggests. We have scoured the deposition transcript and find no support for the plaintiff's brazen assertion that Cohan's testimony "confirmed that Zanella and Clubman agreed that Euromodas be terminated in order to allow Clubman to maintain its preferred price of $ 265 [per pair of trousers]." Appellant's Br. at 38.

The plaintiff also relies, to some extent, on DiNatale's deposition testimony. Without question, that testimony shows that Zanella made no bones about its intention to halt trouser sales to the plaintiff. It also supports a clear inference that, when pressed, Zanella opted to do business with the larger retailer (Clubman) rather than to jeopardize that relationship by continuing to deal with the plaintiff. But DiNatale, like **[**20]** Cohan, made no mention of wanting to maintain a particular price or price level, and the deposition, taken as a whole, does not evince concerted action.

These facts leave room for many inferences, which -- to the extent that they are reasonable -- ordinarily would be taken in favor of the plaintiff. *See* *Podiatrist Ass'n, 332 F.3d at 13*. ***HN15***[] In Sherman Act cases, however, the permissible inferences that can be drawn from ambiguous evidence are quite limited. *Matsushita Elec., 475 U.S. at 588*. If the evidence shows conduct that is as consistent with lawful competition as it is with an illicit conspiracy, it cannot be said to support an inference of concerted action. *Id.*

So it is here. The record, read as favorably to the plaintiff as ***antitrust law*** and summary judgment practice permit, shows that Clubman complained bitterly to Zanella about the plaintiff's low prices, and that Zanella reassured Clubman that it would, in some unarticulated manner, "take care of" the situation (i.e., the price-cutting issue). There is nothing, however, that reflects a commitment on Zanella's part to a minimum retail price maintenance scheme or that suggests that Zanella's **[**21]** reassurances were anything more than an acknowledgment of its unilateral decision to stop supplying the plaintiff. ***HN16***[] The raw fact that a distributor's actions are an attempt to pressure a manufacturer into terminating a distribution relationship with a price-cutting competitor is not enough either to show concerted action or to defeat summary judgment. *See* *Garment Dist., 799 F.2d at 911*.

This case is not unique. Other courts consentiently have held that ***HN17***[] the fact that a dealer was terminated in response to complaints from competing dealers is insufficient, without more, to survive a motion for summary judgment. *See*, *e.g.*, *Winn v. Edna Hibel Corp., 858 F.2d 1517, 1520 (11th Cir. 1988)*; *Garment Dist., 799 F.2d at 908*; *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923-24 (2d Cir. 1985)*; *see also* *Monsanto, 465 U.S. at 763-64* (explaining that "something more than evidence of complaints is needed"). The policy justification for this rule is powerful. To allow "the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to **[**22]** treble damage liability would both inhibit management's **[*20]** exercise of its independent business judgment and emasculate the terms of the statute." *Monsanto, 465 U.S. at 764* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3d Cir. 1980))*. Thus, even were we to assume for argument's sake that Zanella's termination of its distribution relationship with the plaintiff was in direct response to Clubman's withdrawal of its patronage, summary judgment would nonetheless be warranted. *See* *Winn, 858 F.2d at 1520* (stating that "a manufacturer may legitimately respond to pressure from a dealer in order to avoid losing that dealer's business").

The plaintiff strives to deflect the force of this reasoning in two ways: (i) by seeking refuge in a pair of Eleventh Circuit cases, and (ii) by pointing to the fact that Zanella never advanced any alternative explanation for severing ties with the plaintiff. Neither foray succeeds.

The Eleventh Circuit's decision in *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987)*, provides no shelter for the plaintiff. Although the **[**23]** court of appeals vacated summary judgment in favor of the manufacturer-defendant in that antitrust case, the evidence was appreciably different. There was proof that the manufacturer terminated a price-cutter, informed the complaining distributor of the termination, and requested that it advise the manufacturer if it learned about any further price-cutters. *Id. at 1535*. The complaining distributor responded by thanking the manufacturer in a way that the court believed reasonably could be viewed as an agreement to report future violations. *See id.* Last -- but far from least -- the surviving distributorship agreement itself contained language that reasonably could be read as fixing the resale price of the goods. *Id. at 1536*. Given these idiosyncratic facts, the Eleventh Circuit's decision that the case presented a trialworthy issue, *id. at 1536-37*, is unhelpful here.

The plaintiff's reliance on *City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998)*, is equally mislaid. In that antitrust case, the court overturned the entry of summary judgment in favor of one of the defendants because its former **[**24]** chief executive had admitted an involvement "in fixing chlorine prices in the [relevant market area]." *Id. at 557*; *see also id. at 568*. The court overturned the entry of summary judgment as to two other defendants based on its determination that certain expert testimony and data precluded summary judgment. *Id. at 569*. The record before us contains neither an analogous admission of illegal activity nor any comparable expert testimony or data. Accordingly, that decision too is inapposite.

The plaintiff's second foray is no more rewarding. It is true that alternative explanations sometimes are cited as a basis for finding the existence of substantial evidence supporting a plausible and legitimate reason for the conduct of antitrust defendants. *See*, *e.g.*, *Burlington Coat, 769 F.2d at 923-24*. There is no flat rule, however, that requires a defendant to proffer an alternative explanation. In some instances, the facts speak for themselves.

This is such a case. The most natural inference from the evidence -- that the manufacturer took sides as between two dealers and chose the more lucrative of them -- makes manifest **[**25]** a legitimate, independent reason for terminating the less desirable distribution relationship. *See Garment Dist., 799 F.2d at 910-11*. Any other inference necessarily would require building an antitrust claim on ambiguous evidence -- a practice that the Supreme Court has forbidden. *See Matsushita, 475 U.S. at 588* (warning that conduct that is equally consistent with permissible **[*21]** competition and with illegal activity cannot "support an inference of antitrust conspiracy"). Because the plaintiff failed to provide any significantly probative evidence tending to negate this legitimate business reason, the lack of an alternative explanation is irrelevant.

That ends this aspect of the matter. The plaintiff has charged price-fixing, impure and simple -- and the utter absence of meaningful evidence of concerted action dooms the plaintiff's case.

C

Although we need go no further, we add a coda. Even were we to find significantly probative evidence of concerted action (which we do not), the fabric of the plaintiff's case reveals yet another flaw. For the sake of completeness, we mention this shortcoming.

HN18[] An agreement to terminate a price-cutter to placate **[**26]** another dealer does not constitute a per se violation of *section 1 of the Sherman Act*. *See Business Elecs. Corp., 485 U.S. at 726-27*. To render such an agreement illegal per se, there must be "a further agreement on the price or price levels to be charged by the remaining dealer." *Id. at 726*. Without an agreement as to a specific minimum price or price level, a vertical restraint is unlawful only if it fails a rule of reason analysis. *Id. at 726-27*; *Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n, Inc., 908 F.2d 200, 203 (7th Cir. 1990)*.

There is no evidence here that the defendants ever agreed on either a minimum price or price level. Thus, the plaintiff's claim of per se illegality founders. *See Business Elecs. Corp., 485 U.S. at 726-27*; *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1403 (7th Cir. 1992)*; *see also* Hovenkamp, *supra* § 11.1, at 441.

This leaves the rule of reason. ***HN19***[] In a vertical restraint case, liability under that approach requires a showing of harm to the competitive process. *See Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9, 10 (1st Cir. 1987)* **[**27]** (clarifying that the term unreasonable anticompetitive conduct, when used in an antitrust context, necessarily refers "to actions that harm the competitive process").

Here, the plaintiff has made no showing that the putative restraint had an adverse impact on the competitive process. Although it tendered evidence of its own losses, an injury to an individual competitor is not the legal equivalent of an injury to competition in the relevant market. *Id.* Without any evidence that the defendants' actions were inimical to the competitive process, the plaintiff -- who had the burden of proof on this point, *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* -- cannot make out at a trialworthy claim under *section 1 of the Sherman Act*.

IV

We summarize succinctly. [6] Although the district court took too narrow a glimpse of the summary judgment record, de novo review of the record as a whole persuades us that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter **[*22]** of law. There is no rational view of the proffered facts that can support the imposition of antitrust liability. **[**28]**

***Affirmed*.**

End of Document

[6] Because we have upheld the entry of summary judgment for the defendants, it would be an empty exercise to probe the circumstances surrounding the denial of the plaintiff's cross-motion for summary judgment. We caution, however, that we express no opinion on the district court's reasoning in that regard. *See Euromodas, 253 F. Supp. 2d at 204 n.5*.

Freeman Indus. L.L.C. v. Eastman Chem. Co.

Court of Appeals of Tennessee, At Knoxville

December 2, 2003, Session ; May 18, 2004, Filed

No. E2003-00527-COA-R9-CV

Reporter

2004 Tenn. App. LEXIS 321 *; 2004-1 Trade Cas. (CCH) P74,412

FREEMAN INDUSTRIES LLC v. EASTMAN CHEMICAL COMPANY, ET AL.

Subsequent History: [*1]

Appeal granted by *Freeman Indus., LLC v. Eastman Chem. Co., 2004 Tenn. LEXIS 857 (Tenn., Oct. 4, 2004)*

Affirmed in part and reversed in part by, Remanded by *Freeman Indus. v. Eastman Chem. Co., 2005 Tenn. LEXIS 668 (Tenn., Aug. 25, 2005)*

Prior History: *Tenn. R. App. P. 9* Interlocutory Appeal by Permission; Judgment of the Law Court Affirmed, as Modified; Case Remanded. Interlocutory Appeal by Permission from the Law Court for Sullivan County. No. C34355-L. Richard E. Ladd, Chancellor.

Disposition: Affirmed, as Modified; Case Remanded.

Core Terms

purchasers, trial court, commerce, sorbates, indirect, transactions, unjust enrichment, consumers, products, class certification, defendants', interstate commerce, anti trust law, entities, food, putative class member, class action, instant case, out-of-state, contracts, parties, member of the class, antitrust statute, importation, intrastate, summary judgment motion, question of law, predominantly, residents, software

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *Tenn. Code Ann. § 47-25-101* (2001).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

See Tenn. Code Ann. § 47-25-102 (2001).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

See Tenn. Code Ann. § 47-25-106 (2001).

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN4[] Standards of Review, De Novo Review

The motion alleging a failure of a complaint to state a claim upon which relief can be granted, pursuant to Tenn. R. Civ. P. 12.02(6), challenges the legal sufficiency of a complaint. An appellate court must construe the complaint liberally, presume all factual allegations to be true and give the plaintiff the benefit of all reasonable inferences. A complaint should be dismissed only if it appears that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. The court's review is de novo with no presumption of correctness attaching to the trial court's judgment because the question before the appellate court is one of law.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN5[] Monopolies & Monopolization, Attempts to Monopolize

Section 1 of the Sherman Act makes contracts, combinations, and conspiracies in restraint of trade or commerce among the several states illegal. 15 U.S.C.S. § 1. Similarly, § 2 of the Act prohibits monopolies and conspiracies to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2. Consequently, there is an interstate commerce jurisdictional requirement under the Act. Just as actions under federal antitrust statutes can proceed only if there is a jurisdictional basis in interstate commerce, a plaintiff seeking relief under state antitrust statutes must show that those statutes apply, whether such a showing is required to establish subject matter jurisdiction or simply to state a claim.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Constitutional Law > Supremacy Clause > General Overview

Transportation Law > Intrastate Commerce

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

As a general rule, federal ***antitrust law*** does not preempt state ***antitrust law***. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. And on several prior occasions, courts have recognized that the federal antitrust laws do not pre-empt state law. The interstate versus intrastate commerce issue is only raised as a defense where it is arguable that a particular state has limited the scope of its antitrust statute by imposing a greater connection with or impact upon commerce within the state than is the general constitutionally required standard. Apparently, only a few states fall in that category; Tennessee is one. Thus, it is not federal law that determines whether Tennessee has jurisdiction under the Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.* (2001). Rather, it is state law that determines what degree of connection with or impact upon commerce within the state must exist.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

Tennessee's antitrust statute, the Tennessee Trade Practices Act (TTPA), *Tenn. Code Ann. § 47-25-101 et seq.* (2001), is not limited to anticompetitive conduct occurring within the boundaries of the state. It is not limited to transactions between the parties that are predominantly intrastate in character. Neither a transaction-based nor a locality-of-illegal-conduct based test is appropriate for determining the scope of the TTPA. Instead, the proper test must relate to the potential effect or impact on commerce within Tennessee of the illegal acts condemned by the statute because such a standard is directly related to the purpose of the TTPA. The "predominantly intrastate" test has been rejected, finding that the legislature did not intend to limit the application of the statute geographically other than the effect on competition and prices in Tennessee. Instead, the TTPA applies to illegal conduct that substantially affects commerce within Tennessee. Indirect purchasers are "persons" who may bring an action for an injury caused by a violation of the TTPA.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

Sherwood is authority for the proposition that indirect purchasers may recover under the Tennessee Trade Practices Act (TTPA), *Tenn. Code Ann. § 47-25-101 et seq.* (2001). Sherwood does not extend the purview of the TTPA to cover those indirect purchasers who are not Tennessee consumers, i.e., those consumers who did not consume or purchase their products in transactions within the state of Tennessee. The TTPA applies to anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers in Tennessee.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] Regulated Practices, Trade Practices & Unfair Competition

The sole object and purpose of the enactment of the Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.* (2001), was to correct and prohibit abuses of trade within the state.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN10[] Regulated Practices, Trade Practices & Unfair Competition

A claimant cannot rely upon the claims of other unidentified individuals and entities to establish subject matter jurisdiction for itself under the Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.* (2001).

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN11[] Standards of Review, Abuse of Discretion

The decision whether to grant or deny a motion for class certification rests within the sound discretion of a trial court. Accordingly, an appellate court will not reverse a trial court's denial of class certification unless the party seeking certification has demonstrated an abuse of that discretion.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Evidence > Burdens of Proof > General Overview

HN12[] Class Actions, Prerequisites for Class Action

A party seeking class certification has the burden of proving that the prerequisites set forth in Tenn. R. Civ. P. 23.01 have been satisfied.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN13[] Parties, Joinder of Parties

See Tenn. R. Civ. P. 23.01.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN14[] **Class Actions, Prerequisites for Class Action**

For class certification, in addition to compliance with the prerequisites of Tenn. R. Civ. P. 23.01, a party must comply with one of the three requirements found in Tenn. R. Civ. P. 23.02.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN15[] **Prerequisites for Class Action, Predominance**

See Tenn. R. Civ. P. 23.02(3).

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN16[] **Appellate Review, Standards of Review**

Since summary judgment presents a pure question of law, an appellate court's review is de novo with no presumption of correctness as to the trial court's judgment.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > General Overview

HN17[] **Types of Contracts, Quasi Contracts**

As the Tennessee Supreme Court has pointed out, unjust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist. Courts will impose a contractual obligation under an unjust enrichment theory when: (1) there is no contract between the parties or a contract has become unenforceable or invalid; and (2) the defendant will be unjustly enriched absent a quasi-contractual obligation.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Contracts Law > Remedies > Equitable Relief > General Overview

HN18[] **Justiciability, Exhaustion of Remedies**

Before a party can recover under an unjust enrichment theory, the party seeking to recover must have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN19[] **Choice of Law, Significant Relationships**

Tennessee has adopted the choice of law approach that the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN20[] **Types of Contracts, Quasi Contracts**

The Tennessee Supreme Court has never required that a plaintiff confer a direct benefit on a defendant before proceeding with its claim for unjust enrichment.

Counsel: John S. Bingham, Kingsport, Tennessee, for the appellant, Freeman Industries LLC.

William T. Gamble, Kingsport, Tennessee, and Thomas Demitrack, Cleveland, Ohio, for the appellee, Eastman Chemical Company.

S. Morris Hadden, **[*2]** Kingsport, Tennessee, for the appellees, Hoechst Aktiengesellschaft; Nutrinova Nutrition Specialties & Food Ingredients, GmbH; Daicel Chemical Industries, Ltd.; and Nippon Gohsei Industries, Ltd (Michael D. Blechman and Jennifer B. Patterson, New York, New York, of counsel for the appellees, Hoechst Aktiengesellschaft and Nutrinova Nutrition Specialties & Food Ingredients, GmbH; Herbert S. Washer and Jennifer Wendy, New York, New York, of counsel for the appellee, Daicel Chemical Industries, Ltd.; Eugene Illovsky and Peter Stern, Walnut Creek, California, of counsel for the appellee, Nippon Gohsei Industries, Ltd.).

Judges: CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., E.S., and GARY R. WADE, SP. J., joined.

Opinion by: CHARLES D. SUSANO, JR.

Opinion

In this antitrust case, Freeman Industries LLC ("Freeman") sued Eastman Chemical Company ("Eastman") and others for damages, alleging that the defendants engaged in the illegal price-fixing of sorbates, a generic label for several food preservatives. Freeman, who purchased products containing sorbates from entities in New York State, brought suit **[*3]** under the Tennessee Trade Practices Act ("the TTPA") and pursuant to a theory of unjust enrichment. In addition, Freeman sought class certification for all other individuals and entities similarly situated in thirty-five states, including New York, but, significantly, not including the state of Tennessee. Following a hearing on the defendants' motion to dismiss, the trial court granted the motion with respect to the TTPA claim, holding that the TTPA does not apply to indirect purchasers or out-of-state transactions. At a subsequent hearing, the trial court denied Freeman's motion for class certification; and also denied the defendants' motion for summary judgment on Freeman's unjust enrichment claim. Both sides appeal. Because we find that the trial court reached a conclusion that is contrary to the decision of this court in the case of ***Sherwood v. Microsoft Corp****., 2003 Tenn. App. LEXIS 539, No. M2000-01850-COA-R9-CV, 2003 WL 21780975 (Tenn. Ct. App. M.S., filed July 31, 2003)* (Tenn. R. App. P. 11 application pending) - which decision was released after the trial court rendered its decision - we modify the trial court's judgment by deleting that **[*4]** portion of the court's decision holding the TTPA does not apply to indirect purchasers. In all other respects, we affirm the trial court's judgment.

I.

Freeman is a New York corporation, whose principal place of business is in Tuckahoe, New York. It is an end-user of food products such as cheese, bagels, and baked goods that contain minute amounts of food preservatives generically known as sorbates. Freeman purchases its food products at supermarkets in New York State.

In its business, Freeman produces and sells products such as vitamin A and D concentrates to, among others, food processors. In connection with its business, Freeman makes direct purchases of sorbates. However, Freeman does not premise its right of recovery in the instant case on such direct purchases; rather it relies upon its indirect purchases from supermarkets in its role as an end-user.

Eastman is a Delaware corporation with its principal place of business in Kingsport. The other defendants are two German corporations and two Japanese corporations. All of the defendants are producers of sorbates. They sell sorbates to distributors or directly to food manufacturers.

Between 1998 and 2001, all of the **[*5]** defendants pled guilty to fixing the price of sorbates, in violation of *Section 1 of the Sherman Antitrust Act*. [1] Subsequent to the entry of their guilty pleas, the defendants settled with a nationwide class of direct purchasers under federal law. In addition, the defendants settled lawsuits filed by indirect purchasers in fourteen states, *including Tennessee*, and the District of Columbia. [2]

On January 31, 2002, Freeman filed this class action lawsuit on behalf of itself and all similarily-situated individuals and entities in thirty-five other states, [3] who, after January 1, 1979, purchased products containing sorbates from entities other than the defendants. Such purchasers are referred to as "indirect purchasers" because they do not purchase sorbates **[*6]** directly from the defendants, but rather purchase products containing sorbates from others who are lower down in the distribution chain. Freeman premised its lawsuit on dual theories: (1) that the defendants violated the TTPA, codified at *Tenn. Code Ann. § 47-25-101, et seq.*, by selling sorbates from Tennessee into the states where Freeman and the putative class members make or made their purchases from others; and (2) that the defendants were unjustly enriched by virtue of the fact that Freeman and the putative class members are or were forced to pay inflated prices for sorbates.

The defendants filed a motion to dismiss Freeman's **[*7]** complaint. Following a hearing, the trial court granted the defendant's motion with respect to the TTPA, concluding that the act does not apply to transactions outside of Tennessee and does not apply to indirect purchasers.

The trial court then held a second hearing, this time with respect to Freeman's motion for class certification and the defendants' motion for summary judgment on Freeman's unjust enrichment claim. The trial court refused to certify the class, holding that Freeman could not satisfy some of the requisite elements under Tenn. R. Civ. P. 23. The court also determined that the defendants were not entitled to summary judgment on Freeman's unjust enrichment claim. This appeal followed.

II.

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[1] *15 U.S.C. § 1 (1997)*.

[2] The fourteen states are as follows: Arizona, California, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, North Dakota, South Dakota, *Tennessee*, West Virginia, and Wisconsin.

[3] The states involved are Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

The TTPA provides, in pertinent part, as follows:

> *Tenn. Code Ann. § 47-25-101 (2001)*
>
> **HN1**[] All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported *into this state*, or in the manufacture or sale of articles of *domestic* growth or of *domestic* raw material, and all arrangements, contracts, agreements, **[*8]** trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.
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> *Tenn. Code Ann. § 47-25-102 (2001)*
>
> **HN2**[] Any arrangements, contracts, and agreements that may be made by any corporation or person, or by and between its agents and subagents, to sell and market its products and articles, manufactured *in this state*, or imported *into this state*, to any producer or consumer at prices reduced below the cost of production or importation *into this state*, including the cost of marketing, and a reasonable and just marginal profit, to cover wages or management, and necessary incidentals, as is observed in the usual course of general business, and the continuance of such practice under such contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or any other arrangements, contracts, or agreements, by and between its agents and subagents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported **[*9]** *into the state*, and which amount to a subterfuge for the purpose of obtaining the same advantage and purposes are declared to be against public policy, unlawful, and void.
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> *Tenn. Code Ann. § 47-25-106 (2001)*
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> **HN3**[] Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

(Emphasis added).

III.

A.

Both parties raise issues on appeal. Freeman argues that the trial court erred in dismissing its TTPA claim because, according to Freeman, the TTPA applies to indirect purchasers who are out-of-state residents or entities. Further, Freeman contends that the trial court abused its discretion in denying the motion for class certification with respect to Freeman's claim of unjust enrichment. On the other hand, the defendants argue that the trial court erred in refusing to grant them summary judgment on Freeman's unjust enrichment **[*10]** claim. We will address these issues in turn.

B.

As previously stated, the trial court granted the defendants' motion to dismiss Freeman's TTPA claim. The defendants' motion was premised on **HN4**[] the failure of the complaint to state a claim upon which relief can be granted. *See Tenn. R. Civ. P. 12.02(6)*. "Such a motion challenges the legal sufficiency of the complaint." ***Trau-Med of Am., Inc. v. Allstate Ins. Co.**, 71 S.W.3d 691, 696 (Tenn. 2002)*. Our role on this appeal is clear. We "must construe the complaint liberally, presume all factual allegations to be true and give the plaintiff the benefit of all reasonable inferences." ***Id.*** A complaint should be dismissed only if "it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief." ***Cook v. Spinnaker's of Rivergate, Inc.**, 878 S.W.2d 934, 938 (Tenn. 1994)*. Our review is *de novo* with no presumption of correctness attaching to the trial court's judgment, ***Trau-Med**, 71 S.W.3d at 696-97,* because the question before us is one of law.

Freeman and the members of the putative class, by the limiting **[*11]** language of the complaint, are out-of-state residents and entities who purchased products containing sorbates in states other than Tennessee; in other words, Freeman and the others purchased products that contained sorbates from retailers or wholesalers, rather than purchasing sorbates directly from the defendants who originally produced the food preservatives. The sole connection of Freeman's claim to the state of Tennessee is the allegation that Eastman - who admittedly engaged in illegal conduct proscribed by the TTPA - engaged in that conduct in, and shipped sorbates from, Tennessee, into the states in which Freeman and the putative class members reside and where they engaged in the transactions about which they complain. Nevertheless, Freeman contends that the TTPA authorizes a recovery for indirect purchasers, such as itself and the members of the putative class, when the transactions occurred out-of-state, provided the defendants' misconduct "substantially affects" Tennessee commerce. Freeman asserts that the "defendants' price-fixing agreements were hatched in Tennessee" and that these agreements "substantially affected commerce [in Tennessee] because all sorbates sold inside **[*12]** and outside Tennessee were tainted" by the illegal agreements. In advancing this position, Freeman relies primarily upon the recent opinion of this court in the case of ***Sherwood v. Microsoft Corp.****, 2003 Tenn. App. LEXIS 539, No. M2000-01850-COA-R9-CV, 2003 WL 21780975 (Tenn. Ct. App. M.S., filed July 31, 2003)* (Tenn. R. App. P. 11 application pending). We agree that the ***Sherwood*** opinion is dispositive with respect to the TTPA claim asserted in Freeman's complaint. Because we find the ***Sherwood*** opinion, authored by Judge Patricia J. Cottrell, to be an excellent and exhaustive study of the evolution of ***antitrust law*** in this state and a correct interpretation of the TTPA, we will rely on ***Sherwood*** extensively in this opinion.

The plaintiffs in ***Sherwood*** were a class of *Tennessee* consumers who purchased - *in Tennessee* - Microsoft software. *2003 Tenn. App. LEXIS 539, [WL] at *1*. The plaintiffs alleged that Microsoft had violated the TTPA by "engaging in conduct that eliminated or retarded the development of new software products that could support or become alternative platforms to Microsoft's **[*13]** operating systems" and that the price of the software "was higher than it would have been in a competitive market." ***Id.*** The trial court found that the plaintiffs, indirect purchasers, had a cause of action under the TTPA. *2003 Tenn. App. LEXIS 539, [WL] at *2*.

Before addressing whether the TTPA applies to indirect purchasers, Judge Cottrell examined the evolution of both federal and state ***antitrust law***:

> *Section 1 of the Sherman Act* ***HN5***[] makes contracts, combinations, and conspiracies "in restraint of trade or commerce among the several States" illegal. *15 U.S.C. § 1*. Similarly, *Section 2 of the Act* prohibits monopolies and conspiracies to monopolize "any part of the trade or commerce among the several States." *15 U.S.C. § 2*. Consequently, there is an interstate commerce jurisdictional requirement under the Act. ***Summit Health, Ltd. v. Pinhas****, 500 U.S. 322, 111 S. Ct. 1842, [114 L. Ed. 2d 366] (1991)*.
> * * *
>
> Just as actions under federal antitrust statutes can proceed only if there is a jurisdictional basis in interstate commerce, a plaintiff seeking relief under state antitrust statutes **[*14]** must show that those statutes apply, whether such a showing is required to establish subject matter jurisdiction or simply to state a claim.
> * * *
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> ***HN6***[] As a general rule, federal ***antitrust law*** does not preempt state ***antitrust law***. "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law." ***Cal. v. ARC Am. Corp.****, 490 U.S. 93, 101-102, 109 S. Ct. 1661, 1666, 104 L. Ed. 2d 86 (1989)*.
> * * *
>
> The interstate versus intrastate commerce issue is only raised as a defense where it is arguable that a particular state has limited the scope of its antitrust statute by imposing a greater connection with or impact upon commerce within the state than is the general constitutionally required standard. Apparently, only a few states fall in that category; *Tennessee is one*.
> * * *

> Thus, it is not federal law that determines whether Tennessee has jurisdiction under the TTPA. . . . Rather, it is state law that determines what degree of connection with or impact upon commerce within the state must exist. **[*15]**

***Sherwood**, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *5-*9* (emphasis added).

The court then discussed the few Tennessee cases that have addressed the reach of the TTPA, beginning with ***Standard Oil Co. v. State**, 117 Tenn. 618, 100 S.W. 705 (1907)*. The defendants in ***Standard Oil*** were found guilty of conspiring to lessen the competition of coal oil sales in Tennessee, in violation of the TTPA. [4] ***Id.** at 706*. The defendants appealed, arguing that the antitrust statute was an unconstitutional attempt to regulate interstate commerce. ***Id.** at 709*. Specifically, the defendants contended that the statute's application to transactions involving "the importation of articles of commerce from other states" into Tennessee was a regulation of interstate commerce, which violated the United States Constitution. *See* *U.S. Const. art. I, § 8*. The Supreme Court disagreed, finding that the TTPA, "when properly construed, does not apply to interstate commerce." **[*16]** ***Standard Oil**, 100 S.W. at 709*. The Court went on to identify the sole purpose of the TTPA as "correcting and prohibiting abuses of trade *within the state*." ***Id.*** (emphasis added).

> The wrongs to trade which were intended to be corrected and punished were those being perpetrated against commerce *within the state*, which Congress could not reach, and for which there was then no efficient remedy.

***Id.** at 710* (emphasis added).

The Court of Appeals first addressed the present-day version of the TTPA in ***Lynch Display Corp. v. Nat'l Souvenir Ctr., Inc.**, 640 S.W.2d 837 (Tenn. Ct. App. 1982)*. Lynch was a Maryland corporation that agreed to lease wax figures to HRI, a Tennessee corporation **[*17]** that was operating a wax museum. ***Id.** at 839*. The lease contained a requirement that HRI enter into a franchising agreement with a District of Columbia corporation, NHM. ***Id.*** HRI subsequently stopped making payments to NHM under the franchise agreement. ***Id***. HRI then filed suit in federal court for a violation of federal ***antitrust law***. ***Id.*** Lynch filed suit in state court; HRI filed a counterclaim alleging that both the original lease agreement and the franchise agreement "were forced on HRI because of the monopoly position of Lynch," resulting in void agreements under the Tennessee antitrust statute. ***Id.*** This court, in agreeing with the trial court, found that the transactions of the parties exclusively involved interstate commerce, which did not trigger the state antitrust act. ***Id.** at 839, 840*. We opined that "the Tennessee ***antitrust law*** applies to transactions which are *predominantly* intrastate in character." ***Id.** at 840* (emphasis in original).

More recently, we addressed the TTPA in **[*18]** ***Blake v. Abbott Labs., Inc.**, 1996 Tenn. App. LEXIS 184, No.03A01-9509-CV-00307, 1996 WL 134947 (Tenn. Ct. App. E.S., filed March 27, 1996)*. The plaintiffs in ***Blake*** were Tennessee consumers who purchased infant formula in Tennessee. *1996 Tenn. App. LEXIS 184, [WL] at *1*. They sued the defendant, an out-of-state company, for "grossly overcharging" the plaintiffs for the formula. ***Id.*** This court, in reaffirming the "predominantly intrastate" test set forth in ***Lynch***, determined that there were insufficient facts to make a determination as to whether the transactions involved in the case predominantly affected interstate commerce rather than intrastate commerce. *1996 Tenn. App. LEXIS 184, [WL] at *5*. Consequently, the court held that the case should not have dismissed under Tenn. R. Civ. P. 12. ***Id.***

After further analyzing the TTPA as interpreted by courts in other states, the ***Sherwood*** court held as follows:

> We conclude that ***HN7***[] Tennessee's antitrust statute is not limited to anticompetitive conduct occurring within the boundaries of the state. **[*19]** We also conclude that it is not limited to transactions between the parties that are predominantly intrastate in character. We also conclude that neither a transaction-based nor a locality-of-illegal-conduct based test is appropriate for determining the scope of the TTPA. Instead, the proper test must relate to the potential effect or impact on commerce *within this state* of the illegal acts condemned by the statute because such a standard is directly related to the purpose of the Act.

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[4] While the statute as it existed in 1907 was not known as the TTPA, the essential language of the statute has not changed since that time. Therefore, for ease of reference while discussing Standard Oil, we will refer to the statute as the TTPA.

2003 Tenn. App. LEXIS 539, [WL] at *17 (emphasis added). The court went on to reject the "predominantly intrastate" test, holding that "we simply cannot conclude that the legislature intended to limit the application of the statute geographically *other than the effect on competition and prices in Tennessee*." 2003 Tenn. App. LEXIS 539, [WL] at *20 (emphasis added). Instead, the court determined that the TTPA applies "to illegal conduct that substantially affects commerce *within this state*." 2003 Tenn. App. LEXIS 539, [WL] at *21. The court then concluded that the plaintiffs had "sufficiently alleged substantial effects on commerce within **[*20]** this state" in order to sustain a claim under the TTPA. 2003 Tenn. App. LEXIS 539, [WL] at *22. After making the determination that the plaintiffs had passed the "substantial effects" test, the court proceeded to hold that "indirect purchasers are 'persons' who may bring an action for an injury caused by [a] violation of the TTPA." 2003 Tenn. App. LEXIS 539, [WL] at *29.

In the instant case, Freeman argues that it and the putative class members, as indirect purchasers of sorbates, have standing to bring suit against the defendants under the TTPA based upon the holding in ***Sherwood***. While we agree with Freeman that ***HN8***[] ***Sherwood*** is authority for the proposition that *indirect* purchasers may recover under the TTPA, ***Sherwood*** does not extend the purview of the TTPA to cover those indirect purchasers who are not Tennessee consumers, *i.e.*, those consumers who did not consume or purchase their products in transactions within the state of Tennessee. Freeman and the putative class members are all residents of other states, and all of their purchases of products containing sorbates occurred outside of Tennessee. **[*21]** There is simply no caselaw, nor is there an interpretation of the TTPA, that would allow this statutory scheme to be relied upon in such a situation.

Throughout the ***Sherwood*** opinion, there are repeated references to the effects on commerce within the state. The court specifically held that the TTPA applies to "anticompetitive conduct that decreases competition in or increases the price of goods paid by consumers *in Tennessee*," 2003 Tenn. App. LEXIS 539, [WL] at *16 (emphasis added), and concluded that the Tennessee legislature did not intend to "limit the application of the statute geographically *other than the effect on competition and prices in Tennessee*." 2003 Tenn. App. LEXIS 539, [WL] at *20 (emphasis added). The plaintiffs in ***Sherwood*** were Tennessee consumers who purchased Microsoft software in Tennessee. 2003 Tenn. App. LEXIS 539, [WL] at *1. Even though Microsoft was a corporation that clearly engaged in significant interstate commerce, the fact that its software was sold in Tennessee supported a finding that Microsoft's anticompetitive conduct "substantially affected" Tennessee commerce, *i.e.*, **[*22]** transactions in Tennessee involving the ***Sherwood*** plaintiffs. 2003 Tenn. App. LEXIS 539, [WL] at *22.

In the instant case, the indirect purchase of sorbates by out-of-state residents in states other than Tennessee cannot be characterized as *Tennessee* commerce that has been substantially affected by the anticompetitive conduct alleged in this case. The TTPA simply was not designed to protect such out-of-state transactions involving non-Tennessee based consumers. As the Tennessee Supreme Court stated in ***Standard Oil***, ***HN9***[] "the sole object and purpose of the enactment of [the TTPA] was to correct and prohibit abuses of trade *within the state*." ***Id.*** at 709 (emphasis added).

Freeman strenuously argues that the defendants' illegal conduct occurred in Tennessee and that this conduct - in Freeman's words - "substantially affected commerce [in Tennessee] because all sorbates sold inside and outside Tennessee were tainted." It contends that their "substantially affected commerce" allegation is sufficient to place their complaint within the ambit of the TTPA and therefore sufficient to avoid dismissal at this juncture in the proceedings. **[*23]** It is true that "substantially affected commerce" within this state gives rise to a claim *for an appropriate plaintiff* under the TTPA; but *all* of the claims which could have been pursued based on *such* transactions - be they associated with direct or indirect purchasers - *have been settled in earlier litigation*. Freeman's complaint expressly refers to transactions that occurred outside the state of Tennessee. It does not seek to claim *any* transactions in Tennessee and the class sought to be certified is expressly limited to indirect purchasers whose transactions were outside this state. Freeman cannot rely upon the transactions of others, all of whose claims have been settled. As we clearly indicated in ***Sherwood***, ***HN10***[] a claimant cannot rely upon the claims of other unidentified individuals and entities to establish subject matter jurisdiction for itself under the TTPA. *See* ***Sherwood***, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, at *4 ("Plaintiffs argue that since Microsoft has stated that virtually all its sales are through middlemen, there is some possibility that there may have been some direct sales to some unknown Tennesseans. **[*24]** *However, Plaintiffs have made no such claim themselves. The named plaintiffs cannot rely on unidentified persons who may have suffered an injury to state a claim for relief.*") As applied to the facts of the instant case, Freeman cannot rely upon the activity of individuals or entities who were involved in "substantially affected commerce" in Tennessee to obtain subject matter jurisdiction under the TTPA for itself and the members of the putative class when neither Freeman nor any of the putative class members were themselves involved in Tennessee commerce. The issue is *not* whether someone at some time had a transaction *in Tennessee* that was substantially affected by the defendants' illegal conduct; rather, the issue is whether Freeman and the putative class members had such transactions. The answer is clearly no. Simply stated, the allegations of the complaint, construed liberally in favor of Freeman and the putative class, demonstrate a lack of subject matter jurisdiction under the TTPA.

Because ***Sherwood*** - which we would note was decided more than a year after the trial court made its decision in this case - holds that the TTPA *does* apply to indirect purchasers, **[*25]** we modify the trial court's decision holding to the contrary. However, because Freeman cannot show that its purchases of sorbates were in "substantially affected" Tennessee commerce, the trial court's ruling that the TTPA does not apply to Freeman's claim is affirmed.

C.

Freeman next contends that the trial court abused its discretion in refusing to grant Freeman's motion for class certification on the unjust enrichment claim. ***HN11***[] The decision whether to grant or deny a motion for class certification rests within the sound discretion of the trial court. *See* ***Warren v. Scott****, 845 S.W.2d 780, 782 (Tenn. Ct. App. 1992)*. Accordingly, we will not reverse a trial court's denial of class certification unless the party seeking certification has demonstrated an abuse of that discretion. *See* ***Hamilton v. Gibson County Util. Dist.****, 845 S.W.2d 218, 225 (Tenn. Ct. App. 1992)*.

HN12[] The party seeking class certification has the burden of proving that the prerequisites set forth in *Tenn. R. Civ. P. 23.01* have been satisfied. *See* **[*26]** ***Hamilton****, 845 S.W.2d at 224-25*. *Rule 23.01* provides as follows:

> ***HN13***[] One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

HN14[] In addition, the party must comply with one of the three requirements found in *Tenn. R. Civ. P. 23.02*. In the instant case, Freeman relies on *Rule 23.02(3)*, which states as follows:

> ***HN15***[] The court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation **[*27]** concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

In ruling on Freeman's motion for class certification, the trial court found that Freeman had satisfied the *Rule 23.01* requirements of numerous class members and Freeman's ability to fairly and adequately protect the interest of the class, but questioned whether Freeman had sufficiently proven the elements of common questions of law or fact and whether Freeman's claim is typical of the claims of the class, due to the possibility that the law of each of the 35 affected states would apply. However, the court unequivocally found that Freeman had not satisfied the requirements, under 23.02(3), of predominance and superiority. Specifically, the court stated the following:

> But since we're going under 23.02(3) then you have to also have a question of [law or] fact common to the members of the class predominate over any questions affecting only indirect members. Once again, I think

> you're going to get in a quagmire **[*28]** of law and of fact. Certainly, in the ***Meighan*** [***v. U.S. Sprint Communications Co.***] case the Tennessee Supreme Court approved the aggregate damage thing and counsel is absolutely correct on that. But what damage? As I said, you may go through five different consumers before you get the ultimate consumer. Who passed it on and who didn't? If it was not passed on then the ultimate consumer suffered no loss. And there must be proof of loss before the plaintiff can recover. Also, that the class action is superior to other methods. . . . Now it appears that the State of New York is suing and seven other states are suing. It appears to me that the individual state's Attorney Generals are the proper people to represent the people in their individual states and under their individual law rather than Tennessee where there are no Tennessee consumers involved in the class attempting to interpret the laws of the other states. Also, the interest of the members of the class [in] . . . individually control[ling the] prosecution or defense must be satisifed. You have the State of New York representing the people of New York and other states want to control it. On the class action, **[*29]** they would not. Under 23.02(3)(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class. Although most of this litigation by the respective Attorneys General has not been filed, it appears they would. And I think it would be useless to continue on with a class action when that would not [sic] be met soon as these individual suits are filed. C, the desirability or undesirability of [concentrating] the litigation of the classes in this forum. As I said previously, Tennessee only has an interest because one of the defendants was involved in the price fixing. Otherwise, it's the other states that really have the interest and it seems, as I've stated, more appropriate that the Attorney Generals of those states proceed.
>
> And, lastly, the difficulties likely to be encountered in the management of this class action. It's uncontrovertedly got around 200 million ultimate consumers. The difficulty to manage that in notice and resolving the damages, the plaintiffs say they want equity. How can I give equity under the aggregate damage when some states there may not - many of the people may not have suffered any damage?
>
> * * * **[*30]**
>
> Then, of course, you have to use the best practical notice. Now, what would be practical notice? It's pointed out by counsel the - we know who they are and there are methods of notifying them. I suppose it would be proper to consider that the cost of individual notice is not practical when you could go by publication. However, for all of these reasons I feel it's not an appropriate case to certify as a class action.

We find the trial court's approach to the class certification issue to be thorough and well-reasoned. The involvement of the attorneys general and the undesirability of concentrating the class litigation in Tennessee is enough to destroy predominance and superiority. Accordingly, we find no abuse of discretion in the court's decision to deny Freeman's motion for class certification.

D.

The defendants argue that the trial court erred in denying their motion for summary judgment on Freeman's unjust enrichment claim. ***HN16***[] Since summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. **[*31]** ***Gonzales v. Alman Constr. Co.****, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993)*.

HN17[] As the Tennessee Supreme Court has pointed out,

> unjust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist." ***Paschall's, Inc. v. Dozier****, 219 Tenn. 45, 407 S.W.2d 150, 154-55 (1966)*. Courts will impose a contractual obligation under an unjust enrichment theory when: (1) there is no contract between the parties or a contract has become unenforceable or invalid; and (2) the defendant will be unjustly enriched absent a quasi-contractual obligation. ***Id.*** []

Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)*. ***HN18***[] Before a party can recover under an unjust enrichment theory, the party seeking to recover must "have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services." **[*32]** ***Paschall's****, 407 S.W.2d at 155*.

In denying the defendants' motion for summary judgment on the issue of unjust enrichment, the trial court found, with respect to Freeman's individual claim, that the choice of law issue, *i.e.*, whether Tennessee or New York law should apply, was a factual question under the teaching of ***Hataway v. McKinley**, 830 S.W.2d 53 (Tenn. 1992)*. With respect to whether Freeman conferred a direct benefit on the defendants, the trial court stated that it didn't "think [that issue has] been decided by Tennessee so I have to guess what the Supreme Court would do. And my guess is they would not find that there had to be direct contact." The trial court did not address the issue of whether Freeman had exhausted its remedies.

First, with respect to the choice of law issue, ***HN19***[] Tennessee has adopted the approach that "the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation." ***Hataway**, 830 S.W.2d at 59*. The defendants argue that the alleged injury in the instant case occurred in New York, that no other state, especially **[*33]** Tennessee, has a more significant connection to the case, and that New York law should therefore apply. However, we agree with the trial court that the question of whether another state has "a more significant relationship to the litigation" is a question of fact, which, when disputed, as in the instant case, is inappropriate for summary judgment. Second, we agree with the trial court's conclusion that ***HN20***[] the Tennessee Supreme Court has never *required* that a plaintiff confer a direct benefit on a defendant before proceeding with its claim for unjust enrichment. Considering all of the above, we find no error in the trial court's denial of the defendants' motion for summary judgment on Freeman's unjust enrichment claim.

IV.

The judgment of the trial court, as modified, is affirmed. Freeman's individual claim based upon a theory of unjust enrichment is allowed to proceed in a manner consistent with this opinion. Exercising our discretion, we tax the costs on appeal one-half to the appellant, Freeman Industries LLC., and one-half to Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Daicel Chemical Industries, Ltd., and **[*34]** Nippon Gohsei Industries, Ltd.

CHARLES D. SUSANO, JR., JUDGE

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Patel v. Soriano

Superior Court of New Jersey, Appellate Division

January 28, 2004, Argued ; May 18, 2004, Decided

DOCKET NO. A-4239-01T3

Reporter

369 N.J. Super. 192 *; 848 A.2d 803 **; 2004 N.J. Super. LEXIS 177 ***; 2004-1 Trade Cas. (CCH) P74,418

KUMAR R. PATEL, M.D., PLAINTIFF-RESPONDENT/CROSS-APPELLANT, v. JAIME R. SORIANO, M.D., AND IRVINGTON GENERAL HOSPITAL, DEFENDANTS-APPELLANTS/CROSS-RESPONDENTS.

Subsequent History: [*1]** Approved for Publication May 18, 2004.

Certification denied by *Patel v. Soriano, 182 N.J. 141, 861 A.2d 845, 2004 N.J. LEXIS 1317 (N.J., Oct. 12, 2004)*

Certification denied by *Patel v. Soriano, 182 N.J. 141, 861 A.2d 845, 2004 N.J. LEXIS 1318 (N.J., Oct. 12, 2004)*

Prior History: On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-10978-99.

Core Terms

vascular, surgery, privileges, damages, surgeon, patients, cases, trade libel, referrals, credentials, mortality, surgical, percent, defamation, morbidity, cause of action, antitrust, recommendation, tortious interference, Metropolitan, comments, rates, competitors, practices, studies, supervision, references, staff, restraint of trade, antitrust claim

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN1[] **Regulated Practices, Trade Practices & Unfair Competition**

See *N.J. Stat. Ann. § 56:9-3*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

See *N.J. Stat. Ann. § 56:9-4*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] Public Enforcement, State Civil Actions

The dominant purpose of the New Jersey Antitrust Act, N.J. Stat. Ann. §§ 56:9-1 to 19, is to advance public policy in favor of competition and to prevent practices that deprive consumers of the benefit of competitive markets.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN4[] Public Enforcement, State Civil Actions

N.J. Stat. Ann. § 56:9-18 mandates that the New Jersey Antitrust Act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it. Thus, the New Jersey court looks to federal jurisprudence to guide its interpretation of the Act.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Antitrust & Trade Law, Sherman Act

The federal analog to N.J. Stat. Ann. § 56:9-3, the restraint of trade provision, is § 1 of the Sherman Act, 15 U.S.C.S. § 1, which contains virtually identical language.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6[] Antitrust & Trade Law, Sherman Act

N.J. Stat. Ann. § 56:9-4, the monopolization provision, is analogous to § 2 of the Sherman Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

Under N.J. Stat. Ann. § 56:9-3, a plaintiff must prove the existence of a conspiracy in restraint of trade and either an unlawful purpose or an anti-competitive effect. Unilateral action, regardless of its motivation, cannot constitute a violation of § 56:9-3. Instead, a plaintiff must establish a unity of purpose, a common design and understanding, or a meeting of the minds in an unlawful arrangement between, at minimum, two independent, self-interested economic entities. Such a proof must be made by direct or circumstantial evidence that tends to prove a common scheme designed to achieve an unlawful objective.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN10[] **Antitrust Actions, Facilities**

An antitrust conspiracy where hospital surgical privileges have been denied cannot be inferred from the mere opportunity or ability to conspire. Even if an ultimate peer review decision is consistent with the economic interests of a competitor, conspiracy cannot be inferred "from whole cloth."

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

There can be no contract, combination or conspiracy by a corporation with its own officers, agents or employees, who are performing their usual job of formulating and carrying out its managerial policy. Thus, employees of same company do not provide plurality of actors necessary for conspiracy under § 1 of the Sherman Act, 15 U.S.C.S. § 1. For that reason, a hospital is incapable of conspiring with its staff in deciding whether to grant staff privileges.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN12[] **Regulated Practices, Trade Practices & Unfair Competition**

A hospital cannot conspire with its executive or medical staff committees. While each medical staff member has an independent economic interest in competition with one another, thus satisfying the concerted action element of a restraint of trade claim, the staff as an entity has no interest in competition with the hospital and, in fact, operates similarly to an officer of a corporation who makes decisions on behalf of the corporate entity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A restraint of trade claim can be evaluated by two methods: the rule of reason, and the per se rule. Under a per se analysis, a plaintiff need prove only the existence of an illegal agreement and the defendant's anticompetitive intent; anticompetitive effect is presumed. However, the per se rule is reserved for plainly anticompetitive practices, such as price-fixing and tying arrangements, which are always considered harmful to competition.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN14[] **Antitrust Actions, Facilities**

Both the United States Supreme Court and the New Jersey Supreme Court have been reluctant to extend the per se rule, especially in the context of hospital-doctor associations. Thus, a tying arrangement between a hospital and a group of medical specialists does not warrant per se invalidation absent proof of market power. Hospital-doctor associations are not inherently anticompetitive.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason, only restraints of trade that are unreasonably restrictive of competitive conditions are illegal. The focus is on whether the conduct adversely affects competition. A trial judge must closely examine the relevant product and geographic markets and evaluate the effect of the defendant's conduct on that market. The fact that the conduct may have an injurious effect on an individual competitor is irrelevant. The balancing process under the rule of reason requires defining the market in which the restraint operates, evaluating the evils inherent in the conduct, and weighing those anticompetitive influences against any pro-competitive justifications. Proof of adverse effects on profits is insufficient as a matter of law. Actual or probable harm to competition is essential under a reasonableness approach. The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN16[] **Regulated Practices, Monopolies & Monopolization**

For a monopolization claim under *N.J. Stat. Ann. § 56:9-4*, a plaintiff must show that defendants have a dangerous probability of achieving monopoly power in the relevant market. A defendant is prohibited from using its monopoly power to gain a competitive advantage by destroying or eliminating its competitors. Monopoly power is defined as the power to control prices or exclude competition in the relevant market. The likelihood of achieving a monopoly is demonstrated through a market share sufficient to create a monopoly. To demonstrate a monopoly under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must prove possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN17[] **Sherman Act, Jurisdiction**

The only difference between the monopolization provision of the federal act, *§ 2* of the Sherman Act, *15 U.S.C.S. § 2* and the monopolization provision of the state statute New Jersey Antitrust Act, *N.J. Stat. Ann. §§ 56:9-4* is that the state Antirust Act does not require that defendant's activity affect interstate commerce. It is the effect on interstate commerce that supplies the necessary federal jurisdiction under the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

The critical issue in both monopolization and restraint of trade analyses is demonstration of the relevant market. Where a plaintiff fails to adduce any proofs regarding market area or monopoly power, any antitrust claim will fail and must be dismissed as a matter of law. Moreover, since the market power necessary for a monopolization claim requires something more than the market power necessary for a restraint of trade claim, a plaintiff who fails in its proofs for the latter will also fail in its proofs for the former.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

***HN19*[ ] Regulated Practices, Market Definition**

The relevant geographic market is the area in which potential buyers may rationally look for the goods or services they seek. It is the area where customers look to buy products, not the area where the seller attempts to sell its product. In the case of hospitals, the geographic market inquiry focuses on the area within which hospital "customers" can turn to other "sellers" (hospitals) if the hospital raises prices or restricts output. A judge must consider, among other factors, whether the hospital is near major metropolitan areas and whether those areas also have hospitals. Absent an allegation that a hospital exclusively serves a particular area or offers a unique set of services, an antitrust plaintiff may not limit the geographic market to a single hospital.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

***HN20*[ ] Regulated Practices, Trade Practices & Unfair Competition**

Any relevant inquiry for purposes of ***antitrust law*** is the effect on consumers, not on an individual competitor.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Torts > Business Torts > Unfair Business Practices > General Overview

***HN21*[ ] Antitrust & Trade Law, Sherman Act**

The antitrust laws are not intended to replace the common law of unfair competition or to afford remedies for all business torts. Whereas the law of unfair competition is grounded in ethical considerations, ***antitrust law*** is grounded solely in economic considerations and requires specific proof for recovery.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN22[] Intentional Interference, Elements

To establish a cause of action for tortious interference with a prospective economic advantage, a plaintiff must prove that he had a reasonable expectation of advantage from a prospective contractual or economic relationship, that the defendant interfered with this advantage intentionally and without justification or excuse, that the interference caused the loss of the expected advantage, and that the injury caused damage. The protected interest need not rise to the level of an enforceable contract. Instead, the plaintiff must demonstrate that without the interference, there was a reasonable probability that he would have received the anticipated economic benefits.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Defamation > Libel

Torts > ... > Defamation > Defenses > Statute of Limitations

Torts > Intentional Torts > Defamation > Slander

HN23[] Statute of Limitations, Time Limitations

See *N.J. Stat. Ann. § 2A:14-3*.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Trade Libel > General Overview

Torts > Intentional Torts > Conversion > General Overview

HN24[] Statute of Limitations, Time Limitations

See *N.J. Stat. Ann. § 2A:14-1*.

Torts > Business Torts > Commercial Interference > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > Trade Libel > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN25[] Business Torts, Commercial Interference

Trade libel identifies the tort addressing aspersions cast upon one's business operation. The tort is also known as injurious falsehood, disparagement of property, or commercial disparagement. However, the tort is broader in scope than any of those terms would indicate, and is probably as broad as any injurious falsehood which disturbs prospective advantage. It is similar to the tort of intentional interference with one's economic relations, rather than a branch of the general harm to reputation involved in libel and slander. The tort of trade libel is but one part of a rather amorphous concept consisting of communication to a third person of false statements concerning the plaintiff, his property, or his business. A plaintiff alleging trade libel must prove publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with the plaintiff's relations with others. The communication must be made to a third person and must play a material part in inducing others not to deal with plaintiff.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Waiver

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Defamation > Defamation Per Se

Governments > Legislation > Statute of Limitations > General Overview

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Defenses

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Defenses > Statute of Limitations

HN26[] **Statute of Limitations, Waiver**

Certain differences between defamation and trade libel are significant. Whereas a defamation claim is subject to a one-year statute of limitations, a claim for trade libel is subject to the general six-year statute of limitations applicable to malicious interference claims. Also, whereas the need to demonstrate damages is waived in a defamation suit where the statement is oral, constitutes slander per se, and concerns conduct incompatible with the plaintiff's business, proof of damages is essential in an action for trade libel.

Torts > Intentional Torts > Defamation > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Trade Libel > General Overview

HN27[] **Intentional Torts, Defamation**

Interference by falsehoods that cause pecuniary loss, but are not personally defamatory, has been regarded as a tort "more or less distinct" from defamation. Distinguishing between personal defamation of a plaintiff and disparagement of the plaintiff's property may be difficult. Generally, the latter tort has been applied to statements that are injurious to plaintiff's business, but cast no reflection on either plaintiff's person or property. For example, if the statement charges a plaintiff with personal misconduct, or imputes to a plaintiff reprehensible personal characteristics, it is regarded as libel or slander. If, however, the aspersion reflects only on the quality of a plaintiff's product, or on the character of a plaintiff's business as such, it is disparagement. The rule of liability for trade libel applies only when the matter published goes no further than to attack the quality of the thing in question and does not attack the personal character of its owner as vendor. Many statements effectuate both harms. Some accusation of personal incompetence may be implied in imputations directed against a business or its product.

Torts > Intentional Torts > Defamation > General Overview

Torts > Business Torts > Trade Libel > General Overview

HN28[] Intentional Torts, Defamation

Personal defamation is usually found only where the imputation fairly implied is that the plaintiff is dishonest or lacking in integrity, or that he is deliberately perpetrating a fraud upon the public by selling a product which he knows to be defective. No personal defamation will be found where the most that can be made out of the words is a charge of ignorance or negligence. Additionally, one may disparage a plaintiff's business by reflecting upon its character, the manner in which it is conducted, or its popularity or danger, and not affect any property.

Torts > Remedies > Damages > General Overview

Torts > Business Torts > General Overview

Torts > Business Torts > Trade Libel > General Overview

HN29[] Remedies, Damages

The elements of a disparagement action include proof of publication of material derogatory to the quality of a plaintiff's business, or to his business in general, of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others. To establish loss of trade or other dealings, a plaintiff must show the falsehood was communicated to a third person and played a material and substantial part in leading others not to deal with the plaintiff. The plaintiff must also prove that the statement is false, and that the defendant made the statement knowingly or recklessly. Finally, the plaintiff must prove special damages, such as the loss of a present or prospective advantage, in the form of pecuniary loss.

Torts > Business Torts > Trade Libel > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > Breach of Contract Actions > General Overview

Torts > Remedies > Damages > General Overview

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

Torts > ... > Defamation > Elements > General Overview

Torts > ... > Defamation > Remedies > General Overview

HN30[] Business Torts, Trade Libel

The special damages requirement of a disparagement action goes to the cause of action itself, such that a plaintiff will be denied even nominal or punitive damages if he cannot show special damages. The necessary showing is specific: a plaintiff must establish pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers. Traditionally, a plaintiff was required to identify particular business interests who have refrained from dealing with him, or explain the impossibility of doing so. However, where requiring such identification is unreasonable, proof of lost profits resulting from breach of contract may suffice, especially where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded. General, implied, or presumed damages of the kind available in personal defamation actions do not satisfy the requirement of special damages needed for disparagement causes of action. In addition, personal elements of damages, such as mental distress, are strictly excluded.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Business Torts > Trade Libel > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Defamation > Defenses > Statute of Limitations

HN31[] **Statute of Limitations, Time Limitations**

The gravamen of a complaint for malicious intent to cause harm to one's business or employment is not the means used, but the wrongfulness of the defendant's intent. It is not necessary to set out the words of the false representation. For such a cause of action, the more restricted statute of limitations for slander does not apply.

Evidence > Privileges > General Overview

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Hospital Privileges > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

Torts > ... > Defenses > Privileges > Qualified Privileges

HN32[] **Evidence, Privileges**

A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty. The critical elements of this privilege are the appropriateness of the occasion on which the information is published, the legitimacy of the interest sought to be protected or promoted, and the pertinence of the receipt of the information by the recipient. The privilege is based on the public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. A defendant abuses the privilege if he knows the statement is false or acts in reckless disregard of its truth or falsity, if publication serves a purpose contrary to the interest sought to be promoted by the privilege, or if the statement is excessively published. The question of abuse is for the factfinder and must be proven by the plaintiff by clear and convincing evidence. In the case of a hospital performing its credentialing function on applicants for surgical privileges, these competing interests and principles have been codified in both federal and state law under *N.J. Stat. Ann. § 2A:84A-22.10(d)* and *42 U.S.C.S. §§ 11111* and *11112(a)*.

Torts > ... > Defenses > Privileges > Qualified Privileges

HN33[] **Privileges, Qualified Privileges**

To overcome the privilege providing immunity from a defamation action on the ground that a defendant conducted a reckless investigation, a plaintiff must establish that the defendant knew the statement was false or acted in reckless disregard of its truth or falsity. The standard is whether the defendant published a statement while entertaining serious doubts about the statement's truth. Errors of interpretation or judgment and misconceptions are insufficient.

Torts > Business Torts > Trade Libel > General Overview

Torts > ... > Defenses > Privileges > Qualified Privileges

HN34[] **Business Torts, Trade Libel**

In trade libel actions, as in defamation actions, an abuse of a qualified privilege will be found if the publisher knows the statement is false or acts in reckless disregard of its truth, if the publication serves a purpose contrary to the interests of the privilege, or if there is excessive publication.

Torts > ... > Defamation > Remedies > Damages

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > Trade Libel > Remedies

Torts > Remedies > Damages > General Overview

Torts > ... > Pain & Suffering > Emotional Distress > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN35[] **Remedies, Damages**

An aspect pertaining solely to the personal element of a plaintiff's damages is strictly excluded under the tort of trade libel. Recovery for emotional distress under a cause of action for trade libel is barred.

Civil Procedure > Remedies > Damages > General Overview

HN36[] **Remedies, Damages**

Mere uncertainty as to damages will not preclude recovery as long as a wrong has been committed and damages have resulted.

Counsel: *Kevin McNulty* argued the cause for appellants/cross-respondents (*Gibbons, Del Deo, Dolan, Griffinger & Vecchione,* attorneys; *John J. Gibbons and Mr. McNulty,* on the brief).

Glenn A. Clark argued the cause for respondent/cross-appellant (*Riker, Danzig, Scherer, Hyland & Perretti,* attorneys; *Mr. Clark,* of counsel and on the brief; *Edwin F. Chociey, Jr.,* on the brief).

Judges: Before Judges CARCHMAN, WECKER and WEISSBARD. The opinion of the court was delivered by CARCHMAN, J.A.D.

Opinion by: [810]** CARCHMAN

Opinion

[*206] The opinion of the court was delivered by

CARCHMAN, J.A.D.

Plaintiff Kumar A. Patel, M.D., a board certified surgeon with a subspecialty in vascular surgery, sought vascular surgical privileges at defendant Irvington General Hospital (IGH). According to plaintiff, defendant Jaime R. Soriano, [1] M.D., the chief of vascular surgery at IGH, [2] sabotaged plaintiff's application and communicated false statements about **[***2]** plaintiff to other members of IGH's medical staff--all to continue his own monopolistic control over IGH's vascular surgery department. As a result, plaintiff filed an action in the Chancery Division, seeking equitable relief as well as damages for both Soriano's and IGH's misconduct.

[811]** Following an extended bench trial after transfer to the Law Division, the trial judge found in favor of plaintiff and concluded that both IGH and Soriano had defamed plaintiff and had tortiously interfered with plaintiff's reasonable expectation of economic advantage. In addition, she found that Soriano had violated the New Jersey Antitrust Act, *N.J.S.A. 56:9-1 to -19*. The judge awarded joint and several damages including prejudgment interest and costs of $ 1,195,377.61 against IGH and Soriano, and $ 1,184,316.25, including **[***3]** prejudgment interest and costs, against Soriano individually. The judge dismissed plaintiff's breach of **[*207]** contract claim and concluded that IGH was immune from antitrust liability. Both defendants appeal and plaintiff cross-appeals.

We reach the following conclusions:

1) the trial judge's finding of liability for tortious interference was correct and is affirmed;

2) the judge's factual findings support a cause of action for trade libel rather than defamation and a judgment of liability for the former cause of action shall be entered on remand;

3) the judgment for liability and damages for antitrust violations is reversed;

4) the matter shall be remanded for reconsideration of damages on the causes of action for tortious interference and trade libel as well as punitive damages;

5) the cross-appeal is dismissed;

6) in all other respects the judgment is affirmed.

I.

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[1] "Defendant" shall refer to Soriano.

[2] Defendant's position title at IGH is also referred to as "division chair." The terms "division chair" and "chief" are interchangeable.

After completing his medical training, plaintiff ultimately became board certified in both general and vascular surgery. In 1984, plaintiff was named chief of vascular surgery at Metropolitan Hospital, an 800-bed hospital in New York City where among his other duties, he oversaw Metropolitan's vascular laboratory. **[***4]** During his years of practice, plaintiff served as an associate professor of surgery at a medical college, was a member of several medical societies, authored numerous publications, served as a consultant to various insurance companies, and participated in numerous symposia and presentations to the medical profession.

Plaintiff became licensed to practice medicine in New Jersey in 1992. At that time, he decided to leave Metropolitan because of the perceived need to start a private practice in anticipation of his three children going to college. In 1993, plaintiff applied for and was granted attending physician privileges at Mountainside Hospital, **[*208]** St. Joseph's Hospital, and Wayne General Hospital, all in New Jersey.

In February 1995, at the urging of a medical colleague, Dr. Shirish Patrawalla, plaintiff applied for vascular surgical privileges at IGH. Patrawalla, a cardiologist at IGH, felt that IGH needed a vascular surgeon and told plaintiff that other doctors at IGH shared this belief. Plaintiff claimed that Patrawalla told him that he could expect to perform thirty to forty percent of the vascular surgery procedures at IGH. However, Patrawalla also warned him to expect resistance **[***5]** from defendant, the chair of vascular surgery at IGH. Although he was not board certified in vascular surgery, defendant performed virtually all of IGH's vascular surgery procedures and maintained significant influence at the hospital through his membership on various committees and the board of trustees. Plaintiff decided to apply for privileges at IGH because he realized that he needed more than one hospital in which to develop his practice in vascular surgery and IGH appeared to be a promising opportunity for such development.

[812]** In plaintiff's IGH application, he listed four references--Dr. Roy Clauss, plaintiff's surgical colleague and immediate predecessor as chief of vascular surgery at Metropolitan; Dr. Herbert Dardik, a nationally renowned vascular surgeon at Englewood Hospital who was professionally acquainted with plaintiff; Dr. Kamalakar Ayyagari, on staff at IGH, but with whom plaintiff had never worked; and Patrawalla. All of these individuals wrote favorable letters of recommendation supporting plaintiff's application. No one from IGH informed plaintiff that his references were deficient.

Janice Nemeckay, IGH's director of medical staff affairs, oversaw the compilation **[***6]** of documents that comprised a doctor's application for medical staff privileges and would be reviewed by the various levels of peer review at the hospital. She contacted both the New Jersey Board of Medical Examiners and the New York Division of Professional Licensing Services and determined that plaintiff was a doctor in good standing in both states with no **[*209]** derogatory information reported. Nemeckay also reached out to every hospital where plaintiff had privileges as of February 1995. As part of plaintiff's application, he had signed releases which allowed IGH to obtain information about him from third parties. These releases all contained the following language: "You are hereby requested and authorized to furnish, make available and release to Irvington General Hospital, its medical staff and their authorized representatives all information concerning professional competence, ethics, character, and other qualifications relevant to my application for medical staff appointment and clinical privileges."

Dr. Francis Wyckoff, the head of surgery at Mountainside, completed the confidential evaluation form for plaintiff. Mountainside did not have a separate section for, or a separate director **[***7]** of, vascular surgery. Because plaintiff had been at Mountainside for less than two years when Wyckoff reviewed him, he was still under supervision at that hospital, a standard practice at most institutions. Wyckoff rated plaintiff "superior" in every category except one, in which he rated plaintiff "good." Wyckoff recommended "without reservation" that plaintiff be granted privileges at IGH "with supervision and observation as required in Irvington General's Dept. of Surgery." His impression of plaintiff was "favorable."

Dr. Joseph Farrell, a general surgeon and the acting chairman of surgery at St. Joseph's at the time of plaintiff's application to IGH, rated plaintiff "good" in all categories. Farrell considered plaintiff a "capable" applicant and recommended him for privileges "without reservation." The surgical department chair at Wayne General was unable to comment on plaintiff's application because plaintiff had little or no surgical activity at that hospital.

Dr. William Stahl, the chief of surgery at Metropolitan, also completed an evaluation form for plaintiff, rating plaintiff "superior" in all categories. Stahl considered plaintiff an "excellent individual and surgeon" **[***8]** and recommended him without reservation.

[*210] According to Nemeckay, plaintiff's completed application was referred to Dr. Capistrano Luzano, the director of the department of general surgery at IGH, for his recommendation. Luzano noted on his recommendation to the credentials committee that the "record speak[s] for itself" and elected not to interview plaintiff.

This seemingly routine processing of plaintiff's application appeared on track when plaintiff met with defendant who, as chair of the surgery division and the director of vascular surgery, was next to **[**813]** review plaintiff's file. [3] He interviewed plaintiff on June 13, 1995, the same day he reviewed the file. Plaintiff claimed that the interview was brief and defendant did not discuss plaintiff's references.

[*9]** Defendant considered the interview to be cordial and uneventful and gave no indication that the application was deficient in any way. However, he wrote a letter to Patrawalla, the chairman of the credentials committee, asking that the committee postpone its interview of plaintiff since defendant was still obtaining information.

On June 29, 1995, Nemeckay notified plaintiff that his file was complete and that he would be interviewed by the credentials committee on July 12, 1995. On July 12, 1995, when plaintiff met with the committee, Patrawalla handed him a letter dated July 11, 1995, from defendant. According to this letter, which was addressed to plaintiff, defendant asked plaintiff to send him a list of *all* the surgical cases he had performed since September 1993. Plaintiff was also asked to include the following information: the patient's name, pre- and post-operative diagnosis, date and type of procedure performed, and any complications or mortality. The **[*211]** list was to be certified by the chief of vascular surgery or general surgery at the appropriate institution. The credentials committee informed plaintiff that defendant, not the committee, was requesting the information. **[***10]** The committee meeting minutes for July 12, 1995, stated that there was nothing adverse in plaintiff's file and that defendant had requested the delay in recommendation until the additional information was received. The committee agreed with plaintiff that defendant's request for two years' worth of information was "highly unusual."

Plaintiff felt that it would have taken an exhaustive effort to comply with defendant's request, since he would have had to pull each individual patient's chart and there were over one hundred cases at issue. Also, plaintiff concluded that defendant had not complied with IGH's own credentialing procedures since any deferral by a division chair had to be accompanied by a notice in writing to the applicant, stating the reasons for the deferral. Defendant's letter of July 11, 1995, did not inform plaintiff why the additional information was needed.

On July 13, 1995, the medical executive committee (MEC), including defendant, who was a member, met at IGH. According to the minutes of this meeting, there was a "lengthy discussion" regarding the appropriateness of defendant's "laborious request," given the lack of any negative credentials in plaintiff's file. **[***11]** Also, these minutes noted that defendant "elaborated on certain information received verbally (i[.]e.[,] high mortality rate and unsuccessful aneurysm surgery), which caused him to request such surgical information." No action was taken on plaintiff's application.

According to defendant, after his interview with plaintiff in June, he again reviewed plaintiff's application. Certain matters prompted his attention, such as plaintiff's failure to name as a reference any vascular surgeon at a hospital where he currently had privileges. Also, defendant **[**814]** saw no reference from the director of vascular surgery at Metropolitan.

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[3] After the recommendation of the department and division chairs, an application proceeds 1) to the credentials committee for a recommendation to 2) the medical executive committee for a recommendation to 3) the board of trustees, which makes the final decision. At the time of plaintiff's application, defendant was not only the division chair but also a member of the medical executive committee as well as a member of the board of trustees.

[*212] Defendant wanted to ensure that no quality of care issues surrounded plaintiff's decision to leave Metropolitan. Although the chief of general surgery at Metropolitan, Stahl, had given plaintiff a very positive evaluation, he was not a vascular surgeon, and defendant specifically sought to talk to the director of vascular surgery at Metropolitan. Defendant claimed that he placed three phone calls to Metropolitan, looking for the head of vascular surgery, and that he never received a return call. Defendant did not write a letter, nor did he contact Clauss, the vascular **[***12]** surgeon who had been plaintiff's immediate predecessor as chief of that department. Defendant surmised, incorrectly, that plaintiff and Clauss had been associated together in practice. Defendant claimed that if he had obtained a positive recommendation from the current director of vascular surgery at Metropolitan, that would have been the "end of the story."

Also troubling to defendant was the fact that the positive evaluation given by Wyckoff was accompanied by a caveat that plaintiff be given privileges "with supervision and observation." In defendant's opinion, that caveat was a "red flag" even though such supervision and observation is standard practice at most hospitals for a newly admitted surgeon's first two years. Defendant did not, however, call Wyckoff for clarification.

Instead, defendant placed a call to the main switchboard at Mountainside and asked for the head of vascular surgery. He was directed to Dr. Donald C. Syracuse, someone with whom defendant was familiar on a professional, but not personal, basis. Syracuse was a cardiothoracic surgeon who had privileges at Mountainside. About seventy-five percent of his practice was vascular surgery. He had never operated **[***13]** with plaintiff and had never seen him perform surgery.

According to defendant's contemporaneous handwritten notes of his conversation with Syracuse, which were later transcribed, Syracuse told defendant that: plaintiff had provisional status at Mountainside; plaintiff's mortality and morbidity rates were "higher than anyone else here"; plaintiff's first six aneurysm **[*213]** patients had complications and died; plaintiff's cases were discussed "almost every month" in mortality and morbidity conferences; and plaintiff should be asked to submit the cases he had done in the past one to two years. Syracuse declined defendant's request to put his comments in writing.

Defendant also placed a call to St. Joseph's and spoke to Dr. Nazmi Elrabie, the chief of vascular surgery. According to defendant's contemporaneous handwritten notes of that conversation, which were also later transcribed, Elrabie told defendant that plaintiff did not do much surgery at either St. Joseph's or Wayne General, and that most of his practice was at Mountainside. Elrabie also told defendant that plaintiff's privileges to read vascular lab studies at St. Joseph's were removed because he was "bad-mouthing" the three other **[***14]** doctors doing the readings, saying they "didn't know what they were doing."

At trial, Elrabie denied having said anything negative about plaintiff to defendant. He denied having said or implied that the decision to terminate plaintiff's lab privileges was because plaintiff "bad-mouthed" other doctors. Rather, Elrabie claimed that he told defendant only that a decision had been made by St. Joseph's surgical department's executive committee to require that doctors have their primary work at the hospital to be allowed to read the lab studies.

[815]** Armed with the information he claimed to have received from Syracuse and Elrabie, unable to reach the head of vascular surgery at Metropolitan, and having consulted with counsel for the hospital, [4] defendant drafted his letter of July 11, 1995, requesting the list of all of plaintiff's surgical cases performed since September 1993. Defendant admitted that this letter did not notify **[*214]** plaintiff of the reasons for the request or deferral of plaintiff's application.

[*15]** At the MEC meeting on July 13, 1995, defendant was asked to state those reasons. Defendant claimed that he was reluctant to divulge that information since he had not yet had a chance to verify what he had heard.

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[4] This attorney indicated at trial that when defendant called him, he told him that a reasonable way to verify the information he had received about plaintiff would be to request a list of his cases for the prior two years. If any case raised a question, then the hospital could request specific medical records. Since the attorney was not admitted as an expert on any issue, the judge considered this testimony only for the limited purpose of determining whether defendant had acted out of malice.

Nevertheless, defendant admitted that he read to the committee the substance of his notes of his conversations with both Syracuse and Elrabie, including Syracuse's allegations about plaintiff's high mortality and morbidity rates and that his first six aneurysm patients died, as well as Elrabie's allegation that plaintiff "bad-mouthed" other doctors.

Plaintiff considered defendant's request for the information about his surgical cases a "declaration of war." In plaintiff's view, he would have to either withdraw his application or seek legal redress. He chose the latter and retained a lawyer, who immediately sent a letter to the president of IGH, objecting to defendant's request. Plaintiff's lawyer also noted that defendant had not notified plaintiff of the reasons for the deferral. On September 22, 1995, plaintiff himself wrote to Dr. Mahesh Desai, the president of IGH's medical staff, to note his objection, among other things, to defendant's review of his application as being **[***16]** an "obvious conflict of interest."

On October 5, 1995, the MEC, including defendant, met again. According to the minutes of this meeting, an "error" was noted on the MEC minutes for July 13, 1995. Those minutes should have read only that: "[Defendant] reported that he is awaiting information regarding [plaintiff's] surgical procedures during the past two (2) years, prior to submitting a recommendation." Notably, this "correction" meant that all reference to the lengthy discussion about defendant's "laborious request" was deleted, as was any reference to the verbal information received by defendant regarding plaintiff's high mortality rate and unsuccessful aneurysm surgery.

At this October 5 meeting, defendant told the MEC that he had not yet received a response from plaintiff regarding his request **[*215]** and that he would elaborate on his reasons for the request in a letter to plaintiff--a letter dated October 25, 1995, which plaintiff received shortly thereafter.

In that letter, a copy of which defendant sent to Romeo Tiu, who had replaced Desai as president of IGH's medical staff, defendant told plaintiff that during his review of plaintiff's application, he learned that plaintiff **[***17]** held only a provisional appointment at Mountainside Hospital. Since plaintiff had been at that hospital for two years, defendant inquired as to whether plaintiff had yet been promoted to full attending. Also, in further discussions with the chief of vascular surgery at Mountainside, defendant learned that plaintiff's mortality and morbidity rates were higher than those of other doctors performing the same procedures and that **[**816]** plaintiff's cases were "consistently discussed almost every month." It was this information that prompted defendant to request the two-year list of plaintiff's cases, a request which defendant viewed as "prudent and not unreasonable."

Defendant also learned from the chief of vascular surgery at St. Joseph's that plaintiff's privileges to read non-invasive laboratory studies had been removed and defendant wanted to know the circumstances surrounding that removal. Finally, defendant sought clarification as to whether plaintiff sought privileges in general surgery or only vascular surgery.

Upon receipt of this letter, plaintiff noted several issues. First, Mountainside did not have a chief of vascular surgery. Second, plaintiff's mortality and morbidity rates were **[***18]** not higher than other doctors' rates, and plaintiff was unaware of any statistics that kept track of such information. Third, plaintiff's cases were not discussed "almost every month" at mortality and morbidity conferences. Prior to July 1995, plaintiff's cases had been discussed on only four occasions and at no time was a conclusion reached that plaintiff had provided inappropriate care. [5] Finally, **[*216]** plaintiff noted that St. Joseph's had decided, for economic reasons alone, to allow only those surgeons whose primary practices were at St. Joseph's to read laboratory studies. The decision did not affect plaintiff alone.

Plaintiff assumed that it was Syracuse who had spoken to defendant about plaintiff's practice at Mountainside, even though Syracuse was not chief of vascular surgery. According to plaintiff, Syracuse was "constantly" critical of him during mortality and morbidity conferences at **[***19]** Mountainside, often with no reasonable explanation and while ignoring basic surgical knowledge.

Plaintiff's attorney wrote to Syracuse, seeking verification of his statements to defendant, as reported by defendant. Syracuse responded in writing, telling plaintiff that he had been "misinformed" regarding the discussion he had with

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[5] Mortality refers to a patient's death; morbidity refers to complications. Every mortality is discussed at conference.

defendant. According to Syracuse, he told defendant to obtain a list of cases performed by plaintiff and their associated mortality and morbidity. He denied making the specific statements referenced in plaintiff's attorney's letter.

At trial, Syracuse contradicted defendant and claimed that his conversation with defendant was very brief. He denied having identified himself to defendant as the chief of vascular surgery at Mountainside. Syracuse admitted that he did not have any statistics regarding plaintiff's mortality and morbidity rates when he spoke to defendant and that he merely tried to convey an impression to defendant about plaintiff's performance. That is, he implied to defendant, truthfully, that plaintiff had more than a representative number of cases discussed at the mortality and morbidity conferences. Syracuse suggested to defendant that he **[***20]** obtain plaintiff's actual mortality and morbidity records or surgical logs. He admitted that the clear implication of this suggestion was that the records would reveal something negative about plaintiff, even though Syracuse was not aware of any instance where it had been found that plaintiff did not provide quality care. Syracuse denied telling defendant that plaintiff's first six aneurysm patients had died or that his cases were discussed every **[*217]** month. In fact, he denied discussing any specific cases with defendant. In essence, Syracuse refrained **[**817]** from making a judgment about plaintiff, and merely asked defendant to do his "homework" so he could make his own judgment. He also denied that defendant ever asked him to put his comments in writing.

Syracuse also claimed at trial, though he denied it at a prior deposition, that he had heard many negative comments about plaintiff's performance from other doctors and nursing supervisors at Mountainside. He also claimed that Wyckoff, the chief of surgery, verbally expressed doubts to Syracuse about plaintiff's competence, outside of the mortality and morbidity conferences. All of these comments were reflected in Syracuse's overall impression **[***21]** of plaintiff when he spoke to defendant.

Plaintiff also wrote to and received a response from Dr. David Bregman, the chief of surgery at St. Joseph's. According to Bregman, Elrabie had decided that only those surgeons who worked primarily at that hospital should be allowed to read noninvasive vascular laboratory studies. Since plaintiff worked primarily at Mountainside, he was asked to stop reading those studies. The decision was purely a financial one and had nothing to do with the quality of care provided by plaintiff, who Bregman noted had "exceptional qualifications and experience in vascular surgery."

Plaintiff sent the written responses of Syracuse and Bregman, along with other material, to Tiu. On December 14, 1995, Tiu wrote to defendant, asking that defendant submit his recommendation regarding plaintiff prior to the next MEC meeting, which was scheduled for January 11, 1996.

Throughout the first half of 1996, the MEC met monthly. At each of these meetings, no action was taken on plaintiff's application because it was noted that the file remained incomplete and could not be considered as plaintiff had failed to comply with defendant's request. During this entire period **[***22]** of time, plaintiff and his attorney were corresponding with Tiu, insisting that a decision be made on plaintiff's application.

[*218] On March 29, 1996, plaintiff received notification from Mountainside that he had been promoted to an associate attending physician and that all supervision and observation had been removed. This information was passed along to IGH.

On July 18, 1996, Tiu sent a letter to defendant, with a copy to plaintiff, asking that defendant have his final recommendation ready for the next MEC meeting. The MEC met as scheduled on September 5, 1996, at which time a letter written by defendant to Tiu on September 4, 1996, was considered. According to that letter, IGH tried to accommodate plaintiff by allowing an outside vascular surgeon to review his cases and reducing the number of cases he had to submit to those performed within the last one year, instead of two years. The MEC noted that plaintiff did not intend to comply with the modified request and that defendant was therefore unable to make a recommendation for his appointment. Asserting incompleteness of plaintiff's application, the MEC voted to deny it.

Although the president of IGH sent plaintiff a letter dated **[***23]** September 6, 1996, notifying him of this denial, plaintiff apparently did not receive this letter until September 12. However, on September 9, 1996, plaintiff commenced litigation by filing his verified complaint and order to show cause in the Chancery Division, seeking final action on his application. On September 17, 1996, plaintiff requested a hearing to appeal the denial, pursuant to IGH's Medical Staff Fair Hearing Plan.

The next day, defendant filed a certification in opposition to plaintiff's order to show cause, detailing the telephone conversations **[**818]** he had with Syracuse and Elrabie. This certification is significant because plaintiff claimed it was the first notice he had of these allegedly defamatory statements. [6] In his certification, **[*219]** defendant particularized the information he was told by Syracuse and Elrabie that he then related to IGH. This included references to mortality and morbidity rates, aneurysm-related deaths and denial of privileges to read vascular studies.

[*24]** On October 1, 1996, counsel for IGH issued a subpoena duces tecum to Mountainside, seeking production of: (1) all documents and records discussing the surgical procedures performed by plaintiff at Mountainside since September 1, 1993, which were investigated or discussed at the hospital's mortality and morbidity meetings; and (2) the patient case files for every one of those surgical procedures.

On October 9, 1996, IGH provided plaintiff with transcriptions of the contemporaneous handwritten notes taken by defendant during his telephone conversations with Syracuse and Elrabie. According to these notes, both conversations took place on July 5, 1995.

The Chancery judge entered an order directing defendants to withdraw their requests for information, as contained in defendant's letters to plaintiff of July 12 and October 25, 1995. He concluded that those requests were overbroad and violated IGH's credentialing procedures manual. Defendants were also directed to identify each questioned case of plaintiff's and to set forth in detail all the reasons for denying his application. In response to this order, IGH formally withdrew its request for the information. [7]

[*25]** On February 4, 1997, IGH issued another subpoena duces tecum to Mountainside. This subpoena sought all documents relating to plaintiff's mortality and morbidity rates in connection with vascular surgical procedures at Mountainside, and for a comparison of **[*220]** plaintiff's rates to those of the other vascular surgeons at Mountainside with respect to the same procedures.

St. Barnabas Health Care System, IGH's parent corporation, retained Dr. Robert P. Shack to review the records generated at Mountainside for fourteen of plaintiff's patients. Shack was asked to provide an opinion as to the appropriateness and competency of the care rendered. More significantly, defense counsel thereafter wrote to the judge advising him that after reviewing six of the fourteen patient files, Shack concluded that plaintiff was performing "within the median standard of care" of a vascular surgeon. Accordingly, plaintiff's application for privileges at IGH would be considered at the credentials committee meeting scheduled for May 21, 1997, and at the MEC meeting scheduled for June 5, 1997. On June 5, 1997, the MEC met and voted to recommend approval of plaintiff's application to the board of trustees. On June 20, 1997, plaintiff **[***26]** was notified by the board of trustees that **[**819]** he was granted a provisional appointment to the associate staff at IGH with privileges in general surgery and vascular surgery, operating under observation for major cases. Plaintiff's supervisor would be defendant.

Plaintiff never exercised those privileges; plaintiff contended that he could not work under the designated supervision of defendant. According to plaintiff, defendant would have to be present in the operating room, a situation that could present a danger to the patient since it would increase plaintiff's level of stress. Also, plaintiff

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[6] Plaintiff claimed that the defamatory comments referred to in his original complaint, filed in September 1996, were the ones made by defendant in his October 25, 1995, letter to plaintiff, which was copied to Tiu. It was not until October 1996, when plaintiff received minutes of the MEC meeting, that plaintiff discovered what defendant had said about him at the meeting. Those statements were the subject of plaintiff's amended complaint, filed in August 1997.

[7] On December 5, 1996, plaintiff deposed Syracuse. A few days later, plaintiff received a letter from Dr. Richard A. Kaiser, the head of surgery at Mountainside, advising him that Mountainside had decided to review "selected vascular surgical cases" involving plaintiff's patients at that hospital.

would be obligated to tell his patients that he was being supervised by someone he had sued, a circumstance to which according to plaintiff no patient would consent. Plaintiff's application for relief from this supervisory requirement was denied.

On October 15, 1999, more than two years after having been granted privileges, plaintiff formally resigned from IGH's medical staff, citing the intolerable situation of defendant's supervision. Plaintiff claimed that IGH notified him that since he did not have any patient activity during his two-year provisional period, IGH would discontinue his privileges **[***27]** and report that fact to the National **[*221]** Practitioner Data Bank, a permanent registry that maintained information about any negative performance by a doctor. Plaintiff thus had the choice of voluntarily resigning or being reported as a physician whose privileges were discontinued. He chose the former, although his account of events was disputed by Dr. Amit K. Mody, the executive director of IGH who claimed that plaintiff told him that he would prefer to go his own way and had no intention of practicing at IGH.

Plaintiff claimed that in the more than two years he had privileges at IGH, only two cases had been referred to him there. Plaintiff also related how his practice at Mountainside had diminished dramatically. In 2000, he did only twenty-three procedures there. According to plaintiff's tax returns, in 1995 plaintiff's income was $ 302,000. In 1996, the first full year following his application to IGH, his income dropped to $ 181,000. Plaintiff claimed that everything changed for him at Mountainside in 1996, in that other doctors stopped discussing their cases with him. This had an impact on plaintiff professionally, since vascular surgeons depend on referrals from primary care doctors **[***28]** and other specialists for their patients. It also had an impact on him personally, since he considered it "a blessing" to be able to take care of patients and he was not prepared for the "political" side of private practice or for people who would undermine his reputation and view plaintiff as a threat to their own practice.

In 1997 plaintiff's income dropped even further, to $ 124,000. In early 1998, plaintiff applied for staff privileges at Valley Hospital in Ridgewood. He was accepted and also granted privileges to read vascular studies. [8] After he was granted privileges at Valley, his income increased to $ 185,000, and in 1999, it was $ 322,000. Plaintiff, capable of performing 250 or more procedures per year, was then performing about 100 to 120 a year.

Plaintiff also sought to establish defendant's alleged "monopolistic" control over vascular surgery at IGH. In 1999, 154 vascular **[*222]** surgery procedures were performed at IGH. Defendant performed all **[***29]** of them. In 1998, defendant performed 208 of the 219 vascular surgery procedures there; in 1997, 186 of the 188 procedures; in 1996, 133 out of 136; in 1995, 145 out of **[**820]** 153; in 1994, 150 out of 154; and in 1993, 153 out of 159. For his part, defendant claimed that general surgery represented seventy to seventy-five percent of his practice and that vascular surgery comprised the remaining twenty-five to thirty percent. Of all the vascular surgery defendant performed in a year, all but about twenty to thirty percent was derived from IGH. Defendant's tax returns from 1993 to 1999 showed a gross income of about $ 450,000 to $ 550,000 for each of those years. About five to ten percent of the income reflected in those returns was income from other sources. [9] To derive the amount of income generated by vascular surgery performed at IGH, one would have to deduct that five to ten percent, then deduct another seventy to seventy-five percent as income attributable to general surgery only, and then deduct another twenty to thirty percent as income attributable to vascular surgery performed at hospitals other than IGH.

[*30]** Defendant admitted that the practice of vascular surgery was based on referrals and that to secure referrals, a vascular surgeon had to develop the trust and confidence of the other doctors on staff. He maintained that about five to ten percent of his vascular cases at IGH came to him from the IGH emergency room, and about sixty percent came from primary care doctors and other specialists at IGH. The remaining twenty to thirty percent came from current and former patients and doctors who did not use IGH as their primary hospital. He also maintained that his referrals came from other doctors he knew, other patients, and doctors he did not even know. [10]

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[8] As of trial, most of plaintiff's practice was at Valley.

[9] Defendant originally stated the percentage as ten to fifteen percent. Counsel then restated this percentage as five to ten percent, to which defendant agreed.

Defendant claimed that he was **[*223]** never the only vascular surgeon at IGH. At the time plaintiff applied for privileges, there were four vascular surgeons on staff, including defendant. As of the date of trial, one of the three resigned after defendant temporarily suspended him, one left to work at other hospitals, and one relinquished his privileges. Since plaintiff's application, two doctors had been granted vascular surgical privileges at IGH, and defendant had not noticed any diminution in his own practice or in the number of referrals. **[***31]**

Defendant admitted that no vascular surgeon could see a patient who had been admitted to or was in the emergency room at IGH unless that surgeon had privileges at the hospital. If a patient had vascular surgery done at IGH and had other medical problems, as was often the case with vascular surgery patients, the patient's other doctors would be "boxed out" of their care unless they too had privileges at IGH.

Since 1986 defendant had also been the director of the vascular laboratory at IGH. The laboratory was started at defendant's initiative. He offered to bring his own lab to IGH if he could run the lab, read all the tests, and bill for his professional services. Pursuant to his agreement with IGH, which was never reduced to writing, defendant had been the only reader of lab studies since the lab's inception, claiming such privilege by appointment of the board of trustees. **[***32]** He also claimed that no other doctor ever needed to read the studies since these studies were never done on an emergency basis, and he could read the studies by fax when he was away from the hospital.

[821]** Dr. Ramesh Sawhney, an anesthesiologist who previously practiced at IGH until termination of his privileges, claimed that he spoke to Gerry Goodrich, the CEO of IGH, in 1995 about the need for another vascular surgeon at IGH. Goodrich was open to the suggestion and encouraged doctors to apply. Sawhney also claimed that over the years, he had spoken to many doctors about the need for a vascular-trained surgeon at IGH and defendant's running that department as a monopoly. Doctors were enthusiastic about plaintiff's decision to apply to IGH.

[*224] According to Sawhney, he once mentioned plaintiff's name to defendant when the two doctors were in the operating room together. Defendant said that he would not allow plaintiff to work in the hospital and that plaintiff was incompetent. Defendant also told Sawhney that he would never allow another vascular surgeon in "his" institution. Sawhney maintained that defendant, a very powerful individual at IGH, thought of the hospital as his to run. For example, **[***33]** he often barged into the administrator's office and told the administrator what he wanted done. Defendant also walked the hallways bragging that he could determine who would get privileges at the hospital. After defendant started questioning plaintiff's competence in connection with his application for privileges, other doctors at the hospital began to doubt plaintiff's abilities.

On cross-examination, plaintiff admitted that soon after he began practicing at Mountainside, i.e., before he ever applied for privileges at IGH, Syracuse and other doctors questioned the quality of his work during mortality and morbidity conferences. At these conferences, plaintiff's "competitors" made comments that either were inaccurate or distorted the facts. Plaintiff conceded that these doctors were making defamatory statements about plaintiff's practice long before he applied for privileges at IGH. At a prior deposition, plaintiff admitted that he was perceived as a threat by other doctors at Mountainside and that he attributed the decrease in his practice from 1995 to 1996 to their efforts to harm him. Plaintiff also admitted that there was a concerted effort at Mountainside to distort plaintiff's **[***34]** handling of his cases, an effort that started as soon as it became apparent that plaintiff's practice at Mountainside was expanding, a "substantial amount of time" before plaintiff applied to IGH. Plaintiff believed that Syracuse found in plaintiff's application for privileges at IGH the perfect opportunity to hurt plaintiff's Mountainside practice. This was consistent with other problems plaintiff had experienced at Mountainside resulting in meetings to discuss plaintiff's clinical performance and other derogatory comments regarding plaintiff's performance.

[*225] Plaintiff suggested that notwithstanding these negative comments at Mountainside, his income from that hospital actually increased in 1993 and 1994. His income dropped only in 1996, when IGH issued its subpoenas to Mountainside, which hurt plaintiff's reputation because "word gets around" that another hospital is looking at a doctor's mortality and morbidity statistics. However, plaintiff admitted that no one at Mountainside, or any other

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[10] Especially since the advent of managed care, many doctors merely referred their patients to surgeons who were on the required provider lists.

hospital, ever told him about hearing defendant's comments about him spoken at IGH's peer review committees, or refused to refer cases to him because of those comments or the subpoenas IGH issued **[***35]** to Mountainside. Plaintiff contended that defendant's comments made at IGH's MEC meetings were especially damaging to his reputation since doctors from every major department at the hospital attended those meetings and he relied on those doctors for referrals. He claimed that defendant's comments "poisoned the atmosphere" for **[**822]** him in the "very small community" of Essex County, where negative news spread very fast. In contrast, the comments made about him at Mountainside were confined to departmental meetings, where only other surgeons were present. Those surgeons were his competitors, not referring physicians. Plaintiff admitted that theoretically, he could get referrals from doctors at one hospital and perform the vascular surgical procedure at another. However, in practice that never happened because ordinarily no reason existed to move the patient, such that most vascular procedures were done at the same hospital where the referring doctor practiced.

Both sides presented expert testimony with respect to the credentialing and privileging procedures at hospitals. According to plaintiff's expert, John Shershow, defendants violated the standard and fair practice for handling a doctor's **[***36]** application as well as the hospital's own bylaws and credentialing policies, and acted unreasonably and inappropriately in pursuing their request for more information from plaintiff. In Shershow's opinion, when a hospital questions an applicant's references, the standard and fair practice is to make follow-up phone calls to the doctors who wrote the references. If those calls do not answer all the questions, then **[*226]** the applicant may be asked to produce additional references. Standard practice requires contacting the department chairperson of any hospital at which the applicant practiced as well as contacting peer references provided by the applicant. Shershow opined that allowing an applicant's economic competitors to submit solicited or unsolicited comments without speaking to the applicant first was unfair practice.

Here, defendant was entirely unreasonable in failing to call the surgery department chiefs at Mountainside, St. Joseph's, and Metropolitan. Defendant also acted inappropriately when he called Syracuse, who had no position of authority at Mountainside, and Elrabie, who was the head of vascular surgery only at St. Joseph's. Assuming that defendant received negative information **[***37]** from Syracuse and Elrabie, defendant then should have asked them the bases for their statements and verified the specific concrete facts alleged. Most significantly, defendant should not have repeated these statements to the MEC without first confirming them. He should have merely asked the MEC for additional time to continue his investigation until the allegations could be resolved.

Shershow further believed that defendant's request to plaintiff for additional information was unprecedented and onerous. Both the credentials committee and the MEC should have refused to honor defendant's request for this information and either told defendant to call the surgery chief at Mountainside or made that call themselves. Also unprecedented was obtaining an external peer review of an applicant's records. Such a review is necessitated only when there is some internal adverse peer review or internal controversy. Finally, Shershow opined that it was unreasonable for IGH to expect plaintiff, once he got privileges at IGH, to be supervised by defendant, given the history of the litigation.

Shershow's opinion was not altered by the broad language contained in the waiver and release signed by plaintiff **[***38]** in connection with his application. The expert believed that the "universal **[*227]** expectation" of doctors was that the only people contacted would be the references given.

Eric Nelson Burkett, defendants' credentialing expert, opined that defendant acted in an appropriate manner to further investigate plaintiff's credentials. Except for Wyckoff, all of plaintiff's references were more than two years old. Additionally, **[**823]** Wyckoff was only a general surgeon and plaintiff should have offered a vascular surgeon at Mountainside or St. Joseph's as a reference. Burkett believed that it was within defendant's prerogative to go to any peer source he felt was authoritative. Finally, the release form signed by plaintiff, which gave defendant that right, was a standard one used by most hospitals, and defendant did not have to ask plaintiff's permission before making the phone calls beyond the submitted references.

Significantly, however, Burkett conceded that if the reviewer believes there is a conflict of interest, the reviewer should ask someone else to make the phone calls. Also, Burkett admitted that a request for one year of plaintiff's surgical cases probably would have been sufficient here. In **[***39]** previous deposition testimony, Burkett had indicated that defendant should have asked plaintiff for only six months of his cases or for only those cases which had complications. Nevertheless, Burkett maintained that defendant was entitled to the two-year list, as well as all of the accompanying information requested, to be able to ascertain whether any cases presented a quality of care problem. That Syracuse held no position of authority at Mountainside was irrelevant to Burkett. As a vascular surgeon, Syracuse was a peer of plaintiff and in a good position to evaluate plaintiff's performance over the past two years. Examining plaintiff's charts and records was the best way for defendant to verify what Syracuse told him.

According to Burkett, it was also appropriate for defendant to tell the MEC why he was withholding a recommendation on plaintiff's application. Burkett admitted, however, that once plaintiff's application was approved, it was not unreasonable for plaintiff to ask to be supervised by someone other than defendant.

[*228] On cross-examination, Burkett gave conflicting testimony with respect to whether defendant had violated the hospital's manual by failing to give plaintiff **[***40]** notice of the reasons for the deferral of his application. He also admitted that defendant should have asked himself whether any reference had an "ax to grind" with plaintiff. Burkett indicated that defendant should have called Wyckoff to reconcile the difference between Wyckoff's evaluation and Syracuse's accusations. Finally, Burkett admitted that if defendant fabricated or embellished the statements he attributed to Syracuse or Elrabie, then he would have breached his duty of fairness to plaintiff.

To challenge plaintiff's antitrust claims, defendants offered the testimony of Gerry Goodrich, a former State deputy commissioner of health who subsequently became president and CEO of IGH. Goodrich explained that in 1995 and 1996, thirteen hospitals were located in Essex County, making that county one of the more densely hospital-serviced communities in the nation. At least five other hospitals shared the same service area with IGH. Two of those hospitals, Newark Beth-Israel and St. Barnabas, were considerably larger than IGH, each having close to 600 beds and 20,000 to 30,000 admissions a year, compared to IGH's 157 beds and 4000 admissions. In addition, three of the five hospitals **[***41]** were full-service institutions, whereas IGH was a small medical surgical hospital, providing no obstetrical, pediatric, or other tertiary services.

Goodrich acknowledged that defendant was opinionated, voluble, envied, and controversial, but did not believe that defendant "got his way" at IGH more than any other doctor. Although defendant was the sole provider of the service of reading non-invasive lab reports, IGH also had exclusive contracts with several other doctors or groups of doctors for other types of services. **[**824]** To Goodrich's knowledge, no one at IGH conspired with defendant to keep plaintiff from getting hospital privileges. IGH tried to have as many doctors as possible with privileges, because it meant more business. Mody, IGH's executive director, also confirmed that **[*229]** IGH was always recruiting doctors in all specialties, including in the vascular surgery area, to enhance services provided and bring in new patients.

In her written opinion, the trial judge made certain discrete findings that are relevant to our disposition of the appeal. The judge found that, in reviewing plaintiff's application, defendant's mission was to "protect his fiefdom" and to keep out qualified competition **[***42]** by any means possible and "at all costs." When faced with the "red flag" of Wyckoff's caveat that plaintiff be supervised and observed at IGH, defendant chose not to call the author of that note because he "knew in his heart" that Wyckoff would give plaintiff a very positive recommendation. Instead, defendant chose to call Syracuse, a competitor of plaintiff's. The judge also found that rather than call Wyckoff to verify the information given by Syracuse, defendant started an endurance test of "burdensome, inappropriate and unnecessary" requests to wear down plaintiff. Significantly, the judge found defendant's demeanor on the witness stand to be "arrogant and egotistical." The judge had no doubt about his motivation, with all of these findings relevant to the judge's ultimate finding that defendant was not a credible witness.

The judge further found that defendant published both Syracuse's and Elrabie's statements, later revealed as untrue, to the MEC. While she believed that both Syracuse and Elrabie had given negative information to defendant, she could not tell to what extent. She found that Syracuse was not a believable witness and that from his demeanor on the witness stand, **[***43]** "he clearly did not want to admit too much." While Syracuse denied making specific negative statements about plaintiff to defendant, he did admit to general criticisms about him. Elrabie flatly denied making the statements defendant attributed to him. In any event, according to the judge, defendant should have been more circumspect in the weight he gave to those statements and in the way he confirmed their veracity.

[*230] Plaintiff's income levels showed that his credentials and talent were in demand. Also, the evidence demonstrated that defendant had a "virtual lock" on the vascular surgery at IGH. The delay in completing plaintiff's credentialing process, coupled with the negative statements made about plaintiff in connection with that process, led other doctors at IGH to question plaintiff's competence. That meant fewer referrals and diminished income for plaintiff. Furthermore, the initial wrongful denial of privileges to plaintiff at IGH because of plaintiff's refusal to comply with defendant's unwarranted requests, prompted Mountainside to launch its own investigation into plaintiff's practices.

The judge also concluded that Shershow's expert testimony established that defendants **[***44]** violated standard practices in the way they processed plaintiff's application. Burkett, the defense expert, testified "quite incredibly" in the judge's opinion. He ultimately agreed with plaintiff that there had been no negative information in plaintiff's file before defendant made his phone calls, that someone other than defendant was designated to verify any allegations, and that defendant should have called Wyckoff for information about plaintiff's references and Syracuse's allegations. Moreover, at no time did anyone on the credentials committee or the MEC at IGH ask defendant, who generated a high number **[**825]** of patients at the hospital, to modify his request. Rather, the members of both committees simply endorsed defendant's recommendations.

With respect to plaintiff's tortious interference claim, the judge found that plaintiff had been invited to apply to IGH and had been told that IGH had a need for more than one practicing vascular surgeon. Thus, he had a reasonable expectation that patient referrals and income would be forthcoming. The judge concluded that plaintiff, whose excellent credentials defendant recognized would make him a viable option for referrals, posed a threat **[***45]** to defendant's "virtual lock" on vascular surgery. This, in turn, would threaten to diminish defendant's own $ 500,000 annual income. Such risk prompted defendant to seek through discovery, **[*231]** embellishment or creation, negative information to keep plaintiff out of the hospital, or to delay the process so that plaintiff would withdraw his application out of fear or frustration.

The judge had no doubt that defendant had acted maliciously by failing to handle plaintiff's application fairly, his deliberate delays in violation of the hospital's credentialing procedures manual, and his interjection and publication of extremely damaging false information about plaintiff's competence. IGH was also responsible because its committees and their members did nothing to stop defendant's baseless hunt for negative information, and thus IGH acquiesced in defendant's conduct. The judge also found that plaintiff was damaged by defendants' tortious conduct. "Based upon [plaintiff's] income making ability at Mountainside and Valley Hospitals it is reasonable that he would have done the same at IGH had he been given timely privileges."

With respect to plaintiff's antitrust claims, the judge found that **[***46]** IGH was immune from such liability under *N.J.S.A. 56:9-5(b)(5)*. However, defendant was liable because he acted not only as an agent of IGH, but also to protect his own income. The judge found that defendant held a monopoly in vascular surgery at IGH and worked to keep plaintiff out of that institution. As such, for purposes of analysis under the antitrust laws, IGH was the "relevant market."

With respect to plaintiff's defamation claim, the judge found that the statements made by Elrabie and Syracuse which defendant published "pierce one's heart [in] their severity." The comments, if believed, would end plaintiff's career. The same was true for the statements made by defendant to Sawhney. Defendant either fabricated the statements from general information he reviewed, or acted with malice and wanton disregard in failing to verify them. Nor did the committees at IGH verify the statements or ask defendant to do so. Moreover, the statements were meant to damage plaintiff's reputation. Because of the gossip about plaintiff's credential problems, he suffered harm with respect to his work at Mountainside.

[*232] The judge rejected plaintiff's breach of contract claim, **[***47]** finding that the law had not extended contractual rights to hospital procedural manuals which set forth appropriate procedures for granting privileges to hospitals. A contract was formed by bylaws only once privileges were granted. Moreover, the hospital's general duty of good faith did not equate with a contract.

With respect to damages, the judge found the loss due to the tortious interference and antitrust claims were the same, i.e., what plaintiff would have earned at IGH had he been granted privileges in September 1995 rather than September 1997. Defendant earned $ 1 million in that two-year period. The judge found that plaintiff reasonably could have received about twenty-five percent of defendant's **[**826]** referrals; hence, his damages were $ 250,000. The damages to plaintiff due to defendant's defamatory statements were reflected in the years 1996, 1997, and 1998, when plaintiff's gross income substantially dropped from its 1995 high of $ 302,000. Notably, in 1999, plaintiff's income returned to over $ 300,000. The judge found that the loss in plaintiff's net income for this three-year period was $ 472,000, and that no proofs were presented to show any basis for this loss other than **[***48]** defendant's conduct. Plaintiff had also established emotional harm "as evidenced by his being on the verge of tears" when he testified. He clearly had suffered both personal and professional humiliation and had been deprived of the "blessing" of patient care. The judge believed that $ 250,000 was a "fair and reasonable" amount to compensate for this emotional harm.

The judge also found that defendant's conduct was "malicious and heinous," warranting a punitive damage award of $ 250,000. Such an award would punish defendant and send a message to deter others from similar conduct. The court later clarified that of the $ 250,000 awarded for tortious interference and antitrust, $ 125,000 represented a joint and several award against IGH and defendant for tortious interference, and $ 125,000 represented the award against defendant alone for antitrust. Plaintiff was entitled to treble that amount, or $ 375,000. The judge also awarded **[*233]** prejudgment interest and attorneys' fees, which are not disputed on appeal.

II.

We first address the issue of plaintiff's antitrust claim. Defendant challenges the judge's finding in favor of plaintiff, asserting that plaintiff failed to establish three **[***49]** elements of a viable antitrust cause of action: 1) the geographic market; 2) the product market as vascular surgery; and 3) defendant's exercise of monopoly power so as to cause injury to competition.

We start our analysis with the language of the statute. *N.J.S.A. 56:9-3* sets forth the underlying proscriptive conduct: ***HN1***[] "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." *N.J.S.A. 56:9- 4(a)* follows and provides: ***HN2***[] "It shall be unlawful for any person to monopolize, or attempt to monopolize, or to combine or conspire with any person or persons, to monopolize trade or commerce in any relevant market within this State." ***HN3***[] The dominant purpose of the New Jersey Antitrust Act (the Act), *N.J.S.A. 56:9-1 to 19*, is to advance public policy in favor of competition and to prevent practices that deprive consumers of the benefit of competitive markets. *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc., 282 N.J. Super. 140, 175, 659 A.2d 904 (App.Div.)*, *certif. denied, 141 N.J. 99, 660 A.2d 1197 (1995)*.

N.J.S.A. 56:9-18 **[***50]** ***HN4***[] mandates that the Act "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it." We look to federal jurisprudence to guide our interpretation of the Act. *G & W, Inc. v. Bor. of E. Rutherford, 280 N.J. Super. 507, 512, 656 A.2d 11 (App.Div.1995)*; *Van Natta Mech. Corp. v. DiStaulo, 277 N.J. Super. 175, 188, 649 A.2d 399 (App.Div.1994)*.

[*234] ***HN5***[] The federal analog to *N.J.S.A. 56:9-3*, the restraint of trade provision, is § 1 of the Sherman Act (*15 U.S.C.A. § 1*), [11] which **[**827]** contains virtually identical language. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 175, 659 A.2d 904*. The issue is joined by the parties in their disparate interpretation of the applicable sections of the Act that apply here. Defendants analyze plaintiff's claim solely under *N.J.S.A. 56:9-4*, ***HN6***[] the

[11] *§ 1* provides: ***HN7***[] "Every contract, combination in the form of trust or otherwise, or conspiracy, inrestraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." *15 U.S.C.A. § 1*.

monopolization provision, which is analogous to § 2 of the Sherman Act, *15 U.S.C.A. § 2*. [12] Plaintiff urges that his claim is viable under *N.J.S.A. 56:9-3* **[***51]** and invokes the "per se" rule of liability.

Unfortunately, we are constrained by the failure of the trial judge to analyze either provision of the Act or to set forth the statutory basis for the entry of judgment in favor of plaintiff. The trial judge's opinion on plaintiff's antitrust claim consisted of one paragraph and made no reference to either state or federal law.

> IGH is immune by virtue of *N.J.S.A. 56:9-5(b)(5)*. Dr. Soriano is **[***52]** not. His conduct was dual in that he acted on behalf of IGH as to credentialing and on his own behalf in protecting his income. IGH wants qualified competent physicians to serve its patient population. If one, two or more vascular surgeons do the work the result is the same for IGH. That is not the case for Dr. Soriano. He has virtually been the only act in town. Dr. Soriano holds a monopoly in vascular surgery at IGH and worked to keep Dr. Patel out. The only way to do work and get referrals at IGH is to have privileges. That is the relevant market. All the previously cited facts support a finding against Dr. Soriano.

We set forth the basic principles regarding restraint of trade. ***HN9***[] Under *N.J.S.A. 56:9-3*, a plaintiff must prove the existence of a conspiracy in restraint of trade and either an unlawful purpose or an anti-competitive effect. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 186, 659 A.2d 904*. Unilateral action, regardless of its motivation, cannot constitute a violation of **[*235]** *N.J.S.A. 56:9-3*. *Id. at 187 n.3, 659 A.2d 904* (citing *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 110 (3d Cir.1980)* **[***53]**). Instead, plaintiff must establish a unity of purpose, a common design and understanding, or a meeting of the minds in an unlawful arrangement between, at minimum, two independent, self-interested economic entities. *Urdinaran v. Aarons, 115 F. Supp. 2d 484, 488 (D.N.J.2000)*. Such a proof must be made by direct or circumstantial evidence that tends to prove a common scheme designed to achieve an unlawful objective. *Brown v. Our Lady of Lourdes Med. Ctr., 767 F. Supp. 618, 630 (D.N.J.1991)*, *aff'd o.b., 961 F.2d 207 (3d Cir.1992)*. ***HN10***[] An antitrust conspiracy where hospital surgical privileges have been denied cannot be inferred from the mere opportunity or ability to conspire. *Id. at 629-30*; *Petrocco v. Dover Gen. Hosp. & Med. Ctr., 273 N.J. Super. 501, 525, 642 A.2d 1016 (App.Div.)*, *certif. denied, 138 N.J. 264, 649 A.2d 1284 (1994)*. Even if the ultimate peer review decision is consistent with the economic interests of a competitor, conspiracy cannot be inferred "from whole cloth." *Urdinaran, supra, 115 F. Supp. 2d at 488*.

Moreover, ***HN11***[] "[t]here can be no [] contract, combination or conspiracy **[***54]** by a corporation . . . with its own officers, **[**828]** agents or employees, who are performing their usual job of formulating and carrying out its managerial policy." *Exxon Corp. v. Wagner, 154 N.J. Super. 538, 545, 382 A.2d 45 (App.Div.1977)*; *see* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 2741, 81 L. Ed. 2d 628, 642 (1984)* (stating that employees of same company do not provide plurality of actors necessary for conspiracy under *§ 1 of the Sherman Act*). For that reason, a hospital is incapable of conspiring with its staff in deciding whether to grant staff privileges. *Petrocco, supra, 273 N.J. Super. at 524, 642 A.2d 1016.*

The Third Circuit has similarly held that ***HN12***[] a hospital cannot conspire with its executive or medical staff committees. *Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96, 117-18 (3d Cir.1988)*, *cert. denied,* **[*236]** *489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 834 (1989)*; *Weiss v. York Hosp., 745 F.2d 786, 817 (3d Cir.1984)*, *cert. denied, 470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)*. While each medical staff member has an independent **[***55]** economic interest in competition with one another, thus satisfying the concerted action element of a restraint of trade claim, the staff as an entity has no interest in competition with the hospital and, in fact, operates similarly to an officer of a corporation who makes decisions on behalf of the corporate entity. *Nanavati, supra, 857 F.2d at 118*; *Weiss, supra, 745 F.2d at 817*. *But see* *Islami v. Covenant Med. Ctr., Inc., 822 F. Supp. 1361, 1381-82 (N.D.Iowa 1992)* (noting the split in circuits on this issue and an exception to the rule where agents have a personal stake involved).

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[12] *§ 2* provides: ***HN8***[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *15 U.S.C.A. § 2*.

Applying these principles here, we conclude that plaintiff did not demonstrate the concerted action element of a restraint of trade claim under *N.J.S.A. 56:9-3*. The trial judge found that defendant acted in a dual capacity as an agent of the hospital and in his own capacity to further his own economic interests. While that finding is supported by the record, the judge also found that IGH had absolutely no economic interest in preventing plaintiff from getting privileges since, as the evidence showed, the hospital either would gain from having additional **[***56]** doctors or would suffer no detriment. Only defendant would lose from the presence of competitors.

There was no proof that defendant conspired with anyone, much less IGH or one of its agents. That IGH may have acquiesced to defendant's unreasonable demands and chosen to let him "run the show" is not proof of an unlawful agreement between two separate and independent entities.

Plaintiff also failed to prove the necessary unlawful purpose or anticompetitive effect for a claim under *N.J.S.A. 56:9-3*. ***HN13***[] A restraint of trade claim can be evaluated by two methods: the rule of reason, and the per se rule argued by defendant. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 175, 659 A.2d 904*.

[*237] Under a per se analysis, plaintiff need prove only the existence of an illegal agreement and defendant's anticompetitive intent; anticompetitive effect is presumed. *Id. at 178, 186, 659 A.2d 904*. However, the per se rule is reserved for plainly anticompetitive practices, such as price-fixing and tying arrangements, which are always considered harmful to competition. *Id. at 177, 659 A.2d 904*; *G & W, Inc., supra, 280 N.J. Super. at 513, 656 A.2d 11*; *EZ Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J. Super. 546, 552, 704 A.2d 1364 (Ch.Div.1996),* **[***57]** *aff'd, 307 N.J. Super. 438, 704 A.2d 1309 (App.Div.1997)*.

HN14[] Both the United States Supreme Court and our Supreme Court have been reluctant **[**829]** to extend the per se rule, especially in the context of hospital-doctor associations. *See*, *e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 104 S. Ct. 1551, 1560, 80 L. Ed. 2d 2, 15 (1984)* (tying arrangement between hospital and group of medical specialists does not warrant per se invalidation absent proof of market power); *Desai v. St. Barnabas Med. Ctr., 103 N.J. 79, 97-98, 510 A.2d 662 (1986)* (hospital-doctor associations are not inherently anticompetitive).

We reject the application of the per se rule of liability here. Even assuming that defendant and IGH acted in concert, there was no evidence of plainly anticompetitive conduct on the part of these defendants that should relieve plaintiff of the burden of proving anticompetitive effect. Most significantly, the judge made no such finding of such conduct. Although plaintiff relies on defendant's overwhelming market share to prove a per se restraint of trade, his analysis rests on what we determine to be the improper assumption **[***58]** that the relevant market was IGH, a subject we address, *infra.*

HN15[] Under the rule of reason, only restraints of trade that are "unreasonably restrictive of competitive conditions" are illegal. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 175, 659 A.2d 904* (citing *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60-66, 31 S. Ct. 502, 516-18, 55 L. Ed. 619, 645-47 (1910)*). The focus is on whether the conduct adversely affects competition. **[*238]** A trial judge must closely examine the relevant product and geographic markets and evaluate the effect of the defendant's conduct on that market. *Pomanowski v. Monmouth Cty. Bd. of Realtors, 89 N.J. 306, 315-16, 446 A.2d 83*, *cert. denied, 459 U.S. 908, 103 S. Ct. 213, 74 L. Ed. 2d 170 (1982)*; *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 176, 659 A.2d 904*; *EZ Sockets, Inc., supra, 307 N.J. Super. at 553, 704 A.2d 1364*. The fact that the conduct may have an injurious effect on an individual competitor is irrelevant. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 176, 659 A.2d 904*; *EZ Sockets, Inc., supra, 307 N.J. Super. at 553, 704 A.2d 1364*; *see* *Urdinaran, supra, 115 F. Supp. 2d at 489* (interpreting **[***59]** federal statute).

The balancing process under the rule of reason requires defining the market in which the restraint operates, evaluating the evils inherent in the conduct, and weighing those anticompetitive influences against any pro-competitive justifications. *Pomanowski, supra, 89 N.J. at 315-16, 446 A.2d 83*; *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 176, 659 A.2d 904*. Proof of adverse effects on profits is insufficient as a matter of law. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 188, 659 A.2d 904*. "Actual or probable harm to *competition* is essential under a reasonableness approach." *Ibid.* "The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality." Id. at 188-89, 659 A.2d 904 (quoting Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 (7th Cir.1982)).

The analysis is similar HN16[] for a monopolization claim under N.J.S.A. 56:9-4. A plaintiff must show that defendants have a dangerous probability of achieving monopoly power in the relevant market. **[***60]** Van Natta Mech. Corp., supra, 277 N.J. Super. at 188, 649 A.2d 399; *see* Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir.1995) (interpreting § 2 of Sherman Act). A defendant is prohibited from using its monopoly power to gain a competitive advantage by destroying or eliminating its competitors. **[*239]** G & W, Inc., supra, 280 N.J. Super. at 513, 656 A.2d 11. **[**830]** Monopoly power is defined as the power to control prices or exclude competition in the relevant market. *Ibid.* The likelihood of achieving a monopoly is demonstrated through a market share sufficient to create a monopoly. Van Natta Mech. Corp., supra, 277 N.J. Super. at 188, 649 A.2d 399. To demonstrate a monopoly under § 2 of the Sherman Act, a plaintiff must prove "possession of monopoly power in the relevant market and [] willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." [13] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089, 119 L. Ed. 2d 265, 292-93 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778, 786 (1966)); **[***61]** Urdinaran , supra, 115 F. Supp. 2d at 491; Brown, supra, 767 F. Supp. at 630.

HN18[] The critical issue under both analyses is demonstration of the relevant market. Where a plaintiff fails to adduce any proofs regarding market area or monopoly power, any antitrust claim will fail and must be dismissed as a matter of law. Desai, supra, 103 N.J. at 99, 510 A.2d 662. *See* Belmar v. Cipolla, 96 N.J. 199, 213-18, 475 A.2d 533 (1984); Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 190, 659 A.2d 904. Moreover, since the market power necessary for a monopolization claim requires **[***62]** something more than the market power necessary for a restraint of trade claim, a plaintiff who fails in its proofs for the latter will also fail in its proofs for the former. Urdinaran, supra, 115 F. Supp. 2d at 491.

[*240] HN19[] The relevant geographic market is the area in which potential buyers may rationally look for the goods or services they seek. It is the area where customers look to buy products, not the area where the seller attempts to sell its product. Id. at 490. In the case of hospitals, the geographic market inquiry focuses on the area within which hospital "customers" can turn to other "sellers" (hospitals) if the hospital raises prices or restricts output. Brown, supra, 767 F. Supp. at 630. A judge must consider, among other factors, whether the hospital is near major metropolitan areas and whether those areas also have hospitals. *See* id. at 631. Absent an allegation that a hospital exclusively serves a particular area or offers a unique set of services, an antitrust plaintiff may not limit the geographic market to a single hospital. Brader, supra, 64 F.3d at 877.

In Urdinaran, supra, 115 F. Supp. 2d at 489, the district court **[***63]** held that a plaintiff failed to prove the elements of an antitrust claim where he alleged no more than a decline in his business as a result of the loss of his privileges at the Atlantic City Medical Center, and where he failed to provide any evidence of rising prices or a decline in the quality of care to customers in the geographic area. The court also noted that surgical patients in the Atlantic City area might take advantage of medical facilities as far away as Philadelphia. Id. at 490.

Similarly, in Belmar, supra, 96 N.J. at 201, 475 A.2d 533, the Supreme Court was faced with a challenge to a hospital's decision to enter into an exclusive contract with a group of anesthesiologists for the **[**831]** provision of all anesthesiology services at the hospital. The Court refused to find any antitrust violation where the record was devoid of any proof that patients were forced to use the services of those doctors as a result of the hospital's market power. Id. at 218, 475 A.2d 533. Plaintiffs offered no evidence of the relevant market area for anesthesiological

[13] HN17[] The only difference between the federal and state statutes is that the Act does not require that defendant's activity affect interstate commerce. Urdinaran, supra, 115 F. Supp. 2d at 492. It is the effect on interstate commerce that supplies the necessary federal jurisdiction under the Sherman Act. McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241, 100 S. Ct. 502, 508, 62 L. Ed. 2d 441, 449-50 (1980).

services and rested their case on the sole fact that the choice of anesthesiologists at that one hospital **[***64]** was limited to doctors comprising that one group of doctors. *Ibid.* The record also showed that there were four **[*241]** other hospitals within a ten-mile radius of the defendant hospital, and that the defendant hospital had forty-five percent of the share of the market in its "primary area" and eighteen percent of the market in its "secondary area." *Id. at 213, 475 A.2d 533*.

Applying these principles here, we conclude that the judge's finding of violation of the Act must be reversed. Plaintiff produced nothing to support a finding regarding defendant's market power and, like the plaintiffs in *Belmar* rested his case on the sole fact that patients *at IGH* would be limited to using defendant as their vascular surgeon.

If anything, defendants established in their case in chief that the relevant geographic market for vascular surgical services in the community in which IGH was located is *not* limited to IGH. There are numerous other hospitals in Essex County, even disregarding the readily accessible New York hospital market, including many hospitals that are larger and provide a fuller range of services than IGH.

Most significantly, ***HN20***[] any relevant inquiry for purposes of ***antitrust*** **[***65]** ***law*** is the effect on consumers, not on an individual competitor. Defendant's conduct did not restrict the quality or price of vascular surgical services in and around Essex County, and plaintiff's claim must fail. Plaintiff failed to demonstrate that IGH was the only hospital in the community providing these services. That defendant was the sole provider of such services at IGH was irrelevant. Likewise irrelevant for the purposes of application of the Act is that defendant acted improperly in making himself the sole provider of services at IGH. ***HN21***[] The antitrust laws are not intended to replace the common law of unfair competition or to afford remedies for all business torts. *Ideal Dairy Farms, Inc., supra, 282 N.J. Super. at 185, 659 A.2d 904*. Whereas the law of unfair competition is grounded in ethical considerations, ***antitrust law*** is grounded solely in economic considerations and requires specific proof for recovery. *Ibid.* That proof was sorely lacking here. The judge should have dismissed plaintiff's antitrust claim.

[*242] III.

We reach a different result on plaintiff's claim for tortious interference.

HN22[] To establish a cause of action for tortious interference with a prospective economic **[***66]** advantage, a plaintiff must prove that he had a reasonable expectation of advantage from a prospective contractual or economic relationship, that defendant interfered with this advantage intentionally and without justification or excuse, that the interference caused the loss of the expected advantage, and that the injury caused damage. *Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52, 563 A.2d 31 (1989)*. On appeal, defendants challenge only the first element of proof. That is, they claim that plaintiff failed to prove that his expectation of future vascular surgery referrals was reasonable or rose to the level of a protectable interest.

The protected interest need not rise to the level of an enforceable contract. **[**832]** *Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258, 265, 703 A.2d 664 (App.Div.1997)*, *certif. denied, 153 N.J. 405, 709 A.2d 798 (1998)*. Instead, plaintiff must demonstrate that without the interference, there was a reasonable probability that he would have received the anticipated economic benefits. *Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306, 770 A.2d 1158 (2001)*; *MacDougall v. Weichert, 144 N.J. 380, 404, 677 A.2d 162 (1996).* **[***67]**

The record clearly supported the judge's findings and conclusion that but for defendants' malicious interference with plaintiff's application for privileges, that application would have been approved. It is true that, once approved, plaintiff was not guaranteed any particular percentage of the referrals at IGH. Moreover, plaintiff's reliance on Patrawalla's optimistic prediction that he would receive thirty percent of the vascular surgery referrals was unfounded. Nevertheless, these are damage rather than liability issues. They did not bar plaintiff from any recovery, especially as it was undisputed that without privileges, a doctor **[*243]** cannot perform any surgery at that particular institution. The issue, then, was not whether plaintiff proved a loss to a reasonable expectation of economic advantage, but the extent of that loss, an issue we address, *infra.*

We affirm the judgment of liability on plaintiff's tortious interference claim.

IV.

Defendants argue that the judgment in plaintiff's favor on the defamation claim must be reversed because this claim was barred by the one-year statute of limitations; the evidence failed to establish that the alleged defamation caused plaintiff **[***68]** the damages found by the judge; and plaintiff failed to show knowledge of falsity or reckless disregard for the truth, the appropriate standard when a qualified privilege applies.

With respect to the time bar issue, plaintiff responds that defendants waived this defense by failing to plead it as an affirmative defense; that his claim was for trade libel, not defamation, and was therefore governed by a six-year statute of limitations; that the equitable tolling and fraudulent concealment doctrines applied; and that his amended complaint related back to the filing date of the initial verified complaint.

Although we need not address the issues of waiver, equitable tolling, fraudulent concealment or relation back as we now conclude that plaintiff did set forth a cause of action for trade libel that was not barred by the one-year limitation period, we first set forth the relevant statute and then recount the procedural background of this litigation to put our determination in context.

N.J.S.A. 2A:14-3 provides that: ***HN23***[] "Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." However, **[***69]** *N.J.S.A. 2A:14-1* also provides:

> ***HN24***[] Every action at law . . . for any tortious injury to real or personal property, for taking, detaining, or converting personal property, . . . [or] for any tortious injury to the rights of another not stated in sections 2A:14-2 and *2A:14-3* of this Title, . . . **[*244]** shall be commenced within 6 years next after the cause of any such action shall have accrued.

On September 9, 1996, plaintiff filed his initial verified complaint in the Chancery Division, seeking to compel defendants to act on his application. At that point in time, plaintiff had not yet received notification that his application had been denied. Once that notification was received, apparently several days later, his complaint became one for relief from the onerous request **[**833]** to supply two years' worth of his surgical records. That relief was granted by the Chancery judge in October 1996. In June 1997, plaintiff was finally granted the privileges he sought. Within a few months, he filed his amended complaint, which was transferred to the Law Division, tried and is now the subject of this appeal.

Plaintiff's initial complaint contained three counts: the first count alleged **[***70]** breach of IGH's credentialing procedures manual, bylaws, rules and regulations; the second count alleged tortious interference with plaintiff's prospective economic advantage and libel and slander which "*adversely affected [plaintiff's] professional reputation and trade and business;*" and the third count alleged violation of the antitrust statute (emphasis added).

As of the filing of this initial complaint, plaintiff did not yet know about the details of defendant's phone conversations with Syracuse and Elrabie. Those details were revealed in defendant's certification of September 18, 1996, filed in opposition to plaintiff's order to show cause. However, by virtue of defendant's October 25, 1995, letter to plaintiff, plaintiff already knew that defendant had spoken to doctors at Mountainside and St. Joseph's who had allegedly transmitted negative information about plaintiff. Plaintiff also knew that Tiu had been copied on this letter. Moreover, plaintiff suspected that it was Syracuse to whom defendant had spoken at Mountainside, because plaintiff's attorney immediately wrote to Syracuse for his response to these allegations. Although Syracuse denied making the specific statements **[***71]** attributed to him, he did admit that he told defendant to obtain a list of plaintiff's cases.

[*245] We cannot discern from the record at what point plaintiff found out that on July 13, 1995, defendant related to the MEC what he learned from Syracuse. It was not disputed that on October 5, 1995, the MEC voted to redact the minutes of the July 13 meeting. However, the original minutes for July 13 were made available to plaintiff at some point in discovery following the filing of the initial complaint.

Plaintiff's amended complaint filed on August 14, 1997, contained a separate count for defamation. In that count, plaintiff alleged that defendant had "in certain conversations that he had with and in the hearing and presence of certain persons, including but not limited to members of the Hospital's Medical Executive Committee, maliciously spoke and published of and concerning [plaintiff], certain slanderous, false, libelous, malicious, scandalous and defamatory words." Specifically, these words were the ones defendant told the MEC about his conversations with Syracuse and Elrabie. Plaintiff alleged that the slanderous statements injured and damaged him in his good name and reputation, "including **[***72]** but not limited to other physicians at the Hospital and the other hospitals where [plaintiff] holds privileges."

In their answer to plaintiff's amended complaint, defendants did not affirmatively plead the defense of the statute of limitations. However, they did plead the defense of failure to state a claim upon which relief could be granted. In November 2000, defendants filed a notice of motion to dismiss the defamation claim on various grounds, including the one-year statute of limitations bar. Defendants argued that this was not a trade libel claim subject to a six-year statute of limitations. On February 26, 2001, the judge denied the motion. She found that the damages claimed by plaintiff went to the alleged interference with his ability to practice at IGH. Even if the one-year statute applied, defendants had waived the defense "by failure to so **[**834]** plead and move in a timely fashion on that ground."

However, following trial, the judge reversed herself and found that defendants' pleading of "failure to state a claim" **[*246]** *was* sufficient to raise the statute of limitations defense. However, the claim was not time-barred because "[w]hen the statements were made and when [plaintiff] **[***73]** was able to determine when they were made was like chasing a moving target." Moreover, specific information was within defendants' control. While plaintiff's original complaint did not plead this cause of action "in so many words," the claim was there "by inference" and was within the knowledge of defendants, who knew that "negative statements" had delayed plaintiff's credentialing process. We disagree with the judge that this was a defamation case, and plaintiff was subject to the one-year limitations period. Our review of the record reveals that this cause of action should have been reviewed as one of trade libel where a six-year limitations period applies. Our determination renders moot any asserted error as to the application of the one-year limitations period.

We now address the principles of law applicable to plaintiff's asserted trade libel claim. ***HN25***[] Trade libel identifies the tort addressing aspersions cast upon one's business operation. The tort is also known as injurious falsehood, disparagement of property, or commercial disparagement. *Prosser & Keeton on Torts* § 128 at 963 (5th ed. 1984) (*Prosser & Keeton*). However, the tort is broader in scope than any of those **[***74]** terms would indicate, and is probably as broad as any injurious falsehood which disturbs prospective advantage. *Id.* at 963, 967. It is similar to the tort of intentional interference with one's economic relations, rather than a branch of the general harm to reputation involved in libel and slander. *Id.* at 964; *see* *Henry V. Vaccaro Constr. Co. v. A.J. DePace, Inc., 137 N.J. Super. 512, 514, 349 A.2d 570 (Law Div.1975)* (noting that "the tort of trade libel is but one part of a rather amorphous concept" consisting of communication to a third person of false statements concerning the plaintiff, his property, or his business).

A plaintiff alleging trade libel must prove publication of a matter derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to **[*247]** interfere with plaintiff's relations with others. *Prosser & Keeton, supra,* § 128 at 967. The communication must be made to a third person and must play a material part in inducing others not to deal with plaintiff. *Ibid.*; *Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 524, 777 A.2d 365 (App.Div.)*, *certif. denied, 170 N.J. 211, 785 A.2d 439 (2001).* **[***75]**

HN26[] Certain differences between defamation and trade libel are significant. Whereas a defamation claim is subject to a one-year statute of limitations, a claim for trade libel is subject to the general six-year statute of limitations applicable to malicious interference claims. *Crawford v. W. Jersey Health Sys. (Voorhees Div.), 847 F. Supp. 1232, 1239* and n. 7 (D.N.J.1994); *Henry V. Vaccaro Constr. Co., supra, 137 N.J. Super. at 516, 349 A.2d 570*. Also, whereas the need to demonstrate damages is waived in a defamation suit where the statement is oral, constitutes slander per se, and concerns conduct incompatible with the plaintiff's business, *McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 313-14, 751 A.2d 1066 (App.Div.2000)*, proof of damages is essential in an action for trade libel. *Prosser & Keeton, supra,* § 128 at 970-71.

HN27[] Interference by falsehoods that cause pecuniary loss, but are not personally **[**835]** defamatory, has been regarded as a tort "more or less distinct" from defamation. *Id.* at 962. Distinguishing between personal defamation of a plaintiff and disparagement of plaintiff's property may be difficult. **[***76]** *Ibid.* Generally, the latter tort has been applied to statements that are injurious to plaintiff's business, but cast no reflection on either plaintiff's person or property. *Id.* at 963. For example, if the statement charges plaintiff with personal misconduct, or imputes to plaintiff reprehensible personal characteristics, it is regarded as libel or slander. *Id.* at 964. If, however, the aspersion reflects only on the quality of plaintiff's product, or on the character of plaintiff's business as such, it is disparagement. *Id.* at 964-65; *accord Restatement (Second) of Torts* *§ 626* comment d at 346 (1977) (noting that the rule of liability for trade libel applies "only when the matter **[*248]** published goes no further than to attack the quality of the thing in question and does not attack the personal character of its owner as vendor").

Many statements effectuate both harms. *Prosser & Keeton, supra,* § 128 at 965. Some accusation of personal incompetence may be implied in imputations directed against a business or its product. *Ibid.* However, ***HN28***[] personal defamation is usually found only "where the imputation fairly implied is that **[***77]** the plaintiff is dishonest or lacking in integrity, or that he is deliberately perpetrating a fraud upon the public by selling a product which he knows to be defective." *Ibid.* No personal defamation will be found "where the most that can be made out of the words is a charge of ignorance or negligence." *Ibid.* Additionally, one may disparage plaintiff's business by reflecting upon its character, the manner in which it is conducted, or its popularity or danger, and not affect any property. *Id.* at 966.

HN29[] The elements of a disparagement action include proof of publication of material derogatory to the quality of a plaintiff's business, or to his business in general, of a kind calculated to prevent others from dealing with him, or otherwise to interfere adversely with his relations with others. *Id.* at 967. To establish loss of trade or other dealings, plaintiff must show the falsehood was communicated to a third person and played a material and substantial part in leading others not to deal with plaintiff. *Ibid.* Plaintiff must also prove that the statement is false, and that defendant made the statement knowingly or recklessly. *Id.* at 967, 969-70. Finally, plaintiff **[***78]** must prove special damages, such as the loss of a present or prospective advantage, in the form of pecuniary loss. *Id.* at 964.

HN30[] The special damages requirement goes to the cause of action itself, such that a plaintiff will be denied even nominal or punitive damages if he cannot show special damages. *Id.* at 970-71. The necessary showing is specific: plaintiff must establish pecuniary loss that has been realized or liquidated, such as lost **[*249]** sales, or the loss of prospective contracts with customers. *Id.* at 971. Traditionally, plaintiff was required to identify particular business interests who have refrained from dealing with him, or explain the impossibility of doing so. *Id.* at 972-73. However, where requiring such identification is unreasonable, proof of lost profits resulting from breach of contract may suffice, especially where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded. *Id.* at 973.

General, implied, or presumed damages of the kind available in personal defamation actions do not satisfy the requirement of special damages needed for disparagement causes of action. **[***79]** *Id.* at 971. **[**836]** In addition, personal elements of damages, such as mental distress, are strictly excluded. *Ibid.*; *Henry V. Vaccaro Constr. Co., supra, 137 N.J. Super. at 517, 349 A.2d 570*.

HN31[] The gravamen of a complaint for malicious intent to cause harm to one's business or employment is not the means used, but the wrongfulness of the defendant's intent. *Strollo v. Jersey Cent. Power & Light Co., 20 N.J. Misc. 217, 223, 26 A.2d 559 (Sup.Ct.1942)*. It is not necessary to set out the words of the false representation. *Van Horn v. Van Horn, 56 N.J.L. 318, 324, 28 A. 669 (E & A 1893)*. For such a cause of action, the more restricted statute of limitations for slander does not apply. *Ibid.*; *Henry V. Vaccaro Constr. Co., supra, 137 N.J. Super. at 516, 349 A.2d 570*.

Applying these principles here, we conclude that plaintiff established a cause of action for trade libel, in that he established that false statements made knowingly or recklessly about him by defendant caused him to lose referrals at IGH. The statements pertained solely to the character of the medical services provided by plaintiff and essentially charged plaintiff with negligence. **[***80]** Since the statements did not imply that plaintiff was personally dishonest, reprehensible, or lacking in integrity, they fall under the tort of trade libel, as opposed to personal defamation. *Prosser & Keeton, supra*, § 128 at 964-65. We need not recount in detail **[*250]** the statements satisfying the trade libel cause of action. However, the finding of the trial judge as to the defamation cause of action satisfied the proofs necessary to support the trade libel cause of action. The statements regarding such matters as mortality and morbidity, aneurysm-related deaths, and even plaintiff's relationship with others on staff all were focused on his performance as a surgeon as opposed to personal defamation. We hold that plaintiff proved a trade libel cause of action.

Defendants contend that because defendant was qualifiedly privileged to utter the statements he did to the MEC, plaintiff had to prove that defendant knew those statements were false or that he uttered them with reckless indifference to their truth. [14] We conclude that the evidence supported the trial judge's finding that the privilege did not apply and defendant acted with the requisite knowledge or recklessness to abate **[***81]** the privilege.

We review the relevant legal principles. ***HN32***[] "A communication made bona fide upon any subject matter in which the party communicating has an interest or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty." *Williams v. Bell Tel. Lab., Inc., 132 N.J. 109, 121, 623 A.2d 234 (1993)* (citing *Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 375, 149 A.2d 193 (1959)* (citations omitted)); *Govito v. W. Jersey Health Sys., Inc., 332 N.J. Super. 293, 309, 753 A.2d 716 (App.Div.2000)*; *Bainhauer v. Manoukian, 215 N.J. Super. 9, 36, 520 A.2d 1154 (App.Div.1986)*. The critical elements of this privilege are the appropriateness of the occasion on which the information is published, the legitimacy of the interest sought to be protected **[***82]** or promoted, and the pertinence of the receipt of the information by the recipient. *Govito, supra, 332 N.J. Super. at 309-10, 753 A.2d 716*; *Bainhauer, supra, 215 N.J. Super. at 37, 520 A.2d 1154*.

[*251] The privilege is based on the public policy that it is essential that true information be given whenever it is **[**837]** reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. *Erickson v. Marsh & McLennan Co., 117 N.J. 539, 563, 569 A.2d 793 (1990)* (citing *Restatement (Second) of Torts* *§ 592A* at 258 (1965)). A defendant abuses the privilege if he knows the statement is false or acts in reckless disregard of its truth or falsity, if publication serves a purpose contrary to the interest sought to be promoted by the privilege, or if the statement is excessively published. *Williams, supra, 132 N.J. at 121, 623 A.2d 234*; *Govito, supra, 332 N.J. Super. at 312, 753 A.2d 716*; *Bainhauer, supra, 215 N.J. Super. at 42-43, 520 A.2d 1154*. The question of abuse is for the factfinder and must be proven by plaintiff by clear and convincing evidence. *Williams, supra, 132 N.J. at 121, 623 A.2d 234*; **[***83]** *Erickson, supra , 117 N.J. at 565-66, 569 A.2d 793*; *Govito, supra, 332 N.J. Super. at 312, 753 A.2d 716*. [15]

HN33[] To overcome the privilege on the ground that defendant conducted a reckless investigation, a plaintiff must establish that defendant knew the statement was false or acted in reckless disregard of its truth or falsity. *Govito, supra, 332 N.J. Super. at 316-17, 753 A.2d 716*. The standard is whether defendant published a statement while entertaining serious doubts about the statement's truth. *Id. at 318, 753 A.2d 716*. Errors of interpretation or judgment and misconceptions are insufficient. *Id. at 316-17, 753 A.2d 716*.

Applying these principles here, there was sufficient evidence in the record for the judge to conclude that defendant abused the qualified **[***84]** privilege extended to members of peer review bodies when he made the defamatory statements to the MEC for the sole **[*252]** purpose of keeping his competitors out of the hospital and to protect his own "fiefdom." Although the judge never expressly analyzed the issue in terms of privilege and abuse, nor explicitly stated that defendant acted in reckless disregard for the truth, those findings were implicit in her conclusion that defendant either fabricated or embellished the information given to him by Syracuse and Elrabie.

Moreover, although defendants argue that defendant could not have been reckless, since he reasonably tried to investigate the information given to him by asking plaintiff to supply a list of his surgical cases, that conclusion was

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[14] Although the issue of qualified privilege arose in the context of personal defamation, we discuss the issue of privilege in the context of trade defamation.

[15] In the case of a hospital performing its credentialing function on applicants for surgical privileges, these competing interests and principles have been codified in both federal and state statutes. *See* *N.J.S.A. 2A:84A-22.10(d)*; *42 U.S.C.A. §§ 11111* and *11112(a)*.

one for the trier of fact to reach based on the evidence presented. Both sides presented expert testimony that touched on this issue. As the judge noted, defendants' expert not only testified quite incredibly but also supported plaintiff's expert's conclusions. Defendants' expert conceded that defendant should not have called a competitor of plaintiff's and that he should have called Wyckoff directly. Based on the deference given to the findings **[***85]** of fact of judges sitting without a jury, *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84, 323 A.2d 495 (1974)*, we will not disturb these findings.

Since the trial judge found that defendant abused his qualified privilege as a member of a peer review body, such abuse precludes reliance on the principle here as well. ***HN34***[] In trade libel actions, as in defamation actions, an abuse of a qualified privilege will be found if the publisher knows the statement is false or acts in reckless disregard of its truth, if the publication serves a purpose contrary to the interests of the privilege, or if there is **[**838]** excessive publication. *Kass v. Great Coastal Express, Inc., 152 N.J. 353, 356, 704 A.2d 1293 (1998)*. That was the case here.

V.

We now address the issue of damages. As to the defamation claim, the judge found that the loss to plaintiff as a result of the false statements made about him were reflected in the years 1996 to 1998. Even though the judge decided this in the context of a **[*253]** defamation cause of action, in considering a cause of action for trade libel, our analysis remains the same. But a more significant issue arises as **[***86]** to the damages awarded.

First, the judge awarded plaintiff damages in the amount of $ 250,000 for the emotional harm he suffered as a result of the defamation. The judge found that plaintiff was near tears when he testified, that he suffered personal and professional humiliation, and that he was deprived of the "blessing" of taking care of patients. ***HN35***[] This aspect pertains solely to the personal element of plaintiff's damages and is strictly excluded under the tort of trade libel. Recovery for emotional distress under this cause of action is barred. We vacate that portion of the award.

Additionally, the judge assumed that plaintiff's decreased income resulted from defendant's defamatory conduct, absent any reason. This assumption included damage to plaintiff's reputation at Mountainside as an element of damages. Plaintiff's theory was that not only did the doctors at IGH refuse to refer their cases to plaintiff because of the defamation, but the doctors at Mountainside also stopped referring cases to plaintiff when they learned about IGH's allegations against him.

We question whether the evidence supported this theory. The evidence demonstrated that the accusations about plaintiff's **[***87]** competency were first made against him and originated at Mountainside. Even accepting, as we must, the trial judge's finding that defendant uttered false words to the MEC by fabricating or embellishing the information given to him by Syracuse, there was no dispute that Syracuse had indeed conveyed some negative information to defendant about plaintiff.

More importantly, plaintiff himself admitted that negative information about him was extant at Mountainside, long before he ever applied to IGH, though he vigorously denied the truth of any of those allegations. In fact, his defense to those allegations was much the same as his defense to the allegations made against him at IGH--that the allegations were motivated by the ill will of his **[*254]** economic competitors and circulated by doctors who possessed less knowledge and skill than he. Plaintiff also admitted that his cases were frequently discussed at mortality and morbidity conferences at Mountainside and that other surgeons at Mountainside were frequently, albeit incorrectly, impugning his medical competence.

We question, then, whether plaintiff sufficiently proved that the words uttered by defendant at the MEC meetings at IGH resulted **[***88]** in damage to his reputation at Mountainside. While plaintiff pointed to the subpoenas which IGH issued to Mountainside and to the fact that Mountainside launched its own investigation against him only days after Syracuse was deposed, the judge failed to make adequate findings as to causation and linkage between the conduct at Mountainside and the damages claimed.

Significantly, Mountainside's decision to investigate plaintiff was the result **[**839]** of IGH's decision to investigate plaintiff, which in turn was the result of Mountainside's own negative comments about plaintiff. The judge was apparently impressed with the fact that notwithstanding the prior negative comments, plaintiff's Mountainside income did not start to decrease until after IGH started processing his application. Again, we are constrained by a lack of detailed analysis or findings as to this element of charges. While we question whether defendants should be liable at all for the decrease in plaintiff's income derived from Mountainside, on remand the judge should examine this issue and make specific findings as to whether defendant is responsible for the downturn at Mountainside.

The lost referrals at IGH for the period **[***89]** 1996 through 1998 are a different matter. Plaintiff received virtually no referrals from any doctor at IGH once he obtained his privileges, which plaintiff claimed was because every major player at the hospital was on the MEC and heard the defamatory statements uttered about him by defendant on July 13, 1995. While defendant noted that many factors went into a doctor's referral decision, that his own referrals came from many sources, and that it took a long time for a **[*255]** surgeon to build up a reputation at any particular institution, the judge properly awarded plaintiff damages for his lost IGH referrals based on the evidence presented.

In sum, we set aside the $ 250,000 for emotional harm as that element of damages is not viable in a claim for trade libel. The $ 472,000 in lost income on the now trade libel claim contains elements that must be revisited. Plaintiff is entitled to damages for lost income at IGH and the trial judge must, on remand, reexamine and make specific findings regarding the damages arising from lost income at Mountainside. On remand, the judge shall specifically identify those damages attributable to lost income at IGH and those lost at Mountainside in arriving **[***90]** at a total damage award for trade libel.

As to the damages for tortious interference, a different result ensues. A portion of the award of $ 250,000 is flawed.

Defendants allege two separate errors with respect to the $ 250,000 awarded on plaintiff's claims for tortious interference and antitrust. [16] First, they claim that the judge erred in calculating the award by erroneously assuming that the $ 500,000 earned by defendant in both 1995 and 1996 was attributable solely to his vascular surgery work at IGH. The judge then assumed that plaintiff would have earned twenty-five percent of this amount, or $ 250,000 for the two-year period his privileges had been wrongfully denied.

Defendants correctly note that the evidence at trial demonstrated that: five to ten percent of the total income shown on defendant's tax returns was from income from other sources; only twenty-five to thirty **[***91]** percent of his practice was vascular surgery; and only seventy to eighty percent of his vascular surgery was performed at IGH. Hence, the court erroneously based its twenty-five percent award on defendant's full $ 500,000 annual income.

[*256] Plaintiff responds that defendant noted that only one or two vascular cases each year were performed at a hospital other than IGH. However, the testimony to which plaintiff alludes is deposition testimony in which defendant stated that he had only one or two vascular cases at Newark Beth-Israel each year. Defendant, **[**840]** however, also had privileges at St. Barnabas Hospital. More importantly, in that same deposition and again at trial, defendant admitted that only eighty percent of his practice was at IGH. Plaintiff correctly notes that defendant indicated at his deposition that thirty-five to forty percent of his practice was vascular surgery, rather than the twenty-five to thirty percent figure he gave at trial. However, the judge erroneously assumed that it was 100 percent.

To support the award, plaintiff further argues that the judge should have used thirty percent, not twenty-five percent, as the share of referrals he would have gotten had he been **[***92]** timely granted privileges. He bases this on Patrawalla's estimate of his ability to successfully establish himself at both Mountainside and Valley Hospitals.

According to plaintiff's figures, then, the judge could have awarded him $ 123,000 in damages for tortious interference, which is only $ 2000 less than what the court did award. However, as defendants correctly note, the judge awarded plaintiff $ 250,000, not $ 125,000. The judge assessed only $ 125,000 against defendant alone, and then trebled that amount to arrive at the antitrust verdict. Plaintiff has virtually conceded error in the judge's analysis.

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[16] Although we vacate the antitrust award, we briefly discuss the award since it was integrated into the tortious interference claim.

Defendants also argue that Patrawalla's optimistic estimate of the amount of business plaintiff could expect to do at IGH was too slender a basis on which to award "lost profit" damages of twenty-five percent. We will not interfere with the award. ***HN36***[] Mere uncertainty as to damages will not preclude recovery as long as a wrong has been committed and damages have resulted. *Tessmar v. Grosner, 23 N.J. 193, 203, 128 A.2d 467 (1957)*. Defendants' tortious interference with plaintiff's application **[*257]** damaged him as he was wrongly precluded from practicing his profession **[***93]** at IGH. The judge arrived at a figure of twenty-five percent presumably based on all the evidence she heard at trial, both from Patrawalla and from defendant. The judge did not err, but the damages must be recalculated consistent with this opinion.

On remand, the judge must consider yet another element of damages. That is whether plaintiff should also be compensated for the referrals he lost at IGH for the period following the grant of his privileges, but before he resigned. We have remanded on the issue of Mountainside damages; we likewise remand on this issue and consideration as to whether he is entitled to compensation for his lost IGH referrals for that period.

Defendants have also raised the issue of whether plaintiff must elect between treble damages and punitive damages. *See* *St. James v. Future Finance, 342 N.J. Super. 310, 343, 776 A.2d 849 (App.Div.)* (holding that a plaintiff could not collect both treble damages under RICO and punitive damages under a breach of fiduciary duty claim), *certif. denied, 170 N.J. 388, 788 A.2d 773 (2001)*. Punitive damages are still viable, and a punitive damage award of $ 250,000 may stand independently. The issue of damage **[***94]** election is now moot but the punitive award cannot reflect the now rejected antitrust claim. This, too, must be addressed on remand.

Since we have dismissed the antitrust claim, we need not address the issue of IGH's immunity as raised on plaintiff's cross-appeal. Moreover, we have carefully considered plaintiff's contention that the judge erred in dismissing the breach of contract cause of action and conclude that such claim is without merit. *R. 2:11-3(e)(1)(E)*.

Finally, we decline to order that this matter on remand be assigned to a different **[**841]** judge. Since we remand solely on the issue of damages, we perceive of no basis for assigning the matter to a new judge. The trial judge heard the evidence, and may **[*258]** supplement the record as she deems appropriate to arrive at a just damage award consistent with this opinion.

Affirmed in part; reversed in part and remanded for consideration of damages consistent with this opinion. We do not retain jurisdiction.

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Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers

United States District Court for the Central District of California

May 18, 2004, Decided ; May 18, 2004, Filed

CASE NO. CV 04-1292 AHM (CTx)

Reporter

2004 U.S. Dist. LEXIS 29965 *

VERISIGN, INC., Plaintiff, v. INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS, Defendant.

Subsequent History: Claim dismissed by *Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers, 2004 U.S. Dist. LEXIS 17330 (C.D. Cal., Aug. 26, 2004)*

Core Terms

competitors, registries, allegations, gTLD, motion to dismiss, antitrust, compete, antitrust claim, anti trust law, domain name, new service, conspiracy, ccTLD, Sherman Act, registration, cases, anticompetitive, constituent, consumers, regulated, offering, argues, prices, amend

Counsel: **[*1]** For Verisign Inc., a Delaware corporation, Plaintiff: Brian A Davis, Verisign Inc., Dulles, VA; James S Blackburn, Laurence J Hutt, Richard L Rosen, Arnold and Porter, Washington, DC; Ronald L Johnston, Suzanne V Wilson, Thaddeus Mason Pope, Arnold and Porter, Los Angeles, CA.

For Internet Corporation for Assigned Names and Numbers, a California corporation, Defendant: Christina D Coates, AUSA - Office of US Attorney, Los Angeles, CA; Courtney M Schaberg, Jeffrey A LeVee, Sean W Jaquez, Jones Day, Los Angeles, CA; Emma Killick, Jones Day, Los Angeles, CA; Joe Sims, Jones Day, Washington, DC.

Judges: A. Howard Matz, United States District Judge.

Opinion by: A. Howard Matz

Opinion

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corp. for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of *Section 1* of the Sherman Act, (2) injunctive relief for breach of contract, (3) damages for breach of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction **[*2]** is premised on federal questions arising under the Sherman Act and the Declaratory Judgment Act. Compl. P 8. Now ICANN has moved to dismiss claims one through six of Plaintiff's Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*, and also has moved to strike the second through sixth claims as strategic lawsuits against public participation, pursuant to *Cal. Civ. Proc. Code Section 425.15*.

The Court GRANTS ICANN's motion to dismiss the antitrust claim without prejudice. At this stage, the Court elects not to rule on the motion to dismiss the remaining state law claims because if VeriSign fails to state an antitrust claim in any First Amended Complaint ("FAC") or chooses not to file a FAC, the Court will decline to exercise supplemental jurisdiction. The Court also defers any ruling on the Special Motion to Strike until VeriSign's ability to state a viable federal claim has been conclusively resolved.

FACTUAL ALLEGATIONS

ICANN is a non-profit corporation that was organized in 1998 "in response to a plan by the [Department of Commerce] to introduce competition into the field of domain name registration, among **[*3]** other objectives." Compl. P 18. The Internet is comprised of numerous top level domains ("TLDs") - some are generic TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country code TLDs ("ccTLDs") such as .uk and .ca. [1] *Id.* P 12. Each TLD has a "registry" or operator, single entity responsible for keeping the records and a directory of all the domain names registered within that TLD. *Id.* P 15. A person seeking to register a domain name within any given TLD must do so through a "registrar" for that TLD. *Id.* P 16. There are approximately 250 TLDs throughout the world that compete with each other, through their respective registries, to attract registrars and registrants. *Id.* PP 12, 32.

One of ICANN's functions is to enter into registry agreements **[*4]** that authorize an entity to act as the registry for a particular gTLD. *Id.* P 20. The Complaint describes how ICANN functions:

> ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituencies within the Internet community. Among the members of these groups are operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign for certain services; foreign governments and foreign registries that have ccTLDs that compete with the gTLD registries operated by VeriSign; and others. ICANN also operates in cooperation with various industry boards that are comprised of existing or potential competitors of VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of these constituent groups.

Id. P 18. In 2001, VeriSign and ICANN entered into a registry agreement authorizing VeriSign to act as the sole registry for the .com gTLD. *Id.* PP 22-23 Under the agreement, VeriSign must provide certain "registry services" to accredited registrars in accordance **[*5]** with ICANN's specifications. *Id.* P 24.

The core of this dispute is that ICANN allegedly has taken actions to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet users, [2] (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. *Id.* P 1. Because ICANN has allegedly blocked, delayed, and restricted the "value-added" services VeriSign has sought to offer its customers, VeriSign is "at a competitive disadvantage" since other TLD registries have been able to introduce similar services without restriction or delay. *Id.* PP 77-78. VeriSign claims that ICANN's various actions have breached their 2001 registry agreement, *Id.* PP 92-104, 111-126; interfered with a contract VeriSign had with an unidentified third party, *Id.* PP 105-110; and violated the antitrust laws, *Id.* PP 83-91.

[*6] APPLICABLE LEGAL STANDARD

On a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*. A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a

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[1] ICANN does not claim to have any power to regulate ccTLDs. *Id.* P 78. Nonetheless, 10 of the approximately 240 ccTLDs have entered into registry agreements with ICANN. *Id.* P 81. "ccTLDs" compete with other TLD registries. *Id.* P 20.

[2] In particular, the services to which VeriSign refers are Site Finder (described at PP 33-34 of the Complaint), Wait Listing Service (PP 40-42), ConsoliDate (PP 48-50), Internationalized Domain Names (PP 56-60), and the Incentive Marketing Program (P 66).

claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners, 777 F.2d 462, 464 (9th Cir. 1985)*. On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989)* (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a district court should **[*7]** provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)*.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)* (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)* (*citing* *Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991))*. If the documents are not physically attached to the complaint, they may be considered if their "authenticity…is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998).* **[*8]** "The court will not accept as true allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5A Wright & Miller, *Fed. Prac. and Pro.* § 1363 (2d. ed. 1990).

DISCUSSION

VeriSign's antitrust claim is brought under *Section 1* of the Sherman Act, which states, in pertinent part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The elements required to allege a Section 1 violation are: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Assoc., 884 F.2d 504, 507 (9th Cir. 1989)*. [3] Although Section 1 claims are not subject to a heightened pleading standard, the plaintiff must plead facts to support each element of the claim. Von Kalinowski, Sullivan & McGuirl, ***Antitrust Law*** *and* **[*9]** *Trade Regulation* § 164.01 (Matthew Bender 2002). "The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'" *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)*.

Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover treble damages for the alleged Sherman Act violation, authorizes a private individual to bring suit under the antitrust laws if that individual has been "injured in his business or property by reason of anything forbidden in the antitrust **[*10]** laws." *15 U.S.C. § 15*. The Supreme Court has interpreted this language to mean that "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. These requirements are referred to as "antitrust standing." *See, e.g.,* *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)*. There is no antitrust violation "[i]f the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition…[A]n act is deemed *anticompetitive*…only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality."

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[3] The parties jointly proceed in treating this case under the "rule of reason" standard rather than the "per se" rule reserved for presumptively illegal practices such as price-fixing, and the Court does the same. *See* *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 n.3 (9th Cir. 1988)*.

Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995), *cert. denied*, *516 U.S. 987, 116 S. Ct. 515, 133 L. Ed. 2d 424 (1995)* (emphasis in original).

VeriSign alleges that "the collective **[*11]** and conspiratorial acts of ICANN and its members, including constituent groups within ICANN and members of those groups," have "unreasonably restrained and restricted competition in the market for the operation of TLD registries and submarkets thereof, and have deprived consumers of the benefits of free and open competition…" Compl. PP 85-86. In a recurring manner, VeriSign alleges that ICANN's conduct "has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate…" Compl. P 39; *see also* PP 47, 55, 65, 69, 72, 86. By making "the registration of domain names within the .com gTLD more desirable and attractive," these new services are alleged to be important to enable "VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are offering or intend to offer a similar service." *Id.* P 69; *see also* P 32. While VeriSign has been blocked, delayed, or restricted from offering these new services, other gTLD registries regulated by ICANN "have been allowed to offer and market similar, competitive services…" *Id.* P 77; *see also* PP 35, 45, 65, 68. In particular, VeriSign alleges that ICANN **[*12]** has facilitated ".museum," one of its gTLD competitors, in offering a service similar to VeriSign's Site Finder. *Id.* P 35. In addition, ccTLD registries, which constitute some 240 out of 250 of all TLDs, are not regulated by ICANN and "are free to offer, and are offering, new and improved services to registrars and registrants…" *Id.* PP 12, 20, 78. VeriSign does not allege how the market for these services operates or the pricing structure for such services.

ICANN argues that VeriSign has not, and cannot, sufficiently plead antitrust standing or facts supporting *any* of the elements of a Section 1 claim. Def.'s Mot., pp. 8-17. VeriSign disagrees with each of these assertions. Pl.'s Opp'n, pp. 5-15.

A. Conspiracy Allegations

ICANN summarizes the defects in the allegations concerning the first required element of a Section I violation as follows:

> . VeriSign argues that it has alleged that ICANN's competitors exercised control over ICANN, but there are *no* such allegations in the complaint.
>
> . VeriSign argues that these unnamed competitors consist of a "finite group," but the complaint alleges *multiple* groups of conspirators, as well as the **[*13]** undefined phrase "*and others*."
>
> . VeriSign argues that the "conspiracy" - the terms of which are not defined - has had an anticompetitive effect because it has resulted in a decrease in efficiency, increase in prices, and unavailability of products, but the complaint contains no such allegations and, instead, alleges that products similar to VeriSign's *are* available to consumers.

Def.'s Reply, 1:11-22 (emphasis in original).

Trade associations or industry groups that set standards or promulgate regulations, such as ICANN, can be held liable for Section 1 violations because "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*. As the Supreme Court explained in *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*:

> Although, undoubtedly, most [officials] serve [the industry organization] without concern for the interests of their corporate employers, some may well **[*14]** view their positions…, at least in part, as an opportunity to benefit their employers. When the great influence of [the organization's] reputation is placed at their disposal, the less altruistic of [the organization's] agents have an opportunity to harm their employers' competitors through manipulation of [the organization's] codes.

Id. at 571. The Ninth Circuit elaborated on the issue of organizational conspiracies in *Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1029*, holding that "the proper inquiry is whether [decisionmakers] sharing substantially similar economic interests collectively exercised control of [the organization] under whose auspices they have reached agreements which work to the detriments of competitors."

Thus, in order to sufficiently plead a conspiracy, VeriSign must allege that ICANN's decisionmaking process was controlled or greatly influenced by economic competitors who have agreed to injure VeriSign. Instead, VeriSign simply alleges that "ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituencies within the Internet community…that **[*15]** compete with each other and with VeriSign" and that "ICANN also operates in cooperation with various industry boards that are comprised of existing or potential competitors." Compl. P 18. VeriSign also claims that ICANN's decisions regarding the various services it seeks to offer were "made in conjunction with and at the behest of various constituent groups within ICANN and other businesses that compete with VeriSign," *Id.* P 38, and this has benefitted "businesses who have combined and conspired with ICANN." *Id.* P 47; *see also* 44-45, 65.

ICANN properly notes that VeriSign's factual allegations fall far short of the mark. There is not even an allegation (much less factual allegations supporting it) that the Board of ICANN has actually conspired with any of VeriSign's competitors. Nor are there sufficient allegations that competitors control or influence ICANN. VeriSign has not alleged how ICANN operates, makes decisions, and regulates Internet registries and registry services. For all these reasons, VeriSign has not sufficiently alleged a Section 1 conspiracy. [4] *Am. Soc'y of Mech. Eng'rs, supra.*

[*16] B. Antitrust Standing

ICANN argues that VeriSign does not have antitrust standing because even if it has been injured by being put at a competitive disadvantage, that injury is not one that the antitrust laws were designed to address. Def.'s Mot, 15:18-16:15. ICANN relies on many key cases, including *McGlinchy, supra*, which held that a plaintiff's claim that its business had been injured did not amount to an antitrust injury because "the antitrust laws were enacted for the protection of *competition*, not *competitors*." *Id. at 811-13* (internal citations omitted, emphasis in original). VeriSign, in turn, contends that its .com gTLD customers have not been able to purchase its "new innovative value-added services" and that some Ninth Circuit cases have found antitrust standing where only one competitor is harmed "because consumers faced fewer product or service choices…from the remaining competitors." Pl.'s Opp'n, 12:10-14:7. In *Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1988)*, aff'd *496 U.S. 543, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*, the Ninth Circuit cautioned courts not to be too dismissive of an injury to one competitor: **[*17]**

> The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

Id.; *see also* *USA Petroleum Co. v. Atl. Richfield Co., 859 F.2d 687, 696 (9th Cir. 1988)*, rev'd *495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

ICANN cites several Ninth Circuit cases dismissing Section 1 antitrust claims that fail to allege the requisite injury to competition in the relevant market. *See, e.g., Les Shockley Racing, supra at 508* (removal of one competitor from market does not injure competition **[*18]** without allegation of unreasonable disruption in pricing, resource

[4] ICANN argues that its bylaws, which outline how ICANN and its Board of Directors function, preclude VeriSign from ever being able to plead conspiracy. *See* Def.'s Request for Judicial Notice, Exh. B. The Court declines, at this stage, to determine whether these documents would preclude VeriSign from alleging a conspiracy against ICANN.

allocation, market entry, or output); McGlinchy, supra at 811-12 (injury to competitor is not injury to competition); Rutman Wine Co., supra at 734-35 (same). [5] Occasionally, of course, there are situations of "convergence of injury to a market competitor and injury to competition…when the relevant market is both narrow and discrete and the market participants are few." Les Shockley Racing, Inc., supra, at 508-09 (citation omitted). None of the cases VeriSign cites changes this analysis.

[*19] VeriSign relies on three cases where courts found that an antitrust claim was stated by one competitor: Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1032 (9th Cir. 1990), *aff'd* 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991); Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988); and Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336, 1342-43 (9th Cir. 1971). ICANN correctly notes that the plaintiffs in these three cases *did* sufficiently allege impacts on services, prices, or the number of entrants in the marketplace to allege an injury to competition. Def.'s Reply, p. 8 n.10.

VeriSign alleges that ICANN's conduct "has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate…" Compl. P 39; *see also* PP 47, 55, 65, 69, 72, 86. These new services are important to enable "VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are offering or intend to offer a similar service" by making "the registration of domain names within the .com gTLD more desirable and attractive." *Id.* P 69; *see also* P 32. Thus, the **[*20]** crux of VeriSign's injury is that it is being placed at a "competitive disadvantage" *vis-a-vis* other TLDs since ICANN prevents, delays, or restricts VeriSign's ability to make new services its competitors offer from being made available to customers in the .com gTLD it operates. *Id.* PP 77-78.

VeriSign's very theory of damage depends on and arises out of the fact that it has vigorous competitors who will be able to compete more vigorously. Moreover, this is not a case in which the marketplace is small and the participants are few. To the contrary, VeriSign defines the relevant market as the operation of TLD registries worldwide, both gTLD and ccTLD. Compl. P 84. There are approximately 250 TLDs throughout the world and numerous registries operating those TLDs and competing to attract domain name registrations, most of which are ccTLDs unregulated by ICANN. *Id.* PP 12, 20, 32. By VeriSign's own account, many of its competitors already offer (or plan to offer) similar or competitive services. *Id.* PP 77-78. Its Complaint seems to be based on the unstated assumption that ICANN has a duty to help it compete more effectively. VeriSign has not alleged anything more than injury **[*21]** to its own business and therefore, does not have antitrust standing.

The Court DISMISSES the first cause of action for violation of Section 1 of the Sherman Act without prejudice. ICANN states that VeriSign "has not adequately pled an antitrust claim against ICANN and could never do so," suggesting that leave to amend would be futile. Def.'s Mot., 17:10-11. Although VeriSign has not requested leave to amend, it is entitled to attempt to cure the defects. If VeriSign can do so with a good faith basis and consistent with the obligations of Fed. R. Civ. P. 11, it may have until June 7, 2004 to file a FAC. If VeriSign does not timely amend and cure all defects, the antitrust claim will be dismissed with prejudice and the Court will decline to exercise supplemental jurisdiction.

CONCLUSION

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[5] For similar results at the summary judgment stage, *see also* Pool Water Prods., supra at 1035-36 (neither decreased prices nor a competitor's decreased market share are antitrust injuries harming competition); Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998), *cert. denied*, ***525 U.S. 875, 119 S. Ct. 175, 142 L. Ed. 2d 143 (1998)*** (in missile component market with only two or three competitors, forced exclusion of plaintiff resulting in temporary decline in number of competitors not a significant restraint of trade entitling antitrust injury); ***McDaniel v. Appraisal Inst., 117 F.3d 421, 423 (9th Cir. 1997)***, *cert. denied*, ***523 U.S. 1022, 118 S. Ct. 1305, 140 L. Ed. 2d 470 (1998)*** (real estate appraiser who was not certified was at competitive disadvantage, but no harm to competition); Rebel Oil Co., Inc., supra at 1444 (below-cost pricing by competitor who lacks market power is a "boon to consumers," not an antitrust injury).

For the foregoing reasons, the Court hereby GRANTS Defendant's motion to dismiss claim one of the Complaint, without prejudice. [6] The Court declines to rule on the remainder of the motion to dismiss, which addresses the state law claims two through six. If, in any FAC, VeriSign sufficiently states an antitrust claim, but does not change any of the allegations **[*22]** pertaining to claims two through six, the parties shall incorporate into their respective motion papers the precise language and arguments they made in their respective current motion papers. As to the Special Motion to Strike, in order to provide for docketing clarity, the Court ORDERS that it be withdrawn from the active calendar, without prejudice to it being renewed. [7] If the Court eventually rules on a dismissal motion directed at counts two through six, it will also rule on the motion to strike. In that event, regardless of whether VeriSign amends any or all of the second through sixth claims in any FAC, ICANN may incorporate into a renewed motion to strike the facts and arguments it relied on in the current set of motion papers regarding the original Complaint.

In light of this ruling, the Court need not rule on the parties' various requests for judicial notice and related disputes.

This Order is not intended for publication.

IT IS SO ORDERED.

DATE: **[*23]** May 18, 2004

A. Howard Matz

United States District Judge

End of Document

[6] Docket No. 16.

[7] Docket No. 19.

G&R Moojestic Treats Inc. v. MaggieMoo's Int'l, LLC

United States District Court for the Southern District of New York

May 19, 2004, Decided ; May 19, 2004, Filed

03 Civ. 10027 (RWS)

Reporter

2004 U.S. Dist. LEXIS 8806 *; 2004-2 Trade Cas. (CCH) P74,485; 2004 WL 1110423

G&R MOOJESTIC TREATS INC., GEORGE LISI, ROSEMARIE LISI, WATARU IWATA, JI INTERNATIONAL, LLC, and JUN IWATA, Plaintiffs, - against - MAGGIEMOO'S INTERNATIONAL, LLC, Defendant.

Subsequent History: Motion denied by *G&R Moojestic Treats, Inc. v. Maggiemoo's Int'l, LLC, 2004 U.S. Dist. LEXIS 9480 (S.D.N.Y., May 27, 2004)*

Related proceeding at, Motion granted by, Stay granted by *Maggiemoo's Int'l, LLC v. G&R Moojestic Treats, Inc., 2004 U.S. Dist. LEXIS 32059 (D. Md., June 14, 2004)*

Disposition: MMI's motion to transfer claims of Franchisee Plaintiffs to the United States District Court for the District of Maryland was granted, except for the common law fraud claim, each of Wataru Iwata's claims were dismissed for failure to state a claim. MMI's motion for attorney's fees against Waturu Iwata was denied. Plaintiffs' motion to stay and order MMI to dismiss its lawsuits in the District of Maryland was denied.

Core Terms

forum selection clause, franchise, franchise agreement, Franchisee, amended complaint, alleges, Plaintiffs', fraud claim, Franchisor, plaintiff's claim, good faith, Disclosure, fraudulent, antitrust, district court, motion to stay, unconscionable, contractual, breach of contract, attorney's fees, misrepresentation, regulations, invalidate, mediation, covenant, damaging, clauses, privity, argues, entity

LexisNexis® Headnotes

Admiralty & Maritime Law > Practice & Procedure > Forum Selection

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN1[] **Practice & Procedure, Forum Selection**

Forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances. This rule has been extended to diversity and other non-admiralty cases. The United States Court of Appeals for the Second Circuit has a strong policy in favor of giving effect to such a clause.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Defenses > Public Policy Violations

HN2[] **Contract Conditions & Provisions, Forum Selection Clauses**

Forum selection clauses are considered unreasonable (1) if their incorporation into the agreement was the result of fraud or overreaching, (2) if the complaining party will for all practical purposes be deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum, (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, or (4) if the clauses contravene a strong public policy of the forum state.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Defenses > General Overview

HN3[] **Contract Conditions & Provisions, Forum Selection Clauses**

A forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion. In other words, a claim of fraud in the inducement of a contract is insufficient to invalidate a forum selection clause found in that contract. Rather, it is the inclusion of those specific clauses plaintiffs seek to avoid that must have been induced by fraud. The party seeking to invalidate a forum selection clause on grounds of fraud or coercion must specifically prove that but for the drafter's misconduct, it would not have been included in the agreement.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

HN4[] **Contract Conditions & Provisions, Forum Selection Clauses**

Conclusory statements of duress are insufficient to show fraud or overreaching in agreeing to a forum selection clause.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Adhesion Contracts

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Contracts Law > Defenses > Unconscionability > General Overview

HN5[] **Types of Contracts, Adhesion Contracts**

An unconscionable bargain is one which no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other. The fact that a franchise agreement was presented on a take it or leave it basis and was not subject to negotiation renders it neither a contract of adhesion nor unconscionable.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN6[] **Contract Conditions & Provisions, Forum Selection Clauses**

A district court may dismiss on the grounds that the parties have agreed in advance that some other forum is the more convenient location for resolution of the dispute. Resolution of this issue is determined by weighing in each case whether dismissal or transfer is the most efficient and just means of enforcing the clause.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

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

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

Civil Procedure > Dismissal > General Overview

HN7[] **Contract Conditions & Provisions, Forum Selection Clauses**

The presence of a forum-selection clause does not deprive the disfavored forum of jurisdiction or venue, where the conditions of subject matter and in personam jurisdiction are otherwise met. Therefore, dismissal may be based on either the court's inherent power to decline jurisdiction, by analogy to the traditional doctrine of forum non conveniens, or on the power under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Venue > Forum Non Conveniens

HN8[] Contract Conditions & Provisions, Forum Selection Clauses

An enforceable forum selection clause is not dispositive as to transfer under *28 U.S.C.S. § 1404(a)*, and a court must still take account of factors other than those that bear solely on the parties' private ordering of their affairs, such as the convenience of the witnesses and other factors. However, it is clear that such clauses are not lightly disregarded; a party opposing enforcement of a forum selection clause must demonstrate exceptional facts explaining why he should be relieved from his contractual duty. A valid forum-selection clause should be given controlling weight in all but the most exceptional cases.

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

HN9[] Motions to Dismiss, Failure to State Claim

In reviewing a *Fed. R. Civ. P. 12(b)(6)* motion, courts must accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader. However, legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness. A complaint may only be dismissed when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Review must be limited to the complaint and documents attached or incorporated by reference thereto. In this context, the United States Court of Appeals for the Second Circuit has held that a complaint is deemed to include documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN10[] Federal & State Interrelationships, Choice of Law

A federal court sitting in diversity must apply the choice-of-law rules of the forum state. The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved. Where no such conflict exists there is no reason to engage in a choice of law analysis.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Energy & Utilities Law > Oil, Gas & Mineral Interests > Implied Covenants > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN11[] Sales (Article 2), Form, Formation & Readjustment

The elements of a contract claim are the same in Pennsylvania, New York and Maryland, and in each jurisdiction a claim for breach of an implied duty of good faith cannot be brought in the absence of an underlying contract.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Procedural Matters > Conflict of Law > General Overview

HN12[] Business Torts, Fraud & Misrepresentation

Fraud claims are governed by the laws of the jurisdiction where the injury is deemed to have occurred which usually is where the plaintiff is located. If conflict-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. Indeed, the traditional view has been that when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made.

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN13[] Sales (Article 2), Form, Formation & Readjustment

In order to recover on a claim for breach of contract, a plaintiff must allege, among other elements, the existence of a valid contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN14[] Types of Contracts, Covenants

In the absence of a valid contract, a claim for a breach of an implied covenant of good faith must also be dismissed.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > General Overview

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Requirements

HN15[] Distributorships & Franchises, Causes of Action

See *Md. Bus. Reg. Code Ann. § 14-227(a)(1)*.

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Enforcement of Franchise Requirements

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Business & Corporate Law > Distributorships & Franchises > Remedies > General Overview

HN16[] Disclosure & Registration, Enforcement of Franchise Requirements

The plain language of the Maryland Franchise Registration and Disclosure Law, *Md. Bus. Reg. Code Ann. §§ 14-201 to 14-233*, grants a civil remedy only to purchasers and grantees. The purchase requirement simply recognizes that a non-purchaser does not rely on an unregistered or fraudulent prospectus, and hence, does not suffer the type of injury that Maryland franchise law, and similar laws in other states, are designed to prevent.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Real Property Law > Torts > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN17[] Affirmative Defenses, Fraud & Misrepresentation

While it is well-established under New York law that, where a plaintiff alleges only economic damage resulting from a defendant's alleged negligence, defendants owe no duty to plaintiffs with whom they are not in contractual privity, the doctrine does not extend to tort claims for fraud. A cause of action sounding in fraud does not require the existence of a relationship of privity or something close to privity between the parties.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN18[] Business Torts, Fraud & Misrepresentation

To state a claim for fraud under New York law, a plaintiff must allege: (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, (2) made for the purpose of inducing the other party to rely upon it, (3) justifiable reliance of the other party on the misrepresentation or material omission, and (4) injury.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN19[] Heightened Pleading Requirements, Fraud Claims

Under *Fed. R. Civ. P. 9(b)*, the circumstances constituting fraud shall be stated with particularity. However, malice, intent, knowledge, and other condition of mind may be averred generally. To satisfy *Rule 9(b)*'s particularity requirement, a plaintiff's complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN20[] Business Torts, Fraud & Misrepresentation

The fact that a representation was not made directly to a plaintiff is not fatal to a fraudulent misrepresentation claim where he has alleged that he relied upon it to his detriment, and that the defendant intended the misrepresentation to be conveyed to him.

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > Enforcement of Franchise Requirements

Administrative Law > Sovereign Immunity

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Law > Distributorships & Franchises > Disclosure & Registration > General Overview

HN21[] **Disclosure & Registration, Enforcement of Franchise Requirements**

The Federal Trade Commission disclosure requirements provide that it is an unfair or deceptive act or practice to fail to furnish any prospective franchisee with accurate information related to the terms of the franchise agreement and the financial condition of the franchisor. *16 C.F.R. § 436.1*. However, there is no private right of action to enforce the disclosure requirements of § 436, or any other regulation promulgated under the Federal Trade Commission Act, *15 U.S.C.S. §§ 41-58*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN22[] **Private Actions, Standing**

The United States Court of Appeals for the Second Circuit has held that merely derivative injuries sustained by creditors of an injured company do not constitute antitrust injury sufficient to confer antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

International Trade Law > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

HN23[] Private Actions, Racketeer Influenced & Corrupt Organizations

To state a Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq. claim under 18 U.S.C.S. § 1962(b) and (c), a plaintiff must plead seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern (4) of racketeering activity (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an enterprise (7) the activities of which affect interstate or foreign commerce.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN24[] Private Actions, Racketeer Influenced & Corrupt Organizations

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., is a specialized statute requiring a particular configuration of elements. These elements cannot be incorporated loosely from a previous narration, but must be tightly particularized and connected in a complaint. Parroting statutory language while generally referring the reader back to the previous 100 paragraphs in a complaint is inadequate.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN25[] Motions to Dismiss, Failure to State Claim

Fed. R. Civ. P. 11 has been violated, and sanctions are appropriate where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands.

Counsel: [*1] MITCHELL J. KASSOFF, ESQ., Attorney for Plaintiffs, South Orange, NJ.

NIXON PEABODY, Attorneys for Defendant, Boston, MA, By: ARTHUR L. PRESSMAN, ESQ., GREGG A. RUBENSTEIN, ESQ., Of Counsel.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

Sweet, D.J.

Defendant MaggieMoo's International, LLC ("MMI"), has moved to stay, dismiss and/or transfer the claims of plaintiffs G&R Moojestic Treats, Inc. ("G&R"), George Lisi, Rosemarie Lisi, JI International, LLC, Jun Iwata and Wataru Iwata (collectively, "Franchisee Plaintiffs") and to dismiss the claims of plaintiff Wataru Iwata for failure to state a claim upon which relief may be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*, and for attorney's fees. All plaintiffs have moved to stay or dismiss the suit brought by MMI in the District of Maryland.

Parties

MMI is a Delaware limited liability company with its principal offices in Columbia, Maryland. MMI is a franchisor of specialty ice cream stores.

G&R is a New York corporation with its principal offices in Syracuse, New York. George Lisi and Rosemarie Lisi are citizens of New York and are the sole shareholders and **[*2]** officers of G&R. On April 10, 2001, a Franchise Agreement was executed between MMI and G&R (the "G&R Franchise Agreement").

Jun Iwata resides in Pennsylvania and is a member of JI International, LLC ("JI"), a Pennsylvania limited liability company with its principal offices in Pennsylvania. On March 25, 2002, a Franchise Agreement was executed between MMI and Jun Iwata, on behalf of an entity to be later named (the "JI Franchise Agreement"). The entity to be later named was JI. JI is an intended beneficiary of the Franchise Agreement.

Wataru Iwata, a citizen of New York, is the brother of Jun Iwata and is alleged by Plaintiffs to be the provider of funds for the purchase of the franchise by Jun Iwata and a "silent partner" in the franchise, although his name is not on the JI Franchise Agreement.

Prior Proceedings

On December 11, 2003, Plaintiffs filed an action in this Court alleging that MMI breached both Franchise Agreements, committed fraud, breached an implicit covenant of good faith, caused Plaintiffs not to pursue other business opportunities, and violated the Federal Trade Commission Rule on Franchising, the *Sherman Anti-Trust Act*, the *Clayton Act*, the *Robinson-Patman **[*3]** Act* and the *Racketeer Influenced and Corrupt Organizations Act*.

In addition, G&R, George Lisi, and Rosemarie Lisi allege that MMI violated *Article 33 of the New York State General Business Laws*. JI, Jun Iwata, and Wataru Iwata allege that MMI violated the Maryland Franchise Registration and Disclosure law.

On February 13, 2004, MMI commenced separate actions in the United States District Court for the District of Maryland to compel mediation pursuant to identical mediation clauses in the Franchise Agreements of both sets of Plaintiffs, captioned *Maggiemoo's International, LLC v. G&R Moojestic Treats Inc., et. al.*, WMN-04-392, and *Maggiemoo's International, LLC v. JI International, Inc., et. al.*, WMN-04-393, respectively. On March 8, 2004, the Honorable William M. Nickerson of the District of Maryland ordered that:

> In the interests of judicial economy, I will delay the scheduling of a hearing concerning MMI's Motion(s) to Compel Mediation until after Judge Robert Sweet of the Southern District of New York has had a chance to hear arguments and make rulings on related motions before him on March 31st, 2004.

On March 22, 2004, Judge Nickerson denied the motion **[*4]** of MMI to reconsider the March 8 Order.

On February 28, 2004, Plaintiffs filed an amended complaint. Following the filing of the amended complaint, MMI then filed amended versions of its briefs in support of its two motions. On March 26, 2004, MMI's interim motion to stay discovery pending the determination of the instant motions was denied.

Following the submission of briefs, oral argument on the motion was heard on March 31, 2004. On April 26, 2004, MMI's motion to supplement its memorandum of law in support of the motion to stay, dismiss or transfer the action was granted, at which time the motion was deemed fully submitted.

Facts

The following facts are drawn from Plaintiffs' amended complaint (the "Amended Complaint") and accompanying exhibits and do not constitute findings of fact by the Court.

The Amended Complaint alleges that after G&R entered the Franchise Agreement with MMI, MMI rejected more than fifteen sites that were submitted by G&R, George Lisi and Rosemarie Lisi to open the franchise, effectively taking their money and refusing to allow an opening of a franchise. Because another ice cream specialty store subsequently signed a lease for one of the **[*5]** spots they had chosen, Plaintiffs claim that the competitive nature of the business was forever altered, damaging their ability to successfully introduce MMI's franchise system in the area.

The Amended Complaint also alleges that MMI intended to deceive Jun Iwata with a misleading Uniform Franchise Offering Circular ("UFOC"), and intended to deceive any lenders Jun Iwata would employ, such as Wataru Iwata. Further, the lack of support from MMI in granting approval for a site led to another specialty ice cream store signing a lease for the site chosen by JI, thereby damaging Plaintiffs' ability to successfully introduce MMI's franchise system in the area. Upon executing a lease at another location, JI claims that losses were incurred in the amount of rental payment made during months when construction of the store could not begin due to MMI's actions and that construction estimates were more than 51% higher than MMI's UFOC had disclosed, forcing them to terminate the lease.

Paragraph 24.2 of both the G&R and the JI Franchise Agreements provides that "all controversies, disputes, and claims arising out of or related to this Agreement (including any claim that the Agreement or any of **[*6]** its provisions is invalid, illegal, or otherwise voidable or void) . . . shall first be subject to non-binding mediation."

Paragraph 24.4 of both the G&R and the JI Franchise Agreements provide that, "Any legal action brought by Franchisee against Franchisor in any forum or court, whether federal or state, shall be brought exclusively in the federal district court covering the location at which Franchisor has its principal place of business at the time of the action."

MMI's Motion to Stay, Dismiss and/or Transfer the Claims of G&R, George Lisi, Rosemarie Lisi, JI and Jun Iwata

MMI has moved to stay the instant litigation or to dismiss the claims on the basis of the mediation clauses in both the G&R and the JI Franchise Agreements. However, because of the pending actions in the District of Maryland and the forum selection clause providing that all litigation between MMI and the Franchisee Plaintiffs must be brought in that District, MMI's motion to dismiss or transfer pursuant to the forum selection clause will be considered first.

The Forum Selection Clause is Enforceable

HN1[] Forum selection clauses are prima facie valid and should be enforced unless **[*7]** enforcement is shown by the resisting party to be unreasonable under the circumstances. *See* *The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972)*. This rule has been extended to diversity and other non-admiralty cases. *See* *Jones v. Weibrecht, 901 F.2d 17 (2d Cir. 1990)*; *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988)*. "The Second Circuit, moreover, has a 'strong policy' in favor of giving effect to such a clause." *Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 380-81 (S.D.N.Y. 2001)* (citing *Weiss v. Columbia Pictures Sys. of America, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992))*.

HN2[] Forum selection clauses are considered "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching, (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum, (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, or (4) if the clauses contravene a strong public policy of the **[*8]** forum state. *See* *Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993)* (citations omitted).

The Franchisee Plaintiffs have not challenged the forum selection clause on the basis of hardship and contest only the first factor of the reasonableness test, claiming that they were fraudulently induced into accepting the forum selection clauses, that the forum selection clause is unconscionable and unenforceable, and that all plaintiffs were coerced into accepting the forum selection clause. Amended Complaint, PP 13-16, 90-93. In addition, the Franchisee Plaintiffs argue that the entire Franchise Agreement is a contract of adhesion.

HN3[] A "forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion." *Scherk v. Alberto-Culver Co., 417 U.S. 506, n.14, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974)* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801, (1967)*. In other words, "[a] claim of fraud in the inducement of a contract is insufficient to invalidate a forum selection . . . clause found in that contract. Rather, it is the inclusion of **[*9]** those specific clauses plaintiffs seek to avoid that must have been induced by fraud." *Stamm v. Barclays Bank of New York, 960 F. Supp. 724, 729 (S.D.N.Y. 1997)*. The party seeking to invalidate a forum selection clause on grounds of fraud or coercion "must specifically prove that but for the drafter's misconduct, it would not have been included in the agreement." *Sun Forest, 152 F. Supp. 2d at 381*.

The forum selection clause in both Franchise Agreements is labeled "Applicable Law," and is set apart in a separate numbered paragraph. The language of the clause itself provides that "any legal action . . . shall be brought exclusively in the federal district court covering the location at which Franchisor has its principal place of business at the time of the action." Plaintiffs have made no claim that they were not on notice as to the provision.

The Franchisee Plaintiffs have not made the "strong showing" required to prove that the forum selection clause was the result of fraud or coercion. *The Bremen, 407 U.S. at 12*. Rather, Plaintiffs have made conclusory allegations of fraud and coercion. Such bare bones allegations are insufficient **[*10]** to invalidate the forum selection clause. *See*, *e.g.*, *National School Reporting Services, Inc. v. National Schools of California, Ltd., 924 F. Supp. 21, 24 (S.D.N.Y. 1996)* ***HN4***[] ("conclusory statements of duress are insufficient to show fraud or overreaching in agreeing to the forum selection clause"); *Composite Holdings v. Westinghouse Elec. Corp., 992 F. Supp. 367, 371 (S.D.N.Y. 1988)* (refusing to invalidate forum selection clause where allegation of fraud "is entirely conclusory . . . No facts are set forth that logically give rise to an inference of fraudulent intent, particularly given that the designated forum is [where defendant] is headquartered and thus a quite natural selection for entirely ordinary reasons.")).

The Franchisee Plaintiffs' arguments that the forum selection clause is unconscionable and that it is a contract of adhesion may be taken together. ***HN5***[] "An unconscionable bargain is one which no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other." *Doctor's Associates, Inc. v. Jabush, 89 F.3d 109, 113 (2d Cir. 1996)* (quoting *Hume v. United States, 132 U.S. 406, 411, 33 L. Ed. 393, 10 S. Ct. 134 (1889)).* **[*11]** The fact that the Franchise Agreement was presented on a take it or leave it basis and was not subject to negotiation renders it neither a contract of adhesion nor unconscionable. *See, e.g.*, *Novak v. Overture Services, Inc., 309 F. Supp. 2d 446, 2004 U.S. Dist. LEXIS 5277, CV 02-5164, 2004 WL 613001 (E.D.N.Y. Mar. 25, 2004*) ("An 'agreement cannot be considered procedurally unconscionable, or a contract of adhesion, simply because it is a form contract.'") (quoting *Rosenfeld v. Port Authority of New York and New Jersey, 108 F. Supp. 2d 156, 164 (E.D.N.Y. 2000))*; *Stamm, 960 F. Supp. at 733* (finding forum selection clause not unconscionable despite the fact that the clause is "now disadvantageous to Plaintiffs" and that it was presented to plaintiffs on a take it or leave it basis).

The Franchisee Plaintiffs also argue that even if the forum selection is enforceable, the clause does not cover their non-contractual claims. The clause states that "any legal action brought by Franchisee against Franchisor" is subject to the clause. Reading this broad clause to apply at least to actions arising from the Franchise Agreement, non-contractual claims are deemed to arise from the agreement **[*12]** for the purposes of the forum selection clause. *See* *Bense v. Interstate Battery System of America, Inc., 683 F.2d 718, 720 (2d Cir. 1982)* (holding that plaintiff's action arises from the agreement "although the complaint was brought pursuant to federal ***antitrust law***, the gist of [plaintiff's] claim is that [defendant] wrongfully terminated the agreement, thereby damaging [plaintiff].").
In *Young Women's Christian Ass'n of U.S., Nat. Bd. v. HMC Entertainment, Inc., 1992 U.S. Dist. LEXIS 14713, 91 Civ. 7943, 1992 WL 279361, at *4 (S.D.N.Y. Sept. 25, 1992),* the court found that plaintiff's claims for a declaratory judgment with respect to defendant's potential unfair competition, trademark infringement, misappropriation and implied contract claims arose pursuant to the contract, and were therefore within the scope of the forum selection

clause because "any determination with respect to plaintiff's claims will require consideration of the contract and of the parties' respective rights pursuant to the contract." The Franchisee Plaintiffs have conceded that the causes of action in "the Amended Complaint that concern the defendant's breach of contract are inextricably woven with **[*13]** the other actions of defendant." Franchise Plaintiff's Mem. of Law in Opposition to Def.'s Motion to Stay, Dismiss and/or Transfer at 6. It is therefore determined that the forum selection clause agreed to by the Franchisee Plaintiffs (other than Waturu Iwata) is enforceable and that each of Plaintiffs' claims is within the scope of the clause.

The Franchisee Plaintiffs Claims are Transferred to the District of Maryland

Having found the forum selection clause enforceable as to Plaintiffs' claims, it remains to decide whether to dismiss the case pursuant to the forum selection clause or to transfer it pursuant to *28 U.S.C. § 1404(a)*. [1] ***HN6***[] "A district court may 'dismiss on the grounds that the parties have agreed in advance that some other forum is the more convenient location for resolution of the dispute.'" *GMAC Commercial Credit, LLC v. Dillard Dep't Stores, Inc., 198 F.R.D. 402, 405 (S.D.N.Y. 2001)* (quoting *Licensed Practical Nurses, Technicians & Healthcare Workers of N.Y., Inc. v. Ulysses Cruises, Inc., 131 F. Supp. 393, 408 (S.D.N.Y. 2000)*). Resolution of this issue shall be determined by "weighing in each case whether dismissal or transfer is the most efficient and just means of enforcing the clause." **[*14]** *Ulysses Cruises, 131 F. Supp. 2d at 409*. The forum selection clause in this case specifies that any litigation between franchisee and franchisor shall be brought in the "federal district court" where franchisor has its place of business, which is the District of Maryland. JI and G&R Franchise Agreements, P 24.2. Transfer of the claims of the Franchisee Plaintiffs to the District of Maryland is therefore the most "appropriate remedy for effectuating [the] forum-selection clause." *Ulysses Cruises, 131 F. Supp. 2d. at 407*.

[*15] ***HN8***[] An enforceable forum selection clause is "*not* dispositive as to transfer under *§ 1404(a)*", *Falconwood Financial Corp. v. Griffin, 838 F. Supp. 836, 840 (S.D.N.Y. 1993)* (citing *Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29-30, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988))*, and "the court must still 'take account of factors other than those that bear solely on the parties' private ordering of their affairs,' such as the convenience of the witnesses and . . . other factors . . ." *Mpower Communs. Corp. v. Voipld.com, Inc., 304 F. Supp. 2d 473, 475 (W.D.N.Y. 2004)* (quoting *Stewart, 487 U.S. at 30*). However, "it is clear that such clauses are not lightly disregarded; a party opposing enforcement of a forum selection clause must "demonstrate exceptional facts explaining why he should be relieved from his contractual duty." *Id.* (quoting *Weiss, 801 F. Supp. at 1278*); *see also Stewart, 487 U.S. at 33* ("a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases") (Kennedy, J., concurring)). The Franchisee Plaintiffs have not shown any exceptional **[*16]** facts, arguing only that the plaintiffs' choice of forum is entitled to deference. As the Franchise Agreements show, however, the Franchisee Plaintiffs' contractual choice of forum is the District of Maryland. Accordingly, the claims of the Franchisee Plaintiffs will be transferred there.

MMI's Motion to Dismiss the Claims of Wataru Iwata

Because Waturu Iwata was not a party to a Franchise Agreement, his claims are not bound by the terms of the forum selection clause. MMI has not moved to transfer Waturu Iwata's claims to the District of Maryland and has instead moved to dismiss under *Fed. R. Civ. P. 12(b)(6)*.

HN9[] In reviewing a *12(b)(6)* motion, courts must "accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader." *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)* (citing *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052 (2d Cir. 1993)*. However, "legal conclusions,

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[1] Following the instructive discussion by the Honorable Gerard E. Lynch in Licensed Practical Nurses, Technicians and *Health Care Workers of New York, Inc. v. Ulysses Cruises, Inc., 131 F. Supp. 2d 393, 402-09 (S.D.N.Y. 2000)*, it is determined that ***HN7***[] "the presence of a forum-selection clause does not deprive the disfavored forum of jurisdiction or venue, where the conditions of subject matter and *in personam* jurisdiction are otherwise met." *Id. at 409*. Therefore, "dismissal may be based on either the court's inherent power to decline jurisdiction, by analogy to the traditional doctrine of forum non conveniens, or on the power under *Rule 12(b)(6)* for failure to state a claim." *Id.* Although MMI does not specify by what authority it seeks transfer as an alternative remedy, it is presumed to invoke the Court's power to transfer pursuant to *§ 1404(a)*. *Id.*

deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *L'Europeene de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 122 (S.D.N.Y. 1988).* **[*17]** The complaint may only be dismissed when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1956)*; *see also* *Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996)*.

Review must be limited to the complaint and documents attached or incorporated by reference thereto. *Kramer v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991)*. In this context, the Second Circuit has held that a complaint is deemed to "include . . . documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)*.

Choice of Law

As an initial matter, it must be determined what law applies to Waturu Iwata's state law claims for breach of contract, breach of an implied contract of good faith and fair dealing, and fraud. MMI's briefs cite to New York law without addressing the issue. Waturu Iwata is a resident of New York. However, the parties to the contract, JI and MMI, are residents of Pennsylvania and Maryland, respectively, **[*18]** and the proposed franchise location is in Pennsylvania.

HN10[] A federal court sitting in diversity must apply the choice-of-law rules of the forum state, in this instance New York. *See* *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved. Where no [such] conflict exists . . . there is no reason to engage in a choice of law analysis." *Smith v. Mitlof, 148 F. Supp. 2d 279, 285 (S.D.N.Y. 2001)* (quoting *Elson v. Defren, 283 A.D.2d 109, 114, 726 N.Y.S.2d 407, 411 (1st Dep't 2001))*. ***HN11***[] The elements of a contract claim are the same in Pennsylvania, New York and Maryland, *see Morgan Stanley High Yield Securities v. Seven Circle Gaming Corp., 269 F. Supp. 2d 206, 213 (S.D.N.Y. 2003)*; *J.F. Walker Co., Inc. v. Excalibur Oil Group, Inc., 2002 PA Super 39, 792 A.2d 1269, 1272 (Pa. Super. 2002)*; *Yousef v. Trustbank Sav., F.S.B., 81 Md. App. 527, 568 A.2d 1134, 1137 (Md. App. 1990)*, and in **[*19]** each jurisdiction a claim for breach of an implied duty of good faith cannot be brought in the absence of an underlying contract. *See Sheth v. New York Life Ins. Co., 273 A.D.2d 72, 73, 709 N.Y.S.2d 74 (1st Dep't 2000)*; *Landmesser v. United Air Lines, Inc., 102 F. Supp. 2d 273, 280 (E.D. Pa. 2000)*; *Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc., 190 F. Supp. 2d 785, 794 (D. Md. 2002)*. In the absence of a conflict, New York law will be applied to the contract claims.

Without comparing the substantive doctrine with respect to common law fraud claims in the various jurisdictions, New York law applies because

> ***HN12***[] "fraud claims are governed by the laws of the jurisdiction where the injury is deemed to have occurred which usually is where the plaintiff is located." *Pinnacle Oil Co. v. Triumph Oklahoma, L.P., 1997 U.S. Dist. LEXIS 8985, 93 Civ. 3434, 1997 WL 362224, at *1 (S.D.N.Y. Jun. 27, 1997)* (citing *Sack v. Low, 478 F.2d 360, 366 (2d Cir. 1973)* (Friendly, J.)); *Cooney v. Osgood March., Inc., 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993)* ("If conflict-regulating laws are at issue, the **[*20]** law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."). Indeed, "the traditional view has been that … when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made." *Sack, 478 F.2d at 366* (citations omitted).

*PPI Enterprises (U.S.), Inc. v. Del Monte Foods Co., 2003 U.S. Dist. LEXIS 16006, 99 Civ. 3794, 2003 WL 22118977, at *17 (S.D.N.Y. Sept. 11, 2003).* Because Waturu Iwata is a New York resident, any alleged loss was sustained in New York, making New York law applicable.

A. *Breach of Contract*

HN13[] In order to recover on a claim for breach of contract, Waturu Iwata must allege, among other elements, the existence of a valid contract. *See Morgan Stanley High Yield Securities v. Seven Circle Gaming Corp., 269 F. Supp. 2d 206, 213 (S.D.N.Y. 2003)*. The relevant contract is the JI Franchise Agreement. Although a copy of the Agreement was not attached to the Amended Complaint, it is clearly incorporated by reference, and may be considered on a motion to dismiss. **[*21]** *See* *Rothman, 220 F.3d at 88*. On March 25, 2002, MMI entered into the Franchise Agreement with Jun Iwata on behalf of an entity to be named later. *See* Declaration of Gregg Rubenstein, Exhibit 1. That entity is JI. Waturu Iwata is not a party to the JI Franchise Agreement, although he is alleged to be Jun Iwata's lender, and to have reviewed and relied upon the information in the UFOC. Amended Complaint P 99. The Amended Complaint alleges, however, that Waturu Iwata is a "silent partner," and "is more than simply a provider of funds for the purchase of the franchise." *Id.* at PP 100, 101. As a silent partner, Waturu Iwata is alleged to be "the equivalent of an owner of the franchise," and to have the "equivalent of a contractual relationship" with MMI and "the equivalent of a direct relationship" with MMI. *Id.* at PP 102-104.

The allegations in the Amended Complaint are insufficient to establish that there was a valid contract between Waturu Iwata and MMI. The term "silent partner" is not defined in the complaint, but there is no allegation that a contractual relationship was formed. Nor does the allegation that Waturu Iwata and MMI **[*22]** had "the equivalent of a contractual relationship" give rise to a legally recognizable relation. In his brief, Waturu Iwata argues that he "had the same possibility of loss due to an improper action or inaction on the part of" MMI as Jun Iwata. Memorandum of Waturu Iwata in Opposition to Defendant's Motion to Dismiss, at 3. Such a theory of contract liability would give standing to sue for breach of contract to every creditor to a party to a contract. Waturu Iwata has cited no caselaw to support his theory. Accordingly, the breach of contract claim is dismissed.

B. *Breach of Implicit Covenant of Good Faith*

HN14[] In the absence of a valid contract, Waturu Iwata's claim for a breach of an implied covenant of good faith must also be dismissed. *See Sheth v. New York Life Ins. Co., 273 A.D.2d 72, 73, 709 N.Y.S.2d 74 (1st Dep't 2000)* ("cause of action for breach of the implied covenant of good faith and fair dealing . . . may not be used as a substitute for a nonviable claim of breach of contract."); *Lakeville Pace Mech., Inc. v. Elmar Realty Corp., 276 A.D.2d 673, 676, 714 N.Y.S.2d 338 (2d Dep't 2000)* ("there can be no covenant of good faith and fair **[*23]** dealing implied where there is no contract").

C. *Claim for Violation of the Maryland Franchise Registration and Disclosure Law*

Waturu Iwata has alleged that MMI violated the Maryland Franchise Registration and Disclosure Law ("MFRDL"). *See* Md. Bus. Reg. Code Ann. *§§ 14-201 to 14-233*. *Section 14-227(a)(1) of the MFRDL* provides that ***HN15***[] "A person who sells or grants a franchise is civilly liable to the person who buys or is granted a franchise if the person who sells or grants a franchise offers to sell or sells a franchise. . ." There is no allegation in the Amended Complaint that Waturu Iwata was sold or granted a franchise by MMI. Accordingly, this claim is dismissed for lack of standing. *See* *Matterhorn Group, Inc. v. SMH (U.S.) Inc. (In re Matterhorn Group), 2000 Bankr. LEXIS 915, 2000 WL 1174215 (Bankr. S.D.N.Y. Aug. 17, 2000)* ***HN16***[] ("The plain language of the [MFRDL] grants a civil remedy only to purchasers and grantees . . . The 'purchase' requirement simply recognizes that a non-purchaser does not rely on an unregistered or fraudulent prospectus, and hence, does not suffer the type of injury that Maryland franchise law, and similar laws in other states, are designed to prevent."); **[*24]** *Flynn v. Everything Yogurt, 1993 U.S. Dist. LEXIS 15722, C.A. No. HAR92-3421, 1993 WL 454355, at *4-5 (D. Md. Sept. 14, 1993)* (dismissing MFRDL claim by plaintiff whose "only connection with the circumstances that gave rise to the matter at bar is his pledge of certain security in connection with the loan obtained by [franchisees] to purchase the franchise.").

D. *Lost Opportunities*

Waturu Iwata has alleged a claim for lost opportunities. Waturu Iwata has not cited any caselaw supporting the existence of a distinct claim for lost opportunities. Accordingly, the claim for lost opportunities is dismissed.

E. *Fraud*

MMI argues that the fraud claim can be dismissed because, under New York law, tort claim liability based solely on economic loss is limited to those in privity with the alleged tortfeasor. Because Waturu Iwata has no direct relationship to the defendant, MMI argues, he is not entitled to relief on his fraud claim. ***HN17***[] While "it is well-established under New York law that, where a plaintiff alleges only economic damage resulting from a defendant's alleged negligence, defendants owe no duty to plaintiffs with whom they are not in contractual privity,"*The Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Invs. Ltd, 2003 U.S. Dist. LEXIS 5182, 00 Civ. 9214, 2003 WL 1751780,* ***[*25]*** *at *11 (S.D.N.Y. Apr. 1, 2003)* (quoting *Land Mine Enters. v. Sylvester Builders, Inc. 74 F. Supp. 2d 401, 407 (S.D.N.Y. 1999)*, *aff'd*, *234 F.3d 1262 (2d Cir. 2000))*, the doctrine does not extend to tort claims for fraud. *See Metral v. Horn, 213 A.D.2d 524, 526, 624 N.Y.S.2d 177 (2d Dep't 1995)* ("a cause of action sounding in fraud does not require the existence of a relationship of privity or something close to privity between the parties.") (citing *Credit Alliance Corp. v Andersen & Co., 65 N.Y.2d 536, 547, 493 N.Y.S.2d 435, 483 N.E.2d 110 (1985))*; *Shafran v. Kule, 159 A.D.2d 263, 552 N.Y.S.2d 263, 265 (1st Dep't 1990)* ("Lack of privity is not a viable defense to fraud.").

MMI also argues that Waturu Iwata fails to allege a viable fraud claim. ***HN18***[] To state a claim for fraud under New York law, a plaintiff must allege: "(1) a misrepresentation or a material omission of fact which was false and known to be false by defendant; (2) made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury." *Flash Electronics, Inc. v. Universal Music & Distribution Corp., 312 F. Supp. 2d 379, 2004 U.S. Dist. LEXIS 6018, CV01-979, 2004 WL 764584,* ***[*26]*** *at *19 (E.D.N.Y. Mar. 31, 2004)* (citing *AUSA Life Ins. Co. v. Ernst and Young, 206 F.3d 202, 208 (2d Cir. 2000)*. ***HN19***[] Under *Fed. R. Civ. P. 9(b)*, "the circumstances constituting fraud . . . shall be stated with particularity." However, "malice, intent, knowledge, and other condition of mind may be averred generally." *Id.* "To satisfy *Rule 9(b)*'s particularity requirement, a plaintiff's complaint must: '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Flash Electronics, 2004 U.S Dist. LEXIS 6018, [WL] at *20* (quoting *Stevelman v. Alias Research Inc., 174 F.3d 79, 84 (2d Cir. 1999))*.

Drawing all inferences in favor of Waturu Iwata, the Amended Complaint states a valid claim for fraud. The alleged fraudulent misrepresentation made by MMI was the inaccurate estimates of construction and equipment costs for the operation of the franchise, and was made in the UFOC provided to Jun Iwata on January 19, 2002 at MMI headquarters. Amended Complaint PP 145-48. ***HN20***[] The fact that **[*27]** the representation was not made directly to Waturu Iwata is not fatal to the claim because he has alleged "that he relied upon it to his detriment, and that the defendant[] intended the misrepresentation to be conveyed to him." *Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo, 148 F.3d 194, 196 (2d Cir. 1998)* (quoting *Rosen v. Spanierman, 894 F.2d 28, 33 (2d Cir. 1990))*; *see also* *Eaton, Cole & Burnham Co. v. Avery, 83 N.Y. 31, 33-34 (1880)* ("it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof."). The Amended Complaint also alleges that MMI knew that Jun Iwata was going to finance the purchase of the franchise and that the lender would review the information in the UFOC. Amended Complaint PP 95, 97. It is also alleged that MMI knew the UFOC to be inaccurate, and intended to deceive any lenders reviewing the information. *Id.* at PP 96, 165-66. Finally, it is alleged that Waturu Iwata reviewed and relied on the information, and that he was injured as a result. *Id.* at PP 99, 168.

[*28] F. *Claim for Violation of Federal Trade Commission Rules*

Waturu Iwata alleges that MMI violated Federal Trade Commission ("FTC") regulations, in particular the "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventres," *16 C.F.R. §§ 436.1-438.10*, promulgated pursuant to the *Federal Trade Commission Act* ("FTCA"), *15 U.S.C. §§ 41-58*, by failing to provide accurate information in the UFOC. ***HN21***[] The FTC disclosure requirements provide that "it is an unfair or deceptive act or practice" to fail to furnish any prospective franchisee with accurate information related to the terms of the franchise agreement and the financial condition of the franchisor. *16 C.F.R. § 436.1*. However, there is no private right of action to enforce the Disclosure Requirements of § 436, or any other regulation promulgated under the Federal Trade Commission Act. *See* *Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974)* ("Nowhere does the [FTCA] bestow upon either competitors or consumers standing to enforce its provisions."); *Brill v. Catfish Shaks of America, Inc., 727 F. Supp. 1035, 1041 (E.D. La. 1989)* **[*29]** ("there is no private right of action for violation of the FTC's franchise disclosure rules") (citing *Freedman v. Meldy's, Inc., 587 F. Supp. 658 (E.D. Pa. 1984))*.

In the brief by the Franchisee Plaintiffs in opposition to MMI's motion to stay, dismiss and/or transfer, it is argued that plaintiffs are not alleging that they can sue for violation of FTC regulations, but the allegation is made to provide "information to the Court" to show that MMI committed fraud by failing to follow the rule's requirements. While the existence of the FTC regulations is hereby noted, Waturu Iwata's claim for violation of the rule is dismissed for failure to state a claim.

G. *Claims for Violations of Antitrust Laws*

Waturu Iwata has alleged violations of the Section Two of the Sherman Act, *15 U.S.C. § 2*, the Clayton Act, *15 U.S.C. §§ 14* and*15*, and the Robinson-Patman Act, *15 U.S.C. § 13*. Waturu Iwata has alleged that he provided substantial funding to JI and that the damages sustained by JI "are the equivalent of losses sustained by . . . Waturu Iwata." Amended Complaint PP 108, 110.

HN22[] The Second Circuit has held **[*30]** that "merely derivative injuries sustained by . . . creditors of an injured company do not constitute antitrust injury sufficient to confer antitrust standing." *G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766-67 (2d Cir. 1995)*; *see also* Schwimmer Corp. v. Sony Corp. of America, 637 F.2d 41, 46-47 (2d Cir. 1980) ("it is recognized that treble damage actions, effective and attractive as they are in deterring violations of the federal antitrust laws, must have some boundaries. Consequently, the standing requirement is designed, in essence, to limit access to treble recovery to a target of the anticompetitive conduct. Thus, the standing rules exclude a non-target whose damages are more difficult to prove and, in all likelihood, highly speculative."). Each of Waturu Iwata's antitrust claims must be dismissed because he has failed to plead a direct injury or to show that he was a target of anticompetitive conduct, and therefore lacks standing under the antitrust laws.

H. *RICO Claims*

Waturu Iwata has alleged that defendants violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act, *18 U.S.C. § 1961,* ***[*31]*** *et seq.*

> ***HN23***[] To state a RICO claim under *§ 1962(b)and (c)*, a plaintiff must plead seven elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce."

The Jordan (Bermuda) Inv. Co., Ltd. v. Hunter Green Invs. Ltd, 154 F. Supp. 2d 682, 690 (S.D.N.Y. 2001) (quoting *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983)*. Moreover, "RICO ***HN24***[] is a specialized statute requiring a particular configuration of elements. These elements cannot be incorporated loosely from a previous narration, but must be tightly particularized and connected in a complaint. Parroting statutory language while generally referring the reader back to the previous 100 paragraphs in a complaint is inadequate." *Lesavoy v. Lane, 304 F. Supp. 2d 520, 532 (S.D.N.Y. 2004)* (quoting *Zaro Licensing, Inc. v. Cinmar, Inc., 779 F. Supp. 276, 284 (S.D.N.Y. 1991))*.

Waturu Iwata's RICO allegations **[*32]** are insufficient to state a valid claim. No particularized allegation is made. Instead, the factual information is incorporated by reference from the previous paragraphs in the complaint, and the enumeration of the statutory elements are conclusorily alleged. The entities alleged to have conspired with MMI are not named, the predicate acts alleged to form the basis of the claim are not specified, and it is not alleged that "the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." *GICC Capital Corp. v. Technology Fin. Group, Inc., 67 F.3d 463, 465 (2d Cir. 1995)*. Accordingly, Waturu Iwata's RICO claim is dismissed.

MMI's Motion for Attorney's Fees is Denied

MMI argues that it should be awarded attorney's fees for responding to Waturu Iwata's complaint. *Federal Rule of Civil Procedure 11* **HN25**[] has been violated, and sanctions are appropriate "where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands." *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).* **[*33]** While several of Waturu Iwata's claims have been dismissed for failure to state a claim upon which relief can be granted, his fraud claim has been validly pleaded. MMI's motion for attorney's fees is therefore denied.

Plaintiffs' Motion to Stay or Order Defendant to Dismiss Suits Brought in the District of Maryland

The plaintiffs argue that MMI may not institute new actions duplicating existing litigation and that the actions in federal court in Maryland should therefore be stayed and MMI should be ordered to dismiss the Maryland actions. No adequate basis for a stay has been submitted, and the request is accordingly denied.

Conclusion

MMI's motion to transfer the claims of the Franchisee Plaintiffs to the United States District Court for the District of Maryland is granted. Except for the common law fraud claim, each of Wataru Iwata's claims are dismissed for failure to state a claim. MMI's motion for attorney's fees against Waturu Iwata is denied. Plaintiffs' motion to stay and order MMI to dismiss its lawsuits in the District of Maryland is denied.

It is so ordered.

New York, NY

May 19, 2004

ROBERT W. SWEET

U.S.D. [*34] J.

Ocean Spray Cranberries, Inc., Litig.

United States District Court for the District of Massachusetts

May 19, 2004, Decided

Civil Action No. 1:03-CV-10734-JLT

Reporter

382 F. Supp. 2d 221 *; 2004 U.S. Dist. LEXIS 28391 **

OCEAN SPRAY CRANBERRIES, INC., Litigation

Subsequent History: Adopted by, Summary judgment granted by, Partial summary judgment granted by, in part, Partial summary judgment denied by, in part *Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., 382 F. Supp. 2d 221, 2004 U.S. Dist. LEXIS 28390 (D. Mass., June 10, 2004)*

Core Terms

Ocean, Capper-Volstead Act, cooperatives, agricultural, exemption, farmers, associations, cranberry, agricultural product, products, plaintiffs', antitrust, anti trust law, summary judgment, recommends, producers, capital stock, Clayton Act, Undisputed, marketing, commerce, immunity, includes, growers

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

HN1[] **Exemptions & Immunities, Collectives & Cooperatives**

See 7 U.S.C.S. § 291.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Business & Corporate Law > Cooperatives > General Overview

HN2[] **Exemptions & Immunities, Collectives & Cooperatives**

Section 292 of the Capper-Volstead Act, 7 U.S.C.S. § 291 et seq., authorizes the Secretary of Agriculture to take action against an agricultural cooperative that monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced. 7 U.S.C.S. § 292.

Governments > Legislation > Interpretation

HN3[] Legislation, Interpretation

When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails in the absence of clearly expressed legislative intent to the contrary.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN4[] Collectives & Cooperatives, Capper-Volstead Act

The Capper-Volstead Act, *7 U.S.C.S. § 291 et seq.*, is plain and unambiguous in its reference to "persons." No limitation on the ordinary meaning of that word is stated or implied. The term "persons" refers to foreign farmers as well as American farmers.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Business & Corporate Law > Foreign Corporations > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN5[] Collectives & Cooperatives, Clayton Act

Under the Clayton Act, "persons" is expressly defined as including foreign entities. *15 U.S.C.S. § 12*.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] Antitrust & Trade Law, Clayton Act

Section 6 of the Clayton Act- which opens with the statement that the labor of a human being is not a commodity or article of commerce--provides that the antitrust laws are not to be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit. *15 U.S.C.S. § 17*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN7[] Collectives & Cooperatives, Capper-Volstead Act

According to the United States Supreme Court, from the standpoint of agricultural cooperatives, the principal defect in that exemption was that it applied only to nonstock organizations. The Capper-Volstead Act, *7 U.S.C.S. § 291 et* seq., was therefore adopted to clarify the exemption for agricultural organizations and to extend it to cooperatives having capital stock.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN8[] Antitrust & Trade Law, Sherman Act

Section 1 of the Clayton Act defines "person" and "persons" wherever used in the Clayton Act as including corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. *15 U.S.C.S. § 12*. The Sherman Act defines "person" and "persons" in the same way. *15 U.S.C.S. § 7*.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN9[] Collectives & Cooperatives, Capper-Volstead Act

The meaning of the term "persons" under the Capper Volstead Act, *7 U.S.C.S. § 291 et seq.*, is as broad as the definition set forth in the Clayton Act. A review of the Clayton Act as a whole demonstrates that the exemption contained in § 6 of the Clayton Act applies to cooperatives that include foreign farmers; likewise, the Capper-Volstead Act applies to cooperatives that include foreign farmers.

Governments > Legislation > Interpretation

HN10[] Legislation, Interpretation

Where Congress uses the same term in the same way in two statutes with closely related goals, basic canons of statutory construction suggest a presumption that Congress intended the term to have the same meaning in both contexts.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Business & Corporate Law > Cooperatives > Member Duties & Liabilities

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Cooperatives > General Overview

HN11[] **Collectives & Cooperatives, Capper-Volstead Act**

All of the members of a cooperative claiming immunity under the Capper Volstead Act, *7 U.S.C.S. § 291 et seq.*, must be "engaged in the production of agricultural products. *7 U.S.C.S. § 291*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Interpretation

HN12[] **Antitrust & Trade Law, Exemptions & Immunities**

Exemptions to the antitrust laws should be narrowly construed. The rule neither requires nor permits a court to disregard the plain language of the statute when interpreting an exemption. Courts have repeatedly rejected proposed narrow interpretations of statutory exemptions from the antitrust laws where those interpretations are inconsistent with the plain language of the statute.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN13[] **Collectives & Cooperatives, Capper-Volstead Act**

The Fisherman's Collective Marketing Act (FCMA) defines "aquatic products" as all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States. While it is true that the Capper-Volstead Act, *7 U.S.C.S. § 291 et seq.*, is similar to the FCMA in several respects, it differs in a significant respect: Congress did not define "agricultural products" as referring only to products grown in the United States or in places under the jurisdiction of the United States.

Governments > Legislation > Interpretation

HN14[] **Legislation, Interpretation**

When one statute contains limiting language and a related statute does not, the court should presume that the difference was intentional.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Title VII Discrimination > Scope & Definitions > Extraterritorial Application

HN15[] **Collectives & Cooperatives, Capper-Volstead Act**

Under the presumption against extraterritorial application of United States law, courts presume that federal legislation is primarily concerned with domestic conditions, absent a clear expression of congressional intent to the contrary. The presumption serves to protect against unintended clashes between United States laws and those of other nations which could result in international discord.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN16[] **International Aspects, International Application of US Law**

There is no question that the federal antitrust laws apply to conduct outside of the territorial borders of the United States when that conduct affects competition within the United States.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN17[] **Collectives & Cooperatives, Capper-Volstead Act**

The rationale for the presumption against extraterritorial application of United States law is inapplicable where the statute at issue is an exemption from United States law rather than a statute imposing requirements or standards of conduct on persons in other countries. By its very nature, an exemption from a prescriptive law of the United States eliminates any conflict between that prescriptive law and the law of another country. The Capper-Volstead Act, *7 U.S.C.S. § 291 et seq.*, in no way impedes the ability of another sovereign to forbid its citizens to engage in conduct that is permissible under the laws of the United States.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

Administrative Law > Judicial Review > Standards of Review > General Overview

HN18[] **Standards of Review, Deference to Agency Statutory Interpretation**

The question of whether a court should defer to an agency's interpretation of a statute only arises where the statute is ambiguous. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

HN19[] **Exemptions & Immunities, Collectives & Cooperatives**

The term "persons" in the Capper-Volstead Act, *7 U.S.C.S. § 291 et seq.*, unambiguously refers to foreign farmers as well as American farmers.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

International Trade Law > General Overview

Business & Corporate Law > Cooperatives > General Overview

HN20[] **Exemptions & Immunities, Collectives & Cooperatives**

Congress has expressly built a safeguard for American consumers into the Capper-Volstead Act, *7 U.S.C.S. § 291 et seq.*, by authorizing the Secretary of Agriculture to bring proceedings against any cooperative that monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof. *7 U.S.C.S. § 292*.

Counsel: **[**1]** For Gael Mahony, Special Master: Gael Mahony, Holland & Knight, LLP, Providence, RI.

For Northland Cranberries, Inc., Plaintiff: Alan M. Wiseman, Patrick Todd Mullins, Stephen Weissman, Ari N. Rothman, Howrey Simon Arnold & White, LLP, Washington, DC; Vincent P. Cahalane, Law Offices of Vincent P. Cahalane, P.C., Brockton, MA.

For Clermont, Inc., Plaintiff: Alan M. Wiseman, Patrick Todd Mullins, Stephen Weissman, Ari N. Rothman, Howrey Simon Arnold & White, LLP, Washington, DC; Vincent P. Cahalane, Law Offices of Vincent P. Cahalane, P.C., Brockton, MA; J. Douglas Baldridge, Venable LLP, Washington, DC; Mark C. Schechter, Howrey & Simon, Washington, DC; Vincent E. Verrocchio, Howrey Simon Arnold & White, LLP, Washington, DC.

For Ocean Spray Cranberries, Inc., Defendant: David S. Eggert, James L. Cooper, Robert Mascola, William Baer, Arnold & Porter, Washington, DC; Donald M. Barnes, Jennifer J. Illingworth, Salvatore A. Romano, Porter, Wright, Morris & Arthur, Washington, DC; James C. Burling, Michelle D. Miller, Peter A. Spaeth, Wilmer Cutler Pickering Hale and Dorr, LLP, Boston, MA.

For James J. O'Hagan, Movant: Pro se, Grayland, WA.

For National Counsil of **[**2]** Farmer, Cooperatives, Interested Party: Charles S. Treat, Latham & Watkins, San Francisco, CA; Douglas F MacLean, Latham & Watkins, Newton, MA; J. Thomas Rosch, Latham & Watkins LLP, San Francisco, CA.

For Decas Cranberry Products, Inc., Interested Party: Amy C. Stewart, James F. Kavanaugh, Jr., Conn, Kavanaugh, Rosenthal, Peisch &, Ford, LLP, Boston, MA.

Judges: Joseph L. Tauro, United States District Judge.

Opinion by: Joseph L. Tauro

Opinion

[*223] SPECIAL MASTER'S RECOMMENDATION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT CONCERNING CAPPER-VOLSTEAD ACT AND FOREIGN MEMBERSHIP IN OCEAN SPRAY'S AGRICULTURAL COOPERATIVE

Upon consideration of the plaintiffs' Motion for Summary Judgment on the Inapplicability of the Capper-Volstead Act to the Antitrust Allegations of the Complaint and Ocean Spray's Cross-Motion for Partial Summary Judgment

Regarding Capper-Volstead Applicability, the Special Master recommends that the Court **DENY** the plaintiffs' Motion. The Special Master recommends that the Court **ALLOW** Ocean Spray's Cross-Motion to the extent that Ocean Spray seeks a determination that the inclusion of foreign members in its agricultural cooperative does not prevent **[**3]** Ocean Spray from asserting the antitrust exemption set forth in the Capper-Volstead Act, *7 U.S.C. § 291, et seq.* as an affirmative defense to the Amended Complaint.

Ocean Spray has not expressly moved for summary judgment as to the effect of the Capper-Volstead Act on any of the plaintiffs' claims against Ocean Spray. Therefore, the Special Master makes no recommendation on that issue.

The Nature of the Case

This is an antitrust case brought by a current independent seller of cranberry products (Northland Cranberries, Inc.) and a former independent seller of cranberry products (Clermont, Inc.) against Ocean Spray Cranberries, Inc. Ocean Spray is an agricultural cooperative of cranberry growers. The plaintiffs allege that the agreements between Ocean Spray and its members constitute unlawful restraints on competition, and that Ocean Spray has engaged in unlawful, anticompetitive activities "that have harmed, and continue to harm, competition for the sale of cranberry products in the United States." (Amended Complaint, P 1).

As its Second Defense, Ocean Spray alleges that it is "an association of agricultural **[*224]** producers who collectively process, **[**4]** prepare for market, handle and market in interstate and foreign commerce their agricultural products, and thus the plaintiffs' claims are barred in whole or in part by various statutory exemptions for agricultural cooperatives and associations of producers including, but not limited to, the Capper-Volstead Act, *7 U.S.C. § 291, et seq.*; the Agricultural Marketing Agreement Act of 1937, *7 U.S.C. § 601, et seq.*; and the Cooperative Marketing Act of 1926, *7 U.S.C. § 451, et seq.*"

The plaintiffs allege that Ocean Spray is not entitled to claim immunity under the Capper-Volstead Act, because Ocean Spray's members include cranberry growers outside of the United States. The plaintiffs argue that in order for Ocean Spray to claim immunity under the Capper-Volstead Act, all of its members must be growers in the United States.

The issue presented is an issue of first impression. No court has addressed the question of whether the term "persons" in the Capper-Volstead Act includes foreign farmers.

The Undisputed Material Facts

Ocean Spray is a Delaware corporation with its principal place of business in **[**5]** Massachusetts. (Pls' Statement of Undisputed Facts, No. 3, admitted by Ocean Spray; Amended Complaint and Answer thereto, P 16.) Ocean Spray is an agricultural cooperative whose members include 800 cranberry growers. (Pls' Statement of Undisputed Facts, No. 3, admitted by Ocean Spray.) Approximately 75 to 100 of Ocean Spray's members are located outside of the United States. (Pls' Statement of Undisputed Facts, Nos. 3 and 4, admitted by Ocean Spray). [1] The plaintiffs do not allege that any of the foreign members are not cranberry producers; it is undisputed for purposes of summary judgment that all of the foreign members are cranberry producers.

[6]** **The Special Master's Ruling**

[1] The parties dispute the amount of cranberries delivered to Ocean Spray by growers outside of the United States. The Plaintiffs claim that Ocean Spray's Canadian members contribute approximately 20% of Ocean Spray's total cranberry production. (Pls' Statement of Undisputed Facts, No. 5.) Ocean Spray claims that as of August, 2003 approximately 16% of Ocean Spray's total cranberry acreage was located outside the United States and that approximately 17% of the total cranberries delivered to Ocean Spray in the 2002 harvest consisted of cranberries grown outside of the United States. (Ocean Spray's Statement of Undisputed Facts, No. 5.) This dispute is immaterial to the cross-motions for partial summary judgment.

Section 291 of the Capper-Volstead Act (*7 U.S.C. § 291*) provides as follows:

> ***HN1***[] Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> **First.** That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> **[*225] Second.** That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
> And in any case to the following:
>
> **Third. [**7]** That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

HN2[] Section 292 of the Act authorizes the Secretary of Agriculture to take action against an agricultural cooperative that "monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced[.]" *7 U.S.C. § 292*.

HN3[] "When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails in the absence of clearly expressed legislative intent to the contrary." *In re Alappat, 33 F.3d 1526, 1531 (Fed. Cir. 1994)* (citing *Mansell v. Mansell, 490 U.S. 581, 592, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989))*. ***HN4***[] The Capper-Volstead Act is plain and unambiguous in its reference to "persons." No limitation on the ordinary meaning of that word is stated or implied. The term "persons" refers to foreign farmers as well as American farmers.

The conclusion that "persons" includes foreign farmers is confirmed by Congress' purpose in adopting the Capper-Volstead Act. As discussed below, Congress adopted the Capper-Volstead Act (in 1922) in order **[**8]** to extend to agricultural cooperatives having capital stock the exemption from the antitrust laws that Congress had granted (in 1914) to agricultural cooperatives not having capital stock, in *Section 6 of the Clayton Act*. See *Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 390-391, 19 L. Ed. 2d 621, 88 S. Ct. 528 (1967)*. As discussed below, ***HN5***[] under the *Clayton Act*, "persons" is expressly defined as including foreign entities. *15 U.S.C. § 12*.

HN6[] Section 6 of the Clayton Act -- which opens with the statement that "the labor of a human being is not a commodity or article of commerce" -- provides that the antitrust laws are not to be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit[.]" *15 U.S.C. § 17*.

HN7[] According to the United States Supreme Court, "From the standpoint of agricultural cooperatives, the principal defect in that exemption was that it applied only to nonstock organizations." *Case-Swayne Co., 389 U.S. at 391*. The Capper-Volstead Act was therefore adopted "to clarify the exemption **[**9]** for agricultural organizations and to extend it to cooperatives having capital stock." Id. See also *Maryland & Virginia Milk Producers Ass'n. v. United States, 362 U.S. 458, 464-468, 4 L. Ed. 2d 880, 80 S. Ct. 847 (1960)* (discussing the history and purpose of the Capper-Volstead Act at length).

HN8[] Section 1 of the Clayton Act defines "'person' and persons' wherever used in this Act" as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." *15 U.S.C. § 12* (emphasis added). *The Sherman Act* defines "person" and "persons" in the same way. *15 U.S.C. § 7*.

The Special Master concludes that ***HN9***[] the meaning of the term "persons" under the Capper Volstead Act is as broad as the definition set forth in the Clayton Act. A review of the Clayton Act as a whole demonstrates that the exemption contained in *Section 6 of the Clayton Act* applies to cooperatives that include foreign farmers; **[*226]** likewise, the Capper-Volstead Act applies to cooperatives that include foreign farmers. See *New Hampshire v. Ramsey, 366 F.3d 1, 2004 WL 912603, *17 (1st Cir. 2004)* **[**10]** ***HN10***[] ("where Congress uses the same term in the same way in two statutes with closely related goals, basic canons of statutory construction suggest a presumption that Congress intended the term to have the same meaning in both contexts"). [2]

The plaintiffs offer several arguments for the proposition that, notwithstanding the plain meaning of the word "persons," and notwithstanding the fact that the Capper-Volstead Act was enacted to clarify and extend the exemption set forth in *Section 6 of the Clayton Act*, the term "persons" as used in the Capper-Volstead Act does not have **[**11]** the same meaning as the term "persons" as used in the Clayton Act. The Special Master is not persuaded by those arguments.

For example, the plaintiffs cite the statement in *National Broiler Marketing Ass'n v. United States, 436 U.S. 816, 822, 56 L. Ed. 2d 728, 98 S. Ct. 2122 (1978)* that in order for the cooperative in that case (concerned with the production of broiler chickens) to enjoy protection under the Capper-Volstead Act, "all its members must be qualified to act collectively" (emphasis in original). As a review of that case makes clear, however, the statement simply means that ***HN11***[] all of the members of a cooperative claiming immunity under the Capper-Volstead Act must be "engaged in the production of agricultural products." *7 U.S.C. § 291*. The cooperative in that case was not entitled to immunity because its membership included persons who were not "engaged in the production of agricultural products," i.e., persons who did not own a breeder flock or hatchery and did not maintain any facility for raising chickens. *National Broiler Marketing, 436 U.S. at 822*. Nothing in that case suggests that foreign persons who are "engaged in the production of agricultural **[**12]** products" are not "qualified to act collectively" under the Capper-Volstead Act.

The plaintiffs also cite the rule that ***HN12***[] exemptions to the antitrust laws should be narrowly construed. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*. Application of that rule does not, however, support the plaintiffs' proposed limitation on the meaning of "persons": the rule neither requires nor permits a court to disregard the plain language of the statute when interpreting an exemption. Courts have repeatedly rejected proposed narrow interpretations of statutory exemptions from the antitrust laws where those interpretations are inconsistent with the plain language of the statute. See, e.g., *United States v. Tucor Int'l, Inc., 189 F.3d 834, 837 (9th Cir. 1999)* (rejecting the government's proposed construction of the antitrust exemption in the Shipping Act of 1984 as applying only to "ocean common carriers": "the government's construction ignores the Act's plain language and cannot be interpreted consistently with the statute as a whole"); *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1319 (3rd Cir. 1992)* **[**13]** (refusing to limit the term "associations" contained in the *Webb-Pomerene Act* (an antitrust exemption applicable to export associations) to associations of American-owned firms); **[*227]** *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F 2d 203, 214-215 (9th Cir. 1974)* (interpreting the term "marketing" in the Capper-Volstead Act and rejecting a proposed interpretation of the term that would limit it to the "sale" of agricultural products).

In a related vein, the plaintiffs argue that the Court should conclude that "persons" under the Capper-Volstead Act does not include foreign persons, because in another statutory exemption, the Fisherman's Collective Marketing Act (the "FMCA"), Congress included a territorial limitation in the definition of "aquatic products." *15 U.S.C. § 521*. ***HN13***[] (The statute defines "aquatic products" as "all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.") While it is true that the Capper-Volstead Act **[**14]** is similar to the FCMA in several respects, it differs in a significant respect: Congress did not

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[2] Plaintiffs cite various statements made in the legislative debates which they claim demonstrate that Congress intended to exclude foreign farmers from the definition of "persons." None of the statements support the plaintiffs' position. At most, the statements show that certain legislators argued that foreign competition was likely to prevent exempt agricultural cooperatives from achieving a monopoly position.

define "agricultural products" as referring only to products grown in the United States or in places under the jurisdiction of the United States. ***HN14***[] When one statute contains limiting language and a related statue does not, the court should presume that the difference was intentional. Compare *B.F.P. v. Resolution Trust Corp., 511 U.S. 531, 537, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994)* ("it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another").

In arguing that "persons" as used in the Capper-Volstead Act does not include foreign farmers, the plaintiffs also cite the presumption against extraterritorial application of United States law. ***HN15***[] Under this presumption, courts presume that federal legislation is "primarily concerned with domestic conditions," absent a clear expression of congressional intent to the contrary. See *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991)* (internal citation and quotation marks omitted) (holding that the protections of Title VII did not apply to United **[**15]** States citizens employed by American employers outside of the United States). [3] The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Id.

The plaintiffs' reliance on this presumption is misplaced. First, ***HN16***[] there is no question that the federal antitrust laws apply to conduct outside of the territorial borders of the United States when that conduct affects competition within the United States. See, e.g., *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"). To the extent that the instant case involves extraterritorial application of the antitrust laws, the plaintiffs themselves allege that the conduct at issue has **[**16]** had a substantial effect within the United States. (Amended Complaint, P 1.)

Furthermore, ***HN17***[] the rationale for the presumption is inapplicable where the statute at issue is an exemption from United States law rather than a statute imposing requirements or standards of conduct on persons in other countries. By its very nature, an exemption from a prescriptive law of the United States eliminates any **[*228]** conflict between that prescriptive law and the law of another country. The Capper-Volstead Act in no way impedes the ability of another sovereign to forbid its citizens to engage in conduct that is permissible under the laws of the United States. Compare *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (rejecting the argument of London reinsurers that the application of federal ***antitrust law*** to their conduct would conflict with British law: "the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, . . . or claim that their compliance with the laws of both countries is otherwise impossible") (internal citation omitted).

The plaintiffs also claim that the United States Department **[**17]** of Justice (the "DOJ") has taken the position in certain antitrust actions that the Capper-Volstead Act does not apply to agricultural cooperatives that include foreign members, and that the Court should defer to the DOJ's interpretation of the statute. Both Ocean Spray and the National Council of Farmer Cooperatives, amicus curiae, counter that the United States Department of Agriculture (the "USDA") has issued numerous publications stating that Capper-Volstead immunity extends to cooperatives with foreign members and that American farmers can realize substantial economic benefits by associating with foreign farmers (for example, an extended growing season). [4]

[18]** Ocean Spray also counters that the plaintiffs have misinterpreted the DOJ's statements; that statements by the DOJ in the context of litigation are not entitled to deference; and that the USDA's position, rather than the DOJ's

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[3] This holding was superseded by statute. *42 U.S.C. 2000e(f) (2000)*.

[4] See, e.g., James A. Jacobs, Fruit and Vegetable Cooperatives, Farmer Cooperatives in the United States, Cooperative Information Report 1, Sectio, United States Department of Agriculture, Agricultural Cooperative Service, issued September 1978, revised November 1990, p. 59 (Appendix in Support of Ocean Spray's Memorandum ("Ocean Spray's Appendix"), Ex. 10); Tracey L. Kennedy and Karen J. Spatz, "Over There: Cooperatives Going Global to Enhance Marketing Position," Farmer Cooperatives (USDA: October 1993), pp. 14-15 (Ocean Spray's Appendix, Ex. 18); Cooperatives in International Trade, p. 6 (USDA: April 1997) (Ocean Spray's Appendix, Ex. 14, p. OCS 0173A-0287).

position, is entitled to deference. The Special Master does not address these issues, because ***HN18***[] the question of whether a court should defer to an agency's interpretation of a statute only arises where the statute is ambiguous. See *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)* ("if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). The Special Master has concluded that ***HN19***[] the term "persons" in the Capper-Volstead Act unambiguously refers to foreign farmers as well as American farmers.

The plaintiffs also argue that the conclusion that "persons" includes foreign farmers would lead to "absurd results." (Pls' Memo at 19.) The plaintiffs argue that this interpretation would "permit producers throughout the world to cartelize any agricultural commodity," to the detriment of American consumers. (Pls' **[**19]** Memo at 19.) The plaintiffs further argue that a ruling by the Court that "persons" includes foreign farmers "would provide a huge incentive and cause non-cooperative agricultural entities to restructure into cooperatives so that they could fit within the Act's protection of price fixing." (Pls' Memo at 20). Ocean Spray counters that the scenario described by the plaintiffs has not come to pass notwithstanding the fact that the USDA has, for the past several **[*229]** years, encouraged agricultural cooperatives in the United States to add foreign members. (See publications cited in note 4 infra.)

The plaintiffs' argument does not persuade the Special Master that he can or should disregard the plain meaning of the word "persons." ***HN20***[] Congress has expressly built a safeguard for American consumers into the statute, by authorizing the Secretary of Agriculture to bring proceedings against any cooperative that "monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof[.]" *7 U.S.C. § 292* (emphasis added).

For the reasons stated above, the Special Master the recommends **[**20]** that the Court **DENY** the plaintiffs' Motion for Summary Judgment on the Inapplicability of the Capper-Volstead Act to the Antitrust Allegations of the Complaint. The Special Master recommends that the Court **ALLOW** Ocean Spray's Cross-Motion to the extent that Ocean Spray seeks a determination that the inclusion of foreign members in its agricultural cooperative does not prevent Ocean Spray from asserting the antitrust exemption set forth in the Capper-Volstead Act, *7 U.S.C. § 291, et seq.* as an affirmative defense to the Amended Complaint.

Gael Mahony, Special Master

Dated: May 19, 2004

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Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.

United States Court of Appeals for the Second Circuit

May 27, 2003, Argued ; May 20, 2004, Decided

Docket No. 02-9312

Reporter

369 F.3d 212 *; 2004 U.S. App. LEXIS 9898 **; 2004-1 Trade Cas. (CCH) P74,413

BLUE TREE HOTELS INVESTMENT (CANADA), LTD., EDMONTON PLAZA HOTEL, INC., CAESAR PARK HOTELS & RESORTS TUCSON CO. and CAESAR PARK HOTELS & RESORTS HILTON HEAD LTD. PARTNERSHIP, Plaintiffs-Appellants, - v. - STARWOOD HOTELS & RESORTS WORLDWIDE, INC., STARWOOD HOTELS & RESORTS, WESTIN CANADA MANAGEMENT CO., WESTIN OTTAWA MANAGEMENT CO. and WESTIN NORTH AMERICA MANAGEMENT CO., Defendants-Appellees.

Prior History: [1]** Appeal from the September 24, 2002 judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, Jr., District Judge) dismissing plaintiffs-appellants' complaint alleging violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*.

Disposition: Affirmed.

Core Terms

vendors, Hotels, commercial bribery, Kickbacks, antitrust, competitive injury, district court, allegations, rebates, management agreement, purchasing, discount, bribes, brokerage, compete, price discrimination, treble damages, fiduciary, bribery, Robinson-Patman Act, intermediary, asserting, seller's, violates, letters, chain

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN1[] **Standards of Review, De Novo Review**

The appeals court's review of a district court's dismissal of a complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* is de novo. In ruling on the sufficiency of the complaint, the appeals court must accept as true the allegations contained in the complaint and draws all reasonable inferences in favor of the nonmoving party. The review is generally limited to the facts and allegations that are contained in the complaint and in any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits. But the court may also look to public records, including complaints filed in state court, in deciding a motion to dismiss. A dismissal pursuant to *Rule 12(b)(6)* is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN2[] Types of Price Discrimination, Brokerage, Commissions & Compensation

See *15 U.S.C.S. § 13(c)*.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

HN3[] Types of Price Discrimination, Brokerage, Commissions & Compensation

Precision of expression is not an outstanding characteristic of the Robinson-Patman Act. Nevertheless, *15 U.S.C.S. § 13(c)* appears to parse out as follows: It is unlawful for any person to (1) pay (or receive) (a) anything of value as a commission, brokerage, or other compensation, or (b) any allowance or discount in lieu of brokerage, except for services rendered in connection with a sale or purchase of goods (2) when the payment is made to (or by) (a) the other party to the transaction, or (b) an agent, representative or other intermediary where the intermediary is (i) acting for or in behalf of, or (ii) subject to the direct or indirect control of any party to the transaction other than the person by whom the compensation is paid.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN4[] **Standing, Clayton Act**

Although the Robinson-Patman Act, *15 U.S.C.S. § 13*, has frequently been the subject of enforcement actions by the Federal Trade Commission, it does not itself provide a private right of action for treble damages. Such a right is granted only by § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, which authorizes private suits by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN5[] **Robinson-Patman Act, Coverage**

Competitive injury is an element of a claim under § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*. *Section 13(a)* prohibits price discrimination where the effect of such discrimination may be substantially to lessen competition or to injure, destroy, or prevent competition with any person involved in the discrimination. There are three types of competitive injury that may result from such price discrimination: A primary-line violation occurs where the discriminating seller's price discrimination adversely impacts competition with his--the seller's--competitors. In contrast, a secondary-line violation occurs where the discriminating seller's price discrimination injures competition among his customers, that is, purchasers from him. Finally, a tertiary violation may exist where even though the purchasers of the discriminating seller did not compete directly, their customers competed within a unified market region.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] **Price Discrimination, Competitive Injuries**

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN7[] **Robinson-Patman Act, Claims**

Subsections 2(c), (d), (e) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*, *(d)*, *(e)*, unqualifiedly make unlawful certain business practices other than price discriminations. The proscriptions of *§ 13(c)*, *(d)*, *(e)* are absolute. Unlike § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN8[] **Remedies, Damages**

While competitive injury is not an element of a prima facie violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*, a private litigant seeking treble damages for such a violation under § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, must nevertheless allege an antitrust injury. Antitrust injury and competitive injury are conceptually distinct. While "competitive injury" concerns the potential effect certain conduct may have on competition generally or on the business opportunities of a defined class of competitors, the focus of "antitrust injury" is on whether the challenged conduct has actually caused harm to the plaintiff.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

HN9[] **Clayton Act, Claims**

To establish antitrust injury, a private litigant must prove injury in its business or property by reason of the violation and that the violation was at least a material cause of the plaintiff's injury. In other words, a plaintiff must show: (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute. With respect to the latter requirement, the United States Supreme Court has held that a private plaintiff may not recover damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, merely by showing injury causally linked to an illegal presence in the market. Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. This requirement applies to all private actions filed under *§ 15(a)* regardless of the type of antitrust claim involved or whether the challenged conduct constitutes a per se violation.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN10[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

Section 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*, was enacted primarily to target the practice of "dummy brokerages" whereby large retail buying groups--such as large grocery store chains, which, unlike smaller stores, did not need to use intermediary brokers to purchase their merchandise--would require suppliers to pay fees to "dummy brokers," who then passed the fees on to the large retailer, effectively reducing the price the retailer paid for the goods. Some courts, applying *§ 13(c)* to circumstances far removed from the paradigmatic "dummy brokerage" scheme, have held that *§ 13(c)* also proscribes commercial bribery. The United States Court of Appeals for the Second Circuit has never reached the question of whether--and under what circumstances--commercial bribery can form the basis of a claim under *§ 13(c)*.

Business & Corporate Law > Agency Relationships > Types > Employees & Employers

Governments > Fiduciaries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Fiduciaries > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > Criminal Activities

Contracts Law > Contract Interpretation > Fiduciary Responsibilities

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN11[] **Types, Employees & Employers**

Commercial bribery cannot be committed unilaterally by an alleged bribe receiver: one cannot be guilty of receiving a commercial bribe unless someone else is guilty of paying it. In New York, for instance, commercial bribery is defined as conferring, or offering or agreeing to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs. *N.Y. Penal Law § 180.00*. The essence of bribery is in the "intent" to influence improperly the conduct of another by bestowing a benefit, and the essence of bribe receiving is in the "agreement or understanding" that the recipient's conduct will be influenced by the benefit.

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > General Overview

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

HN12[] **Bribery, Commercial Bribery**

See *N.Y. Penal Law § 180.03*.

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN13[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

The sine qua non of a violation of § 2(c) of the Robinson-Patman Act, 15 U.S.C.S. § 13(c), is an improper payment, that is, a payment of a commission, brokerage, or discount other than for services actually rendered. The fact that a direct payment or indirect discount passes from one party to another party does not compel the conclusion that the payment or discount violates § 13(c). If vendor payments themselves do not violate § 13(c), then they cannot be transformed into a § 13(c) violation simply because an agent of the vendee retained the payments. For purposes of § 13(c), it is irrelevant whether an improper payment that is given to a purchaser's agent is kept by the agent for personal gain rather than transferred to the purchaser.

Counsel: CECELIA L. FANELLI, Stroock & Stroock & Lavan, LLP (Bruce H. Schneider, on the brief), New York, NY, for Plaintiffs-Appellants.

DANIEL BROWN (William A. Brewer III, James S. Renard, Jeremy R. Wilson, Bickel & Brewer, on the brief), New York, NY, for Defendants-Appellees.

Judges: Before: WALKER, Chief Judge, CALABRESI, Circuit Judge, and KORMAN, Chief Judge. *

Opinion by: JOHN M. WALKER, JR.

Opinion

[*214] JOHN M. WALKER, JR., *Chief Judge*:

Plaintiffs-appellants Blue Tree Hotels Investment (Canada), Ltd., Edmonton Plaza Hotel, Inc., Caesar Park Hotels & Resorts Tucson Company, and Caesar Park Hotels & Resorts Hilton Head Limited Partnership (collectively, "Blue Tree Owners") are owners of seven Westin Hotels in Canada **[**2]** and the United States ("Hotels"). Defendants-appellees Starwood Hotels & Resorts Worldwide, Inc., Starwood Hotels & Resorts, Westin Canada Management Co., Westin Ottawa Management Co., and Westin North America Management Co. (c ollectively, "Starwood") are a group of related companies that own and/or manage numerous hotels throughout the world (including Westin Hotels, W Hotels, Four Points Hotels, St. Regis Hotels, and Sheraton Hotels). In a complaint filed pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15(a), the Blue Tree Owners alleged that Starwood, acting in its capacity as the manager of their Hotels, has engaged in commercial bribery by receiving and retaining various rebates and discounts in **[*215]** connection with its purchasing activities on behalf of the Hotels and the other hotels Starwood owns and/or manages. Asserting that this conduct violates § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), the Blue Tree Owners claim treble damages and attorneys' fees.

The United States District Court for the Southern District of New York (Charles L. Brieant, Jr., *District Judge*) entered judgment dismissing the complaint under Fed. R. Civ. P. 12(b)(6) **[**3]** for failure to state a claim. The district court ruled that the Blue Tree Owners lacked standing to seek treble damages for the alleged violation, concluding that the only parties who would be able to allege an antitrust injury arising from this type of § 2(c) violation would be vendors who directly compete with the vendors who paid the alleged commercial bribes to Starwood. The Blue Tree Owners appeal.

While we conclude that the district court erred in holding that proof of competitive injury was a necessary component of a § 2(c) violation, we nevertheless find that appellants have failed to allege a violation of § 2(c). Accordingly, we affirm the district court's dismissal of the complaint.

BACKGROUND

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* The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

In 1995, Starwood purchased the entire chain of Westin hotels with the exception of the Hotels owned by the Blue Tree Owners. Prior to Starwood's purchase of the Westin chain, each of the Blue Tree Owners had entered into management agreements (the "Management Agreements") with the Westin Hotel Company ("Westin"), pursuant to which Westin operated the Hotels on behalf of the Blue Tree Owners. As part of its purchase of the Westin chain, Starwood acquired Westin's interest in **[**4]** the Management Agreements.

Under the Management Agreements, Starwood is obligated to operate the Hotels on behalf of the Blue Tree Owners in exchange for management fees, reimbursement for expenses incurred by Starwood for the Blue Tree Owners' accounts, and payment of a percentage of the Westin chain's overhead costs. Each Management Agreement grants Starwood discretion to purchase for the Hotels any operating supplies and fixtures it deems advisable. In addition, all but one of the Management Agreements permit Starwood to "implement [its] standard administrative, accounting, budgeting, marketing, personnel, and operational policies and practices relating to or affecting hotel operations, as those policies may be amended from time to time, but all of which [the Blue Tree Owners] agree [] to accept."

In July 2000, Starwood filed a complaint against the Blue Tree Owners in New York State Supreme Court asserting several claims, including breach of contract, tortious interference with business relationships, and fraud. [1] In October 2000, the Blue Tree Owners and others filed a complaint against Starwood, also in New York State Supreme Court, asserting claims of commercial bribery, **[**5]** fraud, negligent misrepresentation, conversion, breach of contract, and breach of fiduciary duty. [2] As of the date of oral argument in this case, both of these state court cases were still pending.

The Blue Tree Owners filed this federal action in April 2002, asserting a private **[*216]** antitrust claim pursuant to § 4 of the Clayton Act, *15 U.S.C. § 15(a)*, based on allegations that Starwood has engaged in a commercial bribery scheme that violates § 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*. Specifically, the Blue Tree Owners allege that (1) one of Starwood's responsibilities under the Management Agreements is to act as a purchasing agent for the Hotels; (2) it performs such purchasing activities in conjunction **[**6]** with its purchases for the other hotels it owns or manages; (3) it has "entered into agreements with vendors to provide the Hotels with the goods, wares and merchandise that the Hotels require"; and (4) pursuant to these agreements, Starwood has "sought and obtained undisclosed Kickbacks" from the vendors, thereby engaging in an "unlawful Kickback scheme." The Blue Tree Owners define these "Kickbacks" as "allowances, bonuses, charges, commissions, credits, discounts, fees, incentives, profits, rebates, and/or kickbacks."

The Blue Tree Owners acknowledge that they have no involvement in or control over the negotiation and execution of the purchasing agreements between Starwood and its vendors. They complain, however, that Starwood has "intentionally failed to disclose and/or fraudulently concealed [its] receipt and retention of [the] Kickbacks [as well as] the amount of Kickbacks [it has] received and retained in the aggregate, and with respect to each of the Hotels individually." In addition, the Blue Tree Owners allege, Starwood "intended to retain [and] did retain . . . the Kickbacks for [its] own account and to profit therefrom to the detriment of the Hotels and in **[**7]** violation of [its fiduciary] duties and obligations to [the Blue Tree Owners]."

The complaint further alleges that, as a consequence of the "Kickback scheme," Starwood is acting as a "dishonest competitor[]" because the Hotels compete with the other hotels Starwood owns and manages, including the Westin and Sheraton brands. The Blue Tree Owners assert that they have been injured by the "Kickback scheme" because (1) it has deprived them of the opportunity to obtain advantageous prices and terms that would otherwise be available from vendors who did not participate in the "Kickback scheme"; and (2) it has increased the cost of goods to the Blue Tree Owners while simultaneously reducing the cost of goods and generating profits for Starwood. The Blue Tree Owners seek treble damages and attorneys' fees. They also seek permanent injunctive relief prohibiting

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[1] *Starwood Hotels & Resorts Worldwide, Inc. v. Aoki Corp.,* Index No. 602908-00 (Sup. Ct., N.Y. County 2000).

[2] *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, Index No. 604295-00 (Sup. Ct., N.Y. County 2000).

Starwood from continuing (a) to obtain and retain "Kickbacks" and (b) to impede the Blue Tree Owners' access to the Hotels' financial and operating information.

Attached to the complaint are copies of the seven Management Agreements, as well as a series of letters dating from December 1998 to June 2000 that were sent on behalf **[**8]** of the Blue Tree Owners to Starwood and its accountants. The initial letters sent to Starwood in 1998 and 1999 requested information concerning, *inter alia*, Starwood's "treatment of rebates and commissions," including the total amount of rebates, "the way in which Starwood expects to use rebates to offset the cost of [Starwood's] purchasing function," and the proportion of rebates that would be allocated to the Hotel's marketing fund. In subsequent letters to Starwood, the Blue Tree Owners objected to Starwood's retention of rebates and other compensation it obtained from its purchasing activities, asserting that "rebates are owned by the [Blue Tree Owners]."

In May 2002, Starwood moved to dismiss the complaint. The district court granted Starwood's motion on the ground that, as a matter of law, the Blue Tree **[*217]** Owners did not have standing to pursue a *§ 2(c)* claim based on the alleged commercial bribery scheme. As an initial matter, the district court noted that whether commercial bribery falls within the ambit of *§ 2(c)* was an open question in this circuit. On the assumption that *§ 2(c)* comprehends commercial bribery, however, the district court held that a plaintiff seeking **[**9]** to file a private cause of action for treble damages and attorneys' fees would nevertheless have to allege an antitrust injury in accordance with the requirements of *§ 4 of the Clayton Act*, because *§ 2(c)* does not itself create a private cause of action.

Next the district court observed that the legislative history of the *Robinson-Patman Act* showed that *§ 2(c)* "was enacted to remedy . . . the abuses . . . [of] price discrimination obtained through brokerage schemes[] and the unfair advantage over a competing seller who could not or would not pay kickbacks." The district court concluded that in light of this purpose, the only plaintiffs with standing to file a private action based on the alleged scheme would be the vendors of hotel supplies who directly competed with the vendors who paid the "Kickbacks" to Starwood. The district court reasoned that competing vendors would be the only parties who could allege an antitrust injury as a result of the competitive advantage obtained by the vendors who paid "Kickbacks." Finding that the Blue Tree Owners could not assert such an antitrust injury, the district court dismissed their complaint for failure to state a federal claim upon **[**10]** which relief can be granted. The Blue Tree Owners appealed.

DISCUSSION

I. *Standard of Review*

HN1[] Our review of a district court's dismissal of a complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* is *de novo*. *Gryl ex rel. Shire Pharms. Group PLC v. Shire Pharms. Group PLC, 298 F.3d 136, 140 (2d Cir. 2002)*. In ruling on the sufficiency of the complaint, we must accept as true the allegations contained in the complaint and draw all reasonable inferences in favor of the nonmoving party. *See id.* Our review is generally limited to the facts and allegations that are contained in the complaint and in any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits. *See Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 776 (2d Cir. 2002)*; *Chambers v. Time Warner, Inc., 282 F.3d 147, 152-54 (2d Cir. 2002)*; *Hayden v. County of Nassau, 180 F.3d 42, 54 (2d Cir. 1999)*. But we may also look to public records, including complaints filed in state court, in deciding a motion to dismiss. *See Taylor, 313 F.3d at 776*; *Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998).* **[**11]** A dismissal pursuant to *Rule 12(b)(6)* "is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000)*.

On appeal, the Blue Tree Owners contend that the district court erred in concluding that they lacked standing to bring a claim for violation of *§ 2(c) of the Robinson-Patman Act* on the basis of the alleged commercial bribery. They assert that (1) commercial bribery constitutes a *per se* violation of *§ 2(c)*; (2) *§ 2(c)* does not require proof of competitive injury; and (3) even if competitive injury is required for a private action under *§ 2(c)*, appellants alleged competitive injury in their complaint. Addressing these arguments, we conclude that, while the district court did err in imposing a competitive injury requirement, the complaint was nevertheless properly dismissed because it fails to allege a violation of *§ 2(c)* on the basis of commercial bribery or otherwise.

[*218] II. *The Robinson-Patman Act*

Section 2(c) of the Robinson-Patman Act **HN2**[] provides

> It shall be unlawful for any person engaged in commerce, in the course **[**12]** of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c). As Justice Frankfurter observed in Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 65, 97 L. Ed. 1454, 73 S. Ct. 1017, 49 F.T.C. 1763 (1953), **HN3**[] "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." Nevertheless, the statute appears to parse out as follows:

It is unlawful for any person to

(1)pay (or receive)-

> a. anything of value as a commission, brokerage, or other compensation, *or*
>
> b. any allowance or discount in lieu of brokerage, *except* for services rendered in connection with a sale or purchase **[**13]** of goods,

(2) when the payment is made to (or by)
- a. the other party to the transaction, or
- b. an agent, representative or other intermediary where the intermediary is
  - (i) acting for or in behalf of, or
  - (ii) subject to the direct or indirect control of any party to the transaction other than the person by whom the compensation is paid.

HN4[] Although the Robinson-Patman Act has frequently been the subject of enforcement actions by the Federal Trade Commission, *see*, *e.g.*, FTC v. Henry Broch & Co., 363 U.S. 166, 168-69, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960); Biddle Purchasing Co. v. FTC, 96 F.2d 687, 690-92, 26 F.T.C. 1511 (2d Cir. 1938), it does not itself provide a private right of action for treble damages. Such a right is granted only by § 4 of the Clayton Act, 15 U.S.C. § 15(a), which authorizes private suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 46 (2d Cir. 1980) (holding that standing to raise a claim under § 2(a) of Robinson-Patman Act "is derived from Section 4 of the Clayton Act **[**14]** "); *see also* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981).

III. *Antitrust Injury and Standing Under Robinson-Patman*

In dismissing the Blue Tree Owners' complaint, the district court held that the only plaintiffs who would have standing to sue for the alleged § 2(c) violation arising from the challenged vendor payments would be those vendors of hotel supplies who directly compete with the vendors who made the payments. We agree with the Blue Tree Owners that, in so holding, the district court erroneously imposed the "competitive injury" requirement applicable to a prima facie violation **[*219]** of § 2(a) [3] **[**16]** of the Robinson-Patman Act, 15 U.S.C. § 13(a). [4]

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[3] Section 2(a) states in relevant part:

> **HN6**[]

See, *e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55, 65-67, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959); Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 584 (2d Cir. 1987) **HN5**[] (holding that competitive injury is an element of a § 2(a) claim). Section 2(a) prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or . . . to **[**15]** injure, destroy, or prevent competition with any person" involved in the discrimination. 15 U.S.C. § 13(a). We have identified three types of competitive injury that may result from such price discrimination:

> A primary-line violation occurs where the discriminating seller's price discrimination adversely impacts competition with his - the seller's - competitors. In contrast, a secondary-line violation occurs where the discriminating seller's price discrimination injures competition among his customers, i.e., purchasers from him. Finally, . . . a tertiary violation [may exist] . . . where even though the purchasers of the discriminating seller did not compete directly, their customers competed within a unified market region.

Best Brands Beverage, 842 F.2d at 584 n.1 (internal citations omitted). The district court's holding in this case that only competing vendors would have standing to sue on the basis of the challenged vendor payments effectively imposed a "primary line" competitive injury requirement on the Blue Tree Owners' § 2(c) claim.

As the Supreme Court explained in *Simplicity Pattern*, however,

> **HN7**[]
>
> subsections (c), (d), and (e) [of § 2 of the 9 Robinson-Patman Act] unqualifiedly make unlawful certain business practices other than price discriminations . . . . The proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

360 U.S. at 65 (holding that absence of competitive injury **[**17]** was not a defense to prima facie violation of § 2(e)); *see also* Biddle, 96 F.2d at 690 (noting that the competitive injury requirement of § 2(a) does not apply to § 2(c)); *see also* 14 Herbert Hovenkamp, ***Antitrust Law***, P 2362, at 233-34 & nn.64-65, 235, 239 (1999) [hereinafter, "Hovenkamp"] (asserting that § 2(a)'s competitive injury requirement does not apply to § 2(c) claims).

HN8[] While competitive injury is not an element of a prima facie violation of ***[*220]*** § 2(c), a private litigant seeking treble damages for such a violation under § 4 of the Clayton Act must nevertheless allege an antitrust injury. *See In* Town Hotels Ltd. P'ship v. Marriott Int'l, Inc., 246 F. Supp. 2d 469, 475 (S.D. W. Va. 2003); Abernathy v. Bausch & Lomb, Inc., 97 F.R.D. 470, 476 (N.D. Tex. 1983); Hovenkamp, P 2362, at 234-35; *see also* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 335, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (rejecting

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> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce … and *where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person* who either grants or knowingly receives the benefit of such discrimination, or the customers of either of them[.]

15 U.S.C. § 13(a) (emphasis added).

[4] Other courts have made similar errors. *See, e.g.,* Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 272 (5th Cir. 1979) (limiting standing under § 2(c) to violator's competitors); Hansel 'N Gretel Brand v. Savitsky, 1997 U.S. Dist. LEXIS 13324, No. 94 Civ. 4027(CSH), 1997 WL 543088, at *9 (S.D.N.Y. Sept. 3, 1997) (importing competitive injury requirement of § 2(a) to § 2(c) claim); Bunker Ramo Corp. v. Cywan, 511 F. Supp. 531, 533 (N.D. Ill. 1981) (requiring proof of competitive injury in § 2(c) claim).

argument that proof of a *per se* violation obviated requirement that private litigant prove antitrust injury). Antitrust injury and competitive injury are conceptually distinct. *See generally* Hovenkamp, **[**18]** Chap. 23D-1, P 2371(b) (discussing distinctions at length); *see also* J. Truett Payne, 451 U.S. 557 at 561 at 561-62, 68 L. Ed. 2d 442 (explaining some distinctions between § 2(a)'s competitive injury requirement and § 4's antitrust injury requirement); *In* Town Hotels Ltd. P'ship, 246 F. Supp. 2d at 474-81 (S.D. W. Va. 2003) (discussing distinction between types of injury in case involving similar facts). While competitive injury concerns the potential effect certain conduct may have on "competition generally" or "on the business opportunities of a defined class of competitors," Schwartz v. Sun Co., Inc. (R & M), 276 F.3d 900, 904 (6th Cir. 2002), the focus of "antitrust injury" is on whether the challenged conduct has actually caused harm to the plaintiff, J. Truett Payne, 451 U.S. 557 at 561 at 561-62, 68 L. Ed. 2d 442.

HN9[] To establish antitrust injury, a private litigant must "prove . . .'injur[y] in its business or property' by reason of the violation . . . [and that] the violation was at least a material cause of the plaintiff's injury." Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 710-11 (2d Cir. 1985). **[**19]** In other words, a plaintiff must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); *see* Hovenkamp, P 2362, at 234-35. With respect to the latter requirement, the Supreme Court has held that

> [a] private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing "injury causally linked to an illegal presence in the market." Instead, a plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

Atlantic Richfield Co., 495 U.S. at 334 (quoting Brunswick Corp. 429 U.S. at 489 (internal citations omitted)); *see also* J. Truett Payne, 451 U.S. at 562. (holding that to have standing to bring a § 2(a) Robinson-Patman claim, a private plaintiff "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."). This **[**20]** requirement applies to all private actions filed under § 4, "regardless of the type of antitrust claim involved," Atlantic Richfield Co., 495 U.S. at 340, or whether the challenged conduct constitutes a *per se* violation, id. at 341-42.

In the instant case, the Blue Tree Owners assert that their complaint pleads the necessary antitrust injury based on their allegations that the Hotels compete with Starwood's hotels under the Westin and other brand names and that, as a result of the vendor payments, Starwood is a "dishonest competitor." They further allege that the vendor payments preclude the Blue Tree Owners from negotiating advantageous prices and terms with vendors who do not make such payments, and that **[*221]** they increase the cost of goods to the Blue Tree Owners while reducing the cost of the same goods for Starwood, resulting in an anti-competitive advantage for Starwood. We need not - and do not - decide whether these specific allegations would qualify as an antitrust injury as required by § 4 of the Clayton Act because, as we explain below, we conclude that plaintiffs have failed to state a claim for a substantive violation of § 2(c).

IV. **[**21]** *Robinson-Patman Violations*

Courts and commentators are in agreement **HN10**[] that § 2(c) was enacted primarily to target the practice of "dummy brokerages" whereby large retail buying groups - such as large grocery store chains, which, unlike smaller stores, did not need to use intermediary brokers to purchase their merchandise - would require suppliers to pay fees to "dummy brokers," who then passed the fees on to the large retailer, effectively reducing the price the retailer paid for the goods. *See*, *e.g.*, Henry Broch & Co., 363 U.S. at 168-69; Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 992 (4th Cir. 1990); Biddle, 96 F.2d at 690-92; Hovenkamp, P 2362, at 217-18.

Some courts, applying § 2(c) to circumstances far removed from the paradigmatic "dummy brokerage" scheme, have held that § 2(c) also proscribes commercial bribery. *See, e.g.,* Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066; Grace v. E. J. Kozin Co.,538 F.2d 170, 173; Rangen, Inc. v. Sterling Nelson & Sons, Inc.,351 F.2d 851, 858; Fitch v. Kentucky-Tennessee Light & Power, 136 F.2d 12 (6th Cir. 1943). *But see* Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 372 (3d Cir. 1985) **[**22]** ("There is good reason to question whether Congress intended to sweep commercial bribery within the ambit of section 2(c).").

The Second Circuit has never reached the question of whether - and under what circumstances - commercial bribery can form the basis of a claim under § 2(c). And we find that we need not decide the issue here. Even assuming that a § 2(c) claim could be based on commercial bribery, a necessary requirement for stating such a claim would be allegations sufficient to establish commercial bribery. *See, e.g.*, Excel Handbag Co. v. Edison Bros. Stores, Inc., 630 F.2d 379, 387-88 (5th Cir. 1980) (holding that a § 2(c) claim based on commercial bribery requires proof of commercial bribery). We conclude that the allegations in the Blue Tree Owners' complaint fail to meet this threshold requirement.

A. *Plaintiffs' Allegations of Commercial Bribery*

The Blue Tree Owners allege that Starwood and its vendors entered into purchase agreements pursuant to which the vendors would pay "allowances, bonuses, charges, commissions, credits, discounts, fees, incentives, profits, rebates, and/or kickbacks" to Starwood. Based on these allegations, **[**23]** the Blue Tree Owners contend that Starwood and its vendors engaged in a "Kickback Scheme" that constituted commercial bribery. This claim, however, is premised entirely on the tautology created by the fact that the Blue Tree Owners have labeled the payments made by vendors "Kickbacks": because the vendors pay kickbacks to Starwood, they are engaged in commercial bribery, and because the parties are engaged in commercial bribery, the payments made by vendors are kickbacks. Substituting the Blue Tree Owners' repeated use in their complaint of the freighted word "Kickback" with the more benign "vendor payment" reveals that the Blue Tree Owners have not alleged any improper intent or conduct on the part of the vendors who made the payments to Starwood.

[*222] To be sure, Starwood's failure to turn vendor payments over to the Blue Tree Owners may constitute a breach of its fiduciary duties under the Management Agreements, an issue as to which we express no view. But ***HN11***[] commercial bribery cannot be committed unilaterally by an alleged bribe receiver: one cannot be guilty of receiving a commercial bribe unless someone else is guilty of paying it. In New York, for instance, commercial bribery is defined **[**24]** as "confer[ring], or offer[ing] or agree[ing] to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs." [5] N.Y. Penal L. § 180.00. As New York Judge William Donnino has explained in his commentary to this statute, "the essence of bribery, as defined in this article, is in the 'intent' to influence improperly the conduct of another by bestowing a benefit, and the essence of bribe receiving is in the 'agreement or understanding' that the recipient's conduct will be influenced by the benefit." William C. Donnino, Practice Commentary, appended to N.Y. Penal L. § 180.00 (McKinney's 1998).

[25]** In the absence of any allegations that the vendor payments were, in fact, bribes - that is, that they were paid by the vendors with the intent to improperly influence or corrupt Starwood's conduct on behalf of the Blue Tree Owners - Starwood's alleged breach of its fiduciary duties is insufficient to establish commercial bribery. No such allegations appear in the Blue Tree Owners' complaint, however.

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[5] Bribe receiving is similarly defined:

> ***HN12***[] An employee, agent or fiduciary is guilty of commercial bribe receiving in the second degree when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

N.Y. Penal L. 180.03.

Improper intent on the part of the vendors might be inferred from the Blue Tree Owners' allegation that vendors who were unwilling or unable to make the vendor payments were precluded from competing for the Hotels' business and, as a result, the Blue Tree Owners were unable to negotiate advantageous prices and terms with such vendors. But such an inference is belied by the letters attached to the Blue Tree Owners' complaint in which the Blue Tree Owners objected to the manner in which Starwood was allocating vendor payments. These letters contain no assertion that vendor payments are illegal or made pursuant to illicit agreements between Starwood and the vendors to act contrary to the Blue Tree Owners' interests. Rather, they demonstrate that as of December 1998, if not earlier, the **[**26]** Blue Tree Owners were aware that Starwood was receiving vendor payments as a result of its volume purchasing power.

Because the Blue Tree Owners' complaint does not allege that the vendor payments themselves were improper, the Blue Tree Owners have failed to allege facts constituting commercial bribery. *Compare* *Excel Handbag Co., 630 F.2d at 386-87* (holding that evidence did not establish commercial bribery because there was no "proof of inducement"); *United Magazine Co. v. Murdoch Magazines Distrib., Inc., 146 F. Supp. 2d 385, 397 (S.D.N.Y. 2001)* (holding that allegation that discounts or payments passed from one business to another does not implicate bribery) *with* *Envtl. Tectonics, 847 F.2d at 1054, 1066* (finding bribery based on payments to government official to induce award of government **[*223]** contract); *Rangen, 351 F.2d at 854-55 (9th Cir. 1965)* (payments to state agent to maintain exclusive sales contract were bribes); *Fitch, 136 F.2d at 13-14* (finding bribery based on payments to company's president to induce him to enter contract with vendor); *Hansel 'N Gretel Brand, 1997 U.S. Dist. LEXIS 13324, 1997 WL 543088, at *1, *7* **[**27]** (finding commercial bribery scheme based on allegations that vendors overcharged principal and returned excess profits to principal's agent); *Federal Paper Bd. Co. v. Amata, 693 F. Supp. 1376, 1380* (agent purchased only from vendors who agreed to pay bribes, and bribes were incorporated into principal's prices); *Gregoris Motors v. Nissan Motor Corp., 630 F. Supp. 902, 905-06, 909* (payment of kickbacks to agent in order to induce him to accept falsified sales reports constituted bribery); *Bunker Ramo Corp., 511 F. Supp. at 533* (finding bribery established where purchasing agent accepted payments in exchange for processing false invoices for goods never received by agent's principal).

B. *Other Types of Robinson-Patman Violations*

Of course, commercial bribery does not exhaust the factual scenarios that might state a claim based on a *§ 2(c)* violation. [6] Nevertheless, we find that the Blue Tree Owners' failure to allege improper conduct by the vendors is equally fatal to any *§ 2(c)* claim that might be brought on grounds other than commercial bribery.

[28]** As we have explained above, the Blue Tree Owners do not contend that the vendor payments themselves were improper. Indeed, the gravamen of their complaint is not that the vendors are making these payments, but that Starwood is retaining them in breach of its fiduciary obligations. The Blue Tree Owners concede as much in their reply brief on appeal, where they state:

> The monies at issue are rebates to the Owners who are entitled to them but become kickbacks to the Managers [Starwood], when they retain that which belongs to their principals. In other words, the kickbacks are illegal in the hands of the Managers but are legal rebates in the hands of the Owners.

Appellants' Reply Br. at 25.

HN13[] The *sine qua non* of a *§ 2(c)* violation, however, is an improper payment, *i.e.*, a payment of a commission, brokerage, or discount other than for services actually rendered. *See* *Intimate Bookshop, Inc. v. Barnes & Noble, Inc., 88 F. Supp. 2d 133, 140 (S.D.N.Y. 2000)* ("The fact that a direct payment or indirect discount passes from one party to another party does not compel the conclusion that the payment or discount violates *Section 2(c)*.") (citing **[**29]** *Henry Broch & Co., 363 U.S. at 175*). If, as plaintiffs concede, the vendor payments themselves did not violate *§ 2(c)*, [7] then they cannot be transformed into a *§ 2(c)* violation simply because Starwood, an agent of

[6] Indeed, as we have observed, it remains an open question in this circuit whether commercial bribery can even form the basis of a *§ 2(c)* claim.

the Blue Tree Owners, retained the payments. [8] **[**30]** See ***[*224]*** *Fitch, 136 F.2d at 15*. Indeed, for purposes of *§ 2(c)*, it is irrelevant whether an improper payment that is given to a purchaser's agent is kept by the agent for personal gain rather than transferred to the purchaser. *See id.* In light of the Blue Tree Owners' affirmative statement that the payments at issue here were proper, [9] their complaint fails to state a claim and, thus, was properly dismissed.

[31]** CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court dismissing the Blue Tree Owners' complaint.

End of Document

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[7] We express no view as to whether the facts contained in plaintiffs' complaint could support a substantive violation of *§ 2(c)* in circumstances where a plaintiff alleges that the payments at issue are themselves improper.

[8] Indeed, it is unclear whether Starwood's status as an agent of the Blue Tree Owners is even relevant to the *§ 2(c)* analysis. *Section 2(c)*'s proscription on payments to agents applies only to "an agent . . . of any [other] party to [the] transaction." *15 U.S.C. § 13(c)*. The plaintiffs have not alleged that they are parties to the transactions that give rise to the vendor payments. In fact, in their complaint they concede that they have "no involvement in the negotiation and execution of [the] purchasing contracts." Compl. P 25. If in fact Starwood, rather than the Blue Tree Owners, is the "other party to the transaction," then the Blue Tree Owners' *§ 2(c)* claim is even more tenuous because they are neither parties to the transaction nor competing purchasers.

[9] We note that even if the Blue Tree Owners had not expressly conceded the propriety of the vendor payments, it is unlikely that this pleading deficiency could be cured by amending the complaint: Any assertion in an amended complaint that the vendor payments themselves were improper would negate the claim that the Blue Tree Owners, not Starwood, were the rightful recipients of the vendor payments. As we have stated, the proscriptions of *§ 2(c)* apply regardless of whether the improper payment is made to the purchaser or its agent. *See* *15 U.S.C. § 13(c)*. "It shall be unlawful for any person . . . to pay . . . anything of value . . . *either* to the other party to such transaction or [that party's] agent . . . .") (emphasis added); *see* *Biddle, 96 F.2d at 691* ("Congress must have intended that payments by sellers should not be made to buyers through any one acting as agent for the buyer. . . . It may not be said that payments to buyers are in any different category than those to agents or those who act for or under the control of the buyers."); *see also* *Fitch, 136 F.2d at 13*. Thus, the illegality of the vendor payments would not be cured by simply handing them over to the Blue Tree Owners, who have not alleged that *they* render any services to the vendors. Rather, a transfer of the payments from Starwood to the Blue Tree Owners would simply result in the precise "evil" Congress sought to curb: the practice of vendors paying fees to a "dummy broker" - *i.e.*, a buyer's agent - who, in turn, passes the fees over to the buyer. *See* *Henry Broch & Co., 363 U.S. at 168-69*; *Stephen Jay Photography, 903 F.2d at 992* (observing that *§ 2(c)* was directed primarily to the practice whereby "a large buyer with economic clout might insist that in order to do business sellers must pay a fee to a designated 'broker' . . . [who] would then turn the money over to the large buyer").

Textron Financial Corp. v. National Union Fire Ins. Co.

Court of Appeal of California, Fourth Appellate District, Division Three

May 20, 2004, Filed

G020323

Reporter

118 Cal. App. 4th 1061 *; 13 Cal. Rptr. 3d 586 **; 2004 Cal. App. LEXIS 777 ***; 2004 Cal. Daily Op. Service 4394; 2004 Daily Journal DAR 6045

TEXTRON FINANCIAL CORPORATION, Plaintiff and Appellant, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, Defendant and Appellant.

Notice: As modified June 18, 2004.

Subsequent History: Rehearing denied by *Textron Financial Corp. v. National Union Fire Ins. Co., 2004 Cal. App. LEXIS 977 (Cal. App. 4th Dist., June 18, 2004)*

Time for Granting or Denying Review Extended *Textron Financial Corp. v. National Union Fire Ins. Co., 2004 Cal. LEXIS 8092 (Cal., Aug. 26, 2004)*

Review denied by, Request denied by *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., 2004 Cal. LEXIS 8715 (Cal., Sept. 15, 2004)*

Prior History: [*1]** Appeals from a judgment and postjudgment orders of the Superior Court of Orange County, No. 734096, Nancy Wieben Stock and Raymond J. Ikola, Judges.

Nat'l Union Fire Ins. Co. v. Textron Fin. Corp., 538 U.S. 974, 155 L. Ed. 2d 662, 123 S. Ct. 1783, 2003 U.S. LEXIS 2932 (2003)

Disposition: Affirmed as modified.

Core Terms

award of punitive damages, punitive damages, trial court, insurer, damages, cause of action, compensatory damages, costs, concealment, employees, parties, notice, offset, deleted, malice, oppression, unfair competition, managing agent, endorsement, modified, cases, insurance company, special verdict, good faith, cancellation, decisions, practices, benefits, contends, covenant

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Private Causes of Action

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN1[] **Regulated Practices, Trade Practices & Unfair Competition**

The Unfair Insurance Practices Act, *Cal. Ins. Code, § 790 et seq.*, does not create a private cause of action against insurers who violate its provisions. This rule applies to both first party and third party claims. While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices, *Cal. Ins. Code, § 1861.03(a)*, parties cannot plead around Moradi-Shalal's holding by merely relabeling their cause of action as one for unfair competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN2[] **Regulated Practices, Trade Practices & Unfair Competition**

Merely alleging that certain acts constitute unfair business practices under the unfair competition law is insufficient to overcome Moradi-Shalal.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Private Causes of Action

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

HN3[] **Unfair Business Practices, Private Causes of Action**

The California Legislature did not intend to create new causes of action when it described unlawful insurance business practices in *Cal. Ins. Code § 790.03*, and therefore that section did not create a private cause of action under the Unfair Insurance Practices Act, *Cal. Ins. Code, § 790 et seq.*

Insurance Law > Industry Practices > Unfair Business Practices > General Overview

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

Given the supreme court's disapproval of State Farm's amorphous definition of unfair practices and its focus on legislatively declared public policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing.

Civil Procedure > ... > Jury Trials > Verdicts > General Verdicts

Civil Procedure > ... > Jury Trials > Verdicts > General Overview

Civil Procedure > ... > Jury Trials > Verdicts > Special Verdicts

HN5[] **Verdicts, General Verdicts**

The distinction between a general and special verdict is that under the former a jury pronounces generally upon all or any of the issues, while the latter is one by which the jury find the facts only, leaving the judgment to the court.

Cal Code Civ. Proc. § 624. In a case where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly. Cal Code Civ. Proc. § 625.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN6[] **Fraud & Misrepresentation, Negligent Misrepresentation**

A representation made recklessly without knowledge of its falsity is sufficient to establish scienter.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Insurance Law > Remedies > Costs & Attorney Fees > General Overview

Insurance Law > Remedies > Costs & Attorney Fees > Failure to Pay Claims

HN7[] **Liability & Performance Standards, Bad Faith & Extracontractual Liability**

Brandt holds that attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages. When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss - damages - proximately caused by the tort.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN8[] **Remedies, Costs & Attorney Fees**

Fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on a insurance contract.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Criminal Law & Procedure > Counsel > Joint Representation

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN9[] **Costs & Attorney Fees, Costs**

Cal. Code Civ. Proc. § 1032 defines prevailing party to include a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. In situations other than as specified, a prevailing party shall be as determined by a court, and under those circumstances, a court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides. Cal. Code Civ. Proc. § 1032(a)(4). Cases applying this statute hold that where one of multiple, jointly-represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party.

Civil Procedure > Settlements > Offers of Judgment > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > ... > Costs > Costs Recoverable > Witnesses

HN10[] Settlements, Offers of Judgment

Cal. Code Civ. Proc. § 998(d) authorizes a court to award a prevailing plaintiff its expert witness fees if the plaintiff made timely pretrial offer to compromise which a defendant does not accept, and a defendant fails to obtain a more favorable judgment.

Civil Procedure > Settlements > Offers of Judgment > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN11[] Settlements, Offers of Judgment

If a plaintiff elects to submit a Cal. Code Civ. Proc. § 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her.

Evidence > Burdens of Proof > General Overview

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN12[] Evidence, Burdens of Proof

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense Cal. Evid. Code § 500, a defendant seeking an offset against a money judgment has the burden of proving the offset.

Contracts Law > Third Parties > Subrogation

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

HN13[] Third Parties, Subrogation

With respect to a plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable merely because the insured has collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him. An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss.

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN14[] **Multiple Defendants, Joint & Several Liability**

A party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. It has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.

Torts > ... > Multiple Defendants > Concerted Action > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN15[] **Multiple Defendants, Concerted Action**

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

Torts > Procedural Matters > Multiple Defendants > Joint & Several Liability

HN16[] **Costs & Attorney Fees, Costs**

A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. A party seeking to recover litigation costs under this rule must plead and prove the claim.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Claim Procedures

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN17[] Damages, Punitive Damages

Cal. Civ. Code § 3294(a) authorizes the award of punitive damages in any action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. Cal. Civ. Code, § 3294(a).

Torts > ... > Punitive Damages > Availability > Employers

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN18[] Availability, Employers

See Cal. Civ. Code, § 3294(b).

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Torts > ... > Punitive Damages > Availability > Employers

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Availability > Corporations

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Torts > ... > Punitive Damages > Measurement of Damages > Statutory Requirements

Torts > Vicarious Liability > Agency Relationships > General Overview

Torts > ... > Employers > Activities & Conditions > General Overview

HN19[] Management Duties & Liabilities, Causes of Action

In amending Cal. Civ. Code § 3294, the California Legislature intended to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy. Cal. Civ. Code § 3294(b), places "managing agent" next to the terms "officer" and "director," intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term "managing agent," and placing it in the same category as "officer" and "director," the legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages. The critical factor is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

***HN20*[] Damages, Punitive Damages**

While the United States Supreme Court recognizes the broad discretion possessed by the states with respect to the imposition of punitive damages. The federal Constitution's due process clause requires that a party potentially subject to such an award receive adequate notice of both the conduct that would support it and the severity of the penalty which could be imposed. Thus, the federal due process prohibits the States from imposing grossly excessive punishments on tortfeasors.

Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Sentencing > Proportionality

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

***HN21*[] Damages, Punitive Damages**

In determining if a punitive damage award in a particular case is grossly disproportional to the gravity of defendants' offenses, a reviewing court must conduct a thorough, independent review of the award, considering three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The first guidepost, described as the most important indicium of the reasonableness of a punitive damage award, requires an appellate court to consider several factors. They include whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Torts > Vicarious Liability > Agency Relationships > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN22[] **Damages, Punitive Damages**

Imposing punitive damages on a corporate entity under the respondeat superior doctrine based on its agent's fraudulent conduct does not violate the federal Constitution's due process clause.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN23[] **Damages, Punitive Damages**

Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against the defendant under the guise of reprehensibility analysis.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

HN24[] **Damages, Punitive Damages**

The second guidepost used in determining if a punitive damage award in a particular case is grossly disproportional to the gravity of defendants' offenses focuses on the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. The United States Supreme Court has reiterated its reluctance to identify concrete constitutional limits on the ratio between compensatory and punitive damages, declaring the precise award in any case must be based upon the facts and circumstances of the defendant's conduct and the harm to plaintiff. Nonetheless, the court identified certain guidelines to apply in determining whether the punitive damage award is reasonable and proportionate to the harm suffered by the plaintiff. Citing centuries of legislative history providing for sanctions of double, treble, or quadruple damages to deter and punish, the United States Supreme court has noted that jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

HN25[] **Damages, Punitive Damages**

In the usual case, i.e., a case in which the compensatory damages are neither exceptionally high nor low, and in which a defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > Equal Protection > Poverty

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

Civil Procedure > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

HN26[] **Damages, Punitive Damages**

Appellate review of the punitive damages award must ensure the recovery comports with due process. The Supreme Court has recognized the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > General Overview

Torts > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN27[] **Damages, Punitive Damages**

Cal. Civ. Code § 3294 allows the recovery of punitive damages in any action for the breach of an obligation not arising from contract, where it is proven the defendant has been guilty of oppression, fraud, or malice. A consideration of the disparity between compensatory and punitive damage awards must focus on the compensatory damages awarded on only the causes of action providing a basis for punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > Sentencing > Fines

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN28[] **Damages, Punitive Damages**

The third guidepost used in determining if a punitive damage award in a particular case is grossly disproportional to the gravity of defendants' offenses concerns the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN29[] **Damages, Punitive Damages**

While the existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action, when a criminal penalty is used to determine the dollar amount of the award, it has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Judgments > Enforcement & Execution > Writs of Execution

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Appeals > Remands

HN30[] **Remedies, Judgment Interest**

See *Cal. Code Civ. Proc. § 908*.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Procedure > Remedies > Judgment Interest > General Overview

HN31[] **Judges, Discretionary Powers**

An appellate court's power to award interest under *Cal. Code Civ. Proc. § 908* is discretionary and may be denied if to do so would be inequitable under the circumstances.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN32[] **Costs & Attorney Fees, Costs**

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement of the parties. *Cal. Code Civ. Proc. § 1021*. If an opponent's cost of litigating a matter constitutes a basis for denying restitution under *Cal. Code Civ. Proc. 908*, few parties would be entitled to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN33[] **Affirmative Defenses, Unclean Hands**

The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A financial corporation sued a fire insurance company, the insurance company's claims adjuster, its managing agent, and an independent insurance brokerage firm for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud arising from the insurance company's refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which the financial corporation held a security interest. The financial corporation also sought injunctive and restitutionary relief under *Bus. & Prof. Code, § 17200 et seq.*, against the insurance company and its claims adjuster for engaging in unfair business practices, although the trial court sustained the insurance company's demurrers to this cause of action without leave to amend. The trial court entered judgment for the claims adjuster on the financial corporation's fraud claim. With respect to the remaining causes of action, the jury returned a verdict awarding the financial corporation $ 165,414.40 in compensatory damages and $ 10 million in punitive damages; however, in postjudgment proceedings, the trial court remitted the punitive damages award to $ 1.7 million. (Superior Court of Orange County, No. 734096, Nancy Wieben Stock and Raymond J. Ikola, Judges.) The Court of Appeal affirmed the judgment and trial court's postjudgment orders in their entirety. The United States Supreme Court granted the insurance company's petition for a writ of certiorari, vacated the judgment of the Court of Appeal, and remanded the case to the Court of Appeal for further consideration. The Court of Appeal issued a second opinion, again affirming the judgment and postjudgment orders in their entirety. The insurance company again petitioned for a writ of certiorari. The United States Supreme Court granted the petition, vacated the second opinion of the Court of Appeal, and remanded to the Court of Appeal for further consideration.

The Court of Appeal affirmed the trial court's orders denying the insurance company's motion for judgment notwithstanding the verdict, awarding costs to the claims adjuster, and denying the financial corporation recovery of its expert witness fees; reversed the trial court's order remitting the punitive **[*1062]** damages award to $ 1.7 million; affirmed the portions of the judgment in favor of the claims adjuster and awarding the financial corporation compensatory damages; and modified the portion of the judgment awarding the financial corporation punitive damages by reducing the award to $ 360,000. The court held the financial corporation failed to state a cause of action against the insurance company and the claims adjuster for unfair business practices. The trial court properly entered judgment for the claims adjuster on the fraud claim. The absence of an intent to defraud on the part of the claims adjuster defeated the financial corporation's fraud claim against the claims adjuster. With respect to recovery of attorney fees, the trial court properly limited the financial corporation's damage award to the percentage specified in the contingency agreement between the financial corporation and its legal counsel. The trial court also properly denied recovery of expert witness fees to the financial corporation under *Code Civ. Proc., § 998*, as the claims adjuster was deemed the prevailing party. The record supported the trial court's denial of the insurance company's request to have settlement amounts the financial corporation received from the insurance company's managing agent and the brokerage firm offset against the damages the financial corporation recovered from the insurance company. With respect to punitive damages, the insurance company, through its managing agent, engaged in reprehensible conduct supporting an award of punitive damages under the due process clause of the United States Constitution. However, the amount of the punitive damage award, even as reduced by the trial court, was excessive. Finally, pursuant to *Code Civ. Proc, § 908*, the insurance company was entitled to recover interest on the constitutionally excessive portion of the punitive damage award from the date of the insurance company's payment of the judgment. (Opinion by Rylaarsdam, J., with Sills, P. J., and O'Leary, J., concurring.)

Headnotes

CA(1)[] **(1)**

Insurance Companies § 12—Unfair Insurance Practices Act—Private Cause of Action Against Insurers Not Created.

The Unfair Insurance Practices Act, *Ins. Code, § 790 et seq.*, does not create a private cause of action against insurers who violate its provisions. This rule applies to both first party and third party claims. While insurance companies are subject to state laws generally applicable to other businesses, including laws governing unfair business practices (*Ins. Code, § 1861.03, subd. (a)*), parties cannot plead around this rule by merely relabeling their cause of action as one for unfair competition.

CA(2)[] **(2)**

Insurance Companies § 12—Unfair Insurance Practices Act—Private Cause of Action Against Insurers Not Created.

Merely **[*1063]** alleging that an insurer's purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome the rule that the Unfair Insurance Practices Act, *Ins. Code, § 790 et seq.*, does not create a private cause of action against insurers who violate its provisions.

CA(3)[] **(3)**

Fraud and Deceit § 10—Knowledge—Scienter.

A representation made recklessly without knowledge of its falsity is sufficient to establish scienter.

CA(4)[] **(4)**

Fraud and Deceit § 11—Intent.

An intent to induce reliance on a misrepresentation or nondisclosure by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. The absence of this element defeated a financial corporation's fraud claim against an insurance company's claims adjuster, which made representations recklessly but without knowing the statements were false.

CA(5)[] **(5)**

Costs § 13—Attorney Fees—Payment of Policy Benefits Tortiously Withheld by Insurer—Recoverable as Element of Damages.

Attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages.

CA(6)[] **(6)**

Costs § 6—Award—Multiple, Jointly Represented Parties—Discretion of Trial Court to Award or Deny Costs.

Under *Code Civ. Proc., § 1032, subd. (a)(4)*, where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party.

CA(7)[] **(7)**

Costs § 33—Attorney Fees—Postjudgment Fees, Appeal, and Review—Postjudgment Fees—Award of Expert Witness Fees to Prevailing Party.

Code Civ. Proc., § 998, subd. (d), authorizes the court to award a prevailing plaintiff its expert witness fees if the plaintiff made timely pretrial offer to compromise which the defendant does not accept, and the defendant fails to obtain a more favorable judgment.

CA(8)[] **(8)**

Damages § 3—Compensatory Damages—Offset—Burden of Proving.

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (*Evid. Code, § 500*), a defendant seeking an offset against a money judgment has the burden of proving the offset.

CA(9)[] **(9)**

Insurance Contracts and Coverage § 121—Subrogation.

An insured is entitled to receive compensation in accordance with the policy terms, **[*1064]** and an insurer cannot reduce the amount recoverable merely because the insured has collateral contracts or relations with third persons which relieve the insured wholly or partly from the loss against which the insurance company agreed to indemnify the insured. An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss.

CA(10)[] **(10)**

Torts § 9—Persons Liable—Joint and Several Tortfeasors—Double Recovery.

Generally, a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong.

CA(11)[] **(11)**

Torts § 9—Persons Liable—Joint and Several Tortfeasors.

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. Thus, where a financial corporation sued an insurance company for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud after the insurance company refused to honor a claim for insurance benefits concerning property damage to a commercial bus in which the financial corporation held a security interest, but only sought damages against other defendants for negligence, the injury the financial corporation suffered was the same.

CA(12)[] **(12)**

Damages § 11—Compensatory Damages—Attorney Fees—Burden of Proof.

Generally, a party seeking to recover litigation costs under the rule that a person who through the tort of another has been required to act in the protection of his or her interests to bring or defend an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred must plead and prove the claim.

CA(13)[] **(13)**

Damages § 22.2—Punitive Damages—Availability—Insurance Company's Managing Agent.

An agency agreement between an insurance company and its managing agent and other evidence supported a jury's conclusion the managing agent was the insurance company's agent, thereby subjecting the managing agent to punitive damages under *Civ. Code, § 3294*, where the managing agent had broad discretion over the insurance company's bus insurance program; the managing agent could solicit, bind, write, and administer insurance policies, and could exercise its independent judgment as to the time, place, and manner of soliciting insurance and servicing policyholders; the insurance company's claims adjuster directed its employees to contact the managing agent when seeking coverage verification; the managing agent participated in issuing a policy to the insured, in subsequently canceling it, and then reinstating **[*1065]** a modified version of it; the managing agent initially issued a coverage determination when the insured submitted a claim, but then prepared an endorsement deleting the vehicle from the policy and advised the claims adjuster to deny the claim; and the managing agent's president was in contact with both the claims adjuster and the senior management of the insurance company division handling the bus insurance program when a claim was being considered, and participated in the ultimate decision to deny it.

[6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 81; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§ 149, 91 et seq.; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 785; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 705, 706, 710; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 1331C, 1348, 1386, 1402; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 94.]

CA(14)[] **(14)**

Damages § 26—Punitive Damages—Discretion of Court—Due Process—Notice—Grossly Excessive Punishment Prohibited.

While the states possess broad discretion with respect to the imposition of punitive damages, the United States Constitution's due process clause requires that a party potentially subject to such an award receive adequate notice of both the conduct that would support it and the severity of the penalty which could be imposed. Thus, federal due process prohibits the states from imposing grossly excessive punishments on tortfeasors.

CA(15)[] **(15)**

Damages § 27—Punitive Damages—Review—Guideposts.

In determining if a punitive damage award in a particular case is grossly disproportional to the gravity of a defendant's offenses, a reviewing court must conduct a thorough, independent review of the award, considering three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

CA(16)[] **(16)**

Damages § 22—Punitive Damages—Respondeat Superior Doctrine—Due Process.

Imposing punitive damages on a corporate entity under the respondeat superior doctrine based on its agent's fraudulent conduct does not violate the United States Constitution's due process clause.

CA(17)[] **(17)**

Damages § 27—Punitive Damages—Review—Due Process.

Appellate review of a punitive damages award must ensure the recovery comports with due process.

[*1066] *CA(18)*[] (18)

Damages § 8—Compensatory Damages—Interest.

The appellate court's power to award interest under *Code Civ. Proc., § 908*, is discretionary and may be denied if to do so would be inequitable under the circumstances.

Counsel: Horvitz & Levy, Mitchell C. Tilner, Peter Abrahams; Lewis D'Amato, Brisbois & Bisgaard, R. Gaylord Smith and Michael W. Connally for Defendant and Appellant.

Stephan, Oringher, Richman & Theodora and Robert M. Dato for Plaintiff and Appellant.

Judges: Rylaarsdam, J., with Sills, P. J., and O'Leary, J., concurring.

Opinion by: RYLAARSDAM

Opinion

[590] RYLAARSDAM, J.**—This is our third review of the present case. Plaintiff Textron Financial Corporation sued defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania and others for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud arising from defendant's refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which plaintiff held a security interest. The jury returned a verdict awarding plaintiff $ 165,414.40 in compensatory damages and $ 10 million in punitive damages, but in postjudgment proceedings the trial court remitted the latter award to $ 1.7 million.

[*2]** Both plaintiff and defendant appealed. In a January 2001 unpublished opinion, we affirmed the judgment and postjudgment orders in their entirety. Our first opinion rejected plaintiff's attacks on a pretrial order striking a cause of action for unfair business practices, the portion of the judgment in favor of defendant's claims adjuster, the amount of compensatory damages awarded on the insurance bad faith claim, plus the postjudgment orders awarding **[**591]** costs to the claims adjuster and denying its request for expert witness fees. We also rejected defendant's attack on the trial court's refusal to offset the sums plaintiff received in pretrial settlements, and both parties' objections to the punitive damage award.

The United States Supreme Court granted defendant's petition for a writ of certiorari, vacated our judgment, and remanded the case to us for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424 [149 L. Ed. 2d 674, 121 S. Ct. 1678]*. After reviewing the matter in accordance with the United States Supreme Court's direction, **[*1067]** we issued a second opinion in June 2002, again affirming the judgment and postjudgment **[***3]** orders in their entirety. Defendant again petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted the petition, vacated our second opinion, and remanded the case to this court for further consideration in light of *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408 [155 L. Ed. 2d 585, 123 S. Ct. 1513]*.

Except for the issues raised concerning the punitive damage award, we again affirm the trial court's rulings and judgment. For the reasons expressed below, we now conclude, based on the facts of this case, that plaintiff's recovery of punitive damages, in relation to the amount of compensatory damages awarded on the insurance bad faith and fraud claims and the nature of those damages, must be reduced. Consequently, we shall reverse the order remitting the amount of punitive damages and modify the judgment to award plaintiff punitive damages of $ 360,000.

FACTS

Il Sung Ko operated a tour bus company, Taeguk Tour and Sightseeing (Taeguk). Plaintiff loaned Ko funds to purchase a bus, receiving in return a security interest in the vehicle. The security agreement required Ko to insure the bus. Ko obtained a National **[***4]** Union liability insurance policy through D.W. Ferguson & Associates, Inc. (Ferguson), an independent insurance brokerage. The policy was issued through TRM International, Inc. (TRM), a company appointed by defendant to solicit, bind, write, and administer policies for its commercial bus program. The policy listed plaintiff as a loss payee and required defendant to mail plaintiff notice in advance if it cancelled the policy.

Taeguk suffered a downturn in business and Ko failed to timely pay his insurance premiums. In October 1992, TRM sent Ko notice it intended to cancel the policy. TRM did not send a copy of the cancellation notice to plaintiff. The policy terminated November 27.

Beginning in late October and throughout November, Ferguson and Taeguk discussed reducing the insurance premiums by deleting coverage for some of Ko's vehicles. Ferguson also corresponded with a TRM underwriter about the situation, proposing the issuance of a new policy covering only some of Ko's busses. The underwriter suggested an alternative whereby TRM would reinstate the original policy and give Ko a credit against his policy's premium if he agreed to certain conditions, which included delivering **[***5]** the license plates of two buses to Ferguson and temporarily suspending use of those vehicles. Plaintiff presented expert testimony that, unlike a transaction where a vehicle is deleted from a policy, the alternative approach implemented a procedure **[*1068]** described as lay-up credit. Under a lay-up credit, the insured maintains coverage on a vehicle while it is not being operated.

Ko agreed to this proposal, and on December 1, TRM retroactively reinstated **[**592]** the policy effective November 27. The bus encumbered by plaintiff's security interest was one of the vehicles Ko intended not to use. Plaintiff did not receive notice of the policy reinstatement with the endorsement that reflected Ko's business received a premium credit due to the vehicle's nonuse. National Union claimed it sent a copy of this endorsement to plaintiff, but plaintiff denied receiving it.

In January 1993, the bus encumbered by plaintiff's lien suffered extensive damage when it collided with another vehicle on a public highway. At Taeguk's request, Ferguson submitted a notice of claim to defendant's claims adjuster, American International Adjustment Company, Inc. (AIAC). On February 4, TRM sent AIAC a notice verifying **[***6]** coverage for the vehicle and confirming plaintiff as a loss payee. However, after further correspondence with Taeguk and TRM, AIAC denied the claim, asserting the bus had been deleted from the policy before the accident. TRM prepared an endorsement deleting the bus from the policy (Number 8) on February 16. This endorsement purported to be effective as of December 1, 1992.

In late 1993, Ko defaulted on plaintiff's loan. Plaintiff then learned about the accident and contacted Ferguson concerning insurance benefits to repair the vehicle. Ferguson informed plaintiff the bus had been removed from the policy before the accident. Plaintiff sued Ko, recovering a judgment against him and incurring $ 3,859.50 in legal fees in the process. However, Ko filed bankruptcy and discharged the debt.

Plaintiff submitted a claim to defendant for benefits under the insurance policy. At that time, it possessed only a certificate of insurance, not a copy of the policy.

AIAC also handled plaintiff's claim. TRM informed AIAC the encumbered bus had been deleted from the policy before the accident and sent it a copy of endorsement Number 8. A certificate of mailing on that copy covered the part of the **[***7]** endorsement reflecting the date TRM had prepared it. After an AIAC claims manager discussed the matter with John Lavin, a senior underwriter with the division handling defendant's bus program, and Tom Spangenberg, TRM's president, AIAC advised plaintiff the claim was being denied. The basis of the denial was that Ko deleted the bus from the policy before the accident, and TRM and AIAC concluded defendant's policy did not obligate it to give plaintiff advance notice of the deletion. Defendant did not send plaintiff a copy of the policy until August 1994. Again, the mailing certificate covered the portion of endorsement Number 8 displaying the date on which it had been prepared.

[*1069] PROCEDURAL BACKGROUND

The trial's first phase dealt with plaintiff's breach of contract cause of action against defendant. The court found, as a matter of law, the insurance contract's loss-payable clause constituted a separate agreement between plaintiff and defendant, obligating defendant to provide 30 days' notice of the policy's cancellation or the bus's deletion from it, and that defendant failed to comply with this requirement. The jury subsequently awarded plaintiff $ 61,513.80 under the policy.

[*8]** The second phase involved plaintiff's claims for bad faith against defendant and fraud against both defendant and AIAC. The jury returned a special verdict finding defendant violated the policy's implied covenant of good faith and fair dealing and that it acted with oppression, malice, and fraud in doing so. The jury also returned a special verdict finding defendant liable for intentional misrepresentation and concealment and awarded plaintiff $ 3,859.80 in **[**593]** damages. Based on its interpretation of the jury's answers in the special verdict, the trial court entered judgment for AIAC on the fraud count.

During this phase, the trial court also ruled plaintiff could recover $ 30,268.16 in attorney fees as damages under *Brandt v. Superior Court (1985) 37 Cal.3d 813 [210 Cal. Rptr. 211, 693 P.2d 796]*. The parties stipulated plaintiff was entitled to $ 55,616.34 in costs pursuant to *Brandt*. Subsequently, the court denied defendant's request to offset the pretrial settlements plaintiff received from Ferguson ($ 26,500) and TRM ($ 62,500) against the compensatory award imposed on it.

The trial's third phase dealt with punitive damages. The jury awarded $ 10 million in punitive damages **[***9]** against defendant which the trial court subsequently reduced to $ 1.7 million. In addition, the judgment awarded plaintiff compensatory damages, consisting of the policy benefits plus interest, the legal expenses recoverable under *Brandt v. Superior Court, supra, 37 Cal.3d 813*, and the damages for fraud. Finally, the court awarded AIAC $ 10,277.52 in costs against plaintiff.

DISCUSSION

PLAINTIFF'S APPEAL

Demurrer to the Unfair Business Practices Cause of Action

The complaint's fourth count sought injunctive and restitutionary relief under *Business and Professions Code section 17200 et seq.* against defendant and AIAC for “engag[ing] in unfair competition” in the “handling [of plaintiff's] **[*1070]** claim, and the claims of other persons.” Plaintiff alleged defendant, “aided and abetted” by AIAC, “used misleading documents to falsely suggest that it would provide insurance … where it had no intention to do so,” “falsely suggested that it would … provid[e] timely notice of [policy] cancellations,” “misrepresented the terms and meaning of its policies … to provide a pretext for its refusal to provide timely notice,” and “engaged in a pattern **[***10]** and practice of wrongful and false cancellations of insurance policies … .”

Relying on *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287 [250 Cal. Rptr. 116, 758 P.2d 58]*, defendant and AIAC generally demurred to this count. The trial court sustained the demurrers without leave to amend. Citing *State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093 [53 Cal. Rptr. 2d 229]*, plaintiff contends the trial court's ruling was erroneous.

CA(1)[] **(1)** *Moradi-Shalal* held ***HN1***[] the Unfair Insurance Practices Act (*Ins. Code, § 790 et seq.*; UIPA) does not create a private cause of action against insurers who violate its provisions. (*Moradi-Shalal v. Fireman's Fund Ins. Companies, supra, 46 Cal.3d at pp. 304–305*.) This rule applies to both first party and third party claims. (*Maler v. Superior Court (1990) 220 Cal. App. 3d 1592, 1597–1598 [270 Cal. Rptr. 222]*; *Zephyr Park v. Superior Court (1989) 213 Cal. App. 3d 833, 836–838 [262 Cal. Rptr. 106]*.) While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices (*Ins. Code, § 1861.03, **[***11]** subd. (a)*), parties cannot plead around *Moradi-Shalal*'s holding by merely relabeling their cause of action as one for unfair competition. (*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257, 283–284 [41 Cal. Rptr. 2d 220, 895 P.2d 56]*; *Maler v. Superior Court, supra, 220 Cal. App. 3d at p. 1598*; *Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 1494 [265 Cal. Rptr. 585]*.)

[594]** ***CA(2)***[] **(2)** The specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UIPA. (*Ins. Code, § 790.03, subds. (a) & (h)*.) In *Safeco Ins. Co. v. Superior Court, supra, 216 Cal. App. 3d 1491*, the court ordered dismissal of an action which included a request for injunctive relief under *Business and Professions Code section 17200 et seq.* based on an insurer's allegedly unfair claims settlement practices. (*216 Cal. App. 3d at pp. 1493–1494*.) "Though the issue is one of first impression, we have no difficulty in deciding the Business and Professions Code **[***12]** provides no toehold for scaling the barrier of *Moradi-Shalal* … . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (*Id. at p. 1494*.) Under the foregoing cases, ***HN2***[] merely alleging these purported acts **[*1071]** constitute unfair business practices under the unfair competition law is insufficient to overcome *Moradi-Shalal*.

In a few cases, the Supreme Court has allowed an action against an insurance company under the unfair competition law where the alleged conduct constituted an unlawful restraint on trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), even though it also violated the UIPA. (*Quelimane Co. v. Stewart Title Guarantee Co. (1998) 19 Cal.4th 26, 43–44 [77 Cal. Rptr. 2d 709, 960 P.2d 513]*; *Manufacturers Life Ins. Co. v. Superior Court, supra, 10 Cal.4th at pp. 283–284*.) "This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that ***HN3***[] the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in *section 790.03*, and therefore that section did not create a private cause of action under the UIPA. The court **[***13]** did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices." (*Manufacturers Life Ins. Co. v. Superior Court, supra, 10 Cal.4th at p. 284*.)

The case on which plaintiff relies, *State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th 1093*, held the plaintiff-insureds had sufficiently alleged a cause of action against their insurer under the unfair competition law based on allegations of conduct constituting common law fraud and breach of the implied covenant of good faith and fair dealing, even though the same conduct violated the UIPA. "While *Moradi-Shalal* clearly held that the Legislature did not intend to create new causes of action when it enacted *section 790.03*, it is also clear that the Legislature did not intend in any way to circumscribe the previously existing common law right of an insured to seek redress for an insurer's fraudulent deception or breach of the covenant of good faith implied in the policy. … Thus, … common law claims remain as a firm legal **[***14]** basis on which an insured may rely to seek redress against an insurer." (*State Farm Fire & Casualty, at pp. 1107–1108*.)

The persuasiveness of *State Farm Fire & Casualty* has been undercut by the Supreme Court's subsequent disapproval of its definition of "unfair" business practices. Quoting from *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509 [206 Cal. Rptr. 164]*, *State Farm* declared: "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In **[**595]** brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim … . [Citations.]' … . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or **[*1072]** when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at pp. 1103–1104, fn. omitted*.)

But *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163 [83 Cal. Rptr. 2d 548, 973 P.2d 527]* **[***15]** found this definition is "too amorphous and provid[es] too little guidance to courts and businesses." (*Id. at p. 185*.) While *Cel-Tech Communications* limited its discussion to the context of an action between competitors, the court concluded that, "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that under Business and Professions Code section 17200, "the word 'unfair' … means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law … ." (*Cel-Tech Communications at pp. 186–187, fn. omitted*; see also *Schnall v. Hertz Corp. (2000) 78 Cal.App.4th 1144, 1165–1167 [93 Cal. Rptr. 2d 439]* [applying *Cel-Tech Communications*'s standard in vehicle lessee's action against rental agency for allegedly concealing or obscuring the rental agreement's fuel service charge].)

Harmonizing *Moradi-Shalal*'s holding with the foregoing decisions supports a conclusion the trial court properly sustained the **[***16]** demurrers to plaintiff's unfair competition claim. First, the holding in *Safeco Ins. Co. v. Superior Court, supra, 216 Cal. App. 3d 1491*, supports this result. Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured or a third party based on the insurer's alleged failure to comply with a policy or to provide benefits. In *Quelimane*, parties who acquired real estate at tax sales sued title insurance companies for refusing to issue policies on their property. *Manufacturers Life* concerned an insurance agency's action against insurance companies for boycotting the agency. Also, in both cases the plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action. Finally, ***HN4***[] given the Supreme Court's disapproval of *State Farm*'s "amorphous" definition of "unfair" practices and its focus on legislatively declared public policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing.

Under these circumstances, the trial court properly found plaintiff failed to state a cause of action against **[***17]** defendant and AIAC for unfair business practices.

[*1073] *The Jury's Phase Two Findings*

During the second phase, the jury returned a special verdict containing findings on the elements of two theories of deceit, intentional misrepresentation and concealment of a material fact. The jury's responses reflect it found both defendant and AIAC made representations of a material fact on which plaintiff justifiably relied to its injury and that both defendants made the representations "recklessly without knowing whether [they were] true or false." However, the jury concluded AIAC did not know the representations were false and did not make them with the intent to defraud plaintiff. On the concealment **[**596]** theory, the jury found both defendants concealed or suppressed a material fact which resulted in injury to plaintiff, but also found AIAC did not intentionally conceal or suppress a material fact with the intent to defraud plaintiff. In addition, the jury concluded both defendants were "guilty of fraud, malice, or oppression in the conduct upon which [it] based [its] finding of liability … ."

When the jury returned its special verdict, the court discussed the inconsistency in the **[***18]** findings with counsel and ultimately ruled AIAC "is not liable for fraud or concealment." Plaintiff argues the trial court erred by construing the jury's findings to exonerate AIAC.

HN5[] The distinction between a general and special verdict is that under the former a jury "pronounce[s] generally upon all or any of the issues," while the latter is one "by which the jury find the facts only, leaving the judgment to the court." (*Code Civ. Proc., § 624*.) In a case "[w]here a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (*Code Civ. Proc., § 625*; see also *Tavaglione v. Billings (1993) 4 Cal.4th 1150, 1156–1157 [17 Cal. Rptr. 2d 608, 847 P.2d 574]*; *Bond v. DeWitt (1954) 126 Cal. App. 2d 540, 544 [272 P.2d 561]*.)

HN6[] ***CA(3)***[] **(3)** The jury's findings that AIAC made representations recklessly but without knowing the statements were false are inherently inconsistent. A representation made recklessly without knowledge of its falsity is sufficient to establish scienter. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 705, p. 806.) However, on both fraud theories the jury found AIAC did not act with an intent to defraud **[***19]** plaintiff. ***CA(4)***[] **(4)** An intent to induce reliance on a misrepresentation or nondisclosure by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. (*Lovejoy v. AT&T Corp. (2001) 92 Cal.App.4th*

85, 93 [111 Cal. Rptr. 2d 711]; Conrad v. Bank of America (1996) 45 Cal.App.4th 133, 157 [53 Cal. Rptr. 2d 336]; 5 Witkin, Summary of Cal. Law, *supra,* §§ 706, 710, pp. 807, 810.) The absence of this element defeats plaintiff's fraud claim against AIAC. Furthermore, the finding relevant to defendants' punitive **[*1074]** damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud. Thus, the trial court properly entered judgment for AIAC on the fraud claim.

Plaintiff contends AIAC could be found liable either as a coconspirator of defendant or on a theory of negligent misrepresentation. These contentions lack merit.

First, since plaintiff did not assert the latter theory at trial, and the court did not instruct the jury on it, it is now too late to do so. (Overgaard v. Johnson (1977) 68 Cal. App. 3d 821, 826 [137 Cal. Rptr. 412].) Second, while the court did instruct **[***20]** the jury on conspiracy as a basis for imposing liability, as plaintiff concedes, the jury was not asked to return a special verdict on this allegation. Had the jury concluded AIAC was liable as a coconspirator with defendant, it should have returned a finding of an intent to defraud.

A review of plaintiff's closing argument also reflects it relied on the representations and conduct of AIAC's employees, not conspiracy, to support its fraud claim. In fact, while discussing the question of whether defendant acted with malice, plaintiff's counsel suggested no conspiracy existed. “An insurance company whose job is to … investigate the situation thoroughly, concealing information which it knows is going to lead to a discovery that there's coverage—even concealing that information **[**597]** from its own claims people so that they won't have a guilty conscience about denying the claim—that's malice.”

The trial court properly entered judgment for AIAC on the fraud claim.

The Brandt Damage Award

Plaintiff retained legal counsel under an agreement requiring it to pay counsel 40 percent of all amounts recovered in the case. After a lengthy discussion, the trial court limited the sum **[***21]** plaintiff could recover as damages under Brandt v. Superior Court, supra, 37 Cal.3d 813, to 40 percent of the amount recovered as policy benefits during the trial's first phase. Plaintiff attacks this ruling and claims it should have been allowed to recover the reasonable value of counsel's services which it calculates is nearly $ 300,000 greater than the amount awarded by trial court. This contention lacks merit.

HN7[] ***CA(5)***[] **(5)** *Brandt* held attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages. (Brandt v. Superior Court, supra, 37 Cal.3d at pp. 815, 817.) “When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the **[*1075]** insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss—damages—proximately caused by the tort. [Citation.]” (Id. at p. 817.)

The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. It had no further legal obligation to pay counsel for the legal services **[***22]** rendered to it. *Brandt* held the ***HN8***[] “fees recoverable … may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract.” (Brandt v. Superior Court, supra, 37 Cal.3d at p. 819.) Plaintiff cites no authority permitting a posttrial modification of the retainer agreement. The trial court did not err by limiting the damage award under Brandt v. Superior Court, supra, 37 Cal.3d at page 813, to the percentage specified in the parties' contingency agreement.

The Costs Award

Plaintiff attacks the trial court's postjudgment rulings concerning the award of costs on two grounds. Both arguments lack merit.

First, it disputes the court's finding AIAC was a prevailing party. Plaintiff argues that since defendant and AIAC filed a joint answer to the complaint and were represented by the same counsel during trial, they held a unity of interest, which precludes AIAC from acquiring this status.

Code of Civil Procedure section 1032 ***HN9***[] defines prevailing party to include "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a **[***23]** defendant as against those plaintiffs who do not recover any relief against that defendant. … [I]n situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides … ." (*Code Civ. Proc., § 1032, subd. (a)(4)*.) ***CA(6)***[] **(6)** Cases applying this statute hold that where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. (*Webber v. Inland Empire Investments, Inc.* ***[**598]*** *(1999) 74 Cal.App.4th 884, 920 [88 Cal. Rptr. 2d 594]*; *Slavin v. Fink (1994) 25 Cal.App.4th 722, 725–726 [30 Cal. Rptr. 2d 750]*; *Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 272 [150 Cal. Rptr. 828]*.)

Plaintiff asserts the trial court did not exercise its discretion in this case, citing a statement by the trial judge during the hearing on the motion to strike AIAC's cost bill. However, the court made that comment in response to **[*1076]** plaintiff's contention "no evidence" exists "to support any particular allocation" **[***24]** between AIAC and Defendant, and that the latter entity presumably "fronted" AIAC's trial expenses. The record as a whole does not support a conclusion the trial court failed to exercise its discretion concerning AIAC's status and its recovery of costs.

The related arguments also fail. Contrary to plaintiff's assertion, this is not a case where it established wrongdoing against AIAC, but simply failed to recover a monetary award. The jury found AIAC did not commit fraud. Furthermore, since the injunctive relief claim had been previously dismissed, this was an action for damages. Thus, the evidence indicating AIAC subsequently modified its operating procedures concerning claims handling does not preclude it from being deemed a prevailing party.

Second, plaintiff contends the trial court erred by denying its recovery of expert witness fees under *Code of Civil Procedure section 998*. Nearly a year before trial, plaintiff served on defendant and AIAC an unsuccessful pretrial offer to compromise proposing "to allow judgment be taken … against defendants" for $ 626,489.26. In denying plaintiff's request for expert witness fees, the court cited *Taing v. Johnson Scaffolding Co. (1992) 9 Cal.App.4th 579 [11 Cal. Rptr. 2d 820].* **[***25]**

CA(7)[] **(7)** *Code of Civil Procedure section 998, subdivision (d)* ***HN10***[] authorizes the court to award a prevailing plaintiff its expert witness fees if the plaintiff made a timely pretrial offer to compromise which the defendant does not accept, and "the defendant fails to obtain a more favorable judgment … ." In *Taing*, the court reversed an award of costs, declaring, ***HN11***[] "if a plaintiff elects to submit a *section 998* offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing v. Johnson Scaffolding Co., supra, 9 Cal.App.4th at p. 586*.) *Taing* explained its rule as follows: "[A]n unapportioned offer by a single plaintiff to multiple defendants … requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Id. at p. 584*.)

Defendant and AIAC were not jointly and severally liable to plaintiff. **[***26]** (Cf. *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc. (1996) 50 Cal.App.4th 1542, 1547–1549 [58 Cal. Rptr. 2d 371]*.) The complaint sought recovery against defendant on theories of breach of contract, bad faith, and fraud. AIAC was alleged to be liable only on the latter theory. Furthermore, the evidence relating to each defendant's liability for fraud was separate. **[*1077]** Thus, the trial court did not err by exercising its discretion to deny recovery of expert witness fees in this case.

DEFENDANT'S APPEAL

Denial of an Offset

Defendant moved to have the settlement amounts plaintiff received from **[**599]** Ferguson and TRM offset against the damages plaintiff recovered from it. The trial court issued a lengthy written order denying the request as to both the contractual damages and the tort damages recovered by plaintiff. Defendant contends the trial court erred by denying an offset in this case.

HN12[] *CA(8)*[] **(8)** Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (*Evid. Code, § 500*), "[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.]" (*Conrad v. Ball Corp. (1994) 24 Cal.App.4th 439, 444 [29 Cal. Rptr. 2d 441]*.) **[***27]**

HN13[] *CA(9)*[] **(9)** With respect to plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable "merely because [the insured] has 'collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him.' [Citations.]" (*Strickland v. Federal Ins. Co. (1988) 200 Cal. App. 3d 792, 801 [246 Cal. Rptr. 345]*, quoting *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 251 [18 Cal. Rptr. 650]*, disapproved on another ground in *Sabella v. Wisler (1963) 59 Cal.2d 21, 34 [27 Cal. Rptr. 689, 377 P.2d 889]*.) An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss. (*Sapiano v. Williamsburg Nat. Ins. Co. (1994) 28 Cal.App.4th 533, 538 [33 Cal. Rptr. 2d 659]*; *Chase v. National Indemnity Co. (1954) 129 Cal. App. 2d 853, 861–862 [278 P.2d 68]*.)

Defendant refused to pay any policy benefits to plaintiff. The cases on which it relies to establish an offset against the contract **[***28]** damages involve an insured's recovery of tort damages and whether the collateral source rule applied. Its contention the trial court "misread" *Kardly v. State Farm Mut. Auto. Ins. Co. (1989) 207 Cal. App. 3d 479 [255 Cal. Rptr. 40]* is incorrect. Contrary to defendant's claim, *Kardly* did not hold the insurer waives the right of subrogation by breaching the insurance contract. The part of the *Kardly* opinion defendant quotes refers to the facts of another appellate decision. (*Id. at p. 489*.) Thus, the trial court properly refused to offset the Ferguson and TRM settlements against the contractual damage award.

[*1078] As for plaintiff's recovery of tort damages, the trial court agreed the collateral source doctrine did not apply because Ferguson and TRM could not be deemed collateral sources under the facts of this case. However, the court detailed the potential liability facing Ferguson and TRM, and found their potential liability exceeded $ 261,000, which included nonduplicative exposure exceeding $ 96,000. Applying the tort of another doctrine, the court concluded the settlement sums paid by Ferguson and TRM should not be offset against plaintiff's **[***29]** recovery from defendant.

CA(10)[] **(10)** Generally, *HN14*[] a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. (6 Witkin, Summary of Cal. Law*, supra,* Torts, § 1322, p. 779.) "[I]t has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: '… payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment **[**600]** was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing *pro tanto* the amount of the damages he may be entitled to recover.' [Citations.]" (*Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 673 [192 Cal. Rptr. 793]*.)

HN15[] *CA(11)*[] **(11)** Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. (*Sanchez v. Bay General Hospital (1981) 116 Cal. App. 3d 776, 796 [172 Cal. Rptr. 342]*.) **[***30]** Thus, while plaintiff sued defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud, but only sought damages against Ferguson and TRM for negligence, the injury it suffered was the same.

However, the court did find the tort of another doctrine applicable to this case. ***HN16***[] "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice v. North Amer. Title Guar. Corp. (1963) 59 Cal.2d 618, 620 [30 Cal. Rptr. 821, 381 P.2d 645]*.)

CA(12)[] **(12)** Generally, a party seeking to recover litigation costs under this rule must plead and prove the claim. (*Hsu v. Abbara (1995) 9 Cal.4th 863, 869, fn. 4 [39 Cal. Rptr. 2d 824, 891 P.2d 804]*.) While plaintiff did not do so here, the potential for its recovery of damages from Ferguson and TRM was made known to them during pretrial discovery. Furthermore, had it not settled with **[*1079]** Ferguson and TRM, plaintiff could have amended the complaint to assert its right to recover **[***31]** the fees and expenses incurred in its action against defendant.

The record supports the trial court's denial of defendant's request for an offset.

PUNITIVE DAMAGES

Introduction

Both parties attack the punitive damage award. However, in light of our conclusion concerning the validity of the amount of the award, the only issues that need to be considered are defendant's challenges to the sufficiency of the evidence supporting the recovery of exemplary damages and the constitutionality of the amount awarded to plaintiff, plus its claim for interest on the constitutionally excessive portion of the sum previously paid to plaintiff.

Sufficiency of the Evidence

Defendant claims its own conduct was not oppressive, fraudulent, or malicious, TRM's activity cannot be attributed to it, and it did not ratify TRM's actions.

Civil Code section 3294 ***HN17***[] authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice … ." (*Civ. Code, § 3294, subd. (a)*.) In *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809 [169 Cal. Rptr. 691, 620 P.2d 141]* **[***32]** (*Egan*), the Supreme Court upheld an award of punitive damages against an insurer based on evidence two employees, a claims manager and a claims adjuster, failed to adequately investigate the insured's claims under a disability insurance policy. "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion **[**601]** the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation." (*Id. at pp. 822–823*.)

Subsequently, the Legislature amended *Civil Code section 3294* to provide, ***HN18***[] "[A]n employer shall not be liable for [punitive] damages … based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious **[*1080]** disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was **[***33]** personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (*Civ. Code, § 3294, subd. (b)*.)

In *White v. Ultramar, Inc. (1999) 21 Cal.4th 563 [88 Cal. Rptr. 2d 19, 981 P.2d 944]*, the Supreme Court considered the effect of this amendment in an action for wrongful termination. A manager who was responsible for eight stores, covering 65 employees, had fired the plaintiff, a convenience store employee. The jury awarded plaintiff both compensatory and punitive damages.

In affirming, the Supreme Court concluded that ***HN19***[] "in amending *section 3294*, the Legislature intended (like *Egan, supra, 24 Cal.3d at p. 823*) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White v. Ultramar, Inc., supra, 21 Cal.4th at p. 573*.) The court noted, "*section 3294, subdivision (b)*, placed ['managing agent'] next to the terms 'officer' **[***34]** and 'director,' intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*Ibid.*) The critical factor " ' "is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation.]' " (*Id. at p. 574*.)

CA(13)[] **(13)** The agency agreement between defendant and TRM and the evidence in this case shows TRM had broad discretion over defendant's bus insurance program. TRM could "solicit, bind, write and administer insurance" policies, and "exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing policyholders." There was evidence AIAC directed its employees to contact TRM when seeking coverage verification. In this case, TRM participated in issuing **[***35]** the policy to Ko, in subsequently canceling it, and then reinstating a modified version of it. Later, when Ko submitted a claim on the bus, TRM initially issued a coverage determination, but then prepared an endorsement deleting the vehicle from the policy, and advised AIAC to deny the claim. Furthermore, TRM's president was in contact with both AIAC and the senior management of the division handling defendant's bus program when plaintiff's **[**602]** claim was being considered, and participated in the ultimate decision to deny it. This evidence **[*1081]** supports the jury's conclusion TRM was defendant's managing agent, thereby subjecting it to punitive damages under *Civil Code section 3294*. (*White v. Ultramar, Inc., supra, 21 Cal.4th at p. 577*; *Egan v. Mutual of Omaha Ins. Co., supra, 24 Cal.3d at p. 823*.)

In light of this conclusion it is unnecessary to consider defendant's additional claims concerning instructional error and alleged insufficiency of the evidence based on its own conduct.

Validity of the Award

Defendant contends even the $ 1.7 million punitive damage award is unconstitutional and excessive. In both our original and second opinions, we upheld **[***36]** the punitive damage award. The United States Supreme Court has directed us to reconsider this decision for a third time in light of its recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell, supra, 538 U.S. 408* (hereinafter *State Farm*).

HN20[] ***CA(14)***[] **(14)** The rationale underlying punitive damages is to punish the wrongdoer and deter similar future wrongful conduct. (*State Farm, supra, 538 U.S. at p. 416*; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 432*; *PPG Industries, Inc. v. Transamerica Ins. Co. (1999) 20 Cal.4th 310, 317 [84 Cal. Rptr. 2d 455, 975 P.2d 652]*.) While the United States Supreme Court recognizes "the broad discretion" possessed by the states "with respect to the imposition of … punitive damages" (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 433*; see also *State Farm, supra, 538 U.S. at p. 416*), the federal Constitution's due process clause requires that a party potentially subject to such an award receive adequate notice of both the conduct that would support it and the severity of the penalty which could be imposed. (*State Farm, supra, 538 U.S. at p. 417*; **[***37]** *BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 574 [134 L. Ed. 2d 809, 116 S. Ct. 1589]*.) Thus, the Supreme Court has held federal due process "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors [citations]." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra, 532 U.S. at p. 434*.)

HN21[] ***CA(15)***[] **(15)** In determining if the punitive damage award in a particular case is " 'grossly disproportional to the gravity of … defendant[s'] offense[s]' " (*Cooper Industries, Inc. v. Leatherman Tool Group,* *Inc., supra, 532 U.S. at p. 434*), a reviewing court must conduct a "thorough, independent review" of the award (*id. at p. 441*), considering "three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered … and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil **[*1082]** penalties authorized or imposed in comparable cases. [Citation.]" (*State Farm, supra, 538 U.S. at p. 418*; see also *BMW of North America, Inc. v. Gore, supra, 517 U.S. 559 at pp. 574–575*.) **[***38]**

The first "guidepost," described as "the most important indicium of the reasonableness of a punitive damages award" (*BMW of North America, Inc. v. Gore, supra, 517 U.S. at p. 575*; see also *State Farm, supra, 538 U.S. at p. 419*), requires an appellate **[**603]** court to consider several factors. They include "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citation.]" (*State Farm, supra, 538 U.S. at p. 419*; see also *BMW of North America, Inc. v. Gore, supra, 517 U.S. at pp. 575–576*.)

The evidence clearly supports a conclusion TRM, defendant's managing agent, employed trickery and deceit in attempting to hide defendant's potential liability for plaintiff's claim. TRM began the fraudulent concealment scheme shortly after the bus accident by preparing and backdating a false deletion certificate. On **[***39]** at least two occasions, TRM submitted copies of this document to plaintiff with the date of preparation hidden behind a certificate of mailing. Plaintiff also presented evidence that TRM removed documents from the claims file. In addition, the record reflects this misconduct was not merely an isolated incident. Defendant continued to deny plaintiff's entitlement to benefits during the course of this litigation. Recently, this court considered a similar issue in an analogous context in *Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020 [135 Cal. Rptr. 2d 736]*. In finding the defendant-insurer's refusal to provide workers compensation benefits to one of plaintiff's employees constituted reprehensible conduct, we concluded the insurer engaged in repeated misconduct conduct because it "persisted in its denial of a defense for [the plaintiff-employer] and its denial of coverage for [the injured employee] for a period of 18 months." (*Id. at p. 1054*.)

HN22[] ***CA(16)***[] **(16)** Thus, the record confirms the existence of two factors supporting a conclusion that defendant, through its managing agent, engaged in reprehensible conduct supporting an award of punitive damages under the **[***40]** due process clause. (*State Farm, supra, 538 U.S. at p. 419*.) Defendant again repeats its claim that TRM, not it, committed the wrongdoing and its liability for TRM's actions is merely vicarious. But as we have repeatedly explained, TRM "<cised">exercise[d] substantial discretionary authority over decisions … ultimately determin[ing] corporate policy" for defendant's bus insurance program (*White v. Ultramar, Inc., supra, 21 Cal.4th at p. 573*), and thus constituted **[*1083]** defendant's managing agent. Imposing punitive damages on a corporate entity under the respondeat superior doctrine based on its agent's fraudulent conduct does not violate the federal Constitution's due process clause. (*Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 14–15 [113 L. Ed. 2d 111, 1 S. Ct. 1032]*.) Simply describing its liability as vicarious does not militate against imposing a proportionately appropriate punitive damage award against defendant based on TRM's wrongdoing.

But plaintiff suffered only economic harm in the form of defendant's denial of policy benefits and the expense incurred to enforce its rights under the policy. Nor can plaintiff be **[***41]** described as a financially vulnerable victim of defendant's wrongful conduct. While plaintiff contends defendant's conduct reflected its indifference or reckless disregard as to the health and safety of Ko and any individuals potentially injured in the bus accident, this lawsuit concerns only defendant's wrongdoing as it relates to plaintiff. *State Farm* recognized that ***HN23***[] **[**604]** "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis … . [Citation.]" (*State Farm, supra, 538 U.S. at p. 423*.)

HN24[] The second "guidepost" focuses on the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. In *State Farm*, the Supreme Court reiterated its "reluctan[ce] to identify concrete constitutional limits on the ratio between" compensatory and punitive damages (*State Farm, supra, 538*

U.S. at p. 424), declaring "[t]he precise award in any case … must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." **[***42]** (*Id. at p. 425*.) Nonetheless, the court identified certain guidelines to apply in determining whether the punitive damage award is reasonable and proportionate to the harm suffered by the plaintiff. Citing centuries of "legislative history … providing for sanctions of double, treble, or quadruple damages to deter and punish" (*ibid*.), the Supreme Court noted, "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Ibid*.)

Again, our recent opinion in *Diamond Woodworks, Inc. v. Argonaut Ins. Co., supra, 109 Cal.App.4th 1020,* is instructive. After discussing *State Farm* and earlier Supreme Court decisions, we concluded they "suggest that ***HN25***[] in the usual case, i.e., a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages." (*Diamond Woodworks, at p. 1057*.) **[***43]**

[*1084] ***CA(17)***[] **(17)** This case falls within the foregoing rule. The wrongdoing attributed to defendant is sufficiently reprehensible to support a punitive damage award. But, contrary to plaintiff's claim, the compensatory damages awarded to it gave plaintiff full recovery for its loss in this case. (See *State Farm, supra, 538 U.S. at p. 419*.) Plaintiff cites defendant's purported wealth and complains an award smaller than the trial court's 10-to-1 ratio would "render the award laughable." But ***HN26***[] our review of the punitive damages award must ensure the recovery comports with due process. The Supreme Court has recognized that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. [Citations.]" (*State Farm, supra, 538 U.S. at p. 427*; see also *Diamond Woodworks, Inc. v. Argonaut Ins. Co., supra, 109 Cal.App.4th at p. 1056*.)

As a corollary to its attack on the constitutionality of the punitive damage award, defendant argues consideration of the proportionality of the punitive damages to compensatory damages must focus on the amount awarded for breach of the implied covenant of good faith and fair dealing and for fraud **[***44]** ($ 89,744), excluding the sum plaintiff recovered on the contract claim ($ 75,670.40). This argument has merit.

Civil Code section 3294, subdivision (a) ***HN27***[] allows the recovery of punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven … the defendant has been guilty of oppression, fraud, or malice … ." *Diamond Woodworks* also recognized a consideration of the disparity between compensatory and punitive damage awards **[**605]** must focus on the compensatory damages awarded on "only [the] cause[s] of action providing a basis for punitive damages in this case." (*Diamond Woodworks, Inc. v. Argonaut Ins. Co., supra, 109 Cal.App.4th at p. 1056, fn. 35*.) Here, the parties held separate trials on the breach of contract count and the tort claims and the jury returned separate awards on them. In addition, the jury's finding that defendant acted with oppression, fraud, or malice applied solely to the latter two counts. Thus, our consideration of the disparity between plaintiff's actual harm and the punitive damage award must be limited to its tort relief.

HN28[] The third "guidepost" concerns "the difference between the **[***45]** punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]" (*State Farm, supra, 538 U.S. at pp. 418, 428*.) Defendant notes the Insurance Code only imposes a maximum fine of $ 10,000 for willful misconduct by insurers. (*Ins. Code, § 790.035*.) Plaintiff cites us to the potential criminal penalties contained in *Penal Code section 550*. But this latter provision is of little assistance here. In *State Farm*, the Supreme Court noted that, ***HN29***[] while "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful **[*1085]** action," when a criminal penalty is "used to determine the dollar amount of the award," it "has less utility." (*State Farm, supra, 538 U.S. at p. 428*.) "Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive **[***46]** damages award." (*Ibid*.)

Applying the United States Supreme Court's "guideposts" to this case, we conclude the punitive damage award, even as reduced by the trial court, is excessive and violates the federal Constitution's due process clause.

Accordingly, we shall reverse the order remitting punitive damages to $1.7 million and modify the judgment to reduce the punitive damage award to $360,000, a sum approximating four times the compensatory damages awarded on the claims for breach of the implied covenant of good faith and fair dealing and fraud.

Restitution

Defendant claims that, on June 8, 2001, subsequent to the finality of our original judgment, it paid the outstanding judgment when plaintiff threatened to execute on it. Citing *Code of Civil Procedure section 908*, defendant argues it is entitled to not only recover the constitutionally excessive portion of the punitive damage award, but interest on it from the date of payment. Plaintiff opposes the payment of interest contending it is inequitable and "would only add insult to injury."

Code of Civil Procedure section 908 declares, ***HN30***[] "When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so **[***47]** far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or **[**606]** may, by order, refer such matters to the trial court for determination."

CA(18)[] **(18)** As plaintiff recognizes, ***HN31***[] our power to award interest under *Code of Civil Procedure section 908* is discretionary and interest may be denied if an award would be inequitable under the circumstances. (*Holmes v. Williams (1954) 127 Cal. App. 2d 377, 379 [273 P.2d 931]*.) The only bases plaintiff cites for denying recovery of interest on the excess portion of the punitive **[*1086]** damage award are the litigation expenses it has incurred during this lawsuit, plus defendant's fraudulent conduct underlying this litigation. Neither claim supports denying restitution to defendant. The general rule is that, " **[***48]** ***HN32***[] [e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys … is left to the agreement … of the parties … ." (*Code Civ. Proc., § 1021*.) If an opponent's cost of litigating a matter constitutes a basis for denying restitution under *Code of Civil Procedure section 908*, few parties would be entitled to relief.

Plaintiff's unclean hands defense fares no better. ***HN33***[] "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. [Citations.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal.App.4th 970, 979 [90 Cal. Rptr. 2d 743]*.) Defendant's fraudulent conduct occurred in the events leading to this litigation. There is no indication it engaged in inequitable conduct in the postjudgment proceedings. Defendant paid the judgment apparently when plaintiff threatened to execute on it. Had plaintiff chosen to await termination **[***49]** of the proceedings in the United States Supreme Court before seeking recovery, it would be entitled to interest on the sum finally awarded. To deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable.

DISPOSITION

The orders denying defendant's motion for judgment notwithstanding the verdict, awarding costs to AIAC, and denying plaintiff recovery of its expert witness fees are affirmed. The order remitting punitive damages to $ 1.7 million is reversed. The portions of the judgment in favor of AIAC and awarding plaintiff compensatory damages are affirmed. The portion of the judgment awarding plaintiff punitive damages is modified to reduce the award to $ 360,000. As so modified, the judgment is affirmed. Each party shall bear its own costs on appeal.

Sills, P. J., and O'Leary, J., concurred.

A petition for a rehearing was denied June 18, 2004, and the opinion was modified to read as printed above. The petition of appellant Textron Financial Corporation for review by the Supreme Court was denied September 15, 2004.

Hallam v. Alaska Airlines, Inc.

Supreme Court of Alaska

May 21, 2004, Decided

Supreme Court No. S-10198, No. 5809

Reporter

91 P.3d 279 *; 2004 Alas. LEXIS 66 **; 2004-1 Trade Cas. (CCH) P74,429

STUART AARON HALLAM, Appellant, v. ALASKA AIRLINES, INC., Appellee.

Subsequent History: Related proceeding at *Hallam v. Perkins Coie Llp, 2008 U.S. Dist. LEXIS 137078 (D. Alaska, Mar. 24, 2008)*

Prior History: [1]** Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Patricia A. Collins, Judge. Superior Court No. 1JU-99-00928 CI.

Disposition: Superior court judgment affirmed.

Core Terms

Airlines, ticket, superior court, discovery, fare, travel, summary judgment, documentation, unfair trade practice, voucher, reopen, credibility, challenges, preempted, reserved, website, amend, credit card, breached, Recusal, expired, flight, superior court's finding, abuse of discretion, factual findings, individual claim, antitrust claim, leave to amend, first class, reconsideration

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN1[] **Standards of Review, Clearly Erroneous Review**

The Supreme Court of Alaska reviews the trial court's factual findings under a clearly erroneous standard. A finding is clearly erroneous if it leaves this court with a definite and firm conviction on the entire record that a mistake has been made.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Standards of Review, De Novo Review**

A motion to dismiss is reviewed de novo.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN3[] **Standards of Review, Abuse of Discretion**

The denial of a motion for leave to amend a complaint is reviewed for abuse of discretion.

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

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

HN4[] **Standards of Review, Abuse of Discretion**

A motion to reopen discovery is reviewed for abuse of discretion.

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN5[] **Standards of Review, Abuse of Discretion**

The denial of an Alaska. R. Civ. P. 56(f) motion is reviewed for abuse of discretion.

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

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN6[] **Standards of Review, Abuse of Discretion**

The refusal by a judge to be recused from a case is reviewed for an abuse of discretion.

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

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN7[] **Standards of Review, Abuse of Discretion**

The court will find an abuse of discretion when it is left with a definite and firm conviction after reviewing the whole record that the trial court erred in its ruling.

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

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN8[] Standards of Review, Abuse of Discretion

An award of attorney's fees will be overturned only upon a showing of abuse of discretion or a showing that the award is manifestly unreasonable.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

HN9[] Jury Trials, Province of Court & Jury

Because it is the function of the trial court, not of the reviewing court, to judge witnesses' credibility, the reviewing court must give due regard to the superior court's credibility judgments.

Civil Procedure > Trials > Bench Trials

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

HN10[] Trials, Bench Trials

In a bench trial, the judge is the trier of fact, determining the credibility of witnesses and deciding how to weigh the evidence presented.

Civil Procedure > Appeals > Standards of Review > General Overview

HN11[] Appeals, Standards of Review

The appellate court ordinarily will not disturb findings of fact made upon conflicting evidence.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN12[] Summary Judgment, Supporting Materials

Alaska R. Civ. P. 56(f) allows a party opposing summary judgment to seek additional time to gather and submit evidence to justify the party's opposition.

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN13[] **Pretrial Matters, Continuances**

When the party opposing summary judgment demonstrates to the court's satisfaction that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may choose one of two remedies: it may decline to grant summary judgment or it may grant a continuance.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

HN14[] **Judges, Discretionary Powers**

Deciding whether or not to reopen discovery is within the trial court's discretion, and is subject to harmless error review.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Transportation Law > Air & Space Transportation > Airline Deregulation Act > Preemption

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN15[] **Judgments, Relief From Judgments**

If the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend.

Constitutional Law > Supremacy Clause > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

HN16[] **Constitutional Law, Supremacy Clause**

See 49 U.S.C.S. § 41713(b)(1).

Constitutional Law > Supremacy Clause > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

Transportation Law > Air & Space Transportation > Airline Deregulation Act > Preemption

Transportation Law > Air & Space Transportation > Airports > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Consumer Protection

HN17[] **Constitutional Law, Supremacy Clause**

The Airline Deregulation Act, *49 U.S.C.S. § 41713(b)(1)*, is "broadly preemptive," reaching any state laws or enforcement actions having a connection with or reference to airline rates, routes, or services.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

Transportation Law > Air & Space Transportation > Airline Deregulation Act > Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

Transportation Law > Air & Space Transportation > Airline Deregulation Act > General Overview

Transportation Law > Air & Space Transportation > Commercial Airlines > General Overview

HN18[] **Regulated Industries, Transportation**

Preemption under the Airline Deregulation Act, *49 U.S.C.S. § 41713(b)(1)*, is analogous to "broad scope" and "expansive sweep" of preemption under ERISA, *29 U.S.C.S. § 1144(a)*.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN19[] **Inability to Proceed, Disqualification & Recusal**

Recusal was never intended to enable a discontented litigant to oust a judge because of adverse rulings made.

Counsel: Stuart Aaron Hallam, Pro se, Juneau, Appellant.

James N. Leik and Helena L. Hall, Perkins Coie LLP, Anchorage, and Douglas S. Parker, Preston Gates & Ellis, Anchorage, for Appellee.

Judges: Before: Bryner, Chief Justice, Matthews, and Fabe, Justices. [Eastaugh and Carpeneti, Justices, not participating.]

Opinion by: FABE

Opinion

[*281] FABE, Justice.

I. INTRODUCTION

This appeal is the culmination of a series of customer service disputes between Stuart Hallam and Alaska Airlines. Hallam sued the airline, alleging that by failing to honor various terms of his plane tickets, it breached a series of contracts. He also alleged, on behalf of a class of passengers, that the airline's standard ticket terms and policies violate *Alaska's Unfair Trade Practices Act* and state ***antitrust law***. After a bench trial, the superior court ruled in **[**2]** favor of Alaska Airlines on all counts, and Hallam appeals. Most of his arguments on appeal challenge the superior court's factual findings, which we conclude were not clearly erroneous. We therefore affirm the superior court.

II. FACTS AND PROCEEDINGS

A. Factual History

Hallam's claims are based on several transactions he had with Alaska Airlines. The bulk of his appeal is devoted to challenging the factual findings supporting the superior court's judgment on these claims. We outline the incidents here and describe them in greater detail as we examine each in Parts III.B-F below.

First, Hallam claims that he purchased from Alaska Airlines's website a ticket labeled "unrestricted" that turned out to be restricted. Believing that he could change **[*282]** the ticket without incurring a fee, he attempted to change his travel dates, but was told that he would be charged. The fee was later waived, but Hallam chose not to use the ticket. In the second incident, Hallam bought a ticket to fly to Puerto Vallarta. Two charges, for differing amounts, appeared on his credit card bills. The greater of the two charges was credited back to him. Later, Hallam was informed that the charge **[**3]** was being reinstated, but that he could continue to contest it. In the third incident, Hallam attempted to use a Permanent Fund Dividend (PFD) voucher to purchase a ticket to fly from Seattle to Juneau. At the Seattle airport, Hallam was informed that his voucher had expired and that he would have to purchase his ticket some other way. Fourth, Hallam claimed below that he was denied a first class seat for which he had a reserved ticket. He therefore chose not to take the flight; he claimed that the denial of the first class seat was a breach. Finally, Hallam purchased a pair of tickets from the airline's website. He claims that he was charged an amount much greater than what appeared on the screen, and called the airline to complain. The airline refunded all but nine dollars of the alleged overcharge.

B. Procedural History

Hallam's Second Amended Complaint was filed January 18, 2000. He brought a series of contract and conversion claims based on the incidents described above and defamation claims arising from one of his more energetic encounters with Alaska Airlines personnel, along with both class and individual claims under the Alaska Unfair Trade Practices Act [1] and **[**4]** state ***antitrust law***. [2] On March 7, 2000, the superior court dismissed the unfair trade practices and antitrust claims on the ground that Hallam, as a pro se litigant, could not represent the class. The complex procedural history of these claims is laid out in Part F below. In short, Hallam moved for reconsideration of the dismissal of his individual claims. When reconsideration was denied, he moved to amend his complaint to reinstate his individual unfair trade practices and antitrust claims. The superior court eventually denied this motion in November 2000, citing federal preemption under the Airline Deregulation Act [3] as grounds for rejecting the amendment.

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[1] *AS 45.50.471*.

[2] *AS 45.50.562, 564*.

[3] *49 U.S.C. § 41713*.

Meanwhile, discovery closed on May 1, 2000 and in June and July the parties filed cross-motions for summary judgment. Upon receiving Alaska Airlines's summary judgment memorandum, Hallam moved on August **[**5]** 22 to reopen discovery and for a continuance under *Alaska Rule of Civil Procedure 56(f)*, arguing that the airline's motion evidenced "both document tampering and perjury." After the superior court gave Hallam a chance to explain what he was looking for, it denied the motion. The superior court then granted Alaska Airlines summary judgment on some of the defamation claims, based on statute of limitations and privilege grounds, and on Hallam's failure to present evidence that one of the allegedly defamatory statements was published. On all other claims, the superior court declined to enter summary judgment. The case was tried to the bench before Judge Patricia A. Collins, who had handled the case throughout. In late November, and in March 2001 the superior court entered findings of fact and conclusions of law, finding for Alaska Airlines on all claims. Hallam moved for reconsideration, and the motion was denied. Final judgment was entered in April 2001, at which time the superior court awarded fees and costs to Alaska Airlines. Hallam made several further motions for reconsideration or relief from the judgment, including one asking Judge Collins to recuse herself "if the court cannot **[**6]** be unbiased and impartial." All were denied.

Hallam appeals to this court challenging: the superior court's factual findings on claims concerning the incidents described above; the superior court's dismissal of his individual Unfair Trade Practices Act and antitrust claims and its denial of his motion to amend his complaint to add those claims after they were dismissed; the superior court's refusal to reopen discovery; Judge Collins's failure **[*283]** to recuse herself; and the superior court's award of costs and fees to Alaska Airlines.

III. DISCUSSION

A. Standards of Review

HN1[] This court "reviews the trial court's factual findings . . . under a 'clearly erroneous' standard. A finding is clearly erroneous if it leaves this court with a definite and firm conviction on the entire record that a mistake has been made." [4] ***HN2***[] A motion to dismiss is reviewed de novo. [5] ***HN3***[] The denial of a motion for leave to amend a complaint is reviewed for abuse of discretion. [6] ***HN4***[] A motion to reopen discovery is also reviewed for abuse of discretion, [7] as is ***HN5***[] the denial of a *Rule 56(f)* motion. [8] ***HN6***[] "The refusal by a judge to be recused from a case is reviewed for an abuse of discretion." [9] In each **[**7]** of these instances, ***HN7***[] the court "will find an abuse of discretion when we are left with a definite and firm conviction after reviewing the whole record that the trial court erred in its ruling." [10] Finally, ***HN8***[] "an award of attorney's fees will be overturned only upon a showing of abuse of discretion or a showing that the award is manifestly unreasonable." [11]

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[4] *City of Hydaburg v. Hydaburg Co-op. Ass'n, 858 P.2d 1131, 1135 (Alaska 1993)* (quotation marks omitted).

[5] *McElroy v. Kennedy, 74 P.3d 903, 906 (Alaska 2003)*.

[6] *Taylor v. Johnston, 985 P.2d 460, 463 (Alaska 1999)*.

[7] *Id.*

[8] *Gamble v. Northstore Partnership, 907 P.2d 477, 485 (Alaska 1995)*.

[9] *Jourdan v. Nationsbanc Mortgage Corp., 42 P.3d 1072, 1082 (Alaska 2002)*; *see also* *AS 22.20.020*.

[10] *Taylor, 985 P.2d at 463* (quotation marks omitted).

[11] *Feichtinger v. Conant, 893 P.2d 1266, 1268 (Alaska 1995)*.

[8] B. The Superior Court Properly Entered Judgment in Favor of Alaska Airlines on Hallam's Claim Relating to "Unrestricted Tickets."**

Hallam claims that he purchased a ticket labeled "unrestricted" or "U," which Alaska Airlines held out as requiring no fee to change the dates of travel. The airline, he alleges, breached a contract with him when it refused to change the dates without a fee. [12] The superior court found for the airline because Hallam "had not been denied unrestricted travel to date and, in fact, has changed the tickets without charge." He therefore could not show any breach.

Alaska Airlines argues that Hallam has not shown that the "U" designation actually means that the ticket may be changed without a fee, a claim Hallam goes to great lengths to dispute. The superior court's finding on breach, however, is dispositive -- if Hallam cannot show a breach **[**9]** of the terms as he describes them, his claim must fail. And the court's finding that there was no breach of those terms is fully supported by the evidence. The record contains a Post Departure Information report (PDI), showing all of the activity concerning the ticket in question. The PDI shows that the change fee to which Hallam objects was waived at least once. Although Hallam testified at trial that his attempts to change the ticket or get a refund were met by demands that he pay a fee, the superior court found that his testimony was not credible. ***HN9***[] Because "it is the function of the trial court, not of this court, to judge witnesses' credibility," [13] **[**10]** this court must give "due regard" [14] to the superior court's credibility judgments. Hallam offers no documentation of any failed attempts to change the ticket without a fee, nor any other reason to believe that any contract term was breached. [15] The superior court's finding that there was no breach of contract was not clearly erroneous and we affirm its judgment in favor of Alaska Airlines on this claim.

[*284] C. The Superior Court Properly Entered Judgment in Favor of Alaska Airlines on Hallam's Claim Relating to His Ticket to Puerto Vallarta.

Hallam claims that he was charged more than once for a single ticket to Puerto Vallarta that he purchased in August 1998. The cause of the double charge remains unexplained, but that is immaterial. The superior court found that "Hallam suffered no damages as a result" of the incident. The court therefore concluded that "no award of damages for this claim is appropriate." These findings are well supported by the evidence.

Hallam's credit card was billed $ 160.25 for the ticket on September 22. It was charged again, for $ 190.32, on February 20. The PDI for the ticket indicates that these charges are for the same ticket, as the ticket numbers associated with the two transactions on the credit card statements both appear on the PDI. On October 5, 1998, Hallam wrote to the credit card company **[**11]** to dispute the $ 190 charge. His credit card was credited for that amount on October 20. [16] An August 1999 letter from the credit card company says that Alaska Airlines asked to reinstate the $ 190 charge. The letter gives Hallam an opportunity to continue disputing the charge, but there is no evidence of how he responded. By Hallam's own admission, there is similarly no evidence showing that the charge ever actually reappeared on a bill. At trial, Hallam was unable to say whether the charge ever reappeared on his credit card bill and if so, whether he paid it or continued to contest it. He therefore did not prove that the contract was ever breached. We affirm the superior court's dismissal of this claim.

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[12] Hallam pled several of his claims as both contract and conversion claims, but only discusses them before this court in contract terms.

[13] *Parker v. Northern Mixing Co., 756 P.2d 881, 892 (Alaska 1988)*.

[14] *Barios v. Brooks Range Supply, Inc., 26 P.3d 1082, 1085 (Alaska 2001)*.

[15] Nor is there any indication that any breach is forthcoming.

[16] The evidence of this credit is what appears to be a letter from the credit card company or an intermediary to Alaska Airlines. There is no credit card bill showing the credit, but Hallam does not on appeal dispute that the amount was credited.

D. The Superior Court Properly Entered Judgment in Favor [12] of Alaska Airlines on Hallam's Claim Relating to His Attempt To Use a PFD Ticket in Seattle.**

Hallam claims that Alaska Airlines breached another contract with him in March 1999 when it refused to honor a ticket from Seattle to San Francisco that he purchased with a Permanent Fund Dividend voucher. The airline acknowledges that it prevented Hallam from boarding the flight, but defends its action by claiming that the ticket had been purchased with a 1998 voucher and was good only for travel through December 15, 1998. The superior court found that the ticket had expired, and that there was therefore no breach of contract.

Hallam makes much of the fact that an Alaska Airlines employee said in an affidavit that he attempted to board the flight on March 9 while strong evidence argues that it happened on March 8. The exact date of the incident is immaterial. If the ticket's expiration date was December 15, 1998, there was no breach. The superior court's finding that the ticket had expired is well supported by the evidence.

Hallam points to a notation on the PDI for the disputed ticket, which states that it is good for travel through December 15, 1999. The airline explains this through **[**13]** the testimony of employee Jeanne Hightower, who described how that notation would have been generated. She explained that it was placed in the ticket's record because he made a change to the ticket in 1999, and the "reservation agent has no idea what tickets he was actually using." Once he got to the airport, the ticket agent would have tried to confirm that it was a current ticket, and found that it had expired.

Faced with the conflicting testimony, the trial court disbelieved Hallam's assertion that he thought the ticket was still good in March 1999. The court held that he "failed to prove that it was more likely than not that he purchased a valid ticket for the travel on the date in question." ***HN10***[] "In a bench trial, the judge is the trier of fact, determining the credibility of witnesses and deciding how to **[*285]** weigh the evidence presented." [17] Hallam gives us no reason to overturn the trial court's weighing of the evidence. We therefore affirm the superior court's judgment for Alaska Airlines on this claim.

[14] E. The Superior Court Properly Entered Judgment in Favor of Alaska Airlines on the "Bumping" Claim.**

Hallam claimed below that a contract was breached when the airline refused on November 29, 1997 to seat him in first class, despite his reservation. He does not challenge any of the findings underlying the superior court's conclusion that he "failed to prove it is more likely than not he was ever promised a First Class seat on the flight he alleges." These findings are primarily credibility determinations **--** the court found that he "was not credible in his claim of being denied First Class passage on the flight of his choosing. Rather, it is more likely that Hallam voluntarily changed his travel plans . . . ." We find no clear error in this determination and affirm the superior court's judgment in favor of Alaska Airlines on this claim.

F. The Superior Court Properly Entered Judgment in Favor of Alaska Airlines on Hallam's Claim Relating to the Purported Overcharge for Tickets He Bought from the Airline's Website.

Hallam claims that he was overcharged for tickets he purchased through the Alaska Airlines website in June 1997. He claims that the website advertised **[**15]** a total ticket price of $ 180 but his credit card was charged $ 697 for it. Alaska Airlines refunded all but nine dollars of the difference. He has sued for the nine dollars.

The superior court held that Hallam had not proved that the charge on his credit card was a breach because he "failed to prove he was promised a fare at the [lower] rate he asserts." The court based this conclusion on several factual findings, most of which Hallam challenges. Most importantly, the court did not believe Hallam's testimony.

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[17] *Wasserman v. Bartholomew, 38 P.3d 1162, 1166-67 (Alaska 2002)*.

"Hallam," the court found, "was not particularly credible in his claim that he actually reserved or purchased a ticket for the price he claimed." The superior court also relied in part on the testimony of an Alaska Airlines customer service employee who testified that her internal investigation found no evidence "confirming that . . . he reserved at [the lower] fare or that Alaska Airlines even offered this fare." The employee also testified that Hallam's was the only complaint of this sort that she heard. Finally, the court noted that while federal law requires the publication of airline prices, the official publication had no record of the price Hallam claimed.

In evaluating **[**16]** Hallam's testimony, the court relied on his failure "to present documentation of any ticket(s) or ticket confirmation of any travel reserved or purchased at the alleged fare." The court found that the documentation Hallam did produce was "a letter that he drafted that purported to duplicate a web fare advertisement for travel at the lower rate." Hallam asserts that the document in the record is in fact a printout of the web page itself; Alaska Airlines makes no claim as to whether the document is authentic or not. The authenticity of the document, however, is immaterial. Even if it is authentic, it does not establish Hallam's claim. The document states: "To proceed in holding a reservation or purchasing Instant Travel, click 'Continue.' " This shows only that Hallam saw the lower price. It does not establish decisively that he purchased a ticket at the lower price.

Hallam points out that the customer service employee was at the top of a long chain and that all complaints would not necessarily be communicated to her. The employee did, however, testify that she "would be surprised if [she] didn't hear about" a problem like his. The superior court was entitled to credit the witness. **[**17]** [18]

Hallam attacks the superior court's reliance on the fact that the official publication for airline fares had no record of the fare Hallam claimed to have purchased. He compares **[*286]** the prices offered on the website on a given day with those published in the official publication for airline fares on the same day and shows that the official publication does not always match the website fares. This casts some doubt on the weight the superior court should have given this evidence, but is insufficient to undermine the superior court's conclusion that Hallam did not purchase this fare.

Finally, Hallam points to the PDI for this ticket, which appears to say that he received a refund due to an incorrect Internet fare. This may suggest that someone at the airline at one time thought that Hallam had been overcharged. The superior court apparently found that other evidence outweighed it, and decided that Hallam had not shown that he bought the ticket at the lower fare. ***HN11***[] "We ordinarily will not disturb findings **[**18]** of fact made upon conflicting evidence." [19] In view of all the evidence and the superior court's findings, we are not left "with a definite and firm conviction on the entire record that a mistake has been made." [20] The superior court's findings are not clearly erroneous and we therefore affirm its judgment in favor of Alaska Airlines on this claim.

G. The Superior Court Properly Denied Hallam's Motion for Further Time Under *Rule 56(f)*.

After Alaska Airlines filed its motion for summary judgment, Hallam moved to "reopen" discovery. The court denied his motion. Hallam now appeals that denial. He treats the superior court's action as the denial of a motion under *Alaska Rule of Civil Procedure 56(f)*, claiming that he had the right to conduct discovery to oppose summary judgment. ***HN12***[] The rule "allows a party opposing summary judgment to seek additional **[**19]** time to gather and submit evidence to justify the party's opposition." [21] Specifically, ***HN13***[] when the party opposing summary judgment demonstrates to the court's satisfaction that the party "cannot for reasons stated present by affidavit facts essential to justify the party's opposition," the court may choose one of two remedies -- it may decline to grant summary judgment or it may grant a continuance. Although the superior court denied Hallam's *Rule 56(f)* motion, it

[18] *See id.*

[19] *In re Friedman, 23 P.3d 620, 625 (Alaska 2001)*.

[20] *City of Hydaburg, 858 P.2d at 1135* (quotation marks omitted).

[21] *Gamble v. Northstore Partnership, 907 P.2d 477, 484-85 (Alaska 1995)*.

did not enter summary judgment against him on any of the ticketing claims for which he claims he needed further discovery. He therefore was not harmed by the denial of his *Rule 56(f)* motion.

Hallam further claims that discovery should have been reopened because Alaska Airlines failed to produce documents that they were required to produce in the initial discovery period. [22] ***HN14***[] Deciding whether or not to reopen discovery is within the trial court's discretion, and **[**20]** is subject to harmless error review. [23] Hallam only identifies two of the "missing documents," neither of which makes a case for reopening discovery.

The first concerns the Puerto Vallarta ticket. In its summary judgment motion, the airline suggested that one of the charges was for a ticket issued to Hallam himself; at a deposition, an Alaska Airlines attorney suggested the extra charge was for a ticket issued to one Anna Salyer. Hallam wants the airline to produce documentation for these theories. As described above, however, the question of how the **[**21]** extra charges came to be on Hallam's credit card is immaterial because Hallam never proved he paid them. Any error associated with this failure is harmless. [24]

[*287] The other example of missing documents Hallam provides is the documentation surrounding the expired PFD ticket: if the airline claims he exchanged a 1998 voucher for the original ticket, he argues, it should have produced the voucher. Hallam knew that the voucher would be subject to proof long before Alaska Airlines filed its summary judgment motion. The voucher was, in fact, part of his theory of the case. He could have specifically requested the documentation or made a motion to compel during discovery. The superior court was entirely justified in determining that Hallam's requests following the summary judgment motion "involved discovery that could have (and should have) been made long ago." The court's refusal to reopen discovery at that time was not an **[**22]** abuse of discretion.

H. The Superior Court Properly Dismissed Hallam's Individual Claims Brought Under the Alaska Unfair Trade Practices Act and Alaska *Antitrust Law* and Properly Denied Hallam Leave To Amend His Complaint To Include Them.

Hallam's complaint includes both individual and class claims based on alleged violations of state ***antitrust law*** and the Unfair Trade Practices Act. The superior court dismissed these claims on the ground that Hallam, as a pro se litigant, could not represent the class; it held that the question whether the unfair trade practices claims are preempted by federal law was mooted by its class-representation decision. Hallam moved for reconsideration in order to reinstate the individual aspect of these claims. The court denied his motion without explanation. The court then noted that "neither Mr. Hallam's motion to amend nor the proposed amended complaint make clear how the actions [Hallam alleged] violate the cited [statutory] provisions." This order gave Hallam five days to submit a statement explaining how the conduct alleged in his contract and conversion claims violated the cited statutes. His response, although it contains some **[**23]** language suggesting he may have abandoned his motion to amend, detailed the actions he alleged violated the statutes. The superior court denied the motion for leave to amend "for the reasons set forth in [its initial ruling], the opposition memorandum by Alaska Airlines and the summary judgment order entered on this date as it relates to preemption of state statutory consumer protection claims related to airline services." Hallam appeals both the dismissal of the individual claims and the superior court's denial of leave to amend the complaint to add them.

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[22] Hallam also raises the airline's failure to produce certain documents as a distinct point on appeal. He did not, however, make any motion before the superior court to compel production of these "missing" documents. Without a motion to compel, there is no decision for this court to review. We therefore consider this argument only in the context of his motion to reopen discovery.

[23] *Taylor v. Johnston, 985 P.2d 460, 466 (Alaska 1999)*.

[24] *See Walden v. Dep't of Transp., State, 27 P.3d 297, 307-08 (Alaska 2001)*.

"Even when the court concludes that no portion of the action is maintainable as a class action, the individual plaintiff[] may continue it on an individual basis . . . ." [25] Hallam claims that he should have been allowed to amend his complaint to reinstate the individual claims after they were dismissed along with the class claims. The superior court correctly denied his motion for leave to amend because amendment would be futile as the claims were clearly preempted by the federal Airline Deregulation Act. [26] ***HN15***[] "If the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face, **[**24]** the court may deny leave to amend." [27]

The federal statute's preemption provision provides that ***HN16***[] "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." [28] ***HN17***[] The provision is "broadly preemptive," [29] **[**26]** reaching any state **[**25]** laws or **[*288]** enforcement actions "having a connection with or reference to airline rates, routes, or services." [30] In *American Airlines v. Wolens*, the United States Supreme Court held that the Airline Deregulation Act preempted a claim under the Illinois analog to the Unfair Trade Practices Act challenging an airline's changes to its frequent-flier program. [31] *Wolens* requires an analysis of the particular claims in question. Here, Hallam's claims plainly relate to a price, route, or service of an air carrier. He challenges the airline's policy of classifying tickets as refundable or non-refundable; he challenges the airline's policy of overbooking flights; and he challenges the terms included in all tickets, relating to timetables, routes, departure and arrival times, and fares. His Unfair Trade Practices Act claims are preempted and the superior court properly denied him leave to add them.

Hallam's antitrust claims are similarly preempted. He argues under *AS 45.50.562* and *AS 45.50.564* that Alaska Airlines "has attempted to contract, conspire, and combine" with other airlines "to monopolize air travel in this region" and "restrain[] free trade." He does not describe how this restraint of trade and monopoly manifest themselves, despite the superior court's order requiring him to state the facts underlaying the claims. It is hard to imagine that they do not relate to airline rates, routes, or services. We assume that these claims resemble those in the rest of his complaint, all of which involve the airline's ticketing, ticket pricing, or boarding procedures and would be preempted if made the subject of an antitrust charge. Hallam waived his opportunity to convince the superior court otherwise when he failed to take the opportunity for clarification offered to him by the court. The superior court properly held his antitrust **[**27]** claims were preempted and refused to grant him leave to amend his complaint.

I. The Superior Court Properly Refused Recusal.

Hallam asserts that Judge Collins should have recused herself because "the evidence on record is overwhelming in showing a bias" on her part. He also refers, without documentation, to "statements" Judge Collins made "at the

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[25] 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1785, at 117; *see also* *Mead v. Parker, 464 F.2d 1108, 1112 (9th Cir. 1972)* ("Nothing in *Rule 23, F.R.Civ.P.* contemplates that an action shall be dismissed if the court determines that it cannot be maintained as a class action. In all actions, whether determined to be class actions or not, there are individuals who bring the action asserting claims for relief in their own behalf.").

[26] *49 U.S.C. § 41713*.

[27] *Taylor, 985 P.2d at 464* (quoting 6 WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1487 (2d ed.1990)).

[28] *49 U.S.C. § 41713(b)(1)*.

[29] *American Airlines, Inc. v. Wolens, 513 U.S. 219, 225, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995)*; *see also* *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992)* ***HN18***[] (analogizing Airline Deregulation Act preemption to "broad scope" and "expansive sweep" of preemption under ERISA, *29 U.S.C. § 1144(a)*).

[30] *Morales, 504 U.S. at 384* (citation omitted).

[31] *513 U.S. at 226-28*.

pretrial conference regarding her failure to administratively transfer this case when she dismissed the class claims, as a result of the dollar value involved." He finally refers to an incident involving another, unrelated case before Judge Collins, *Hallam v. Alaska Travel Adventures*, in which, he alleges, "Judge Collins went out of her way to interfere with production of the electronic record in that case."

HN19[] "Recusal was never intended to enable a discontented litigant to oust a judge because of adverse rulings made." [32] Judge Collins gave Hallam many chances to clarify motions and prove his case. The fact that he did not prove it does not show bias on her part. His claim is "little more than an expression of [his] dissatisfaction with the superior court's rulings." [33] There was no abuse of discretion in Judge Collins's decision **[**28]** to remain on the case.

J. The Superior Court Did Not Abuse Its Discretion in Awarding Fees and Costs to Alaska Airlines.

Hallam makes a cursory argument that Alaska Airlines should not have been awarded fees and costs because "they failed to respond honestly to requests for admissions." He identifies no specific failures or dishonesty. Even giving this argument the liberal reading due pro se plaintiffs, we find no abuse of discretion.

[*289] IV. CONCLUSION

For the foregoing reasons, the judgment of the superior court is AFFIRMED in its entirety.

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[32] *Wasserman v. Bartholomew, 38 P.3d 1162, 1171 (Alaska 2002)* (citation omitted).

[33] *Lacher v. Lacher, 993 P.2d 413, 421 (Alaska 1999)*.

Clarett v. NFL

United States Court of Appeals for the Second Circuit

April 19, 2004, Argued ; May 24, 2004, Decided

Docket No. 04-0943

Reporter

369 F.3d 124 *; 2004 U.S. App. LEXIS 10171 **; 174 L.R.R.M. 3185; 149 Lab. Cas. (CCH) P10,345; 2004-1 Trade Cas. (CCH) P74,422

MAURICE CLARETT, Plaintiff-Appellee, v. NATIONAL FOOTBALL LEAGUE, Defendant-Appellant.

Subsequent History: US Supreme Court certiorari denied by *Clarett v. NFL, 544 U.S. 961, 125 S. Ct. 1728, 161 L. Ed. 2d 602, 2005 U.S. LEXIS 2979 (2005)*

Related proceeding at *National Football League v. Vigilant Ins. Co., 2006 N.Y. App. Div. LEXIS 13446 (N.Y. App. Div. 1st Dep't, Nov. 14, 2006)*

Prior History: **[**1]** Defendant-appellant National Football League ("NFL") appeals from a judgment of the United States District Court of the Southern District of New York (Scheindlin, J.) granting summary judgment in favor of plaintiff-appellee Maurice Clarett on his claim that the NFL's eligibility rules, which prevent him from entering the NFL draft because he is not more than three football seasons removed from high school, violate the antitrust laws. We hold that the challenged rules are shielded from the antitrust laws by the non-statutory labor exemption and on that basis REVERSE and REMAND for the district court to enter judgment in favor of defendant. As the NFL is entitled to summary judgment, we further VACATE the district court's order declaring Clarett eligible to participate in the 2004 NFL draft that was stayed pending appeal.

Clarett v. NFL, 306 F. Supp. 2d 379, 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y., 2004)

Disposition: Reversed in part, vacated in part and remanded.

Core Terms

players, exemption, eligibility rules, bargaining, non-statutory, collective bargaining agreement, collective bargaining, anti trust law, antitrust, negotiations, league, mandatory, district court, bargaining unit, eligibility, teams, multi-employer, federal labor, labor law, terms and conditions, employees, season, policies, salary, professional sports, high school, hired, antitrust liability, collective bargaining process, football season

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

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

HN1[] Standards of Review, De Novo Review

The district court's denial of a motion for summary judgment is reviewed de novo, and all factual inferences are drawn in favor of the nonmovant.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN2[] Collectives & Cooperatives, Clayton Act

Although the interaction of the antitrust laws and federal labor legislation is an area of law marked more by controversy than by clarity, it has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws. Courts, therefore, have carved out two categories of labor exemptions to the antitrust laws: the so-called statutory and non-statutory exemptions. The non-statutory exemption has been inferred from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board (NLRB). The exemption exists not only to prevent the courts from usurping the NLRB's function of determining, in the area of industrial conflict, what is or is not a reasonable practice, but also to allow meaningful collective bargaining to take place by protecting some restraints on competition imposed through the bargaining process from antitrust scrutiny.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Mining Industry > Coal Mining > General Overview

HN3[] Antitrust & Trade Law, Exemptions & Immunities

While a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers without incurring antitrust liability, a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN4[] Labor, Nonstatutory Exemptions

The United States Court of Appeals for the Second Circuit has never regarded the United States Court of Appeals for the Eighth Circuit's test in Mackey as defining the appropriate limits of the non-statutory exemption. Moreover, the Second Circuit disagrees with the Eighth Circuit's assumption in Mackey that the United States Supreme Court's decisions in Connell, Jewel Tea, Pennington, and Allen Bradley dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship. Indeed, the Second Circuit has previously recognized that these decisions are of limited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process, because all involved injuries to employers who asserted that they were being excluded from competition in the product market.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

HN5[] Regulated Industries, Sports

The nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN6[] Exemptions & Immunities, Labor

The non-statutory exemption applies where restraint alleged is not a direct restraint on the business market but rather a direct restraint on the labor market, with only tangential effects on the business market.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN7[] Scope, Exemptions

The term nonstatutory exemption is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN8[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

Because the National Football League (NFL) players have unionized and have selected the NFL Players Association as its exclusive bargaining representative, labor law prohibits an individual player from negotiating directly the terms and conditions of his employment with any NFL club, and an NFL club would commit an unfair labor practice were it to bargain with the player individually without the union's consent. The terms and conditions of the player's employment are instead committed to the collective bargaining table and are reserved to the NFL and the players union's selected representative to negotiate.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN9[] **Regulated Industries, Sports**

To be sure, in sports leagues, unionized players generally engage in individual bargaining with teams. However, it must be emphasized that such individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

HN10[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

The National Football League (NFL) players' union's representative possesses powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. In seeking the best deal for NFL players overall, the representative has the ability to advantage certain categories of players over others, subject of course to the representative's duty of fair representation. The union representative may, for example, favor veteran players over rookies, and can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders. This authority and exclusive responsibility is vested in the players' representative once a mandatory collective bargaining relationship is established and continues throughout the relationship. For the duration of that relationship, federal labor law then establishes a soup-to-nuts array of rules, tribunals and remedies to govern the collective bargaining process.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Governments > Courts > Judicial Precedent

HN11[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

Though tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject. But moreover, the eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current National Football League players. Because the unusual economic imperatives of professional sports raise numerous problems with little or no precedent in standard industrial relations, the United States Court of Appeals for the Second Circuit has recognized that many of the arrangements in professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

HN12[] **Regulated Industries, Sports**

The preservation of jobs is within the area of proper union concern, and union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Governments > Legislation > Effect & Operation > General Overview

HN13[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

But simply because the National Football League's eligibility rules work a hardship on prospective rather than current employees does not render them impermissible. The eligibility rules in this respect are not dissimilar to union demands for hiring hall arrangements that have long been recognized as mandatory subjects of bargaining. In such hiring hall arrangements, the criteria for employment are set by the rules of the hiring hall rather than the employer alone. Nevertheless, such an arrangement constitutes a permissible, mandatory subject of bargaining despite the fact that it concerns prospective rather than current employees.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN14[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

In the context of this collective bargaining relationship, the National Football League and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices, *29 U.S.C.S. § 201 et seq.*, or discrimination, *42 U.S.C.S. § 2000e et seq.* Any challenge to those criteria must be founded on labor rather than ***antitrust law***.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN15[] **Regulated Industries, Sports**

In the context of collective bargaining, federal labor policy permits the National Football League (NFL) teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment. Such concerted action is encouraged as a matter of labor policy and tolerated as a matter of ***antitrust law***, despite the fact that it plainly involves horizontal competitors for labor acting in concert to set and to implement terms of employment. Multi-employer bargaining in professional sports, moreover, offers the added advantage of allowing the teams to agree with one another and, as required, bargain with the union over the host of uniform rules needed for the successful operation of the league, such as the number of games, length of season, playoff structures, and roster size and composition. The fact that the challenged rules govern eligibility for the NFL draft, thereby excluding some potential employees from consideration, does not render the NFL's adherence to its eligibility rules as a multi-employer bargaining unit suspect.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN16[] **Regulated Practices, Monopolies & Monopolization**

The primary objective of all the antitrust legislation has been to preserve business competition and to proscribe business monopoly.

Counsel: GREGG H. LEVY, Covington & Burling (Joshua D. Wolson, James M. Garland, and Benjamin C. Block, on the brief), Washington, DC, for Defendant-Appellant.

ALAN C. MILSTEIN, Sherman, Silverstein, Kohl, Rose & Podolsky (Jeffrey P. Resnick; John B. Langel, Burt M. Rublin, and Amy L. Weiss, Ballard Spahr Andrews **[**2]** & Ingersoll, LLP; Robert A. Skirnick and Daniel B. Allanoff, Meredith Cohen Greenfogel & Skirnick; Robert A. McCormick, Michigan State University, on the brief), Pennsauken, NJ, for Plaintiff-Appellee.

G. MICHAEL PHARIS, Taylor, Porter, Brooks & Phillips L.L.P. (Fredrick R. Tully and Robert W. Barton, on the brief), Baton Rouge, LA, for Amicus Curiae American Football Coaches Association.

JEFFREY A. MISHKIN, Skadden, Arps, Slate, Meagher & Flom LLP (Peter S. Julian and Darren C. Broughton; Richard W. Buchanan, National Basketball Association; William L. Daly and Julie Spar, National Hockey League, on the brief), New York, NY, for Amici Curiae National Basketball Association, the Women's National Basketball Association, and the National Hockey League.

GREGORY L. CURTNER, Miller, Canfield, Paddock & Stone, PLC (David R. Grand, on the brief), New York, NY, for Amicus Curiae National Collegiate Athletic Association.

JAMES W. QUINN, Weil, Gotshal & Manges LLP (Bruce S. Meyer; Richard A. Berthelsen, National Football League Players Association; Jeffrey L. Kessler, Joseph Angland, and David G. Feher, Dewey Ballantine LLP, on the brief), New York, NY, for Amicus Curiae **[**3]** National Football League Players Association.

PERRY H. APELBAUM, United States House of Representatives, Rep. John L. Conyers, Ranking Member, Committee on the Judiciary (Kanya A. Bennett, Stacey Dansky, and Michelle A. Persaud, on the brief), Washington, DC, for Amicus Curiae John Conyers, Jr., Member of Congress.

Judges: Before: SACK, SOTOMAYOR, Circuit Judges, and KAPLAN, District Judge. *

Opinion by: SOTOMAYOR

Opinion

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* The Honorable Lewis A. Kaplan, Judge of the United States District Court for the Southern District of New York, sitting by designation.

[*125] SOTOMAYOR, *Circuit Judge*:

Defendant-appellant National Football League ("NFL" or "the League") appeals from a judgment of the United States District Court for the Southern District of New York (Scheindlin, J.) ordering plaintiff-appellee Maurice Clarett ("Clarett") eligible to enter this year's NFL draft on the ground that the NFL's eligibility rules requiring Clarett to wait at least three full football seasons after his high school graduation before entering the draft violate antitrust laws. In reaching its conclusion, the district court held, *inter alia*, that the eligibility rules are not immune from **[**4]** antitrust scrutiny under the non-statutory labor exemption. [1] We disagree and reverse.

BACKGROUND

Clarett, former running back for Ohio State University ("OSU") and Big Ten **[*126]** Freshman of the Year, is an accomplished and talented amateur football player. [2] After gaining national attention as a high school player, Clarett became the first college freshman since 1943 to open as a starter at the position of running back for OSU. He led that team through an undefeated season, even scoring the winning touchdown in a double-overtime victory in the 2003 Fiesta Bowl to claim the national championship. [3] Prior to the start of his second college **[**5]** season, however, Clarett was suspended from college play by OSU for reasons widely reported but not relevant here. [4] Forced to sit out his entire sophomore season, Clarett is now interested in turning professional by entering the NFL draft. Clarett is precluded from so doing, however, under the NFL's current rules governing draft eligibility.

Founded in 1920, the NFL today is comprised of 32 member clubs and is by far the most successful professional football league in North America. [5] Because of the League's fiscal success and tremendous public following, a career as an NFL player "represents an unparalleled **[**6]** opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition." *Clarett, 306 F. Supp. 2d at 384*. But since 1925, when Harold "Red" Grange provoked controversy by leaving college to join the Chicago Bears, [6] the NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft. For much of the League's history, therefore, a player, irrespective of whether he actually attended college or not, was barred from entering the draft until he was at least four football seasons removed from high school. The eligibility rules were relaxed in 1990, however, to permit a player to enter the draft three full seasons after that player's high school graduation.

[7]** Clarett "graduated high school on December 11, 2001, two-thirds of the way through the 2001 NFL season" and is a season shy of the three necessary to qualify under the draft's eligibility rules. Clarett Decl. at P 6. Unwilling to forego the prospect of a year of lucrative professional play or run the risk of a career-compromising injury were his entry into the draft delayed until next year, Clarett filed this suit alleging that the NFL's draft eligibility rules are an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*, and Section 4 of the Clayton Act, *15 U.S.C. § 15*.

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[1] Because we find that the eligibility rules are immune from antitrust scrutiny under the non-statutory labor exemption, we do not express an opinion on the district court's legal conclusions that Clarett alleged a sufficient antitrust injury to state a claim or that the eligibility rules constitute an unreasonable restraint of trade in violation of the antitrust laws.

[2] These facts, except where otherwise noted, are undisputed and taken from the opinion of the district court. *See* *Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004)*.

[3] *See* Joe Drape, *Extra! Extra! It's Ohio State*, N.Y. Times, January 4, 2003, at D1.

[4] *See* Mike Freeman, *Buckeyes Suspend Clarett For Year*, N.Y. Times, Sept. 11, 2003, at D1.

[5] *See generally*, *United States Football League v. Nat'l Football League, 842 F.2d 1335, 1343-45 (2d Cir. 1988)* (recounting history of professional football leagues in the United States).

[6] *See* Gerald Eskenazi, *Red Grange, Football Hero of 1920's, Dead at 87*, N.Y. Times, Jan. 29, 1991, at B5.

Because the major source of the parties' factual disputes is the relationship between the challenged eligibility rules and the current collective bargaining agreement governing the terms and conditions of employment for NFL players, some elaboration on both the collective bargaining agreement and the eligibility rules is warranted. The current collective bargaining agreement **[*127]** between the NFL and its players union was negotiated between the NFL Management Council ("NFLMC"), which is the NFL member clubs' multi-employer bargaining unit, **[**8]** and the NFL Players Association ("NFLPA"), the NFL players' exclusive bargaining representative. This agreement became effective in 1993 and governs through 2007. Despite the collective bargaining agreement's comprehensiveness with respect to, *inter alia*, the manner in which the NFL clubs select rookies through the draft and the scheme by which rookie compensation is determined, the eligibility rules for the draft do not appear in the agreement.

At the time the collective bargaining agreement became effective, the eligibility rules appeared in the NFL Constitution and Bylaws, which had last been amended in 1992. [7] Specifically, Article XII of the Bylaws ("Article XII"), entitled "Eligibility of Players," prohibited member clubs from selecting any college football player through the draft process who had not first exhausted all college football eligibility, graduated from college, or been out of high school for five football seasons. Clubs were further barred from drafting any person who either did not attend college, or attended college but did not play football, unless that person had been out of high school for four football seasons. Article XII, however, also included an **[**9]** exception that permitted clubs to draft players who had received "Special Eligibility" from the NFL Commissioner. In order to qualify for such special eligibility, a player was required to submit an application before January 6 of the year that he wished to enter the draft and "at least three NFL seasons must have elapsed since the player was graduated from high school." The Commissioner's practice apparently was, and still is, to grant such an application so long as three full football seasons have passed since a player's high school graduation. [8] Appellant's Brief, at 7 n.3.

[10]** Although the eligibility rules do not appear in the text of the collective bargaining agreement, the NFL Constitution and Bylaws that at the time of the agreement's adoption contained the eligibility rules are mentioned in three separate provisions relevant to our discussion. First, in Article III, Section 1 (Scope of Agreement), the collective bargaining agreement states:

> This Agreement represents the complete understanding of the parties as to all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent . . . . The NFLPA and the Management Council waive any rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, *including the provisions of the NFL Constitution and Bylaws*; provided, however, that if any proposed change in the NFL Constitution and Bylaws during the term of this Agreement could significantly affect the terms and conditions of employment of NFL players, then the [NFLMC] will give the NFLPA notice of and negotiate the proposed change in good faith.

[*128] (emphasis added). Second, Article IV, Section 2 (No **[**11]** Suit) provides generally that "neither [the NFLPA] nor any of its members" will sue or support a suit "relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered." Third, Article IX, Section 1 (Non-Injury Grievance) makes "any dispute . . . involving the interpretation of, application of, or compliance with, . . . any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players" subject to the grievance procedures afforded under the collective bargaining agreement.

Before the collective bargaining agreement became effective, a copy of the Constitution and Bylaws, as amended in 1992, was provided by the NFL to the NFLPA along with a letter, dated May 6, 1993, that "confirm[ed] that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in

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[7] After the Constitution and Bylaws were amended in 1992, a revised copy was sent by the NFL Commissioner to all club owners, presidents and general managers. A memorandum from the Commissioner that accompanied the revised Constitution and Bylaws noted that changes had been made to the eligibility rules.

[8] At oral argument, counsel for Clarett clarified that his challenge is not limited to the "Special Eligibility" rule, as his papers on appeal might suggest, but extends to any and all of the eligibility rules that would keep Clarett from entering the NFL draft this year. We refer to these rules collectively as "the eligibility rules."

Article IV, Section 2, of the Collective Bargaining Agreement." The May 6 letter was signed by representatives of the NFL and the NFLPA. The only other evidence presented to the district court by the NFL concerning the negotiation of the collective bargaining **[**12]** agreement were the two declarations of Peter Ruocco, Senior Vice President of Labor Relations at the NFLMC. In the second declaration, Ruocco attests that "during the course of collective bargaining that led to the [collective bargaining agreement], the [challenged] eligibility rule itself was the subject of collective bargaining." Ruocco Decl. at P 8.

In 2003, ten years into the life of the collective bargaining agreement, Article XII was amended. Although the substance of most of the eligibility rules was retained, the "Special Eligibility" provision was removed and substituted with the following [9]:

> If four seasons have not elapsed since the player discontinued high school, he is ineligible for selection, but may apply to the Commissioner for special eligibility.

The Bylaws then refer to a separate memorandum issued by the Commissioner on February 16, 1990 - three years before the current collective bargaining agreement became effective - pursuant to his authority under the Bylaws to establish necessary policies and procedures. That memorandum states that "applications for special eligibility for the 1990 draft will be accepted only from college players **[**13]** as to whom three full *college* seasons have elapsed since their high school graduation." (emphasis added). [10] It is this version of the eligibility rules that the NFL relies upon in refusing Clarett special eligibility for this year's draft, and it is this version of **[*129]** the eligibility rules that Clarett seeks to invalidate.

[14]** After Clarett filed this suit in September 2003, the parties conducted limited discovery and thereafter moved for summary judgment. Clarett sought summary judgment on the merits of his antitrust claim. The NFL asserted that Clarett lacked "antitrust standing" and that, as a matter of law, the eligibility rules were immune from antitrust attack by virtue of the non-statutory labor exemption. On February 5, 2004, the district court granted summary judgment in favor of Clarett and ordered him eligible to enter this year's draft. *Clarett, 306 F. Supp. 2d at 410-11*. First, relying on the test articulated by the Eighth Circuit in *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*, the district court rejected the NFL's argument that the antitrust laws are inapplicable to the eligibility rules because they fall within the non-statutory labor exemption to the antitrust laws. *Clarett, 306 F. Supp. 2d at 397*. Specifically, the district court held that the exemption does not apply because the eligibility rules: 1) are not mandatory subjects of collective bargaining, 2) affect only "complete strangers to the bargaining relationship, **[**15]** " and 3) were not shown to be the product of arm's-length negotiations between the NFL and its players union. *Id. at 393-97*.

Second, the district court ruled against the NFL on its contention that Clarett lacked standing because he had not demonstrated a sufficient "antitrust injury" to maintain this suit, holding that the "inability to compete in the market" for NFL players' services is sufficient injury for antitrust purposes. *Id. at 403*.

Third, on the merits of Clarett's antitrust claim, the district court found that the eligibility rules were so "blatantly anticompetitive" that only a "quick look" at the NFL's procompetitive justifications was necessary to reach the conclusion that the eligibility rules were unlawful under the antitrust laws. *Id. at 408*. The NFL had argued that because the eligibility rules prevent less physically and emotionally mature players from entering the league, they justify any incidental anticompetitive effect on the market for NFL players. *Id.* In so doing, according to the NFL, the eligibility rules guard against less-prepared and younger players entering the League and risking injury to

[9] Although Article III, Section 1 of the collective bargaining agreement obligates the NFL to notify the players union of, and to bargain over, any change to the Bylaws that "could significantly affect the terms and conditions" of players' employment, the record is silent as to whether the NFL or the players union considered the changes to Article XII significant, whether the NFL notified the players union of these changes, or whether the changes were bargained over.

[10] Whereas the pre-2003 version of the Constitution and Bylaws authorized special eligibility for players after the passing of "three NFL seasons," the current eligibility rules as established by the Bylaws and the Commissioner's memorandum require that "three full college seasons" have elapsed. Clarett is neither three NFL seasons nor three college seasons out of high school. Because the difference is immaterial for our purposes, we use the less specific "three football seasons" when referring to the amount of time after graduating high school a player must wait before entering the draft.

themselves, **[**16]** prevent the sport from being devalued by the higher number of injuries to those young players, protect its member clubs from having to bear the costs of such injuries, and discourage aspiring amateur football players from enhancing their physical condition through unhealthy methods. *Id. at 408-09*. The district court held that all of these justifications were inadequate as a matter of law, concluding that the NFL's purported concerns could be addressed through less restrictive but equally effective means. *Id. at 410*. Finding that the eligibility rules violated the antitrust laws, the district court entered judgment in favor of Clarett, and, recognizing that this year's draft was then just over two months away, issued an order deeming Clarett eligible to participate in the draft.

The NFL subsequently moved for a stay pending appeal, which the district court denied. *Clarett v. Nat'l Football League, 306 F. Supp. 2d 411 (S.D.N.Y. 2004)*. After filing a notice of appeal, the NFL petitioned to have the appeal heard on an expedited basis and again moved to stay the district court's order pending appeal. On March 30, 2004, we agreed to hear **[**17]** the appeal on an expedited basis and set a substantially compressed briefing schedule. Following oral argument on April 19, we granted the NFL's motion to stay the **[*130]** district court's order, citing the NFL's "likelihood of success on the merits" and noting that the resulting harm to Clarett was mitigated by the NFL's promise to "hold a supplemental draft for [Clarett] and all others similarly situated" were the district court's judgment affirmed. Order of April 19, 2004. Clarett thereafter made successive applications to two Justices of the Supreme Court to lift this Court's stay order. Both applications were denied. Clarett did not participate in the NFL draft held on April 24 and 25, 2004.

DISCUSSION

Clarett argues that the NFL clubs are horizontal competitors for the labor of professional football players and thus may not agree that a player will be hired only after three full football seasons have elapsed following that player's high school graduation. That characterization, however, neglects that the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a **[**18]** multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability. For those reasons, the NFL argues that federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules. We agree.

HN1[] The district court's denial of the NFL's motion for summary judgment is reviewed *de novo*, and all factual inferences are drawn in favor of Clarett. *See* *Amnesty America v. Town of West Hartford, 361 F.3d 113, 122 (2d Cir. 2004)*.

I.

HN2[] Although "the interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity," *Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)* (citing R. Gorman, *Labor Law, Unionization and Collective Bargaining* 631-35 (1976)), it has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws. *See* *United States v. Hutcheson, 312 U.S. 219, 85 L. Ed. 788, 61 S. Ct. 463 (1941)*; **[**19]** *Apex Hosiery Co. v. Leader, 310 U.S. 469, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)*. Courts, therefore, have carved out two categories of labor exemptions to the antitrust laws: the so-called statutory and non-statutory exemptions. [11] We deal here only with the non-statutory exemption.

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[11] The statutory exemption, so named because it is derived from the texts of the Clayton Act, *15 U.S.C. § 17*, *29 U.S.C. § 52*, and the Norris-LaGuardia Act, *29 U.S.C. § 101 et seq*., shields from the antitrust laws certain unilateral conduct of labor groups such as boycotts and picketing. *See* *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 451 U.S. 704, 714-15, 68 L. Ed. 2d 558, 101 S. Ct. 2102 (1981)*. Because the statutory exemption does not provide any protection for "concerted action or agreements between unions and nonlabor parties," *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*, the NFL does not rely on the statutory exemption in arguing that its eligibility rules are immune from the antitrust laws.

[20]** The non-statutory exemption has been inferred "from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board." *Brown v. Pro Football, Inc., 518 U.S. 231, 236, 135 L. Ed. 2d 521, **[*131]** 116 S. Ct. 2116 (1996)* (internal citations omitted). The exemption exists not only to prevent the courts from usurping the NLRB's function of "determin[ing], in the area of industrial conflict, what is or is not a 'reasonable' practice," but also "to allow meaningful collective bargaining to take place" by protecting "some restraints on competition imposed through the bargaining process" from antitrust scrutiny. *Id. at 237*.

The Supreme Court has never delineated the precise boundaries of the exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market. In the face of **[**21]** such allegations, the Court has largely permitted antitrust scrutiny in spite of any resulting detriment to the labor policies favoring collective bargaining.

In the first case to deal squarely with the non-statutory exemption, *Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945)*, the New York City electrical workers union negotiated a series of agreements in which local manufacturers and contractors agreed to deal only with other manufacturers and contractors that employed the union's members. *Id. at 799-800*. A non-local manufacturer that was excluded from the market as a result successfully sued under the antitrust laws, establishing that these agreements were "but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level." *Id. at 809*. Although the Court recognized that the union sought the agreements out of "a desire to get and hold jobs for themselves at good wages and under **[**22]** high working standards," it held that the non-statutory exemption did not apply where unions "combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods." *Id. at 798*.

Twenty years later, the Court considered two cases dealing with the non-statutory exemption. Although the Court again refused to apply the non-statutory exemption in the first, *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, it did apply the exemption in *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*. In *Pennington*, a small coal mine operator claimed that a miners union violated the antitrust laws by agreeing with large coal mine companies that the union would demand a higher wage scale from small coal mine operators in an effort to drive the small mine operators from the market. Echoing its decision in *Allen Bradley*, the Court held that ***HN3***[] while "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other **[**23]** employers" without incurring antitrust liability, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Pennington, 381 U.S. at 665*.

The Court, however, reached a different result in *Jewel Tea*, which involved a challenge to a collective bargaining agreement between the butchers union and meat sellers in Chicago, whereby the meat sellers **[*132]** agreed to limit the operation of meat counters to certain hours. *See Jewel Tea, 381 U.S. at 679-80*. The union sought the restriction not only to cabin the hours in the workday but also to diminish the threat posed to members' job security by evening sales of prepackaged meat and the nighttime use of unskilled labor. *Id. at 682*. Jewel Tea was one of the meat sellers that signed the agreement. It did so, however, only under pressure from the union and then challenged the hours restriction on antitrust grounds. Jewel Tea notably did not allege that the hours restriction eliminated competition among the meat sellers that made up the bargaining unit or that the union sought **[**24]** the hours restriction from Jewel Tea at the behest of other meat sellers. *Id. at 688*.

A majority of the Court agreed that the hours restriction fell within the non-statutory exemption, but the Justices disagreed as to the reason for applying the exemption. Justice White, writing for himself and two other Justices, advocated that the application of the non-statutory exemption should be determined by balancing the "interests of union members" served by the restraint against "its relative impact on the product market." *Id. at 690 n.5*. Applying that test, Justice White held that the hours restriction was

> so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

Id. at 689-90. [12]

[25]** Concurring in *Jewel Tea* but dissenting in *Pennington*, Justice Goldberg, writing for himself and two Justices, found that no such balancing was necessary. Because federal labor law obligates the union and employer to bargain in good faith and permits unions to strike over those issues that relate to workers' wages, hours, or terms and conditions of employment, Justice Goldberg found that it would "stultify the congressional scheme" to expose collective bargaining agreements on these so-called mandatory bargaining subjects to antitrust liability. *Id. at 712*. Therefore, according to Justice Goldberg, all "collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] is not subject to the antitrust laws." *Id. at 710*.

Another ten years later, in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*, the Court held the non-statutory exemption did not protect a union's agreement with a contractor that bound the contractor to deal only with subcontractors that employed the union's members. The challenged agreement was not a collective bargaining agreement, **[**26]** and the union did not represent the contractor's employees; rather, the contractor acceded to the agreement only after the union picketed one of its facilities. *Id. at 619*. The Court refused to apply the exemption to this "kind of direct restraint on the business market[, which] has substantial **[*133]** anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id. at 625*.

Contending that these cases establish the applicable boundaries of the non-statutory exemption to be applied in the present case, Clarett argues that the NFL's eligibility rules lack all of the characteristics that led Justice White to apply the exemption in *Jewel Tea*. Clarett, furthermore, maintains that the boundaries of the exemption were properly identified in, and thus we should follow, the Eighth Circuit's decision in *Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)*. *Mackey* involved a challenge brought by NFL players to the League's so-called "Rozelle Rule," which required NFL clubs to compensate any club from which they hired away a player whose **[**27]** contract had expired. *Id. at 609*. Presenting arguments not dissimilar from those made in the present case, the players in *Mackey* alleged that the Rozelle Rule constituted an unlawful conspiracy amongst the NFL clubs to restrain players' abilities freely to contract their services. The NFL, for its part, asserted that the Rozelle Rule was exempt from the antitrust laws by virtue of its inclusion in the League's collective bargaining agreement with the players union. Noting that the Supreme Court had to that point applied the non-statutory exemption only in *Jewel Tea*, the Eighth Circuit gleaned from the Court's decisions, and Justice White's opinion in *Jewel Tea* in particular, that in order to fall within the non-statutory exemption, a restraint must: 1) primarily affect only the parties to the collective bargaining relationship, 2) concern a mandatory subject of collective bargaining, and 3) be the product of bona fide arm's-length bargaining. *Id. at 614*. Although the Eighth Circuit found that the Rozelle Rule satisfied the first two prongs, it nonetheless refused to apply the exemption after finding that the Rozelle Rule was not the product **[**28]** of arm's-length negotiations. *Id. at 615-16*. Noting that the Rozelle Rule predated the advent of the collective bargaining relationship between the NFL and its players union, the Eighth Circuit found that the

[12] When confronted with allegations that agreements between labor and employers damaged competition in the business or product market, we have previously regarded Justice White's decision in *Jewel Tea* as setting forth the "classic formulation" of the non-statutory exemption. See *Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors of Am., 844 F.2d 69, 79 (2d Cir. 1988)*; *Berman Enterprises, Inc. v. Local 333, United Marine Div., etc.,644 F.2d 930, 935 n. 8 (2d Cir. 1981)*.

record lacked sufficient evidence to conclude that the players union had received some *quid pro quo* in exchange for including the Rule in the collective bargaining agreement. *Id. at 616*. For that reason, the Eighth Circuit held that the Rozelle Rule did not fall within the non-statutory exemption, and the Rule was invalidated on antitrust grounds. *Id. at 621-22*.

Relying on *Mackey*, the district court below held that the non-statutory exemption provides no protection to the NFL's draft eligibility rules, because the eligibility rules fail to satisfy any of the three *Mackey* factors. *Clarett, 306 F. Supp. 2d at 397*. Specifically, the district court found that the rules exclude strangers to the bargaining relationship from entering the draft, do not concern wages, hours or working conditions of current NFL players, and were not the product of bona fide arm's-length negotiations during the process that **[**29]** culminated in the current collective bargaining agreement. *Id. at 395-97*.

HN4[] We, however, have never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption. See*Local 210, Laborers' Int'l Union, 844 F.2d at 80 n.2* (declining to follow *Mackey* in favor of balancing test articulated in *Jewel Tea*); *see also United States Football League v. Nat'l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988)* (recognizing *Mackey* is "not consistent with our decision in *Wood v. National Basketball Ass'n*"). Moreover, we disagree with the Eighth Circuit's assumption in *Mackey* that the Supreme Court's decisions **[*134]** in *Connell*, *Jewel Tea*, *Pennington*, and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship. Indeed, we have previously recognized that these decisions are of limited assistance in determining whether an athlete can challenge restraints on the market for professional **[**30]** sports players imposed through a collective bargaining process, because all "involved injuries to *employers* who asserted that they were being excluded from competition in the product market." [13] *Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 963 (2d Cir. 1987)* (emphasis in original). [14]

[31]** Clarett does not contend that the NFL's draft eligibility rules work to the disadvantage of the NFL's competitors in the market for professional football or in some manner protect the NFL's dominance in that market. *Compare N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d Cir. 1982)*. He challenges the eligibility rules only on the ground that they are an unreasonable restraint upon the market for players' services. *See Clarett, 306 F. Supp. 2d at 399*. Thus, we need not decide here whether the *Mackey* factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market, because our cases have counseled a decidedly different approach where, as here, the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit. *See Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995)*; *Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995)*; *Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).* **[**32]** Moreover, as the discussion below makes clear, the suggestion that the *Mackey* factors provide the proper guideposts in this case simply does not comport with the Supreme Court's most recent

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[13] Although Justice White in his opinion in *Jewel Tea* stated that the plaintiff had "not allege[d] that it ha[d] been injured by the elimination of competition among the other employers within the unit with respect to marketing hours," *Jewel Tea, 381 U.S. at 688*, Justice Goldberg in his concurrence noted that it was conceded on that record that the uniform hours restriction challenged in that cases aided "small employers at the expense of the large," *id. at 699*.

[14] We are not the only circuit to have drawn this distinction. *See, e.g.,* ***Brown v. Pro Football, 311 U.S. App. D.C. 89, 50 F.3d 1041, 1056 (D.C. Cir. 1995)***, *aff'd*, *518 U.S. 231, 135 L. Ed. 2d 521, 116 S. Ct. 2116 (1996)* ***HN5***[] ("The nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."); *Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 893 (7th Cir. 1982)* ***HN6***[] ("[Non-statutory exemption applies where] restraint . . . alleged is not a 'direct restraint on the business market' but rather a direct restraint on the labor market, with only tangential effects on the business market."); *Consol. Express, Inc. v. N.Y. Shipping Ass'n, 602 F.2d 494, 513 (3d Cir. 1979)*, *vacated on other grounds*, ***448 U.S. 902, 65 L. Ed. 2d 1131, 100 S. Ct. 3040 (1980)*** ***HN7***[] ("The term nonstatutory exemption . . . is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market.").

treatment of the non-statutory labor exemption in *Brown v. Pro Football, Inc., 518 U.S. 231, 135 L. Ed. 2d 521, 116 S. Ct. 2116 (1996)*.

II.

Our decisions in *Caldwell*, *Williams*, and *Wood* all involved players' claims that the **[*135]** concerted action of a professional sports league imposed a restraint upon the labor market for players' services and thus violated the antitrust laws. In each case, however, we held that the non-statutory labor exemption defeated the players' claims. Our analysis in each case was rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws. We reasoned that to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws, including the **[**33]** congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units. Subsequent to our decisions in this area, similar reasoning led the Supreme Court in *Brown v. Pro Football, Inc., 518 U.S. 231, 135 L. Ed. 2d 521, 116 S. Ct. 2116 (1996)*, to hold that the non-statutory exemption protected the NFL's unilateral implementation of new salary caps for developmental squad players after its collective bargaining agreement with the NFL players union had expired and negotiations with the union over that proposal reached an impasse. We need only retrace the path laid down by these prior cases to reach the conclusion that Clarett's antitrust claims must fail.

A.

The plaintiff in *Wood*, O. Leon Wood, was a star college basketball player who, after being drafted by the Philadelphia 76ers, sued the NBA alleging that its policies regarding, *inter alia*, the entry draft process and team salary caps constituted unlawful agreements among horizontal competitors to eliminate competition for college players. [15] *Wood, 809 F.2d at 956-58*. All of the challenged policies, however, were included **[**34]** in a collective bargaining agreement and memorandum of understanding between the NBA and its players union. *Id. at 957-58*. Because these agreements were the result of the federally mandated bargaining process through which the union and the NBA, in light of the unique economic imperatives of professional basketball, negotiated a host of creative solutions to settle their differences, we held that to permit Wood to challenge particular aspects of their agreement on antitrust grounds would "subvert fundamental principles of our federal labor policy." *Id. at 959*.

Specifically, we found that Wood's claim that the NBA's agreements prevented him from becoming a free agent and negotiating directly with the teams for the best salary contravened the principle of federal labor law that once a majority **[**35]** of employees votes to unionize and elects a representative, individual employees - whether in the bargaining unit or not - no longer possess the right to negotiate with the employer for the best deal possible. *Id. at 959-60* (citing *29 U.S.C. § 159(a)*). Rather, the union representative is charged with the responsibility of seeking the best overall deal for employees, which often means that some employees or prospective employees may fare worse than they would in a competitive market free from restraints. *Id.* We further rejected Wood's contention that the non-statutory exemption did not preclude his challenge because he was not a member of the union when the collective bargaining agreement became **[*136]** effective, observing that new union members often find themselves disadvantaged vis-a-vis more senior union members and that collective bargaining units commonly disadvantage employees outside of, or about to enter, the union. *Id. at 960*.

We also reasoned that to allow Wood to cherry-pick the particular policies with which he took issue would run counter to the "freedom of contract" that labor law intends unions and employers to **[**36]** have during the collective bargaining process, because Wood could negate aspects of the "unique bundle of compromises" struck between the NBA and its players on their way to a peaceful and efficient resolution of their differences. *Id. at 961*. Particularly because Wood challenged agreements concerning mandatory subjects of bargaining, to which labor

[15] The challenge to the NBA draft in *Wood*, as with the challenge in *Williams*, discussed *infra*, did not include any claim against the rules governing eligibility for the draft.

law attaches a host of rights and obligations, we saw no place for the application of the antitrust laws and found the non-statutory exemption applicable. *Id. at 962*.

Eight years later, in *Williams*, a class of professional basketball players again brought an antitrust suit challenging, *inter alia*, the NBA's draft process and salary caps. *Williams, 45 F.3d at 685-86*. This time, however, the restraints challenged by the players were not encompassed in any effective agreement between the NBA and its players union, because the collective bargaining agreement had expired. *Id. at 686*. The challenged policies were implemented unilaterally by the NBA after negotiations with the players union on these subjects reached an impasse. *Id.* We nevertheless held that the NBA's **[**37]** conduct fell within the non-statutory exemption. *Id. at 693*. Foremost, we found that the players' antitrust claims were inconsistent with federal labor law because they imperiled the legitimacy of multi-employer bargaining, "a process by which employers band together to act as a single entity in bargaining with a common union." *Id. at 688*. From the standpoint of our labor and antitrust laws, we explained that such multi-employer bargaining units are a long-accepted and commonplace means of giving employers the tactical and practical advantages of collective action. *Id. at 688-93*. Moreover, in the context of sports leagues, we observed that multi-employer bargaining units serve the additional, important purpose of allowing the teams to establish and demand uniformity in the rules necessary for the proper functioning of the sport. *Id. at 689*. Second, we found that legality of conduct undertaken in the course of negotiations over a collective bargaining agreement is an issue committed to the specialized knowledge of the National Labor Relations Board, for which federal labor law provides a "soup-to-nuts array of rules **[**38]** and remedies." *Id. at 693*. Because permitting courts to police that same conduct under the auspices of the antitrust laws would disrupt that remedial scheme, we held that the non-statutory exemption was applicable. *Id. at 693*.

That same year, in *Caldwell*, we heard the appeal of Joe L. Caldwell, a former professional basketball player who after four successful seasons of play was suspended from his team in 1974 and never returned to the game. *Caldwell, 66 F.3d at 525-26*. While a basketball player, Caldwell represented the players in labor negotiations with the league and claimed to have incurred the scorn of his league, the American Basketball Association ("ABA"), as a result. *Id. at 526*. He alleged that the teams consequently agreed among themselves, in violation of the antitrust laws, that he should be fired and then blacklisted from professional play. *Id.* Despite the district court's finding that the case could "be entirely resolved without any reference whatsoever to the" collective bargaining agreement between the ABA and its players union, *id.* ***[*137]*** *at 529 n. 1*, we held that the non-statutory **[**39]** exemption defeated Caldwell's claims, *id. at 527*.

In *Caldwell*, our analysis began with the observation that "the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime." *Id. at 527-28* (quoting *Brown v. Pro Football, 311 U.S. App. D.C. 89, 50 F.3d 1041, 1054 (D.C. Cir. 1995)*, *aff'd* 518 U.S. 231, 135 L. Ed. 2d 521, 116 S. Ct. 2116 (1996)). We found that as a consequence of the collective bargaining relationship between the ABA and its players union, Caldwell's claims, insofar as they concerned the "circumstances under which an employer may discharge or refuse to hire an employee," involved a mandatory bargaining subject. *Id. at 529*. Thus, federal labor law afforded Caldwell a host of administrative and judicial remedies to contest the parties' agreements on the subject, as well as his firing and any team's refusal to rehire him. *Id.* Drawing upon our discussion of multi-employer bargaining units in *Williams*, we then observed that the legality *vel non* of his treatment did not become a question of ***antitrust law*** simply because the "employers **[**40]** acted jointly in refusing employment." *Id.* Because such issues are remediable under labor law, we concluded that the non-statutory exemption applied.

The following year, in *Brown*, the Supreme Court was presented with facts similar to *Williams*, and eight Justices agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse. *Brown, 518 U.S. at 240-42*. There, a class of professional football players challenged the NFL's unilateral institution of a policy that permitted each team to establish a new squad of developmental players and capped those players' weekly salaries after negotiations with the players union over that proposal became deadlocked. *Id. at 234-35*. Approaching the issue largely as a "matter of logic," *id. at 237*, the Court found that to permit antitrust liability in such a case would call into question a great deal of conduct, such as multi-employer bargaining, that federal labor policy promotes and for which labor **[**41]** law provides an array of rules and remedies, *id. at 237-42*. The Court held that the non-statutory labor exemption necessarily applied not only to protect such labor policies but also to prevent "antitrust courts" from usurping the NLRB's responsibility for policing the collective bargaining process. *Id. at 240-42*.

The Court also rejected a number of potential limits on the exemption that were raised by the players and their supporters. First, the Court held that the exemption was not so narrow as to protect only agreements between the parties that are embodied in an existing collective bargaining agreement. *Id. at 243-44*. Second, in finding that the League's post-impasse action was protected by the exemption, the Court dismissed the suggestion that the exemption should insulate the concerted action of employers only up to the point at which negotiations reach impasse or a "reasonable time" thereafter. *Id. at 244-47*. Third, the Court rejected the notion that courts in applying the exemption could distinguish between bargaining "tactics," which the players argued should be exempt, and unilaterally imposed "terms." **[**42]** *Id. at 247-48*. Finally, the Court refused the players' contention that the labor of professional sports players was unique and that the market for players' services therefore should be treated differently than other **[*138]** organized labor markets for purposes of the non-statutory exemption. *Id. at 248-49*.

Although the Court in *Brown* held that the non-statutory exemption applied, it left the precise contours of the exemption undefined. *Id. at 250*. In so doing, the Court found it unnecessary to embrace, and indeed expressed some reservations about, the broader holding of the court of appeals that the non-statutory exemption "waiv[es] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." *Id. at 235*.

Clarett argues that his case differs in material respects from *Brown*, but he does not argue, nor do we find, that the Supreme Court's treatment of the non-statutory exemption in that case gives reason to doubt the authority of our prior decisions in *Caldwell*, *Williams* **[**43]** , and *Wood*. Because we find that our prior decisions in this area fully comport - in approach and result - with the Supreme Court's decision in *Brown*, we regard them as controlling authority. In light of the foregoing jurisprudence, we therefore proceed to the merits of this appeal.

B.

Clarett argues that he is physically qualified to play professional football and that the antitrust laws preclude the NFL teams from agreeing amongst themselves that they will refuse to deal with him simply because he is less than three full football seasons out of high school. Such an arbitrary condition, he argues, imposes an unreasonable restraint upon the competitive market for professional football players' services, and, because it excludes him from entering that market altogether, constitutes a *per se* antitrust violation. The issue we must decide is whether subjecting the NFL's eligibility rules to antitrust scrutiny would "subvert fundamental principles of our federal labor policy." *Wood, 809 F.2d at 959*. For the reasons that follow, we hold that it would and that the non-statutory exemption therefore applies.

Although the NFL has maintained draft eligibility **[**44]** rules in one form or another for much of its history, the "inception of a collective bargaining relationship" between the NFL and its players union some thirty years ago "irrevocably alter[ed] the governing legal regime." *Caldwell, 66 F.3d at 527*. Our prior cases highlight a number of consequences resulting from the advent of this collective bargaining relationship that are relevant to Clarett's litigation. For one, prospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment. That responsibility is instead committed to the NFL and the players union to accomplish through the collective bargaining process, and throughout that process the NFL and the players union are to have the freedom to craft creative solutions to their differences in light of the economic imperatives of their industry. Furthermore, the NFL teams are permitted to engage in joint conduct with respect to the terms and conditions of players' employment as a multi-employer bargaining unit without risking antitrust liability. The arguments Clarett advances in support of his antitrust claim, however, run counter to each of these **[**45]** basic principles of federal labor law.

HN8[] Because the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative, labor law prohibits Clarett from negotiating directly the terms and conditions of his employment with any NFL club, *see* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 18 L. Ed. 2d **[*139]** 1123, 87 S. Ct. 2001 (1967), and an NFL club would commit an unfair labor practice were it to bargain with Clarett individually without the union's consent, *see* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683, 88 L. Ed. 1007, 64 S. Ct. 830 (1944). [16] The terms and conditions of Clarett's employment are instead committed to the collective bargaining table and are reserved to the NFL and the players union's selected representative to negotiate. Allis-Chalmers Mfg. Co., 388 U.S. at 180.

[46]** ***HN10***[] The players union's representative possesses "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 458-59, 103 L. Ed. 2d 456, 109 S. Ct. 1225 (1989) (quoting Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202, 89 L. Ed. 173, 65 S. Ct. 226 (1944)). In seeking the best deal for NFL players overall, the representative has the ability to advantage certain categories of players over others, subject of course to the representative's duty of fair representation. *See* Vaca v. Sipes, 386 U.S. 171, 177, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). The union representative may, for example, favor veteran players over rookies, *see* Ford Motor Co. v. Huffman, 345 U.S. 330, 338-39, 97 L. Ed. 1048, 73 S. Ct. 681 (1953), and can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders, *see* Fibreboard Paper Prods. Corp v. NLRB, 379 U.S. 203, 210-15, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964); Wood, 809 F.2d at 960 & n.3. This authority and exclusive responsibility is vested in **[**47]** the players' representative "once a mandatory collective bargaining relationship is established and continues throughout the relationship." Caldwell, 66 F.3d at 528. For the duration of that relationship, federal labor law then establishes a "'soup-to-nuts array' of rules, tribunals and remedies to govern [the collective bargaining] process." Id. at 529 (quoting Williams, 45 F.3d at 693).

Clarett's argument that ***antitrust law*** should permit him to circumvent this scheme established by federal labor law starts with the contention that the eligibility rules do not constitute a mandatory subject of collective bargaining and thus cannot fall within the protection of the non-statutory exemption. Contrary to the district court, however, we find that the eligibility rules are mandatory bargaining subjects. [17] ***HN11***[] Though tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject. *See* Caldwell, 66 F.3d at 529 (describing the mandatory bargaining subject **[**48]** "pertinent" to that case as "the circumstances **[*140]** under which an employer may . . . refuse to hire an employee"); R. Gorman, *Labor Law* at 504 ("In accordance with the literal language of the Labor Act, the parties must bargain about the requirements or 'conditions' of initial employment."). But moreover, the eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players. Because the unusual economic imperatives of professional sports raise "numerous problems with little or no precedent in standard industrial relations," Wood, 809 F.2d at 961, we have recognized that many of the arrangements in professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects, *see* Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1061 (2d Cir. 1995). In *Silverman*, for example, we recognized that "[a] mix of free agency and reserve clauses combined with other provisions [such as a rookie draft and salary caps] is the universal method by which leagues and players unions **[**49]** set individual salaries in professional sports." *Id.* We therefore held that the issues of free agency, an anti-collusion provision in players' contracts, and major league baseball's reserve system are mandatory bargaining subjects in the context of professional baseball. *Id.* Similarly, the complex scheme by which individual salaries in the NFL are set, which involves, *inter alia*, the NFL draft, league-wide salary pools for rookies, team salary caps, and

[16] ***HN9***[] "To be sure, in sports leagues, unionized players generally engage in individual bargaining with teams. However, it must be emphasized that such individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." Caldwell, 66 F.3d at 528.

[17] Because we conclude that the eligibility rules are mandatory subjects of collective bargaining, we have no occasion to address whether, or in what circumstances, the non-statutory exemption extends to permissive bargaining subjects. *See* Feather v. United Mine Workers, 711 F.2d 530, 542 (3d. Cir. 1983) ("[Non-statutory exemption] generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or *permissive* subjects of bargaining under the National Labor Relations Act, unless the Union acts with a predatory anti-competitive purpose." (emphasis added and footnote omitted)).

free agency, was built around the longstanding restraint on the market for entering players imposed by the eligibility rules and the related expectations about the average career length of NFL players. The eligibility rules in other words cannot be viewed in isolation, because their elimination might well alter certain assumptions underlying the collective bargaining agreement between the NFL and its players union.

[50]** Furthermore, by reducing competition in the market for entering players, the eligibility rules also affect the job security of veteran players. *See* *Fibreboard, 379 U.S. at 210-15* (recognizing union members' "vital concern" in preserving jobs for union members); *see also* *Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 887-88 (2d Cir. 1970)* ***HN12***[] ("The preservation of jobs is within the area of proper union concern, and union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws." (internal citations omitted)). Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent. *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1, 16 (1971) (recognizing that entry of new players through draft "has an enormous effect on those already in the unit and the collective agreement which governs them"). **[**51]** Consequently, as was true in *Silverman*, we find that to regard the NFL's eligibility rules as merely permissive bargaining subjects "would ignore the reality of collective bargaining in sports." *Silverman, 67 F.3d at 1061-62*.

Clarett, however, argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union. ***HN13***[] But simply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible. *See* *Wood, 809 F.2d at 960*. The eligibility rules in this respect are not dissimilar to union demands for hiring hall arrangements **[*141]** that have long been recognized as mandatory subjects of bargaining. *See* *Associated Gen. Contractors of America, Houston Chapter, 143 N.L.R.B. 409, 412*, *enforced*, *349 F.2d 449 (5th Cir. 1965)* ("'Employment' connotes the initial act of employing as well as the consequent state of being employed."). In such hiring hall arrangements, the criteria for employment are set by the rules of the hiring hall rather than the employer alone. *See* R. Gorman, *Labor Law* at 666-70. Nevertheless, **[**52]** such an arrangement constitutes a permissible, mandatory subject of bargaining despite the fact that it concerns prospective rather than current employees. *Wood, 809 F.2d at 960*.

As a permissible, mandatory subject of bargaining, the conditions under which a prospective player, like Clarett, will be considered for employment as an NFL player are for the union representative and the NFL to determine. Clarett, however, stresses that the eligibility rules are arbitrary and that requiring him to wait another football season has nothing to do with whether he is in fact qualified for professional play. But Clarett is in this respect no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set. ***HN14***[] In the context of this collective bargaining relationship, the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices, *29 U.S.C. § 201 et seq.*, or discrimination, **[**53]** *42 U.S.C. § 2000e et seq.* *See* *Reliance Ins. Cos. v. NLRB, 415 F.2d 1, 6 (8th Cir. 1969)* ("[Employer is usually free to] pick and choose his employees and hire those he thinks will best serve his business interests."). Any challenge to those criteria must "be founded on labor rather than ***antitrust law***." *Caldwell, 66 F.3d at 530*.

Even accepting that an individual club could refuse to consider him for employment because he is less than three full seasons out of high school, Clarett contends that the NFL clubs invited antitrust liability when they agreed amongst themselves to impose that same criteria on every prospective player. As a consequence of the NFL's unique position in the professional football market, of course, such joint action deprives Clarett of the opportunity to pursue, at least for the time being, the kind of high-paying, high-profile career he desires. ***HN15***[] In the context of collective bargaining, however, federal labor policy permits the NFL teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment. Such concerted action is encouraged **[**54]** as a matter of labor policy and tolerated as a matter of ***antitrust law***, *see* *Williams, 45 F.3d at 693*, despite the fact that it "plainly involve[s] horizontal competitors for labor acting in concert to set and to implement terms of employment," *Caldwell, 66 F.3d at 529*. Multi-employer bargaining in professional sports, moreover, offers the added advantage of allowing the teams to agree with one another and, as required, bargain with the union over the host of uniform rules needed for the successful operation of the league, such as the "number of games, length of season, playoff structures, and roster size and composition." Williams, 45 F.3d at 689. The fact that the challenged rules govern eligibility for the NFL draft, thereby excluding some potential employees from consideration, does not render the NFL's adherence to its eligibility rules as a multi-employer bargaining unit suspect.

[*142] The threat to the operation of federal labor law posed by Clarett's antitrust claims is in no way diminished by Clarett's contention that the rules were not bargained over during the negotiations that preceded the current collective bargaining agreement. **[**55]** The eligibility rules, along with the host of other NFL rules and policies affecting the terms and conditions of NFL players included in the NFL's Constitution and Bylaws, were well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations. Given that the eligibility rules are a mandatory bargaining subject for the reasons set out above, the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted. *See* NLRB v. Katz, 369 U.S. 736, 743, 8 L. Ed. 2d 230, 82 S. Ct. 1107 (1962). Indeed, according to the declaration from the NFLMC's Vice President for Labor Relations, Peter Ruocco, this is exactly what the NFL did.

Although this declaration was the only evidence on this point and went uncontradicted by Clarett below, the district court found that this evidence was insufficient to entitle the NFL to a non-statutory exemption defense as a matter of law. [18] *See* Clarett, 306 F. Supp. 2d at 396-97. But even disregarding this evidence entirely, the collective bargaining agreement itself makes clear that the union and the NFL reached an agreement with respect to how the **[**56]** eligibility rules would be handled. In the collective bargaining agreement, the union agreed to waive any challenge to the Constitution and Bylaws and thereby acquiesced in the continuing operation of the eligibility rules contained therein - at least for the duration of the agreement. The terms of that waiver not only keep the eligibility rules in effect for the length of the agreement but also leave the NFL in control of any changes to the eligibility rules on the condition that any significant change potentially affecting the terms and conditions of players' employment would be preceded by notice to the union and an opportunity to bargain. The value of such a clause to the NFL is obvious, as control over any changes to the eligibility rules is left in the hands of management at least until the expiration of the collective bargaining agreement. Although it is entirely possible that the players union might not have agreed entirely with the eligibility rules, the union representative might not have regarded any difference of opinion with respect to the eligibility rules as sufficient to warrant the expenditure of precious time at the bargaining table in light of other important issues. **[**57]**

Clarett would have us hold that by reaching this arrangement rather than fixing the eligibility rules in the text of the collective bargaining agreement or in failing to wrangle over the eligibility rules at the bargaining table, the NFL left itself open to antitrust liability. Such a holding, however, would completely contradict prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny are not limited to protecting only terms contained in collective bargaining agreements. *See* Brown, 518 U.S. at 243-44; **[**58]** Caldwell, 66 F.3d at 528-29 & n.1. The reach of those policies, rather, extends as far as is necessary to **[*143]** ensure the successful operation of the collective bargaining *process* and to safeguard the "unique bundle of compromises" reached by the NFL and the players union as a means of settling their differences. [19] Wood, 809 F.2d at 961. It would disregard those policies completely to hold that some "particular *quid pro quo* must be proven to avoid antitrust liability," id. at 962 n.5, or to allow Clarett to undo what we assume the NFL and its players union regarded as the most appropriate or expedient means of settling their differences, id. at 961. We have cautioned before that "to the extent that courts prohibit

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[18] We do not here address whether the district court was correct to regard the non-statutory exemption as an affirmative defense for which the defendant bore the burden of proof. *Cf.* USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 805 n. 3 (9th Cir. 1994) (noting that although defendants typically bear burden of proving entitlement to exception from the antitrust laws, "statutory exemption is not an affirmative defense").

[19] We therefore need not determine whether as a matter of law the Constitution and Bylaws that contained the eligibility rules were incorporated by reference into the current collective bargaining agreement.

particular solutions for particular problems, they reduce the number and quality of compromises available to unions and employers for resolving their differences." *Id.* Clarett would have us disregard our own good advice.

[59]** The disruptions to federal labor policy that would be occasioned by Clarett's antitrust suit, moreover, would not vindicate any of the antitrust policies that the Supreme Court has said may warrant the withholding of the non-statutory exemption. This is simply not a case in which the NFL is alleged to have conspired with its players union to drive its competitors out of the market for professional football. *See* *Pennington, 381 U.S. at 665*. Nor does Clarett contend that the NFL uses the eligibility rules as an unlawful means of maintaining its dominant position in that market. *See* *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533* ***HN16***[] ("The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly."). This lawsuit reflects simply a prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment. Any remedies for such a claim are the province of labor law. Allowing Clarett to proceed with his antitrust suit would subvert "principles that have been familiar to, and accepted by, the nation's workers for **[**60]** all of the NLRA's [sixty years] in every industry except professional sports." *Caldwell, 66 F.3d at 530*. We, however, follow the Supreme Court's lead in declining to "fashion an antitrust exemption [so as to give] additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy." *Brown, 518 U.S. at 249*.

CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED and the case REMANDED with instructions to enter judgment in favor of the NFL. The order of the district court designating Clarett eligible to enter this year's NFL draft is VACATED.

End of Document

Macpherson's Inc. v. Windermere Real Estate Servs.

United States Court of Appeals for the Ninth Circuit

May 6, 2004, Argued and Submitted, Seattle, Washington ; May 25, 2004, Filed

No. 03-35107

Reporter

100 Fed. Appx. 651 *; 2004 U.S. App. LEXIS 10337 **; 2004-2 Trade Cas. (CCH) P74,490

MACPHERSON'S INC; MACPHERSON'S PROPERTY MANAGEMENT INC, Plaintiffs - Appellants, v. WINDERMERE REAL ESTATE SERVICES COMPANY; WINDERMERE REAL ESTATE SOUTH INC; WPM INC; WPM SOUTH LLC; EDWARD VERDI; KRIS VERDI, husband and wife and their marital community; GWENDOLYN ELDRIDGE; JOHN DOE ELDRIDGE, wife and husband and their marital community; LAURA GORDON; JOHN DOE GORDON, wife and husband and their marital community; PAMELA JONES; JOHN DOE JONES, wife and husband and their marital community; DEBRA POHLENZ; JOHN DOE POHLENZ, wife and husband and their marital community; JAMES LAWS; JANE DOE LAWS, husband and wife and their marital community; RICK MENTI; JANE DOE MENTI, husband and wife and their marital community; MICHAEL RATCLIFFE; JANE DOE RATCLIFFE, husband and wife and their marital community; WINDERMERE REAL ESTATE CO; WINDERMERE REAL ESTATE/BELLEVUE COMMONS INC; WINDERMERE REAL ESTATE/BI INC, WINDERMERE REAL ESTATE/CAPITOL HILL INC; WINDERMERE REAL ESTATE/EAST INC; WINDERMERE REAL ESTATE/FOUNTLEROY INC; WINDERMERE REAL ESTATE/HH INC; WINDERMERE REAL ESTATE/HKW INC; WINDERMERE REAL ESTATE/MAPLE VALLEY INC; WINDERMERE REAL ESTATE NORTH INC; WINDERMERE REAL ESTATE/NORTHEAST INC; WINDERMERE REAL ESTATE/NORTHWEST INC; WINDERMERE REAL ESTATE/OAK TREE INC; WINDERMERE REAL ESTATE/RENTON INC; WINDERMERE REAL ESTATE/SBA INC; WINDERMERE REAL ESTATE/SCA INC; WINDERMERE REAL ESTATE/SG INC; WINDERMERE REAL ESTATE/VASHON ISLAND INC; WINDERMERE REAL ESTATE/WALL STREET INC; WINDERMERE REAL ESTATE/WASHINGTON INC; WINDERMERE REAL ESTATE/WASHINGTON REFERRAL RESOURCES INC; WINDERMERE/WEST CAMPUS INC; WINDERMERE RELOCATION INC; WINDERMERE SOUTH REFERRAL ASSOCIATES INC, Defendants - Appellees.

Notice: **[**1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-01-01885-MJP. Marsha J. Pechman, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

discovery, district court, property management, summary judgment, trade secret, no evidence, Antitrust, motions, grant summary judgment, triable issue of fact, franchisees, breach of contract claim, additional discovery, abuse of discretion, antitrust claim, anti trust law, customer list, cause injury, consists, respects, alleges, movant

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Continuances

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

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

HN1[] **Pretrial Matters, Continuances**

An appellate court reviews a district court's denial of a *Fed. R. Civ. P. 56(f)* motion for abuse of discretion.

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

Civil Procedure > Discovery & Disclosure > General Overview

HN2[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the district court's discovery rulings for abuse of discretion.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN3[] **Standards of Review, De Novo Review**

As to the merits of a case, an appellate court examines the grants of summary judgment de novo.

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

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Pretrial Matters > Continuances

HN4[] **Standards of Review, Abuse of Discretion**

A district court abuses its discretion under *Fed. R. Civ. P. 56(f)* only where the movant has diligently pursued its previous discovery opportunities and if the movant can show how allowing additional discovery would have precluded summary judgment.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HN5[] Standards of Review, Harmless & Invited Errors

Broad discretion is vested in the trial court to permit or deny discovery and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN6[] Private Actions, Remedies

Antitrust violations not causing injury to the plaintiff are not cognizable in a private suit.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN7[] Private Actions, Standing

Antitrust standing requires that a plaintiff show: 1) unlawful conduct; 2) causing injury to plaintiff; 3) that flows from that which makes the conduct unlawful; 4) and is the type of injury that ***antitrust law*** guards against.

Trade Secrets Law > Protected Information > Customer Lists

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Civil Actions > Questions of Fact

Trade Secrets Law > Employee Duties & Obligations > Right to Compete > Customer Solicitation

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

HN8[] Protected Information, Customer Lists

Washington law affords trade secret protection to customer lists where the list is 1) a compilation of information; 2) valuable because it is unknown to others; 3) subject to reasonable efforts to maintain its secrecy.

Counsel: For MACPHERSON'S INC, MACPHERSON'S PROPERTY MANAGEMENT INC, Plaintiffs - Appellants: Robert L. Wilson, Esq., Seattle, WA.

For WINDERMERE REAL ESTATE SERVICES COMPANY, WINDERMERE REAL ESTATE SOUTH INC, WPM INC, WPM SOUTH LLC, EDWARD VERDI, KRIS VERDI, GWENDOLYN ELDRIDGE, JOHN DOE ELDRIDGE, LAURA GORDON, JOHN DOE GORDON, PAMELA JONES, JOHN DOE JONES, DEBRA POHLENZ, JOHN DOE POHLENZ, JAMES LAWS, JANE DOE LAWS, RICK MENTI, JANE DOE MENTI, MICHAEL RATCLIFFE, JANE DOE RATCLIFFE, WINDERMERE REAL ESTATE CO, WINDERMERE REAL ESTATE/BELLEVUE COMMONS

INC, Defendants - Appellees: Matthew F. Davis, Esq., ROHAN, GOLDFARB & SHAPIRO, John W. Demco, DEMCO LAW FIRM, P.S., Seattle, WA.

For WINDERMERE REAL ESTATE/BI INC, WINDERMERE REAL ESTATE/CAPITOL HILL INC; WINDERMERE REAL ESTATE/EAST INC; WINDERMERE REAL ESTATE/FOUNTLEROY INC; WINDERMERE REAL ESTATE/HH **[**2]** INC; WINDERMERE REAL ESTATE/HKW: Matthew F. Davis, Esq., ROHAN, GOLDFARB & SHAPIRO, John W. Demco, DEMCO LAW FIRM, P.S., Seattle, WA.

Judges: Before: HUG, TASHIMA, and PAEZ, Circuit Judges.

Opinion

[*652] MEMORANDUM [*]

This is an appeal from the district court's grant of summary judgment for **[*653]** defendants. The parties are familiar with the factual and procedural background of this case, so we recount it here only as necessary to explain our decision. Macpherson's, Inc. and Macpherson's Property Management, Inc. (collectively, "Macpherson") are a real estate brokerage and property management firm under common ownership.

The many defendants in this action fall into two categories. The first category consists of Windermere Real Estate Services Company and its independently owned franchisees (collectively "Windermere"). Macpherson alleges that these defendants conspired in **[**3]** various ways to restrain trade in violation of federal antitrust laws. The second group of defendants consists of Windermere South, a Windermere franchisee offering property management services, and a group of individuals who left the employ of Macpherson Property Management to work at Windermere South. Macpherson alleges, inter alia, against these defendants breach of contract and misappropriation of trade secrets under Washington law, invoking the district court's supplemental jurisdiction under *28 U.S.C. § 1367(a)*.

The district court granted summary judgment as to all defendants on the antitrust and trade secret claims. It granted summary judgment as to individual defendants Eldridge and Verdi on the breach of contract claim. Macpherson met each summary judgment motion with a request for a continuance under *Federal Rule of Civil Procedure 56(f)*. The district court denied each of these requests. Macpherson appeals these summary judgments, denial of its three *Rule 56(f)* motions, and a number of the district court's other discovery rulings. We have jurisdiction over this matter as a timely appeal from the district court's **[**4]** final judgment. *28 U.S.C. § 1291*. We affirm the district court in all respects.

I.

HN1[] We review the district court's denials of Macpherson's *Rule 56(f)* motions for abuse of discretion. *See United States v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002)*. ***HN2***[] We review the district court's other discovery rulings for abuse of discretion as well. *See Kulas v. Flores, 255 F.3d 780, 783 (9th Cir. 2001)*. ***HN3***[] As to the merits of the case, we examine the grants of summary judgment de novo. *See Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003)*; *County of Toulomne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001)*.

II.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

HN4[] A district court abuses its discretion under *Rule 56(f)* only where "the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Panatronic USA v. AT&T Corp., 287 F.3d 840, 846 (9th Cir. 2002)* (internal quotations omitted). An examination of the record and of the voluminous filings made by the plaintiffs in this case reveals that **[**5]** additional discovery would not have aided Macpherson to avoid summary judgment on any of the three motions. Macpherson has not identified any specific evidence that it sought with further discovery and their difficulties in opposing summary judgment were more related to an inability to timely file evidence than to its unavailability. The district court was within its discretion in denying the *Rule 56(f)* motions.

The same is true with respect to the district court's other challenged discovery rulings. ***HN5***[] "Broad discretion is vested in the trial court to permit or deny discovery and its decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual **[*654]** and substantial prejudice to the complaining litigant." *Sablan v. Dep't of Fin., 856 F.2d 1317, 1321 (9th Cir. 1988)*. There has been no showing of prejudice to Macpherson. Accordingly, we affirm the district court's discovery rulings, and move on to its orders granting summary judgment.

III.

Macpherson failed to raise a triable issue of fact with respect to its antitrust standing. ***HN6***[] Antitrust violations not causing injury to the plaintiff are not cognizable **[**6]** in a private suit. *Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. ***HN7***[] Antitrust standing requires that a plaintiff show: 1) unlawful conduct; 2) causing injury to plaintiff; 3) that flows from that which makes the conduct unlawful; 4) and is the type of injury that ***antitrust law*** guards against. *Am. Ad Mgmt. v. GTE Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)*.

Macpherson failed on points one and two. First, much of the conduct alleged, even if illegal, could not be injurious to Macpherson. For example, Macpherson alleged a conspiracy to fix prices *above* what the market would set. Absent monopoly power on the part of Windermere (of which Macpherson provided no evidence), this price fix would actually aid Macpherson's business by exerting upward pressure on the market price. The second problem with Macpherson's antitrust claim was that it provided no evidence of what Windermere was actually doing. Macpherson provided much speculation and opinion about what is possible, but no evidence of collusion between Windermere franchisees. Macpherson did not raised a triable issue of fact on its antitrust claim.

[7]** Similarly, Macpherson's breach of contract claim against Verdi and Eldridge fails. Macpherson admitted pending discovery that Verdi and Eldridge had not signed a written agreement. Neither side produced an agreement and Macpherson never attempted to modify its admission. There was no evidence before the district court that any agreement contained the allegedly breached term. There was insufficient evidence to support a triable issue of fact on this claim as well.

Finally, Macpherson did not demonstrate an issue of fact as to its trade secret claim. The trade secret claim centered around former Macpherson employees soliciting business from Macpherson property management clients. ***HN8***[] Washington law affords trade secret protection to customer lists where the list is 1) a compilation of information; 2) valuable because it is unknown to others; 3) subject to reasonable efforts to maintain its secrecy. *Ed Nowogroski Ins. Co. v. Rucker, 137 Wn.2d 427, 971 P.2d 936, 944 (Wash. 1999)*. The record shows that Macpherson sold nearly all of the information on its customer lists to appraisers. The remaining information was sufficiently easy for an interested competitor to discover **[**8]** that the lists cannot be protected as trade secrets. *See id.*

IV.

Windermere requested sanctions on appeal under *Federal Rule of Appellate Procedure 38*. While Macpherson has not prevailed, we cannot say that their arguments were so wholly without merit or that the outcome of this appeal was obvious. *See* *Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir. 1984)*. As to the merits of this appeal, the district court is in all respects,

AFFIRMED.

Masimo Corp. v. Tyco Health Care Grp., L.P.

United States District Court for the Central District of California

May 28, 2004, Decided; May 28, 2004, Filed

CASE No. CV 02-4770 MRP

Reporter
2004 U.S. Dist. LEXIS 32404 *

Masimo Corporation, Plaintiff, v. Tyco Health Care Group, L.P. and Mallinckrodt, Inc., Defendant.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by *Masimo Corp. v. Tyco Health Care Group, L.P., 2004 U.S. Dist. LEXIS 26916 (C.D. Cal., June 9, 2004)*

Core Terms

patent, patent case, patent infringement, antitrust, infringement, jury's verdict, reliability, anticompetitive conduct, anti trust law, prejudicial, motion to exclude, contracts, lawsuit, motion in limine, final judgment, factors

Counsel: **[*1]** For Masimo Corporation, a Delaware corporation, Plaintiff: Amy Thomas Brantly, LEAD ATTORNEY, Kesselman Brantly Stockinger LLP, Los Angeles, CA; David W Kesselman, LEAD ATTORNEY, Goldberg Lowenstein and Weatherwax LLP, Los Angeles, CA; David C Marcus, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP, Los Angeles, CA; Deborah Kay Croyle, LEAD ATTORNEY, Orrick Herrington and Sutcliffe LLP, San Francisco, CA; Donald R Pepperman, LEAD ATTORNEY, Blecher and Collins, Los Angeles, CA; Marc M Seltzer, Stephen E Morrissey, LEAD ATTORNEYS, Susman Godfrey LLP, Los Angeles, CA; Maurice M Suh, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Los Angeles, CA; Maxwell M Blecher, LEAD ATTORNEY, Blecher and Collins PC, Los Angeles, CA; Stephen D Susman, Vineet Bhatia, LEAD ATTORNEYS, Susman Godfrey, Houston, TX.

For Tyco Health Care Group L.P., a Delaware partnership, Mallinckrodt Incorporated, a Delawre corporation, Defendants: Bruce A Blefeld, John P DeGeeter, John L Murchison, Jr, LEAD ATTORNEYS, Vinson & Elkins, Houston, TX; Christopher D Dusseault, Heather Lynn Richardson, LEAD ATTORNEYS, Gibson Dunn and Crutcher, Los Angeles, CA; Craig Nevin Hentschel, LEAD ATTORNEY, Dykema Gossett LLP, Los **[*2]** Angeles, CA; Dominic Surprenant, LEAD ATTORNEY, Quinn Emanuel Urquhart Oliver & Hedges, Los Angeles, CA; James J Donato, LEAD ATTORNEY, Shearman & Sterling LLP, San Francisco, CA; John Francis Young, Neil J Stephens, LEAD ATTORNEYS, Cooley Godward Kronish, San Francisco, CA; Linda A F Callison, LEAD ATTORNEY, Cooley Godward Kronish, Palo Alto, CA; Stephen C Neal, LEAD ATTORNEY, Cooley LLP, Palo Alto, CA.

Judges: Honorable Mariana R. Pfaelzer, United States District Judge.

Opinion by: Mariana R. Pfaelzer

Opinion

MEMORANDUM OF DECISION RE: Motions in Limine

The parties have filed several motions in limine in anticipation of the trial of this matter. The Court has read and considered the parties' submissions on these motions, and has determined that oral argument would not assist the Court in its decisions. Accordingly, for the reasons discussed below, this Court rules as follows:

Masimo's consolidated motion in limine is **denied in part** and **granted in part**: reference to any other lawsuit involving any party other than this lawsuit will be excluded, Topic 4 will be excluded, and Topics 2 and 6 are not excluded. Tyco's Motion to Exclude any Reference to Patent case is **granted**. Tyco's motions to exclude the reports and **[*3]** testimony of Mr. Einer Elhauge, Ms. Patti King, and Dr. Steven Barker are **denied**.

ANALYSIS

Masimo filed a consolidated motion in limine seeking to exclude five topics from the trial.[1] Tyco has four pending motions in limine.[2] Both parties seek determination of how the verdict from the patent case may be used at this trial, Masimo seeks to exclude defenses that it believes are improper as a matter of law, and Tyco seeks to exclude three of Masimo's expert witnesses.

I. Patent Case

Both parties filed motions related to the patent case. Masimo seeks to exclude three topics that raise issues related to the patent trial:[3]

> <u>Topic 1</u>: Any reference to any other lawsuit involving any party other than this lawsuit and the patent infringement case styled *Mallinckrodt, Inc. et al. v. Masimo Corp.*, No. CV 00-6506-MRP (C.D. Cal.) (hereinafter the "patent trial").[4]
>
> <u>Topic 2</u>: Evidence or argument challenging the jury's findings of infringement in the patent trial.

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[1] Masimo actually seeks to exclude evidence about or reference to thirteen topics, but Tyco does not oppose eight of these. The topics that the parties agree should be excluded are: 1) references to trebling or treble damages, 2) references to witness preparation for witnesses with whom a party has a privilege, 3) references to any stipulations declined or refused, 4) use of videotaped deposition without affording opposing counsel an opportunity to review, except for purposes of impeachment, 5) references to any party's motions in limine or responses to contested motions in limine, 6) any questioning in an attempt to elicit testimony that is privileged for any reason because such an attempt might unfairly create the appearance **[*4]** that the witness was hiding information from the jury, 7) any question or comment in the presence of the jury which could cause a witness to claim a recognized privilege, 8) any commentary or testimony that constitutes direct or indirect comment on the law firm or lawyers representing any party including, without limitation, references to the size of the law firm, the geographic location of the law firm's offices, or other clients or types of clients represented by the law firm or lawyers representing any party. *See* Plaintiff Masimo Corporation's Consolidated Notice of Motion and Motion in Limine (filed May 7, 2004) ("Notice"), pp.3-5.

[2] Tyco actually filed another motion in limine, its "Motion to Exclude Reference to the Alleged Criminal Fraud of Former Tyco Executives." Motion to Exclude Reference to Alleged Criminal Fraud of Former Tyco Employees. (filed May 7, 2004). This motion is not discussed in this memorandum because Masimo agrees that excluding reference to alleged fraud by former Tyco executives Kozlowski and Swartz would be appropriate. Plaintiff Masimo Corporation's Response to Defendants' Motion to Exclude Reference to the Alleged Criminal Fraud of Former Tyco Executives **[*5]** (filed May 11, 2004).

[3] *See* Plaintiff Masimo Corporation's Consolidated Notice of Motion and Motion in Limine, at 3 (filed May 7, 2004)("Masimo Notice"); *see also* Plaintiff Masimo Corporation's Memorandum of Points and Authorities in Support of Its Consolidated Motions in Limine, at 2-4 (filed May 7, 2004)("Masimo Motion"); Plaintiff **[*6]** Masimo Corporation's Reply to Tyco's Opposition to Plaintiff's Motion in Limine re Patent Case (filed May 13, 2004) ("Masimo Patent Reply").

[4] Tyco does not object to excluding reference to other lawsuits, but only to allowing reference to the patent case. Only the contested portion of Masimo's Topic 1 is decided by this memorandum as the parties have agreed that all other litigation will not be referenced.

Topic 3: Evidence or argument that the motion tolerant technology in Tyco's products is the result of innovation because any such evidence and argument is barred by collateral estoppel by the jury verdict in the patent trial.

Tyco opposes excluding these topics.[5] Tyco seeks to exclude any reference to the patent trial during this case.[6] Masimo opposes excluding reference to the patent case.[7]

For the reasons discussed below, neither party will be permitted to discuss the patent jury's verdict, the patent trial, or the issues of patent **[*7]** infringement and/or validity.

A. Issue Preclusion

The jury's verdict in the patent case does not have issue preclusive effect because it is not a final judgment. *Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002)*(noting that collateral estoppel attaches only when an issue has been "determined by a valid and final judgment"). The Court's Judgment in the patent case specifically noted that it was interlocutory, and stated that it "does not constitute entry of final judgment for any purpose."

Some courts have held that "a final judgment is not a prerequisite for issue preclusion when a jury has rendered a conclusive verdict." *Recoveredge v. Pentecost, 44 F.3d 1284, 1295 (5th Cir. 1995)*. This line of reasoning is inapplicable here, however, because the jury's verdict in the patent case is not conclusive. To be used for collateral estoppel a jury verdict must be "sufficiently firm to be accorded conclusive effect." *Id.* (quoting *Restatement (Second) of Judgments §13* (1982)). The pending indefiniteness and inequitable conduct defenses and motions for judgment as a matter of law prevent the jury's verdict in the patent case from being "sufficiently firm" to have preclusive effect.

B. *Seventh Amendment*

Neither party in this case will be permitted, to discuss patent infringement or validity, as those issues have been taken up and decided in separate cases, **[*8]** with separate damage awards for any infringement found to exist. As this case will focus solely on antitrust issues, and will not involve testimony or evidence on any of the patent issues litigated in other cases, the *Seventh Amendment* will not be implicated.

C. Hearsay

If offered into evidence, the patent verdict will be excluded as hearsay that meets neither the exception in *Federal Rules of Evidence (FRE) Rule 803* nor *Rule 807*. Masimo's reliance on a criminal case from South Dakota is misplaced. *See United States v. Waldman, 172 F.Supp.2d 1222 (D.S.D. 2001)*. However, even *Waldman* suggests the reliability of the previous judgment is a significant consideration under both *Rules 803* and *807*. *Id. at 1222-24*. The verdict in the patent trial is not reliable because the pending equitable defenses and motions for judgment as a matter of law may disturb the patent jury's verdict. The verdict therefore does not fulfill the exceptions of *Rules 803* and *Rule 807*.

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[5] *See* Tyco's Opposition to Plaintiff's Motion in Limine Re Patent Case (filed May 11, 2004) ("Tyco Patent Opposition").

[6] *See* Motion to Exclude Reference to Patent Case (filed May 7, 2004)("Tyco Infringement Motion"); Declaration of Neal J. Stephens in Support of Defendants' Motion to Exclude Any Reference to the Nellcor Patent Case ("Stephens Decl."); Tyco's Reply in Support of Motion to Exclude Any Reference to the Nellcor Patent Case (filed May 13, 2004) ("Tyco Patent Reply").

[7] *See* Masimo Corporation's Opposition to Defendants' Motion to Exclude any References to the Nellcor Patent Case (filed under seal May 11, 2004) ("Masimo Patent Opposition").

D. Relevance

Although there is ample support for considering baseless patent infringement suits to be anticompetitive conduct, Masimo has not cited and this Court has not found any case where patent infringement has been considered anticompetitive conduct.[8] If the patent verdict stands Masimo will be compensated for its losses due to patent infringement. There is no authority to support allowing Masimo **[*9]** to be doubly compensated by allowing the same conduct for which Masimo will be compensated in the patent case to serve as the basis of an antitrust claim. In addition to Masimo's failure to assert patent infringement as a basis of its Section 2 claim until its opposition for summary judgment and the fact that infringement has not been definitively determined because the judgment in the patent case is not final, that no legal authority supports basing a patentee's antitrust case on a finding of patent infringement dictates that the infringement verdict is not relevant to consideration of whether anticompetitive conduct has occurred.

Not only is the verdict from the patent trial irrelevant, but any discussion of patent infringement and validity is irrelevant. Determination of patent infringement and/or validity will not help the antitrust jury determine whether Tyco's innovations or its anticompetitive conduct explains its market dominance. If the jury determines superior products and not anticompetitive conduct is the explanation for Tyco's market dominance, it will be irrelevant that Tyco's products may infringe Masimo's patents. Masimo will receive compensation for infringement from the patent case. That an innovation is infringing will not change the fact **[*11]** that the infringing innovation, and not anticompetitive conduct, explains market dominance.

E. Prejudice

Introduction of prior judgments may be unfairly prejudicial. *See* *United States v. Bejar-Matrecios, 618 F.2d 81, 84 (9th Cir. 1980)*(holding that a district court committed reversible error by allowing introduction of a prior judgment relevant to showing that the defendant accused of illegal reentry was an alien because it was unfairly prejudicial); *Mendenhall v. Cedarapids, Inc., 5 F.3d 1557, 1573-75* (affirming a district court's decision not to allow admission of a prior judgment of validity regarding the patents at issue in the district court's case, in part because the possibility of prejudice to the defendant was very high).

In this case, the danger of prejudice is particularly high because the antitrust jury would hear only the patent jury's verdict, not the Court's final judgment on the patent case. Without a presentation of the equitable issues and motions for judgment as a matter of law, the jury would be very likely to conclude that the verdict in the patent case means, conclusively, that Nellcor willingly infringed Masimo's patents. Because the issues remaining in the patent case are more complex than a simple presentation of the jury's verdict would suggest, allowing the antitrust jury **[*12]** to hear the patent jury's verdict would be unfairly prejudicial.

II. Legal Issues

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[8] The one case that Masimo cites does not support the proposition that patent infringement may support antitrust claims brought by the patentee. *See* *Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 787-88 (6th Cir. 2002)*. In fact, *Conwood* does not discuss patent infringement at all. Instead, it analyzes whether tortious acts committed by one competitor against another competitor's display racks in retail shops may constitute anticompetitive conduct supporting a Section 2 claim. Masimo tries to draw an analogy between its intellectual property and the property (display racks) at **[*10]** issue in *Conwood*, and argues that it was the taking of property that created the antitrust violation in *Conwood*. This analogy is strained and inaccurate. The *Conwood* Court is considering tort, not property, and is not analogous to the case at hand. The *Conwood* Court's concern was whether the Defendant's acts should be considered isolated tortious acts, which would not be an antitrust violation, or an exclusionary pattern, which would support an antitrust claim. *Conwood* does not offer guidance as to whether patent infringement may support an antitrust claim.

The remaining two topics that Masimo seeks to exclude relate to defenses that Masimo argues are legally improper:[9]

Topic 4: Evidence or argument that *42 C.F.R. §1001.952*, which provides that certain administrative fees are not criminal, authorizes any of the conduct at issue in this case for purposes of the antitrust laws.

Topic 6: Evidence or argument that the fact that an agreement is "voluntary" means that it is lawful.

Tyco opposes excluding these topics.[10] For the reasons discussed below, this Court will exclude Topic 4, but not Topic 6.

A. Administrative Fees

Conduct expressly authorized by federal regulation can serve as the basis of antitrust liability. Absent clear congressional **[*13]** intent, antitrust immunity is not implied when a federal statute or regulation authorizes conduct. *National Gerimedical Hosp. v. Blue Cross of Kansas City, 452 U.S. 378, 388, 101 S. Ct. 2415, 69 L. Ed. 2d 89 (1981)*; *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1056 (9th Cir. 1983)*. Tyco has not made the necessary "showing of clear repugnancy" between *42 C.F.R. 1001.952* and the antitrust laws. *National Gerimedical, 452 U.S. at 388*. When "relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in antitrust laws." *Northrop, 705 F.2d at 1057*. Because this argument contradicts the law, Tyco will not be permitted to argue that *42 C.F.R. 1001.952* immunizes administrative fees from the antitrust laws.

Nevertheless, if Masimo argues that the administrative fees are evidence of anticompetitive conduct, Tyco may properly defend this practice as standard in the industry and reference to *42 C.F.R. 1001.952* may be necessary to that argument, thus this ruling does not exclude any reference to *42 C.F.R. 1001.952* but merely argument that the regulation authorizes the fees for the purpose of ***antitrust law***.

B. Voluntary Agreements

If this Court correctly understands Tyco's position, Tyco does not argue that voluntariness immunizes agreements from antitrust liability, but instead contends that voluntariness affects whether the agreements **[*14]** can be considered exclusionary and whether they foreclose Masimo from the market. This position is not contrary to any law that has been brought to the attention of the Court. *See National Assn. of Broadcasters, 536 F. Supp. 149, 164 (D.D.C. 1982)* (suggesting that as all anticompetitive agreements are voluntary in the sense of not being legally enforceable, voluntariness is not a defense to Section 1 claims, but not addressing whether voluntariness affects whether agreements are exclusionary).

III. Expert Witnesses

Tyco has filed motions in limine seeking to exclude the reports and testimony of three witnesses: Mr. Einer Elhauge,[11] Ms. Patti King,[12] and Dr. Steven Barker.[13] Masimo opposes these motions.[14] None of these witnesses will be excluded.

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[9] *See* Masimo Notice, at 3-4; *see also* Masimo Motion, at 4-7; Plaintiff Masimo Corporation's Reply Memorandum in Support of Its Motion in Limine Regarding Administrative Fees and the Purportedly Voluntary Nature of the Challenged Agreements (filed May 13, 2004)("Masimo Legal Reply").

[10] *See* Tyco's Opposition to Plaintiff's Motions in Limine Regarding Payment of Administrative Fees and the Voluntary Nature of the Challenged Agreements (filed May 11, 2004)("Tyco Legal Opposition").

A. Mr. Einer Elhauge

1. Qualifications

Economic analysis of law was a part of Mr. Elhauge's education and is an area that he has followed in the literature and relied upon in his own academic work. *See* Expert Report of Professor Einer Elhauge, Stephens Decl. **[*16]** Ex. A, pp. 1-2; CV of Einer Richard Elhauge, Stephens Decl. Ex C. Thus, despite his lack of an economics degree, Mr. Elhauge's "knowledge, skill, experience, training, or education" gives him special expertise in the area in which he seeks to testify. *FRE Rule 702*.

2. Independence

That Mr. Elhauge may have been an advocate for Masimo could impact his credibility, but that is not sufficient reason for this Court to exclude him. His potential lack of objectivity is an issue that can easily be addressed via cross examination.

3. Speculation and Legal Conclusions

Even if it is true that some of Mr. Elhauge's opinions are speculative or are legal rather than factual conclusions, these are issues best addressed at trial. This Court may exclude speculative or legal testimony if it is presented to the jury, but will not use the potential that such testimony will be offered to exclude this witness entirely.

B. Ms. Patti King

1. Qualifications

Masimo seeks to offer Ms. King as an expert based on her "specialized knowledge" of group purchasing organizations ("GPOs"). Her CV indicates significant management experience in the healthcare industry and her report suggests that much of this experience includes negotiations **[*17]** with or investigations of GPOs. *See* CV of Patti King, Stephens Decl. Ex. B, pp. 40-41; Expert Report of Patti King, Stephens Decl. Ex B. pp. 26. To the extent

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[11] *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Exclude Reports and Testimony of Einer Elhauge ("Tyco Elhauge Motion") (filed under seal April 22, 2004); Declaration of Neal J. Stephens [re Einer Elhauge] (filed under seal April 22, 2004); Reply [re Einer Elhauge] (filed under seal May 10, 2004).

[12] *See* Defendants' Motion to Exclude the Reports and Testimony of Patti King ("Tyco King Motion") (filed under seal April 22, 2004); Declaration of Neal J. Stephens [re Patti King] (filed under seal April 22, **[*15]** 2004) ; Reply [re Patti King] (filed under seal May 10, 2004).

[13] *See* Motion to Exclude the Expert Report and Testimony of Dr. Barker (filed May 7, 2004)("Tyco Barker Motion"); Reply [re Steven Barker] (filed under seal May 13, 2004)("Tyco Barker Reply").

[14] *See* Memorandum of Points and Authorities in Opposition to Defendant's Motion to Exclude Reports, and Testimony of Einer Elhauge (filed under seal May 3, 2004)("Masimo Elhauge Opposition"); Memorandum of Points and Authorities in Opposition to Defendant's Motion to Exclude Reports and Testimony of Patti King (filed under seal May 3, 2004)("Masimo King Opposition"); Plaintiff Masimo Corporation's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Exclude the Report and Testimony of Dr. Steven Barker (filed under seal May 11, 2004) ("Masimo Barker Opposition"); Declaration of Stephen E. Morrisey [re Steven Barker](filed under seal May 11, 2004) ("Morrissey Decl.")

that Ms. King's testimony is confined to her specialized knowledge of healthcare management and GPOs, she is qualified to offer this testimony.

2. Scope

An industry expert is qualified to offer opinions that would help the jury understand, how the industry works and the factors that influence business decisions in that industry. Most of the "opinions" upon which Tyco bases its assertion that Ms. King is offering economic conclusions are not her original opinions but merely restatements of the facts upon which she relied, including citations to the documents from which she drew those facts. She does not, for example, conduct her own analysis of what share of the market Tyco controls; she states conclusions about market share drawn from other sources and then offers her opinion as to the industry factors that led to that market share. Expert Report of Patti King, Stephens Decl. Exh. B. at 7. This type of opinion is not beyond the scope of her expertise. To the extent that Ms. King may offer opinions that stray beyond her area of **[*18]** expertise, they may be challenged on cross examination during trial.

3. Analysis and Methods

"*Rule 702* generally is construed liberally" when an expert's testimony is based on her "other specialized knowledge." *United States v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000)*. "The *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to the kind of testimony whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Id.* (citing *Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*("relevant reliability concerns may focus upon personal knowledge or experience"). Ms. King's testimony is based on her knowledge and experience, thus its reliability is not undermined by her failure to satisfy the factors specifically discussed in *Daubert*.

4. Conclusions re "Penalties" and "Foreclosure"

Ms. King's report does not draw legal conclusions about "penalties." Ms. King's report discusses vendors' contracts with GPOs and states that hospitals that chose to go outside of the sole source contracts or bundling arrangements would not receive the discounts available to hospitals that complied with those contracts. She does not draw legal conclusions about whether forgoing a discount constitutes a penalty under ***antitrust*** **[*19]** ***law***.

Ms. King's report also does not rely upon incorrect legal conclusions about foreclosure. It is not the case that in "the absence of total exclusivity, contracts providing discounts in exchange for purchase commitments do not violate antitrust laws." Tyco King Motion at 10 (citation omitted). Contracts that have the "practical effect" of preventing a hospital from purchasing from competitors may be exclusive dealing contracts, even if they do not require a 100% commitment. *United Shoe Machinery Corp. v. United States, 258 U.S. 451, 458, 42 S. Ct. 363, 66 L. Ed. 708 (1922)*.

5. Prejudice

Tyco argues that the overview of the GPO industry contained in the initial pages of her report is irrelevant and prejudicial. However, as this case is focused entirely on the GPO industry and the interactions among the stakeholders in that industry an overview of the industry seems particularly relevant. More even than in other areas of law, an antitrust case requires consideration of an entire market, including players that are not involved in the litigation. Although it would likely not be helpful to spend a great deal of trial time discussing the GPO industry in a very general way, this Court does not find Ms. King's industry overview to be irrelevant.

Tyco's argument that Ms. King's generalized **[*20]** opinions on the, GPO industry are prejudicial are not a reason to exclude her testimony. Tyco complains about general statements that mimic the claims that Masimo makes against Tyco in this case. Ms. King's opinion appears to be that Tyco fits the model of other large vendors that she has worked with in this industry. That she starts by suggesting that large manufacturers in general behave similarly to the way Tyco is accused of behaving in this case does not support excluding her testimony. It is impossible to believe that the factfinder will not be able to draw the link between, for example, Ms. King's general statement that "[b]y leveraging their power with GPOs, large manufacturers have successfully foreclosed competition" and her specific opinions that Tyco has leveraged its power with GPOs to foreclose Masimo's attempts to gain market share. *See* Expert Report of Patti King, Stephens Decl. Exh. B. at 7, et seq. That Tyco does not agree with Masimo's claims in this case or Ms. King's opinions in support of those claims does not make her opinions prejudicial. Certainly any prejudicial effect found to exist could be countered via cross examination or through Tyco's presentation of its **[*21]** defense.

C. Dr. Steven Barker

Although this Court's concern is the reliability of Dr. Barker's opinions, not Tyco's notice of them, Masimo is correct in suggesting that Tyco's motion should be considered in the context of the recent patent trial. In that trial, Dr. Barker testified extensively and described his methodology. *See* Trial Transcript 2/23/04 pp. 529-606; Trial Transcript 3/17/04 pp. 3217-3240. Although it would have saved everyone a great deal of effort if Dr. Barker had identified which of the numerous publications listed in his CV formed the bases of his conclusions, the Court finds it difficult to believe that, after two opportunities to cross examine Dr. Barker in the patent trial, Tyco has any real doubts about what his methods were. The Court remembers them quite well. The Court is satisfied that Dr. Barker's testimony and the methods upon which it is based are sufficiently reliable that the Court is not required to exclude his reports and testimony under the Daubert line of cases. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* (describing the factors courts should consider to determine whether proffered expert opinions are reliable).

CONCLUSION

In light of the Court's consideration of the parties' submissions, and **[*22]** based upon the foregoing analysis, Masimo's consolidated motion in limine is **denied in part** and **granted in part** (reference to any other lawsuit involving any party other than this lawsuit will be excluded, Topic 4 will be excluded, and Topics 2 and 6 are not excluded), Tyco's Motion to Exclude Reference to the Patent Case is **granted**, Tyco's Motion to Exclude Report and Testimony of Einer Elhauge is **denied**, Tyco's Motion to Exclude Reports and Testimony of Patti King is **denied**, and Tyco's Motion to Exclude Report and Testimony of Dr. Barker is **denied**.

IT IS SO ORDERED

DATED: MAY 28 2004

/s/ Mariana R. Pfaelzer

Honorable Mariana R. Pfaelzer

United States District Judge

Mid-America Real Estate Co. v. Iowa Realty Co.

United States District Court for the Southern District of Iowa, Central Division

May 28, 2004, Decided

Case No. 4:04-CV-10175

Reporter
2004 U.S. Dist. LEXIS 10155 *; 2004-1 Trade Cas. (CCH) P74,440

MID-AMERICA REAL ESTATE COMPANY d/b/a COLDWELL BANKER MID-AMERICA GROUP, REALTORS, Plaintiff, v. IOWA REALTY COMPANY, INC. and, FIRST REALTY, LTD., Defendant.

Subsequent History: Reversed by, in part *Mid-America Real Estate Co. v. Iowa Realty Co., 2005 U.S. App. LEXIS 7852 (8th Cir. Iowa, May 6, 2005)*

Disposition: Temporary Injunction granted.

Core Terms

listing, exclusive listing, software, monopoly power, parties, preliminary injunction, market share, monopolization, Realtors, brokers, fair dealing, termination, injunction, contends, percent, succeed, prices, multiple listing service, residential real estate, real-estate, database, license, notice, implied covenant of good faith, non-exclusive, full-service, advertising, soliciting, damages, sharing

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The granting of a preliminary injunction is an extraordinary remedy that will not issue unless the right to such relief is clearly established by the movant. In evaluating a motion for preliminary injunction, the court must consider: (A) the threat of irreparable harm to the moving party; (B) the balance of hardships should the injunction issue; (C) the probability that the moving party will succeed on the merits; and (D) the public interest. No single factor is dispositive, and the United States Court of Appeals for the Eighth Circuit favors a flexible approach.

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Damages, Monetary Damages**

The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. Generally, irreparable harm is suffered when monetary damages are difficult to ascertain or are inadequate. When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong may be satisfied.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars.

Contracts Law > Contract Interpretation > General Overview

HN4[] **Contracts Law, Contract Interpretation**

As a general rule, a contract will be strictly construed if its words are clear and unambiguous.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN5[] **Contract Interpretation, Good Faith & Fair Dealing**

A duty of good faith and fair dealing is imposed in the performance and enforcement of a contract. Encompassed within this duty is an obligation not to do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Monopolies & Monopolization, Attempts to Monopolize**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

Two basic elements must exist to establish a case under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*: (a) possession of monopoly power in the relevant market; and (b) the willful acquisition or maintenance of that power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

The United States Supreme Court has defined monopoly power as the power to control prices or exclude competition. There are two ways of proving market power. The first is by defining the relevant market in geographic and product terms and by showing that the defendant's share exceeds a reasonable threshold under the circumstances. The second is through direct evidence of anti-competitive effects.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

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

HN9[] **Monopolies & Monopolization, Actual Monopolization**

The relevant product market must be defined so as to capture the competitive realities of the market place -- the "area of effective competition." In defining the product market, courts consider whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Courts have generally found that a 50 to 60 percent market share is insufficient to create a monopoly. Even assuming 50 to 60 percent was sufficient, however, evidence of market share alone is not conclusive as to whether monopoly power exists because market share may not reflect actual power to control price or exclude competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

A company may not be found guilty of completed monopolization in violation of the *§ 2* of the Sherman Anti-Trust Act, *15 U.S.C.S. § 2* without proof of actually attaining market dominance or monopoly power.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

HN12[] **Sherman Act, Claims**

A claim of attempted monopolization requires a plaintiff to prove that the defendant (1) specifically intended to control prices or destroy competition in some part of commerce; (2) engaged in predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (2) a dangerous probability of success.

Counsel: **[*1]** For MID-AMERICA REAL ESTATE COMPANY dba Coldwell Banker Mid-America Group Realtors, plaintiff: Thomas O Kuhns, Andrew P Bautista, J Robert Robertson, KIRKLAND & ELLIS LLP, CHICAGO, IL.

For MID-AMERICA REAL ESTATE COMPANY dba Coldwell Banker Mid-America Group Realtors, plaintiff: Joseph R Gunderson, GUNDERSON SHARP & WALKE PC, DES MOINES, IA.

For IOWA REALTY CO., INC., FIRST REALTY LTD, defendants: Kimberly J Walker, FAEGRE & BENSON LLP, DES MOINES, IA.

For IOWA REALTY CO., INC., FIRST REALTY LTD, defendants: Richard A Duncan, Craig S Coleman, FAEGRE & BENSON, MINNEAPOLIS, MN.

Judges: RONALD E. LONGSTAFF, Chief Judge, United States District Court.

Opinion by: RONALD E. LONGSTAFF

Opinion

ORDER

I. BACKGROUND

Plaintiff Mid-America Real Estate Company d/b/a Coldwell Banker Mid-America Group, Realtors ("Coldwell Banker") filed its Complaint against defendants Iowa Realty Company, Inc. ("Iowa Realty") and First Realty, Ltd. ("First Realty") (together referred to as the "Iowa Realty Group") on March 25, 2004, seeking to enjoin defendants from excluding other real-estate agents from showing and selling homes listed by defendant Iowa Realty under its Passport Plus program. [1] In the Complaint, **[*2]** Coldwell Banker alleged the following: Count I breach of contract; Count II breach of implied covenant of Good Faith and Fair Dealing; Count III monopolization; and Count IV Attempt to Monopolize. The matter now before the Court is Coldwell Banker's request for a preliminary injunction that would preclude Iowa Realty Group from taking such action during the pendency of the lawsuit.

Pursuant to a stipulated temporary restraining order ("TRO") defendants are presently prohibited from: (1) failing to comply with the August 30,2002 Co-Marketing Agreement, (2) failing to deliver their listing information to the Des Moines Area Association of Realtors' ("DMAAR") Multiple Listing Service in accordance with the Agreement executed by Iowa **[*3]** Realty, First Realty, Coldwell Banker, and the Des Moines Area Association of Realtors, (3) signing exclusive listing contracts with, and offering exclusive listing contracts to, clients pursuant to the Passport Plus program, (4) refusing to split commissions with Coldwell in accordance with the parties' established course of dealing, (5) advertising the Passport Plus program, and (6) otherwise implementing the Passport Plus program. Subsequent to the issuance of the TRO, the parties engaged in discovery, exchanged documents, and took depositions.

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[1] Coldwell Banker initially sought a temporary restraining order ("TRO") until the Court could rule on its request for a preliminary injunction. The parties then agreed to the issuance of a stipulated TRO on March 29, 2004 until the preliminary injunction request could be resolved.

Defendants resisted plaintiff's motion for a preliminary injunction on April 14, 2004 and plaintiff filed its response on the same day. This Court held a preliminary injunction hearing on April 15-16, 2004. Both parties submitted additional filings to the Court on April 30, 2004. The motion for preliminary injunction is now fully submitted.

II. FINDINGS OF FACT

A. Parties

Plaintiff Coldwell Banker is a licensed full-service real-estate brokerage firm in the greater Des Moines area. Coldwell Banker is owned by Mid-America Group, Ltd. The president of Coldwell Banker is Carolyn Helmlinger.

Defendant Iowa Realty is a licensed full-service **[*4]** real-estate brokerage firm in the greater Des Moines area. Iowa Realty is owned by Home Services of America, Inc. The president of Iowa Realty is Michael Knapp.

Defendant First Realty is a licensed full-service real-estate brokerage firm in the greater Des Moines area. First Realty is a wholly-owned subsidiary of Iowa Realty. First Realty is a separately-licensed broker distinct from Iowa Realty. Michael Knapp is also the president of First Realty.

B. Des Moines Real Estate Market

The relevant geographic market for purposes of the present dispute consists of the greater Des Moines area, essentially Warren, Dallas and Polk counties. The Co-Marketing Agreement refers to the "Des Moines metropolitan market" in Section I.A.2.

C. DMAAR

All parties to this case are members of the Des Moines Area Association of Realtors ("DMAAR"). DMAAR operates a multiple listing service ("MLS") and publishes Rules and Regulations for the participation in and operation of the MLS. Those rules are implemented and enforced by the standing DMAAR MLS Committee and the DMAAR Board of Directors.

D. Multiple Listing Services

A multiple listing service is a common database where member companies submit listings **[*5]** to facilitate the exchange of information about one another's listings so agents can cross company lines to sell one another's houses and can show clients all houses on the market, not just those homes listed with their own company. There are two multiple listing services in the Des Moines area: Rapattoni and MLXchange. DMAAR operates the Rapattoni MLS. Rapattoni is a web-based MLS database software system. All DMAAR members except Iowa Realty, First Realty and Coldwell Banker enter their listing information directly into the Rapattoni MLS software and view that listing information through the Rapattoni software.

Iowa Realty, First Realty and Coldwell Banker use a multiple listing service separate from Rapattoni known as MLXchange. Iowa Realty has the exclusive license in the Des Moines area real-estate market for the MLXchange software. Coldwell Banker has access to MLXchange pursuant to the 2002 Co-Marketing Agreement detailed below. All home listings from Iowa Realty, First Realty and Coldwell Banker are listed on MLXchange and each day this information is shared with the DMAAR Rapattoni system and vice versa. Consequently, other DMAAR members have access to MLXchange listing data **[*6]** through Rapattoni and Coldwell Banker, Iowa Realty, and First Realty have access to Rapattoni listings through MLXchange.

E. Co-Marketing Agreement

In early 2002, Coldwell Banker approached Interealty, the owner of the MLXchange software, to purchase a license and was informed that Iowa Realty has the exclusive license for MLXchange in the Des Moines area. Consequently, in the summer of 2002, Coldwell Banker approached Michael Knapp, President of Iowa Realty, about the possibility of sublicensing the MLXchange software. Ms. Helmlinger of Coldwell Banker was told that Iowa Realty would grant a sublicense of the MLXchange software for a fee but only on the condition that Coldwell Banker also participate and help fund a saturated mass marketing ("SMM") mailer (known as Des Moines Ads at Home) that would contain 16 pages of advertisements for residential homes listed by Iowa Realty, First Realty and Coldwell Banker.

On August 30, 2002, the parties signed the Co-Marketing Agreement. In Section I.A.1 of the Co-Marketing Agreement, Iowa Realty grants Coldwell Banker a non-exclusive license to use the MLXchange software. Section I.A1 provides:

> Iowa Realty grants to Coldwell a non-exclusive **[*7]** sub-license to use the MLXchange software all as further set forth in this Agreement. The MLXchange software shall include the MLXchange system (real estate listing information management system), Passport Plus program (distribute desktop software designed to function as an offline listing database), Designer Tool (report creation tool), Datalink (data and photo download tool), Photolink (photo upload tool), (all hereinafter collectively referred to as 'the MLXchange Software')

The Iowa Realty Group also granted Coldwell Banker a nonexclusive license to use all the listing information on MLXchange. Section I.A.2 of the Co-Marketing Agreement provides:

> Subject to the restrictions set forth in Section I(C)(1) Restrictions on Use-Coldwell, Iowa Realty Group hereby grants to Coldwell a non -exclusive license to use the listing information, including listings, sales, pending/closed sales, expirations and modifications thereto related to residential real estate located in the Des Moines metropolitan market ('Listings and Listing Information') that Iowa Realty Group shall enter into the MLXchange Software ("Iowa Realty Group Listings and Listing Information").

In reciprocation, **[*8]** Coldwell Banker granted the Iowa Realty Group a nonexclusive license to use all its listings information on MLXchange in section I.A.3.

The Co-Marketing Agreement also contains a termination clause, VII.C., which provides in part:

> Termination without Cause. In the event either party desires to cancel this Agreement for any reason other than provided under Section VII(B) prior to the expiration of the term of this Agreement, either party may provide to the other, a written notice delivered at least twelve (12) months prior to the desired cancellation date … The MLXchange Software and the SMM program will continue to be made available to Coldwell during any such twelve (12) month notice cancellation period; however, upon the expiration of such twelve (12) month notice period, all licenses, sub-licenses, and any services previously made available to Coldwell will cease.

Plaintiff's Appendix II, PX1 at 10.

F. Passport Plus Program

In an attempt to bolster its share of the Des Moines real estate market Iowa Realty developed and had originally planned on implementing its Passport Plus program in the early spring of 2004. The program's implementation, as previously **[*9]** mentioned, was delayed pursuant to the parties stipulated TRO until the resolution of Coldwell Banker's preliminary injunction request.

The Passport Plus program was designed to be exclusive to the Iowa Realty Group. The complete listing information for homes listed in this program will only be available to Iowa Realty and First Realty agents and there is no commission sharing with non-Iowa Realty Group agents. Passport Plus program homes may only be shown by Iowa Realty agents and all buyers must be represented by a First Realty or Iowa Realty agent. The program offers home sellers the choice to enter into an exclusive listing agreement with Iowa Realty in return for several incentives. As incentives to sign up for the Passport Plus program, Iowa Realty will offer prominent advertising for Passport Plus listings, a one-year home warranty on the property, financing incentives through Iowa Realty's mortgage company, a free appraisal and a quarter percent discount or reduction in the cost of the loan origination fees through the mortgage company, and abstract updating immediately upon listing of the home.

III. APPLICABLE LAW AND ANALYSIS

Coldwell Banker now requests that this **[*10]** Court grant a preliminary injunction enjoining Iowa Realty from implementing its Passport Plus program. *HN1*[] The granting of a preliminary injunction is an extraordinary remedy that will not issue unless the right to such relief is clearly established by the movant. *Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984)*. In evaluating a motion for preliminary injunction, the Court must consider: (A) the threat of irreparable harm to the moving party; (B) the balance of hardships should the injunction issue; (C) the probability that the moving party will succeed on the merits; and (D) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)* (en banc). No single factor is dispositive, and the Eighth Circuit favors a flexible approach *Calvin Klein Cosmetics Corp. v. Lenox Lab., 815 F.2d 500, 503 (8th Cir. 1987)*.

A. Irreparable Harm

HN2[] "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003)*. Generally, irreparable harm is suffered when monetary damages **[*11]** are difficult to ascertain or are inadequate. *See Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 386 (7th Cir. 1984)* (preliminary injunction may be granted upon a showing that an award of damages will be inadequate). When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong may be satisfied. *See United Healthcare Ins. Co. v. AdvancePCS, 316 F.3d 737, 741 (8th Cir.2002)* ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury.").

In the present case, Coldwell Banker argues that it faces immediate and irreparable harm from Iowa Realty's Passport Plus program that cannot be later compensated fully by monetary damages. Coldwell Banker contends that it will sustain lost customers, lost agents, lost reputation, and lost goodwill if the preliminary injunction is not granted. Ms. Helmlinger, Coldwell Banker's President, testified that Coldwell Banker's "reputation would be damaged because [Coldwell] could no longer show [potential clients] a hundred percent of the market," resulting in the loss **[*12]** of customers. Transcript at 111:15-25. Potential clients of Coldwell Banker will have a strong incentive to use Iowa Realty or First Realty, because they will be the only agents that can show all homes in the MLXchange database. [2] Ms. Helmlinger also testified that if the preliminary injunction is not granted, she expects Coldwell Banker agents to leave the company and go to work for Iowa Realty or First Realty so they can show clients all of the listings in the Des Moines area market. Transcript at 179:16-20.

Iowa Realty Group, on the other hand, contends that any harm to Coldwell **[*13]** is wholly speculative and any future harm could be fully compensated by an award of money damages. This Court disagrees. There is little doubt that Coldwell Banker's inability to continue to show all of the homes listed by Iowa Realty will adversely affect Coldwell Banker's business and will likely result in a significant loss of agents. While Ms. Helmlinger admitted that it may be possible to calculate some elements of Coldwell Banker's economic loss incurred as a result of Passport Plus, ***HN3***[] "harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars." *Medicine Shoppe Intern., Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 805 (8th Cir. 2003)*. Harm to Coldwell Banker's reputation and goodwill has the potential to be especially damaging in this case, where the parties' business practices and marketing campaigns have been developed with the understanding that the parties will be able to access each others' listings. The one year termination clause contained in the Co-Marketing Agreement was an obvious acknowledgment that a material change by one party under the agreement would require a significant time period to explore alternative **[*14]** marketing strategies by the other party. The Court therefore finds this factor weighs in favor of granting preliminary injunctive relief.

B. Balance of Hardships

As detailed more fully above, Coldwell Banker has indicated that it will be adversely affected if its motion for a preliminary injunction is denied and Iowa Realty were to implement the Passport Plus program. Conversely, Iowa Realty Group has presented little evidence that it would be harmed by a decision of the Court granting an injunction

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[2] The Court notes that because of the presence of office exclusive listings and for-sale-by-owner homes, no real estate agents have the ability to show *all* homes in the Des Moines area market. Nevertheless, the homes listed in the MLXchange database comprise a substantial portion -- approximately 85 percent -- of the Des Moines area market. Transcript at 58:4-7 (DMAAR sales represent 85 percent of the Des Moines area market).

maintaining the status quo. Iowa Realty Group contends only that the issuance of a preliminary injunction will impede Iowa Realty's ability to respond to increasing competitive pressure in the marketplace. This concern does not outweigh the aforementioned consequences that the Passport Plus program could have on Coldwell Banker's business. Under these circumstances, the balance of harms tips in favor of granting preliminary injunctive relief.

C. Likelihood of Success on the Merits

1. Count I: Breach of Contract

Coldwell Banker alleges that Iowa Realty's use of the Passport Plus program will breach several provisions of the Co-Marketing Agreement. The most relevant provisions of the **[*15]** Co-Marketing Agreement are set forth below. Section I.A. 1 provides in part:

> MLXchange and Related Software. Iowa Realty grants to Coldwell a non-exclusive sub-license to use the MLXchange software all as further set forth in this Agreement. The MLXchange software shall include the MLXchange system (real estate listing information management system), Passport Plus program (distribute desktop software designed to function as an offline listing database), Designer Tool (report creation tool), Datalink (data and photo download tool), Photolink (photo upload tool), (all hereinafter collectively referred to as 'the MLXchange Software').

Plaintiff's Appendix II, PX1 at 1. Section I.A.2 provides:

> Iowa Realty Group Listing and Listing Information. Subject to the restrictions set forth in Section I(C)(1) Restrictions on Use-Coldwell, Iowa Realty Group hereby grants to Coldwell a non-exclusive license to use the listing information, including listings, sales, pending/closed sales, expirations and modifications thereto related to residential real estate located in the Des Moines metropolitan market ('Listings and Listing Information') that Iowa Realty Group **[*16]** shall enter into the MLXchange Software ("Iowa Realty Group Listings and Listing Information").

Plaintiff's Appendix II, PX1 at 1-2. Section I.B.2 provides, in part: "Coldwell users will have access to all application data on MLXchange." Plaintiff's Appendix II, PX1 at 3.

Coldwell Banker contends that the Co-Marketing Agreement requires Iowa Realty to share all of the information that it enters into the MLXchange. At the hearing, Mr. Knapp admitted that Passport Plus listings would be entered into the MLXchange, but that they would be entered in such a way that Coldwell Banker would not be able to see the information. Transcript at 355:19-22, 360:21-23, 362:11-13. Coldwell Banker argues that by barring them from seeing or using the Passport Plus listings in the MLXchange database, Iowa Realty Group is denying them "access to all application data in MLXchange," section I.B.2, for the "purpose of assisting Coldwell clients … interested in listing, selling, or buying residential real estate … or for developing comparative market analyses … [or for] conducting residential real estate appraisals," section I..C.1, in breach of sections I.A.2, I.B.2, I.C.1 and I.C.2.

Iowa **[*17]** Realty Group argues that the Co-Marketing Agreement does not require Iowa Realty to make available their office exclusive listings. [3] Iowa Realty Group notes that there is no language in the Co-Marketing Agreement that addresses the sharing of office exclusive listing information. The parties negotiated and entered into the Co-Marketing Agreement against a backdrop of industry standards providing that office exclusive listing information

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[3] The parties disagree as to whether Iowa Realty's Passport Plus homes are properly classified as office exclusive listings. An office exclusive listing is one in which a customer directs his or her broker to market the seller's property only to those brokers and agents the customer specifically authorizes. Transcript at 170:24-172:1. Coldwell Banker makes several arguments that Iowa Realty's Passport Plus listings are not truly office exclusive. Essentially, Coldwell Banker contends that the Passport Plus homes cannot be "office exclusive" because Iowa Realty shares the listing information with First Realty and thus does not keep the listings exclusive to its office. The Court finds this argument unpersuasive. As noted above, a realtor will list a property as an office exclusive when "it is the desire of the seller that a listing not be filed with the [MLS]." Handbook on Multiple Listing Policy of the National Association of Realtors, Plaintiff's Appendix II, PX245 at 6-6. It appears under the guidelines that Iowa Realty may share the listing with any other realtor, as long as it is authorized by and is the "desire of" the seller. In the present case, sellers who sign up for the Passport Plus program authorize Iowa Realty and its subsidiaries -- i.e. First Realty -- to market office exclusive listings. Defendants' Appendix, Exhibit G at G.021.

shall not be disseminated to MLS members while the listing is pending. Section 1.1(a) of the Rules and Regulations of the MLS of the Bylaws of the DMAAR, Defendants' Appendix, Exhibit D at D.023. Iowa Realty Group contends that under these circumstances, the parties did not intend the Co-Marketing Agreement to create any obligation to each other with respect to information sharing for office exclusive listing agreements. *See Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 184 (Iowa Ct. App. 1986)* (the court should "absolutely never give effect to the meaning of words that neither party in fact gave them.").

[*18] ***HN4***[] As a general rule, a "contract will be strictly construed if its words are clear and unambiguous." *SDG Macerich Props., L.P. v. Stanek, Inc., 648 N.W.2d 581, 586 (Iowa 2002)*. Under the Co-Marketing Agreement, Iowa Realty expressly gave Coldwell Banker the right to "all application data on MLXchange." Plaintiff's Appendix II, PX1 at 3. The fact that the Passport Plus program homes may be classified as office exclusive listings does not create ambiguity in the Co-Marketing Agreement, nor does it require Iowa Realty to choose between violating its commitment to its office exclusive clients or breaching the Co-Marketing Agreement. If a client of Iowa Realty desires an office exclusive listing, Iowa Realty should honor that request by simply not putting the listing in the MLXchange where, under the Co-Marketing Agreement, other realtors have full access to it. It is for the aforementioned reasons that this Court finds the record sufficient to support a finding that Iowa Realty Group would breach the Co-Marketing Agreement by denying Coldwell Banker access to information about Passport Plus homes listed on MLXchange. Accordingly, the Court finds Coldwell Banker likely to **[*19]** succeed on the merits of its breach of contract claims.

2. Count II: Implied Covenant of Good Faith and Fair Dealing

Coldwell Banker also argues that by refusing to share commissions, in contradiction to decades of reciprocity and cooperation, Iowa Realty Group is violating its duty of good faith and fair dealing. Coldwell Banker contends Iowa Realty has shared commissions for over thirty years with other brokers and that the continued cooperation among brokers is part of the essential purpose of the Co-Marketing Agreement. Transcript at 350:4-10.

The Supreme Court of Iowa has adopted the *Restatement (Second) of Contracts § 205* (1981), which ***HN5***[] imposes a duty of good faith and fair dealing in the performance and enforcement of a contract. *See Engstrom v. State, 461 N.W.2d 309, 314 (Iowa 1990)*. Encompassed within this duty is an obligation not to do anything "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Pittman v. Blackhawk Rock & Gravel, Inc.,* 1999 WL 823544, *2 (Iowa Ct. App. Oct. 15, 1999) (quoting *17A Am.Jur.2d Contracts § 380* **[*20]** (1991)).

Iowa Realty Group claims that the parties did not intend the Co-Marketing Agreement to regulate its obligations with respect to commission sharing or sharing of office exclusive listings. Furthermore, Iowa Realty Group argues that a finding that the Passport Plus program would violate the implied covenant of good faith and fair dealing would essentially impose unbargained for obligations upon the parties. This Court disagrees.

As Coldwell Banker points out, Mr. Knapp admitted that the purpose of Section I.C. 1 of the Co-Marketing Agreement is to let Coldwell Banker and Iowa Realty Group use each other's data for the purpose of listing, selling, buying residential real estate, and doing comparables and appraisals. Transcript at 365:5-16. The Court notes that the effect of Iowa Realty's decision to actively solicit office exclusive listings would be to limit Coldwell Banker's access to many of Iowa Realty Group's listings. Iowa Realty Group has not contested Coldwell Banker's contention that office exclusive listings have traditionally been used in situations where the seller has personal reasons for not wanting the fact known that the property was being offered for sale. **[*21]** *See* Handbook on Multiple Listing Policy of the National Association of Realtors, Plaintiff's Appendix II, PX245 at 6-6; Transcript at 68:20-24, 204:16-22. Thus, it appears that the active solicitation of office exclusive listings is contrary to the parties' established course of dealing under the Co-Marketing Agreement. By limiting the open exchange of listing information between the parties, Iowa Realty Group restricts an essential purpose of the Co-Marketing Agreement, thereby breaching the implied covenant of good faith and fair dealing. Thus, the Court finds that as long as the Co-Marketing Agreement remains in effect, implementation of the Passport Plus program would deny Coldwell Banker its rights to the "fruits of the contract."

Assuming, however, that Iowa Realty Group had properly terminated the Co-Marketing Agreement, there would be nothing in this doctrine that would prevent Iowa Realty Group from trying to increase its share of the market by soliciting office exclusive listings. Prior to the Co-Marketing Agreement the parties had been operating for years in a market that included office exclusive listings, albeit a small number. Plaintiff's Proposed Findings of Fact **[*22]** at 10 ("At most, Iowa Realty executed 9 office exclusive sales in 2003."). The presence of these office exclusive listings must be taken into account when considering the parties course of dealings. While Iowa Realty's decision to advertise its ability to take office exclusive listings with the Passport Plus program may be a departure from past practices, aside from the implied duty of good faith and fair dealing created by the Co-Marketing Agreement, nothing would prevent Iowa Realty Group from attempting to increase its share of the Des Moines area real estate market by soliciting office exclusive listings. Under these circumstances, Iowa Realty Group's acceptance of office exclusive listings would not violate the implied covenant of good faith and fair dealing any more than when it executed a limited number of office exclusive sales in the past.

For the aforementioned reasons, the Court finds that as long as the Co-Marketing Agreement remains in effect, Coldwell Banker is likely to succeed on the merits of its claim for breach of implied covenants of good faith and fair dealing.

3. Count III: Monopolization

Coldwell Banker alleges that Iowa Realty Group's Passport Plus program **[*23]** will effectively create a monopoly in the Des Moines area real estate market in the in violation of *§ 2* of the Sherman Act. *Section 2* of the Sherman Act provides that it is unlawful to: ***HN6***[] "…monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states …." *15 U.S.C. Section 2*. ***HN7***[] Two basic elements must exist to establish a case under *section 2 of the Sherman Act*: (a) possession of monopoly power in the relevant market; and (b) the willful acquisition or maintenance of that power. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *Paschall v. Kansas City Star Co., 727 F.2d 692, 695-96 (8th Cir. 1984)*, *cert. denied, 469 U.S. 872, 83 L. Ed. 2d 152, 105 S. Ct. 222 (1984)*.

a. Monopoly Power

In *United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, ***HN8***[] the Supreme Court defined monopoly power as "the power to control prices or exclude competition." There are two ways of proving market power. The first is by defining the relevant market in geographic and **[*24]** product terms and by showing that the defendant's share exceeds a reasonable threshold under the circumstances. *See, e.g., United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *United States v. Grinnell Corp., 384 U.S. 563, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The second is through direct evidence of anti-competitive effects. *See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* ("the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.").

(1) Relevant market and market share

The parties have stipulated that the relevant geographical market is the greater Des Moines area. ***HN9***[] The relevant product market must be defined so as to capture the competitive realities of the market place -- the "area of effective competition." *United States v. E. I. du Pont De Nemours II, 353 U.S. 586, 593, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957).* **[*25]** In defining the product market, courts consider "whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other." *Hayden Pub. Co. v. Cox Broadcasting Corp., 730 F.2d 64, 70 n.8 (2nd Cir.1984)*.

Coldwell Banker contends that the relevant product market is residential real estate brokerage services, which does not include flat-fee brokers or for-sale-by-owner homes. The Court disagrees. [4] Coldwell Banker's proposed definition of the product market places undue emphasis on the differences between the product offered by a full-service broker, and a flat fee or for-sale-by-owner home. Full-service brokers are clearly in competition with flat-fee brokers and a persuasive argument can be made that they are also competing with for-sale-by-owner homes. While full-service brokers may offer additional services, in each case the fundamental purpose is the marketing and sale of a residential home.

[*26] Given the Court's aforementioned determination of the relevant product market, Iowa Realty Group represents an approximately 50 percent share of the Des Moines area real estate market. [5] ***HN10***[] Courts have generally found that a 50 to 60 percent market share is insufficient to create a monopoly. *See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Company of America, 885 F.2d 683 (10th Cir. 1989)* ("While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%.", citing 2 E. Kintner, Federal ***Antitrust Law*** § 12.6 (1980)); *see also* Areeda & Turner, ***Antitrust Law***, P 518.3c ("There is substantial merit in a presumption that market shares below 50 or 60 percent do not constitute a monopoly."); *but see Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69 n.7 (2nd Cir. 1984)* ("a party may have monopoly power in a particular market, even though its market share is less than 50%."). Even assuming 50 to 60 percent was sufficient, however, evidence of market share alone is not conclusive as to whether **[*27]** monopoly power exists because market share "may not reflect actual power to control price or exclude competition." *Reazin v. Blue Cross & Blue Shield, Inc., 899 F.2d 951, 967 (10th Cir. 1990)*; *see also Broadway Delivery Corp. v. United Parcel Serv. of America, 651 F.2d 122, 128 (2nd Cir. 1981)* ("The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence.").

[*28] Because Iowa Realty Group does not have a materially significant market share -- only controlling approximately 50 percent -- the Court will not infer that Iowa Realty Group has monopoly power unless there is a direct evidence that they have actual power to control price or exclude competition. *See Tops Maekets, Inc. v. Quality Markets, Inc., 142 F.3d 90 (2nd Cir. 1998)* (holding that despite evidence of 72 percent market share, consideration of other relevant factors did not support a finding of monopoly power); *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)* (finding that mere showing of substantial or even dominant market share alone cannot prove monopoly power, plaintiff must show that dominant firm can control price or exclude competition); *Nat'l Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020 (8th Cir. 1985)* (holding that 100 percent market share fails to prove monopoly power where dominant firm had not power to control price).

(2) Direct evidence of monopoly power

Coldwell Banker alleges that Iowa Realty Group has caused sustained adverse effects on competition by maintaining supracompetitive **[*29]** prices, has excluded competition by forcing adverse commission splits on other realtors, and has coerced Coldwell Banker into buying advertising under the Co-Marketing Agreement. If true, these

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[4] The Court disagrees for the purposes of this motion only. At later stages in this litigation it may be necessary for the parties to revisit both the issue of whether for-sale-by-owner and flat-fee broker homes should be included in the relevant product market and whether Iowa Realty's market share should be considered separately or combined with First Realty.

[5] The parties did not provide data showing Iowa Realty Group's share of the entire relevant product market. However, in 2003 DMAAR sales accounted for approximately 85 percent of the Des Moines area real estate market, Transcript at 58:4-7, and Iowa Realty Group had an approximately 60 percent share of DMAAR sales, Plaintiff's Appendix II, PX64 at IR01436.

Even assuming the relevant product market did not include for-sale-by-owner homes, Iowa Realty Group would only have an approximately 60 percent share of the market. *See generally* Transcript at 57:22-58:3 (flat-fee brokers represented approximately 2 to 3 percent of the Des Moines area real estate market in 2002), Transcript at 58:4-7, Plaintiff's Appendix II, PX64 at IR01436.

actions would be indicative of monopoly power, however, the record currently before the Court is insufficient to support Coldwell Banker's allegations.

There is nothing in the record suggesting that Iowa Realty Group has the power to control prices in the Des Moines area market. In fact, Coldwell Banker's own expert indicated that Iowa Realty cannot control prices. Transcript at 257:7-15. There is also insufficient evidence in the record showing that Iowa Realty Group has the power to exclude competition from the market. Coldwell Banker's allegation that Iowa Realty Group imposed adverse commission splits against RE/MAX is unpersuasive in that it only addresses harm to a specific competition and not to competition generally. *See* *Los Angeles Land Co., 6 F.3d 1422, 1426-27 (9th Cir. 1993)*; *Davies v. Genesis Medical Center, 994 F. Supp. 1078, 1097 (S.D. Iowa 1998)*. Moreover, it appears that the market has sustained a significant number of real estate businesses, **[*30]** Transcript at 135:19-136:1, while Iowa Realty Group's share of the market has decreased over the last several years, *see* Iowa Realty and First Realty Share of Completed MLS Transactions for 1996-2003, Defendant's Exhibit DDD. For the aforementioned reasons, the Court finds that there is no convincing direct evidence in the present record that Iowa Realty Group has monopoly power.

b. Willful Acquisition or Maintenance of Monopoly Power

As detailed above, Coldwell Banker was required to show both that Iowa Realty Group has monopoly power and that it willfully utilized that power. The Court found the record insufficient to support of finding that Iowa Realty Group has monopoly power. Consequently, the Court need not determine whether Iowa Realty Group willfully acquired or maintained monopoly power. *See* *National Reporting Co. v. Alderson Reporting Co., Inc., 763 F.2d 1020 (8th Cir. 1985)* ***HN11***[] (company may not be found guilty of completed monopolization in violation of the *Sherman Anti-Trust Act § 2* without proof of actually attaining market dominance or monopoly power). The Court finds Coldwell Banker unlikely to succeed on the merits of its monopolization claim.

[*31] 4. Count IV: Attempted Monopolization

Coldwell Banker also claims that Iowa Realty Group's implementation of the Passport Plus program is an attempt to monopolize in violation of *§ 2 of the Sherman Act*. ***HN12***[] A claim of attempted monopolization requires Coldwell Banker to prove that Iowa Realty Group: "(1) specifically intended to control prices or destroy competition in some part of commerce; (2) engaged in predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (2) a dangerous probability of success." *H.J., Inc. v. Int'l Tel. & Telegraph Corp., 867 F.2d 1531, 1540-41 (8th Cir. 1989)*.

a. Specific intent to control prices or eliminate competition

As indicated above, the Court has already concluded that it is unlikely that Coldwell Banker will be able to prove that Iowa Realty Group has the ability to control prices or eliminate competition. Similarly, Coldwell Banker has not provided sufficient evidence in the record to support a finding that Iowa Realty Group implemented the Passport Plus program with the specific intent to control prices or eliminate competition from the market. Instead of attempting to create a monopoly, it appears **[*32]** that Iowa Realty Group was simply trying to reverse its recent trend of losing market share. *See* Iowa Realty and First Realty Share of Completed MLS Transactions for 1996-2003, Defendant's Exhibit DDD.

Because the Court has found insufficient evidence to support a finding of Iowa Realty Group's specific intent, the Court need not consider the remaining two factors for determining attempted monopoly. Based on the current record, the Court finds that Coldwell Banker is not likely to succeed on its attempted monopolization claim.

5. Conclusion: Likelihood of Success on the Merits

As detailed above, the Court found that Coldwell Banker is likely to succeed on its contract claims (Counts I and II), but that the record is insufficient to support a finding that Coldwell Banker is likely to succeed on its monopolization claims (Counts III and IV). Nevertheless, because Coldwell Banker is likely to succeed on its breach of contract claims this factor weighs in favor of granting preliminary relief on a limited basis.

D. Public Interest

Finally, the Court must consider whether the issuance of a preliminary injunction serves the public interest. The parties disagree as to whether implementation **[*33]** of the Passport Plus program will increase or decrease consumer choice. Iowa Realty Group argues that Passport Plus provides home sellers with additional choices regarding the listing and selling of their homes. Conversely, Coldwell Banker contends that if the Passport Plus program is enacted, buyers will no longer be able to select a realtor of their choice if they choose to purchase a Passport listed home. Coldwell Bankers also asserts that because buyers and sellers not represented by Iowa Realty Group will not have access to listing information, they will be unable to price homes competitively and do comparisons in the market.

As the Court has indicated above, the ability of the consumer to choose an office exclusive listing has been around long before the Passport Plus program. The success of Iowa Realty's promotion of office exclusive listings ultimately will be driven by the consumer. Despite the fact that Iowa Realty may advertise its Passport Plus program, it will be up to the seller of the home to decide whether an office or MLS listing is preferable. Under these circumstances, Coldwell Banker has the burden to present sufficient evidence to convince the Court that Iowa **[*34]** Realty Group's solicitation of office exclusive listings will in fact limit overall consumer choice. Coldwell Banker has not sustained its burden and the Court finds this factor neutral with regard to the Court's decision to grant preliminary injunctive relief.

IV. CONCLUSION

For the reasons outlined above and after weighing all relevant factors, IT IS HEREBY

ORDERED THAT:

I. Pending judgment after a trial, defendants, defendants' officers, servant, employees, and attorneys and all those acting in active concert or participation with them, will refrain from:

A. Failing to comply with the August 30, 2002 Co-Marketing Agreement executed by defendants and plaintiff; specifically by denying plaintiff access to information listed in the MLXchange database;

B. Failing to deliver listings and listing information to the Des Moines Area Association of Realtors' Multiple Listing Service in accordance with the Agreement executed by defendants, plaintiff, and the Des Moines Area Association of Realtors, Inc.;

C. Actively offering to or soliciting exclusive listing contracts from clients pursuant to the Passport Plus program; nothing in this Order precludes defendants **[*35]** from entering into exclusive listing contracts in accordance with the established course of dealing between the parties;

D. Refusing to cooperate with plaintiff and other real-estate brokers in the greater Des Moines area in the sharing of listing information or in the showing, selling, or buying of residential real estate; and

E. Refusing to split commissions with plaintiff and other real-estate brokers in the greater Des Moines area in accordance with the established course of dealing.

II. Nothing in this Order is to be interpreted to prevent defendants from offering benefits and incentive programs that are not exclusionary and that otherwise do not breach the Co-Marketing Agreement.

III. Nothing in this Order precludes defendants from exercising its right to terminate the Co-Marketing Agreement pursuant to VII.C. If Iowa Realty Group determines that it is in its best interest to give notice and terminate the Co-Marketing Agreement in accordance with the contract, the injunction shall only remain in effect until one year after the date notice of termination is given.

IV. In conjunction with this Preliminary Injunction Order, plaintiff has filed a bond **[*36]** in the amount of one hundred thousand dollars ($ 100,000).

The injunction will remain in effect until after the trial. [6] However, if Iowa Realty Group determines that it is in its best interest to give notice and terminate the Co-Marketing Agreement in accordance with the contract, the injunction shall only remain in effect until one year after the date notice of termination is given.

IT IS ORDERED.

Dated this 28th day of May, 2004.

RONALD E. LONGSTAFF, Chief Judge

United States District Court

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[6] Nothing in the Court's preliminary injunction order precludes Iowa Realty Group from exercising its termination right under the Co-Marketing Agreement pursuant to VII.C.

Dagher v. Saudi Ref., Inc.

United States Court of Appeals for the Ninth Circuit

October 7, 2003, Argued and Submitted, Pasadena, California ; June 1, 2004, Filed

No. 02-56509

Reporter
369 F.3d 1108 *; 2004 U.S. App. LEXIS 10624 **; 2004-1 Trade Cas. (CCH) P74,432

FOUAD N. DAGHER; BISHARAT ENTERPRISES INC.; ALFRED BUCZKOWSKI; ESEQUIEL DELAGADO; MAHWASH FARZANEH; NASSER EL-RADI; G.G.&R. PETROLEUM INC.; H.J.F. INC.; KALECO CO.; CARLOS MARQUEZ; SAMI MERHI, EDGARDO R. PARUNGAO; RON ABEL SERV. CENTER, INC.; GULLERMO RAMIREZ; JERRY'S SHELL SERV. CENTER, INC.; LEOPOLOO RAMIREZ; NAZAR SHEIBAINI; SITARA MANAGEMENT CORPORATION; TINSEL ENTERPRISES INC.; QUANG TRUONG; STEVEN RAY VEZERIAN; LOS FELIZ SHELL, INC.; NASSIM HANNA, Plaintiffs-Appellants, v. SAUDI REFINING INC., (SRI); TEXACO INC.; SHELL OIL COMPANY, Defendants-Appellees, and MOTIVA ENTERPRISES LLC; EQUILON ENTERPRISES, LLC; EQUIVA TRADING COMPANY; EQUIVA SERVICES LLC, Defendants.

Subsequent History: Later proceeding at *Texaco, Inc. v. Dagher, 543 U.S. 1143, 125 S. Ct. 1372, 161 L. Ed. 2d 103, 2005 U.S. LEXIS 1440 (2005)*

Subsequent appeal at *Shell Oil Co. v. Dagher, 543 U.S. 1143, 125 S. Ct. 1372, 161 L. Ed. 2d 103, 2005 U.S. LEXIS 1441 (2005)*

US Supreme Court certiorari granted by, Motion granted by *Texaco, Inc. v. Dagher, 125 S. Ct. 2957, 162 L. Ed. 2d 887, 2005 U.S. LEXIS 5035 (U.S., 2005)*

US Supreme Court certiorari granted by, Motion granted by *Shell Oil Co. v. Dagher, 125 S. Ct. 2958, 162 L. Ed. 2d 887, 2005 U.S. LEXIS 5036 (U.S., 2005)*

Reversed by *Texaco Inc. v. Dagher, 2006 U.S. LEXIS 2023 (U.S., Feb. 28, 2006)*

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. CV-99-06114-GHK. George H. King, District Judge, Presiding.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

joint venture, prices, brands, price fixing, gasoline, alliance, products, venture, marketing, district court, antitrust, Sherman Act, per se rule, anticompetitive, entity, competitors, defendants', oil, price-fixing, unified, nationwide, refining, naked, summary judgment, rule of reason, combinations, conspiracy, same price, conspirators, Enterprises

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN1[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

In the context of an antitrust suit, a horizontal agreement is "naked" if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality.

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

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN2[] Appellate Review, Standards of Review

An appellate court reviews a district court's grant of summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] Entitlement as Matter of Law, Genuine Disputes

In the context of a motion for summary judgment, taking the evidence in the light most favorable to the nonmovant, a court must consider whether there are any genuine issues of material fact and whether the district court properly applied the pertinent substantive law. All inferences must be drawn in favor of the nonmovant. In antitrust cases, these general standards are applied even more stringently and summary judgments granted more sparingly. As the United States Supreme Court explained in Poller v. Columbia Broadcasting Sys. Inc.: Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

For an agreement to constitute a violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1, a conscious commitment to a common scheme designed to achieve an unlawful objective must be established.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN5[] Sherman Act, Defenses

No antitrust violation is more abominated than the agreement to fix prices. With few exceptions, price-fixing agreements are unlawful per se under the Sherman Act and no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN6[] Antitrust & Trade Law, Sherman Act

The Sherman Antitrust Act makes illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*. The United States Supreme Court has declined to read this language literally. Instead, the Court has created a two-tiered mode of analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of members of an industry, subject to exceptions defined by statute, that policy decision has been made by the Congress.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Quick look analysis applies when per se review is inapplicable but when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anti-competitive effect on customers and markets. Much like per se treatment, quick-look analysis applies when the great likelihood of anticompetitive effects can easily be ascertained.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

If the plaintiffs can establish that the defendants' conduct falls within the range of conduct considered illegal per se, it does not matter whether the particular application of the per se rule appears inefficient or unfair. As the United States Supreme Court has explained, the costs of judging business practices under the rule of reason have been reduced by the recognition of per se rules. Once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, it has tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable. The Court has held consistently that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN9[] Regulated Practices, Price Fixing & Restraints of Trade

Price fixing is among the practices which the courts have heretofore deemed to be unlawful in and of themselves.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN10[] Regulated Practices, Price Fixing & Restraints of Trade

Price fixing is the quintessential example of a per se violation of *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

It is plain that *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, blanket prohibition on price fixing, like the Act itself, cannot be read literally. There are some price fixing arrangements that violate the letter of the Sherman Act but are legal nonetheless.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN12[] **Types of Contracts, Joint Contracts**

It is not the case that the mere existence of a bona fide joint venture means that participating companies may use the enterprises to do anything they please with full immunity from per se analysis under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, including price fixing. The issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN13[] **Types of Contracts, Joint Contracts**

The United States Supreme Court has continued to enforce the Sherman Act's per se prohibition on price fixing, and has scrutinized joint ventures to ensure that they do not contain "naked" restraints on trade. Nothing in the cases suggests that the Court would overrule Citizen Publishing in its entirety, abandon its holding that the price fixing in which the joint venture engaged was illegal per se, or eliminate the rule that "naked" price-fixing by a joint venture violates the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Even a small conspirator may be able to impede competition and conspirators need not achieve the dimensions of a monopoly to warrant condemnation under the antitrust laws.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] **Types of Contracts, Joint Contracts**

The proper inquiry for a per se analysis of price fixing is not simply whether the joint venture itself is anti-competitive. Nor is the relevant question simply whether the defendants intended to destroy competition.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Joint Ventures > General Overview

HN16[] **Types of Contracts, Joint Contracts**

The United States Supreme Court has upheld joint ventures and other corporate combinations involving fixed prices, but generally has done so only when it appeared plain to the Court that the restraints undertaken by the joint ventures were "necessary" to the legitimate aims of the joint venture. Courts have engaged in this "essentiality query," in order to ensure that a joint venture has a legitimate justification--other than the desire to enhance profits and market control--for adopting a particular restraint that would otherwise violate the Sherman Act. Thus, whether the per se rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN17[] Types of Contracts, Joint Contracts

Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this burden, a court should preclude the restraint without any further inquiry.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18[] Robinson-Patman Act, Claims

Under Robinson-Patman, *15 U.S.C.S. § 13*, sellers may not sell the same product at different prices on the basis of the identity of the buyer. The Act explicitly excludes price differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. *15 U.S.C.S. § 13(a)*. But in adopting the Act, Congress did not intend to outlaw price differences that result from or further the forces of competition.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN19[] Antitrust & Trade Law, Robinson-Patman Act

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN20[] Regulated Practices, Price Fixing & Restraints of Trade

The "fairness" of uniform pricing is not a relevant consideration in an antitrust case; consumers are presumed to prefer lower prices to the satisfaction of knowing they paid the same inflated price as everyone else.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Business & Corporate Law > Joint Ventures > Formation

HN21[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

The United States Supreme Court has declined to immunize joint ventures from per se antitrust scrutiny.

Counsel: Daniel R. Shulman, Gregory Merz; Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota; Joseph M. Alioto (argued), Angelina Alioto-Grace, Joseph M. Alioto, Jr.; Alioto Law Firm, San Francisco, California, for the appellants.

Stuart N. Senator; Munger, Tolles & Olson LLP, Los Angeles, California, for appellee Shell Oil Co.

Patricia G. Bulter; Howrey, Simon, Arnold & White LLP, Washington, DC, for appellee Texaco Inc.

Bryan A. Merryman; White & Case LLP, Los Angeles, California, for appellee Saudi Refining, Inc.

Judges: Before: Stephen Reinhardt, Ferdinand F. Fernandez, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Reinhardt; Partial Concurrence and Partial Dissent by Judge Fernandez.

Opinion by: Stephen Reinhardt

Opinion

[*1110] REINHARDT, Circuit Judge:

Plaintiffs Fouad N. Dagher, et al., appeal from the district court's award of summary judgment to the defendants, Texaco, Inc., Shell Oil Co., and Saudi Refining, Inc. (SRI), et al. The plaintiffs represent a class of 23,000 Texaco and Shell service station owners who allege that the defendants conspired to fix the nationwide prices for the Shell and Texaco brands of gasoline **[**2]** through the creation of a national alliance consisting of two joint ventures. The district court granted two summary judgment motions: one to dismiss defendant SRI because the plaintiffs lacked antitrust standing; the other to dismiss the complaint against the remaining defendants because the plaintiffs failed to raise a triable issue of fact as to whether the *Sherman Antitrust Act*'s *per se* prohibition against price fixing is applicable to the economic arrangements between the defendants. We affirm the district court's ruling as to the plaintiffs' standing to sue SRI, but reverse the district court's decision that the plaintiffs failed to create a triable issue of fact under the Sherman Act.

I. Factual and Procedural History

A. Factual History

Texaco, Inc., and Shell Oil Co. were once fierce competitors in the national oil and gasoline markets. They competed at both wholesale and retail levels, and in both upstream and downstream operations. [1] The two companies generally operated by independently refining gasoline and then selling the gas either to licensed Texaco **[*1111]** and Shell service stations or to wholesale distributors.

[3]** From 1989 to 1998, defendants Saudi Refining, Inc. (SRI) and Texaco sold gas on the East Coast through Star Enterprise, a joint venture "engaged in the refining and marketing of gasoline under the Texaco brand." Both Shell and Texaco sensed intensified competition in the downstream operations of their industry -- they similarly believed that "the oil industry was about to enter a period of consolidation." To respond to the heightened competition in the oil and gas industry, Shell approached Texaco in 1996 about several potential corporate combinations designed to enhance efficiency and reduce competition between the two companies with respect to the downstream refining and marketing of gasoline. In 1998, preliminary discussions yielded an agreement to form a nationwide alliance (hereinafter: "the alliance") [2] **[**5]** consisting of two separate joint ventures. [3] One joint venture was named "Equilon Enterprises" (Equilon); it combined Shell's and Texaco's downstream operations in the western United States. The other venture, formed by Texaco, Shell, and SRI, was named "Motiva Enterprises" (Motiva); it combined the three companies' downstream operations in the eastern United States. The alliance **[**4]** had a national market share of 15% of all gasoline sales, on the West Coast, Equilon's market share exceeded 25%.

There is a voluminous record documenting the economic justifications for creating the joint ventures. After analysis by teams made up of representatives of all three companies, the defendants concluded that numerous synergies and cost efficiencies would result. The defendants concluded that nation-wide there would be up to $ 800 million in cost savings annually. The Federal Trade Commission and several State Attorneys General approved the formation of the joint ventures, subject to modifications demanded by both the federal agency and the various Attorneys General.

The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline. Texaco and Shell signed non-competition agreements which prohibited **[**6]** them from competing with either Equilon or Motiva and committed them "not to engage in the manufacturing and marketing of certain products in the [relevant] geographic areas, including fuel, synthetic gasoline, and electricity." The two joint ventures established fixed ratios for profit sharing and for bearing the risk of

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[1] The parties have explained in their joint stipulations that "crude oil is the raw product from which gasoline is made at a refinery. Upstream operations consist of exploring for and producing crude oil, and downstream operations consist of refining crude into gasoline and other products and marketing the finished products."

[2] Defendants dispute that an "alliance" existed and characterize Equilon and Motiva as distinct entities. Appellees' Brief, at 46. While the defendant corporations did not create a new legal entity called "The Alliance," the record establishes beyond dispute that representatives of Texaco and Shell generally referred to the two joint ventures as part of a single project to combine the two companies' nationwide refining and marketing operations. Moreover, the record confirms that the single project was often referred to as "an alliance," and frequently called "The Alliance," by representatives of Texaco, Shell, and SRI, and by Board Members from the two joint ventures, "Equilon Enterprises" (Equilon) and "Motiva Enterprises" (Motiva). When we refer to "the alliance," we therefore refer to the combined national refining and marketing operation consisting of Equilon and Motiva -- an enterprise which was created, developed, and maintained collectively by the individual defendant corporations.

[3] The district court explained the massive scope of the alliance: "the downstream assets in Equilon and Motiva include twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees."

losses. **[*1112]** In Equilon, Shell has a 56% interest while Texaco owns 44%. In Motiva, Shell owns 35%, while SRI and Texaco each own 32.5%.

Despite the collective assumption of risk and resource pooling in the joint ventures, Shell and Texaco continued to operate as distinct corporations. Each retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand. Under the joint venture agreements, Equilon and Motiva market Shell and Texaco gasoline under licensing agreements governing both the sale of the products and the use of the Shell and Texaco trademarks. Each company maintained its ability to return to individual sales and marketing -- the joint ventures contain provisions allowing for dissolution at any time by mutual consent **[**7]** or, after five years time, by unilateral dissolution with two years advance notice.

The various agreements between the oil companies allowed Texaco and Shell to consolidate and unify the pricing of the Texaco and Shell gasoline brands within the Equilon and Motiva joint ventures. Before creating the two joint ventures, Shell, Texaco, and Star all independently set prices for their wholesale and retail sales, generally through decisions made by their corporate pricing units. Testimony in the record reveals that, either immediately before the formation of the joint ventures or sometime shortly thereafter, "a decision was made that the Shell and Texaco brands would have the same price in the same market areas." The decision to charge the same price for the two distinct brands "was developed as sort of an operating requirement right from the very start or near to the very start of the alliance." Equilon and Motiva integrated this pricing decision into a project named "The Strategic Marketing Initiative" (SMI), which sought to develop ways in which the alliance could produce and promote both brands more competitively. There is some evidence in the record establishing that the decision **[**8]** to set one price for the two brands was conceived of in the SMI even before Motiva was formed. [4]

The alliance consolidated pricing of the Texaco and Shell brands such that a single individual at each joint venture was responsible for setting a coordinated price for the two brands. The joint ventures did, however, continue to adjust the pegged price of the brands to each unique geographic sale area. The pricing was consolidated **[**9]** despite the fact that Texaco and Shell maintained each brand as a distinct product -- each brand has its own unique chemical composition (the gasoline is differentiated by separate packages of "additives"), trademark, and marketing strategy -- and competed for customers "at the pump." The companies, and the joint ventures, continued to target each brand at a different customer base -- "Texaco customers tend to be more blue-collared and rural than Shell customers, who are more affluent and urban."

The price optimization program may have allowed Equilon and Motiva to raise gasoline prices at a time when the price of crude oil was low and stable. During a **[*1113]** time when crude oil prices reached near-historic lows -- the price of crude oil decreased from $ 10 to $ 12 per barrel between September 1998 and February 1999 -- Equilon raised its prices $ .40 per gallon in Los Angeles and $ .30 per gallon in both Seattle and Portland.

B. Procedural History

The plaintiffs commenced this civil action in the United States District Court for the Central District of California. They brought suit on behalf of themselves and approximately 23,000 Shell and Texaco service station owners, alleging **[**10]** that defendants SRI, Texaco, Shell, Motiva, Equilon, Equiva Trading Co., and Equiva Services, LLC, engaged in a price fixing scheme to raise and fix gas prices through the alliance and the two joint ventures, Motiva and Equilon, in violation of *Section 1 of the Sherman Antitrust Act*, *15 U.S.C. § 1*. The plaintiffs disclaimed any

[4] The record does not establish with certainty whether the decision to price the two brands together was actively discussed during the SMI. The evidence does show that the SMI included a "price optimization" program. And there is some evidence in the record that the price optimization program ratified the unofficial decision to move toward unitary pricing -- one witness testified that the price optimization program included "a policy or a procedure to charge the same prices to both -- to similar classes of trade in the same marketing areas and to effect those -- to effect those changes."

reliance on the traditional "rule of reason" test, instead resting their entire claim on either the per se rule or a "quick look" theory of liability.

The defendants moved to dismiss under *FED. R. CIV. P. 12(b)(6)*. The issue with respect to the *12(b)(6)* motion was "whether the alleged agreement among Saudi, Shell, and Texaco is an unreasonable restraint of trade . . . under either the *per se* rule or a 'quick look' rule of reason analysis." The district court denied the motion. The court found that although the *per se* rule against price fixing plainly does not make all price-restraining joint ventures illegal, neither does "an agreement to fix prices . . . merit full rule of reason treatment solely because it is part of a broader joint venture agreement." The court explained that "price fixing **[**11]** can still be illegal per se even if it accompanies an efficient, integrated joint venture. If the joint venture could function perfectly well without price fixing, then the price fixing amounts to no more than an extraneous, anticompetitive restraint that does not merit rule of reason analysis." The district court found that the plaintiffs' complaint alleged sufficient facts to demonstrate that the alliance's price setting regime was a naked, rather than an ancillary, restraint on trade. [5] The district court disposed of the plaintiffs' alternative theories of liability -- the plaintiffs originally alleged a "market division" theory and a "manipulation of leases" theory to support their *per se* *Section 1* violation -- but gave plaintiffs leave to amend.

[12]** The parties filed cross-motions for summary judgment. The district court decided the motions in two separate orders. The first order granted SRI's motion for summary judgment on the ground that the plaintiffs lacked antitrust standing because no plaintiff had ever bought gasoline, or other products, from the Motiva joint venture or directly from SRI and because the plaintiffs lacked "direct or circumstantial evidence 'sufficiently unambiguous to permit a trier of fact to find that [SRI] conspired' to fix prices in the western United States absent 'any apparent motive to do so.'" (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986))*.

The second order granted the remaining defendants' motion for summary judgment on the ground that the rule of reason, not the *per se* or "quick look" rules, governed the Sherman Act analysis of the joint ventures. The district court applied its own analytical framework, consisting of two **[*1114]** questions: "(1) whether a reasonable trier of fact could conclude that Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or (2) whether they are otherwise patently **[**13]** anticompetitive." The court concluded -- relying on the detailed and costly negotiations leading up to the creation of the joint ventures -- that Equilon and Motiva were plainly not "fly-by-night" operations designed to cover up an elaborate price-fixing scheme. Moreover, the court found that Motiva and Equilon produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures under either the *per se* rule or a "quick look" analysis. Finally, the district court concluded that, because every joint venture "must, at some point, set prices for the products they sell" (citation omitted), a theory which made it illegal for a joint venture to fix prices of its various brands would "act as a per se rule against joint ventures between companies that produce competing products."

II. Standard of Review

HN2[↑] We review a district court's grant of summary judgment *de novo*. *United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003)*. ***HN3***[↑] Taking the evidence in the light most favorable to the nonmovant, we must consider whether there are any genuine issues of material fact and whether the district court properly **[**14]** applied the pertinent substantive law. *City of Tacoma, 332 F.3d at 578*; *Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 410 (9th Cir. 1996)*. All inferences must be drawn in favor of the nonmovant. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. "In antitrust cases, these general standards are applied even more stringently and summary judgments granted more sparingly." *Beltz Travel Service, Inc. v.*

[5] ***HN1***[↑] A "horizontal agreement [is] 'naked' if it is formed with the objectively intended purpose or likely effect of increasing price or decreasing output in the short run, with output measured by quantity or quality." XI HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 1905, at 210 (1998) (hereinafter: HOVENKAMP).

International Air Transport Ass'n., 620 F.2d 1360, 1364 (9th Cir. 1980) (citations omitted). As the Supreme Court explained in *Poller v. Columbia Broadcasting Sys. Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*:

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Id. at 473.

III. Standing

The district **[**15]** court found that the plaintiffs lacked standing to sue SRI. The court's decision was based upon two considerations: first, none of the named plaintiffs had ever purchased any products from SRI or from Motiva; and second, the plaintiffs failed to produce sufficient evidence linking SRI to a conspiracy to fix prices in the Western United States. There is no dispute that the plaintiffs never purchased any products from SRI, or from Motiva. Nor is there any doubt that SRI did not sign any of the documents establishing Equilon, did not refine or market gasoline in the Western United States, and had no motive to conspire with Shell and Texaco to fix those brands' prices in the West. Yet the plaintiffs maintain that SRI engaged in a nationwide price-fixing conspiracy with Texaco and Shell through its participation in Motiva, and therefore is liable for all of the acts of each conspiracy member. *See Beltz Travel, 620 F.2d at 1367*; *see also Appellants' Brief, at 42.*

The plaintiffs rest their theory of standing on the existence of a national **[*1115]** conspiracy -- and, in this case, defendants Texaco, Shell, Equilon, and Motiva have admitted that they fixed prices by charging the **[**16]** same price for the Texaco and Shell brands. But the plaintiffs do not establish standing under our precedent simply by showing that SRI was involved to some extent in the planning of certain aspects of the alliance. Rather, ***HN4***[] "for an agreement to constitute a violation of *section 1 of the Sherman Act*, a 'conscious commitment to a common scheme designed to achieve an unlawful objective' must be established. *Toscano v. PGA, 258 F.3d 978, 983 (9th Cir. 2001)* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464, (1984))*.

The plaintiffs did proffer evidence showing that Equilon and Motiva were formed as the result of a series of negotiations designed to create a national alliance. Apparently, Shell originally approached the other parties with "ideas about a larger alliance" and explored the possibility of a nationwide alliance. The record contains clear evidence showing that Equilon and Motiva were conceived of as a single strategy to create a national operating structure, separated solely for the sake of efficiency. Moreover, the plaintiffs point to substantial evidence that Equilon and Motiva made pricing decisions together **[**17]** via cooperation through their marketing departments.

Still, the plaintiffs have failed to provide evidence sufficiently implicating SRI in the nationwide price-fixing scheme. The district court found that SRI had "no apparent motive to conspire with Shell and Texaco with respect to Equilon and the Western United States," largely because SRI "would not benefit from any potential anticompetitive effects in Equilon's territory." The plaintiffs have offered no evidence to the contrary. In fact, the record shows unequivocally that SRI's interests were limited to the operation of Motiva and the refining and marketing of gasoline in the Eastern portion of the nation, and that, even there, SRI vigorously protested the domination of the Motiva Board by Shell and Texaco representatives. SRI lamented that the Motiva Board members, who were corporate representatives of Texaco and Shell, and many of whom were also members of the Equilon Board, appeared to be making their decisions for the nationwide "alliance" rather than for the individual joint ventures. [6] The record thus demonstrates

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[6] One board member who represented SRI in Motiva observed that, "once the Equilon Board takes a position on an issue common to both Motiva and Equilon, Shell and Texaco will have a strong desire to have the same action taken in Motiva." The member further stated:

that -- far from engaging in a nationwide conspiracy -- SRI had little interest in acceding to the "cooperative" **[**18]** efforts by "common Motiva and Equilon Board members, from Shell and Texaco." In short, the plaintiffs failed to produce evidence that SRI had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 764*. Although the issue is a close one, we affirm the district court's holding that the plaintiffs failed to establish that SRI participated in the operation of a nation-wide **[*1116]** price-fixing alliance or in the fixing of prices in the Western region of the United States.

[**19] IV. Liability under the Sherman Antitrust Act

HN5[] "No antitrust violation is more abominated than the agreement to fix prices. With few exceptions, 'price-fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.' The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1144 (9th Cir. 2003)* (citations omitted) (alteration in original). The question we confront in this case, however, is not whether two companies engaged in run-of-the-mill price fixing. Instead, the defendants have asked us to find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands. In doing so, the companies fixed the prices of those two brands of gasoline, Texaco and Shell, by agreeing *ex ante* to charge the exact same price for **[**20]** each. We think the exception the defendants seek is inconsistent with the Sherman Act as it has been understood to date.

HN6[] The Sherman Antitrust Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations[.]" *15 U.S.C. § 1*. The Supreme Court has declined to read this language literally. *See* *Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 687, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)* (noting that *§ 1 of the Sherman Act* "cannot mean what it says"). Instead, the Court has created a two-tiered mode of analysis.

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it **[**21]** is not to decide whether a policy favoring competition is in the public interest, or in the interest of members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Prof'l Engineers, 435 U.S. at 692. All parties agree that the relevant question in this case is whether the defendants' conduct falls under the first category of analysis. [7]

> As is exhibited by Motiva's incorrect reference to the Alliance, rather than Motiva, at the bottom of page 7 and the top of page 8 of the attached Business Plan writeup, the 'focus on Motiva' message will have to be repeated often to get it accepted. The more we allow "Alliance" to dominate, the greater the likelihood that personal behavior will favor "Alliance" over Motiva and the greater the likelihood that sub-optimizations of Motiva, in favor of the Alliance, will occur. We are on alert in this regard but the "Alliance" force is a large one.

[7] The plaintiffs have also suggested that if we reject their *per se* approach, we should employ the "quick look" theory of review to find defendants liable. ***HN7***[] Quick look analysis applies when *per se* review is inapplicable but when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anti-competitive effect on customers and markets." *California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756, 770, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*. As the district court rightly noted, "much like per se treatment, quick-look analysis applies 'when the great likelihood of anticompetitive effects can easily be ascertained.'" (quoting *California Dental, 526 U.S. at 770*). Because we hold that the plaintiffs have made a sufficient showing with respect to the illegality of the alliance's price fixing system under the *per se* rule, we need not decide whether that scheme would survive "quick look" review.

[22]** **[*1117]** ***HN8***[] If the plaintiffs can establish that the defendants' conduct falls within the range of conduct considered illegal *per se*, it does not matter whether the particular application of the *per se* rule appears inefficient or unfair. As the Court has explained,

> The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of per se rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.

Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982) (citations omitted). [8] The Court has held consistently that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary. *See* *Prof'l Engineers, 435 U.S. at 692.* **[**23]**

HN10[] Price fixing is the quintessential example of a *per se* violation of *§ 1*. Numerous cases support this basic principle. *See* *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990)* (explaining that there is a *per se* rule against price fixing having the "same force and effect as any other statutory commands"); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 107-08, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.") (citation omitted) (hereinafter: *NCAA*); *Maricopa County, 457 U.S. at 351* **[**24]** ("The anticompetitive potential inherent in *all* price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."); *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* ("It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.") (citations omitted); *Prof'l Engineers, 435 U.S. at 692* (noting that "price is the 'central nervous system of the economy'" and holding that "an agreement that 'interferes with the setting of price by free market forces' is illegal on its face") (citation and alteration omitted).

Notwithstanding the above, ***HN11***[] it is plain that *§ 1*'s blanket prohibition on price fixing, like the Act itself, cannot be read literally. *Cf.* *Prof'l Engineers, 435 U.S. at 687* (*§ 1 of the Sherman Act* "cannot mean what it says"). There are *some* price fixing arrangements that violate the **[**25]** letter of the Sherman Act but are legal nonetheless. For instance, when two competing companies agree to merge and **[*1118]** to combine their product lines, or to eliminate the old product lines and create an entirely new one, they generally agree to adopt a uniform pricing scheme. The Supreme Court has permitted such arrangements. In addition, in *Maricopa County*, the Supreme Court noted in dicta that in joint ventures where "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit," the ventures are considered, for some purposes at least, to be "single firms competing with other sellers in the market." *457 U.S. at 356*; *see also* *Broad. Music, Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 9, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)* ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act.") (hereinafter: *BMI*) (citation omitted).

HN12[] It is not the case, however, that the mere existence of a bona fide joint venture means that participating companies may use the enterprises to do anything they please with full immunity **[**26]** from *per se* analysis under *§ 1*, including price fixing. As the district court correctly stated when ruling on the motion to dismiss, the issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not). *Accord* XI HOVENKAMP P 1908, at 228-30 (arguing that "a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful" and that "a restraint

[8] The *Maricopa* Court noted in a footnote that ***HN9***[] price fixing is "among the practices which the courts have heretofore deemed to be unlawful in and of themselves." *Id. at 344 n.15* (quoting *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))* (parallel citation omitted).

is not saved from the 'naked' classification simply because it is included in some larger joint venture arrangement that is clearly efficient"). For instance, if in reliance on the existence of a valid joint venture between Coca Cola and Pepsi designed to research new types of soda flavors, the two companies imposed a price floor on all soda sold nationwide, the price fixing would constitute an illegal "naked restraint on trade." Along these lines, the Supreme Court has recognized that even joint ventures that are lawful in their general operations may violate the Sherman Act when they engage in specific anticompetitive conduct. *See* *NCAA, 468 U.S. at 110* (holding that **[**27]** an agreement among NCAA schools restricting the broadcasting of football games was an invalid "naked restraint on price and output" but not questioning the validity of the association itself); *BMI, 441 U.S. at 23* (holding that joint ventures are not "*usually* unlawful, at least not . . . where the agreement on price is *necessary* to market the product at all") (emphasis added); *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)* ("The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the anti-trust laws. . . . Agreements between legally separate persons and companies to suppress competition among themselves and others [cannot] be justified by labeling the project a 'joint venture.'") (citation omitted); *see also* XI HOVENKAMP P 1908, at 228-29 (1998) (noting that the Supreme Court has often condemned joint ventures' price- or output-fixing provisions while leaving "the balance of the joint venture intact").

The defendants' argument to the contrary -- that joint ventures such as Equilon and Motiva are incapable of violating the Sherman **[**28]** Act -- ignores the lesson of *Citizen Publishing Co. v. United States, 394 U.S. 131, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969)*, as well as that of *NCAA*, *BMI*, and *Timken*. In *Citizen Publishing*, the Supreme Court confronted a joint venture similar to the one between Equilon and Motiva. The defendants in that case were the two daily newspapers in Tucson, Arizona. **[*1119]** They entered into a joint venture agreement, which "provided that each paper should retain its own news and editorial departments, as well as its corporate identity." *394 U.S. at 133*. The joint venture established a new company, Tucson Newspapers, Inc., "which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI." *Id. at 133-34*. The purpose of the agreement, like the purpose of the Alliance, was "to end any business or commercial competition between the two papers." *Id. at 134*. [9]

[29]** The Supreme Court held that the confluence of these anti-competitive restraints, in the context of a joint venture between two formerly-vigorous competitors in the market area targeted by the venture, constituted a *per se* violation of the Sherman Act.

> The *§ 1* violations are plain beyond peradventure. Price-fixing is illegal per se. Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field.

Id. at 135 (internal citations omitted). Cases like *Maricopa County* and *BMI* do seem to suggest that the Court, if confronted with a similar joint venture today, might not find the enterprise as a whole unlawful. ***HN13***[] The Court has, however, continued to enforce the Sherman Act's *per se* prohibition on price fixing, and has scrutinized joint ventures to ensure that **[**30]** they do not contain "naked" restraints on trade. *See, e.g.*, *NCAA, 468 U.S. at 109*. Nothing in the cases suggests that the Court would overrule *Citizen Publishing* in its entirety, abandon its holding that the price fixing in which the joint venture engaged was illegal *per se*, or eliminate the rule that "naked" price-fixing by a joint venture violates the Sherman Act.

The district court distinguished *Citizen Publishing* in three ways. Each is unsatisfactory. First, the court found that the Tucson newspapers in *Citizen Publishing* effectively eliminated "all competition," whereas Equilon and Motiva "continue to compete with several major oil companies in their relevant markets." This distinction runs contrary to

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[9] Also similar to the agreements forming Equilon and Motiva, the *Citizen Publishing* agreement imposed several anticompetitive controls: first, the joint venture consolidated pricing and set joint subscription and advertising rates; second, the venture pooled all profits and losses pursuant "to an agreed ratio"; and third, the two parent corporations agreed not to compete against each other or the joint venture in the relevant market areas. *Id.*

Supreme Court precedent. *See* *Fed. Trade Comm'n, 493 U.S. at 434, 436* (noting that ***HN14***[] even "a small conspirator may be able to impede competition" and holding that "conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws"). [10]

[31] [*1120]** Second, the district court found that the *Citizen Publishing* newspapers "combined for the specific purpose of restricting competition and fixing prices," in contrast to a complete lack of evidence establishing such intent for the alliance ventures. That distinction, if true, would speak only to the validity of Equilon and Motiva as a whole -- it would not justify the defendants' adoption of a price fixing scheme. Moreover, the court's finding was contrary to its obligation to accept the version of disputed facts most favorable to the plaintiffs. Several of the defendants' witnesses admitted during depositions that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formation of the alliance, but before the actual joint ventures officially existed, and that the very purpose of the alliance was to eliminate competition in order to realize efficiency gains and gain market share. [11] The plaintiffs created a sufficient issue of material fact as to whether the intended purpose of the unified pricing scheme was to restrict competition.

[32]** Third, the district court believed that the only reason the non-competition agreement in *Citizen Publishing* was unlawful was because the agreement joined the only two competitors in the market. The Western oil market, by contrast, is a diverse market with "several competitors," while the Equilon joint venture has a much narrower non-competion agreement. This distinction returns to an analysis of market power, an analysis which the Supreme Court has held is inappropriate in this type of case. *See* *Federal Trade Comm'n, 493 U.S. at 434-35*; *NCAA, 468 U.S. at 110* ("We have never required proof of market power in such a case."). Moreover, the record shows both that Equilon exercised a substantial amount of control over the Western gasoline market, and that the two joint ventures helped divide the gasoline consumer field by jointly promoting and targeting the Texaco and Shell brands to better capture their relevant markets. None of the district court's distinctions is sufficient to justify ignoring *Citizen Publishing* and that decision's condemnation of price fixing by former competitors even when adopted as part of a joint venture arrangement.

[33]** In granting the defendants' summary judgment motion, the district court ruled that "a reasonable trier of fact could not find that the Defendants formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive." [12] **[*1121]** Even were that true, the district court stopped short of completing the requisite inquiry. ***HN15***[] The proper inquiry for a *per se* analysis of price fixing is not simply whether the joint venture itself is anti-competitive. Nor is the relevant question simply whether the defendants intended to destroy competition. *See* *Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1153-54 (9th Cir. 2003)* (holding that evidence of an intent to destroy competition or engage in predatory price controls is not essential to demonstrating the existence of an illegal agreement). Rather, if the answer to those questions is in the

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[10] *See also* *NCAA, 468 U.S. at 109-10* ("As a matter of law, the absence of proof of market power does not justify a naked restraint on price or output. . . . This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.").

[11] Thus, contrary to our dissenting colleague's understanding, the pricing decision was not made by a single economic entity. *See* Post, at 6901, *id.* at 6902 ("Nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could."). At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity -- it was a decision made by competitors. Whether the agreement constituted "a conspiracy [] in restraint of trade," *15 U.S.C. § 1*, or whether such a conspiracy would exist regardless of when the decision to engage in unified pricing was made, is for the district court to determine on remand.

[12] The district court asked whether "Equilon and Motiva are either mere window-dressings for a price fixing conspiracy or . . . are otherwise patently anticompetitive."

negative, we must then decide whether the defendants' conduct -- setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors [13] -- is reasonably necessary to further the **[**34]** legitimate aims of the joint venture. *See* *Freeman, 322 F.3d at 1151* (holding that plainly anticompetitive conduct by otherwise valid joint ventures must be "reasonably ancillary to the legitimate cooperative aspects of the venture") (citation omitted).

HN16[] The Supreme Court has upheld joint ventures and other corporate combinations involving fixed prices, but generally has done so only when it appeared plain to the Court that the restraints undertaken by the joint ventures were "necessary" to the legitimate aims of the joint venture. *See* *BMI, 441 U.S. at 23* (approving an otherwise invalid price restraint only because "the agreement on price is necessary to market the product at all"); **[**35]** *NCAA, 468 U.S. at 117* ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."); *468 U.S. at 101* ("what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"); *accord* XI HOVENKAMP P 1908, at 236 ("Joint sales endeavors may require joint price setting, particularly when the jointly produced product, such as the "blanket" license in *BMI*, is something individual participants could not produce at all."). Courts have engaged in this "essentiality query," *id.* at 228, in order to ensure that a joint venture has a legitimate justification -- other than the desire to enhance profits and market control -- for adopting a particular restraint that would otherwise violate the Sherman Act. Thus, whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint **[**36]** is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded. [14]

[37] [*1122]** In considering the relationship of the enterprise's pricing actions to the venture's legitimate objectives, we find it significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures -- they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands. [15] Normally, a business determines the prices it will charge for its various products by considering numerous factors, just a few of which include the costs of production and marketing and the contours of the relevant product markets. In this case, the defendants have stressed that, in addition to the differences in the product themselves, the gasolines marketed under the Texaco and Shell labels have different reputations and consumer bases. It thus seems likely that independent price analyses would result, at least in some circumstances, in the rational decision to sell the different brands at different prices. Instead, the defendants chose to fix those prices uniformly.

[38]** The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference. To

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[13] We assume that normal market factors would include the cost of production and marketing, supply, demand, and the like.

[14] As one commentator has explained,

> ***HN17***[] Once a court finds the joint venture proper, it can easily determine the appropriateness of any related competitive restraints among the parties to the venture. A court should simply consider whether such restraints are necessary to promote the venture's procompetitive purposes. If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. . . . The defendant should have the burden of proving that a competitive restraint is required to further a venture's efficiency objectives. If a defendant fails to meet this burden, a court should preclude the restraint without any further inquiry.

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, *86 Iowa L. Rev. 1137, 1188-89 (2001)*.

[15] As stated earlier, this single price was subject to variations depending upon geographic markets, such that the price of the Texaco and Shell brands might be higher in San Diego, California than it was in Lincoln, Nebraska. The two brands, however, were always priced together in each geographic market -- the price never varied as between the two.

the contrary, the record before us reveals that the alliance never considered unified pricing to be relevant to product improvement or efficiency gains. As one oil company executive explained, all of the anticipated cost savings, which were calculated prior to formation of the joint ventures, had "nothing to do with pricing." The absence of persuasive evidence showing a procompetitive justification for initiating the price-fixing scheme, when viewed along with the plaintiffs' evidence showing anti-competitive effects, convinces us that the plaintiffs have made a sufficient showing as to the applicability of the *per se* rule. [16]

[39]** The defendants offer only two justifications for the unitary pricing scheme. First, the defendants argue -- as does our dissenting colleague -- that, as a general rule, any bona fide joint venture must be able to set prices for its products at whatever level it chooses: "without the ability to price its products, neither venture would have had the authority to make fundamental decisions affecting its financial performance." Appellees' Brief, at 16. Second, the defendants argue that Equilon and Motiva fixed uniform Texaco and Shell prices in order to "prevent issues of price discrimination from arising under the *Robinson-Patman Act*[.]" *Id.* We address the latter justification first.

A cursory examination of the Robinson-Patman Act, *15 U.S.C. § 13*, [17] which was **[*1123]** designed to prevent sellers from engaging in price discrimination, reveals its inapplicability here. ***HN18***[] Under Robinson-Patman, sellers may not sell the same product at different prices on the basis of the identity of the buyer. [18] But in adopting the Act, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993).* **[**40]** Robinson-Patman was aimed at evils entirely absent here. As another Circuit has explained,

> The [Act] was . . . motivated by concerns for small, independent distributors, which in the 1930's were threatened by the arrival of chain stores. It marked "the high-water mark of the anti-chain-store movement." Although the *Clayton Act* had prohibited certain price discriminations, it was seen as ineffective in stopping the discriminatory prices granted chain stores by virtue of their size. So far as purchasing was concerned, this discrimination put the more normal "mom and pop" merchants of the day at a competitive disadvantage. Congress [enacted Robinson-Patman] to alleviate the disadvantage by putting the new age retailing behemoths on a level "playing-field" with small independent merchants and businessmen. . . .
>
> As is obvious from this brief summary of the RPA's history, "it is fairness, as Congress perceives it, that Robinson-Patman is all about." The Act's goal is to abolish unwarranted favoritism among all functional competitors, big or small. Its objective is to assure "that businessmen at the same functional level start on equal competitive footing so far as price **[**41]** is concerned"; "to assure that all sellers regardless of size, competing directly for the same customers . . . receive evenhanded treatment from their suppliers" . . . .

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1422 (11th Cir. 1990) (internal citations, alterations, and footnote omitted).

The quoted passage makes it clear that the defendants' Robinson-Patman argument is wholly **[**42]** without merit. The Act would unquestionably be inapplicable to a decision by the defendants to sell the distinct Texaco and Shell

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[16] Indeed, the record is close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' motion for summary judgment. However, given the complexity of the economic arrangements at issue, the sparseness of the record, the district court's failure to apply the appropriate test, and our general presumption against granting summary judgment in such cases, we conclude that the denial of both sides' motion for summary judgment is appropriate here.

[17] The Act provides that ***HN19***[] "it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality[.]" *15 U.S.C. § 13(a)*.

[18] The Act explicitly excludes price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered[.]" *15 U.S.C. § 13(a)*.

brands of gasoline at different prices. Any such decision would necessarily be predicated on the differences between the two brands, not upon the identity of the buyers. The record shows that the alliance never intended to market or sell the two brands as the same product. Rather, it went to great lengths to differentiate carefully between the brands. Mostly, this took place at the additive stage -- where generic "fungible" gasoline is transformed into a specific brand. But it also took place at the marketing stage, where the Texaco and Shell brands of gasoline were always targeted at different groups of consumers. The defendants cite no precedent or provision of statutory law that would support applying Robinson-Patman to a decision to use different prices for distinct, though similar, products. Finally, this Circuit has rejected "the argument relying on the 'underlying notion of fairness of offering the same services at the same prices to all participants.' ***HN20***[] The 'fairness' of uniform pricing is not a relevant consideration in an antitrust **[*1124]** case; consumers **[**43]** are presumed to prefer lower prices to the satisfaction of knowing they paid the same inflated price as everyone else." *Freeman, 322 F.3d at 1151*.

The first of the defendants' two arguments -- that a joint venture must be able to set whatever price it chooses for its products -- proves too much. If that were true, any number of companies could create joint ventures as fronts for price-fixing. The simple answer is that ***HN21***[] the Supreme Court has declined to immunize joint ventures from *per se* antitrust scrutiny. *See* *NCAA, 468 U.S. at 109*; *BMI, 441 U.S. at 23*; *Citizen Publishing, 394 U.S. at 135*; *Timken, 341 U.S. at 598*. We too have rejected the plaintiffs' proposed rule. *See* *Freeman, 322 F.3d at 1148* (holding that the fact that joint ventures "pursue the common interests of the whole" does not necessarily immunize them from antitrust scrutiny and noting that "cases finding joint ventures to be incapable of conspiracy are the 'exception'"). The leading treatise in the field has also expressed similar disapproval of the defendants' claim. *See* XI HOVENKAMP P 1908, at 229 ("Such a rule **[**44]** could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction.").

Finally, the defendants claim -- as does our dissenting colleague -- that an application of the *per se* rule here would mean that joint ventures could not set prices for their products. We reject this argument. We of course recognize that joint ventures may price their products; that is not the question. The question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands. We have held that the Sherman Act's *per se* rule applies when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture -- a relationship that justifies the otherwise prohibited price restraints. Thus far in this litigation, the defendants have failed to produce sufficient evidence demonstrating that their price fixing scheme was ancillary rather than naked and, thus, that they are entitled to summary **[**45]** judgment.

The result we reach here allows joint ventures to set prices for their products within the limits of the Sherman Act. Our analysis would be different if we confronted a joint venture in which former competitors agreed jointly to research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint ventures.

We do not share the defendants' concern that validating the application of the *per se* rule to the pricing decisions of joint ventures will risk invalidating countless economically efficient business integrations. The plaintiffs have come forward with sufficient evidence to create a triable issue of fact as to whether the defendants engaged in a naked restraint on trade, prohibited *per se* by the Sherman Act. Whether the **[**46]** defendants will be found liable at trial remains to be seen. But if they are, and if that individual application of the *per se* rule is economically inefficient, that concern **[*1125]** must be addressed to Congress, not the judiciary. *See* *Maricopa County, 457 U.S. at 354-55*; *Professional Engineers, 435 U.S. at 692*. [19]

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[19] Congress's response to *Citizen Publishing* further convinces us that we should not carve out an exception to the Sherman Act simply because the type of venture at issue here may be economically efficient. Shortly after the decision, Congress passed the Newspaper Preservation Act, *15 U.S.C. §§ 1801-1804*, which specifically exempted from the Sherman Act newspaper operating

[47]** We therefore hold that the district court erred in finding no triable issue of fact with respect to the plaintiffs' *per se* claim. The plaintiffs have presented sufficient evidence to create a triable issue of fact as to whether the alliance's unified pricing scheme was a *per se* violation of *§ 1 of the Sherman Act*.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's award of summary judgment to defendant Saudi Refining, Inc., REVERSE the district court's award of summary judgment against the Plaintiffs-Appellants, and REMAND for further proceedings consistent with this opinion.

Concur by: FERNANDEZ (In Part)

Dissent by: FERNANDEZ (In Part)

Dissent

FERNANDEZ, Circuit Judge, Concurring and Dissenting:

I agree that the plaintiffs lacked standing as to SRI and, therefore, concur in the result of part III of the majority opinion. However, I dissent from part IV.

While this case does involve a very complicated set of transactions, it presents a rather straightforward ***antitrust law*** question. That is, where former competitors create a bona fide joint venture to which all of their assets and operations in segments of their businesses are contributed, will there be **[**48]** a *per se* violation of the antitrust laws, if the joint venture entity sets the prices of the goods it sells? I think the answer is no.

Here, Shell and Texaco formed Equilon Enterprises, LLC in the western United States, and Motiva Enterprises, LLC in the eastern United States. [1] **[**49]** There can be no doubt that each of the new entities is a true, bona fide, economically integrated joint venture. Refineries, lubricant plants, research laboratories, thousands of service stations, thousands of miles of pipeline, thousands of employees, and over 100 terminals were contributed to the ventures. Upon those transfers, Shell and Texaco ceased refining and marketing operations in both the western and the eastern United States. They were no longer in those businesses within the United States; the joint ventures were. [2] In other words, **[*1126]** Equilon now manufactured, inventoried, transported, and marketed the products. It ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands.

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arrangements like the one in *Citizen Publishing*. *See* *Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 744-45 (9th. Cir. 1996)*. After surveying the relevant "economic conditions," Congress determined that the specific type of joint venture at issue was beneficial and even necessary in a "large majority of American communities." H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3547, 3548. Those economic conditions, in Congress's view, justified more lenient antitrust review of newspaper industry joint ventures than the Court had applied in *Citizen Publishing*. Congress has made no such findings, nor has it passed any similar law, relevant to the oil and gasoline industry, which certainly is not without its supporters in the Legislative and Executive Branch. If Congress wishes to exempt oil and gasoline enterprises from the Sherman Act's *per se* prohibition of price fixing, it may certainly do so, but it is beyond our authority to read new exceptions into the Act.

[1] Henceforth, I shall only refer to Equilon because it is the entity that directly affects plaintiffs in this case -- Independent Operators.

[2] We have previously had occasion to describe the nature of Equilon. *See* *Abrahim & Sons Enters. v. Equilon Enters., LLC, 292 F.3d 958, 960 (9th Cir. 2002)*. As we stated, an LLC is an entity truly distinct from its members and its acts "are deemed independent of the acts of its members." *Id. at 962*. It is a separate juridical person. *Id.* LLCs are much like corporations, and, though controlled by their members, "LLCs remain separate and distinct from their members." *Id.*

While Independent Operators do not assert that the placing of the whole manufacturing, transport and marketing functions in a single entity violated 15 U.S.C. § 1, they do assert that having the pricing function in Equilon did violate the antitrust laws *per se*. The majority thinks that might be true; I do not.

It is plain enough that the mere creation of a joint venture is not a *per se* antitrust violation. No doubt, like mergers, joint ventures are combinations of business assets but "such combinations are judged under a rule of reason" analysis. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 2740, 81 L. Ed. 2d 628 (1984). **[**50]** Especially should that be true of the LLC type of venture, which is not only a separate entity, but which also functions as a separate economic unit for all practical purposes. *See Northrop Corp.*

v. McDonnell Douglas Corp., 705 F.2d 1030, 1053 (9th Cir. 1983). In fact, to slightly paraphrase the Supreme Court statement in Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356, 102 S. Ct. 2466, 2479, 73 L. Ed. 2d 48 (1982):

> [Equilon is] . . . analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.

Nor does the mere fact that Equilon sets prices for the products it manufactures and sells suffice to demonstrate that its actions were price fixing for antitrust purposes. *See* Broad. Music, Inc., v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-9, 99 S. Ct. 1551, 1556-57, 60 L. Ed. 2d 1 (1979). Rather, "literalness is overly simplistic and often overbroad. When two partners set the **[**51]** price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." Id. at 9, 99 S. Ct. at 1557. So just what could make the operation of Equilon a *per se* violation of the antitrust laws? Surely it is not a claim that the venture is a sham. *See* Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 52 (1st Cir. 1998). No one seriously asserts *that*.

Nor can it be that this is a case like Citizen Publ'g Co. v. United States, 394 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969). There, two newspapers formed a third corporation for the principal purpose of eliminating competition, but each remained in the same business in the same area, and retained the production of the true product -- news and editorials -- in its own hands. Id. at 133, 89 S. Ct. at 928. Moreover, the newspapers themselves -- not the new entity -- jointly set the subscription and advertising rates. Id. at 134, 89 S. Ct. at 928. None of that is true here. Equilon owned all of the assets, all of the obligations, and, in a word, the whole business. It set the prices. **[**52]** It was a separate entity; a fact that the Independent Operators seem unable or unwilling to grasp.

[*1127] But, Independent Operators argue, in this case the fixing of prices by the venture is neither essential nor "reasonably ancillary to the legitimate cooperative aspects of the venture." Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1151 (9th Cir. 2003). The majority agrees; I cannot understand why. The situation here is far from the kind of situation we faced in *Freeman*. There, the reason for the venture was the unifying of disparate multiple listing databases. Id. at 1140-41. That done, there was a new database entity, and the corporations that formed it for that purpose went on operating their own businesses. But they all also agreed to fix a price for support services. That was essentially unrelated to the database itself, and was unnecessary, and unjustified. Id. at 1151. It was the latter "price fix" that ran afoul of antitrust principles. Here we have nothing of the kind.

In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, **[**53]** sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services? I am at a loss for an answer to that question, and nothing written about this case to date imparts additional wisdom or better information.

Yet Independent Operators insist that the setting of the prices is a violation. That is, separate juridical business entity though it is, Equilon can really only be the semblable of a true business, for if it, like any other economic actor, desires to price its own goods, its members may well be subject not merely to commination, but to outright denunciation by the courts as *per se* violators of the antitrust laws. It means that this entity must ask a separate juridical entity -- for example, Shell, which does not itself own any of the facilities or products -- to decide what price should be charged by Equilon. [3] Again, the majority thinks that might be so; I do not.

[54]** We now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business -- sets prices for its own goods -- it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the body of an entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.

In short, I do not believe that the Independent Operators have pointed to a *per se* antitrust violation, [4] and they do not even attempt to assert a full rule of reason claim.

[55]** Thus, I respectfully dissent as to part IV of the majority opinion.

[3] Shell, by the way, is a mere member of Equilon and is shielded from liability for the debts or obligations of Equilon, just as corporate share-holders are shielded. *See* *Cal. Corp. Code § 17101*.

[4] Similarly, no "quick look" violation is shown. *See* *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 1612, 143 L. Ed. 2d 935 (1999)*; *Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999)*.

Lorix v. Crompton Corp.

Court of Appeals of Minnesota

June 2, 2004, Filed

A03 -1518

Reporter

680 N.W.2d 574 *; 2004 Minn. App. LEXIS 634 **; 2004-1 Trade Cas. (CCH) P74,438

Diane Lorix, individually and on behalf of all others similarly situated, Respondent, vs. Crompton Corporation, et al., Defendants, Flexsys NV, et al., Appellants.

Subsequent History: Review denied by Lorix v. Crompton Corp., 2004 Minn. LEXIS 608 (2004)

Subsequent appeal at Lorix v. Crompton Corp., 2006 Minn. App. LEXIS 122 (Minn. Ct. App., Aug. 22, 2006)

Prior History: **[**1]** Hennepin County District Court. File No. 02-19278.

Disposition: Reversed.

Core Terms

contacts, sales, general jurisdiction, personal jurisdiction, forum state, tire manufacturer, manufacturer, chemicals, supplier, tires, website, rubber-processing, products, argues, district court, consumers, residents, courts, cause of action, out-of-state, motion to dismiss, nonresident, purchasers

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

An order denying a motion to dismiss for lack of personal jurisdiction is appealable as a matter of right.

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

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

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

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **In Personam Actions, Challenges**

Determining whether personal jurisdiction exists is a question of law, and an appellate court need not defer to the district court's decision. When jurisdiction is challenged, the plaintiff bears the burden of proving that sufficient contacts exist with the forum state to support personal jurisdiction.

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

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

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

HN3[] **In Personam Actions, Minimum Contacts**

A Minnesota court may assume jurisdiction over nonresident defendants only to the extent permitted by Minnesota's long-arm statute and by the Due Process Clause of the Fourteenth Amendment. Because Minnesota's long-arm statute is coextensive with the constitutional limits of due process, the inquiry necessarily focuses on the personal-jurisdiction requirements of the federal constitution. To satisfy the Due Process Clause, a plaintiff must show that a defendant has "minimum contacts" with a forum state such that maintaining jurisdiction there does not offend "traditional notions of fair play and substantial justice." There must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. The defendant must reasonably anticipate the possibility of being haled into the state's courts.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

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

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

HN4[] **Jurisdiction, Subject Matter Jurisdiction**

Minnesota courts use a five-factor test to determine whether the exercise of personal jurisdiction is proper: (1) The quantity of the contacts with the forum state, (2) The nature and quality of the contacts, (3) The source and connection of the cause of action with these contacts, (4) The interest of the state in providing a forum, (5) The convenience of the parties. There is a distinction between specific and general personal jurisdiction. Specific jurisdiction exists when the cause of action arises out of or is related to the defendant's contacts with the forum. Specific jurisdiction can exist as the result of a single contact with the forum if the cause of action arose out of that contact. General jurisdiction exists when a defendant has "continuous and systematic" contacts with the forum state.

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

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

HN5[] **In Personam Actions, Minimum Contacts**

In judging minimum contacts for purposes of assessing whether the exercise of specific jurisdiction is appropriate, a court focuses on the relationship among the defendant, the forum, and the litigation. Specific jurisdiction may be found when the nonresident defendant has purposefully directed its activities at residents of the forum and the litigation results from alleged injuries that "arise out of or relate to" those activities.

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

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

HN6[] **In Personam Actions, Minimum Contacts**

But for specific jurisdiction to exist, a plaintiff must show a more direct connection between his alleged injury and the defendant's contacts with the forum state.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] **Private Actions, Costs & Attorney Fees**

See *Minn. Stat. § 325D.57*.

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

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

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

HN8[] **In Personam Actions, Minimum Contacts**

The Court of Appeals of Minnesota emphasizes that the personal jurisdiction analysis must precede, and proceed independently of, the question whether a substantive statute has been violated.

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

HN9[] **In Rem & Personal Jurisdiction, In Personam Actions**

The Minnesota Supreme Court has held that a nonresident supplier does not have contacts with Minnesota that would support the exercise of personal jurisdiction by selling raw material to a nonresident manufacturer when (1) the manufacturer incorporated the raw material into a different product that the manufacturer then sold in Minnesota in accordance with its own business plans and (2) there was no showing that the supplier delivered its product into the stream of commerce with the expectation that it would be purchased by customers in Minnesota.

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

HN10[] **In Rem & Personal Jurisdiction, In Personam Actions**

The United States Supreme Court has explained that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. The U.S. Supreme Court has held that a showing is needed of "additional conduct" by a defendant evidencing an "intent or purpose" to serve the market in the forum state.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN11[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

General jurisdiction exists when a nonresident defendant's contacts with the forum are so substantial and are of such a nature that the state may assert jurisdiction over the defendant even for causes of action unrelated to the defendant's contacts with the forum state. Conduct of single or isolated items of activities in a state in a corporation's behalf are not enough to subject it to general jurisdiction. Only when a defendant's continuous corporate operations within a state are thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities may a court assert general jurisdiction over a defendant. The United States Supreme Court has held that a defendant corporation's contacts with the forum state, which included the temporary physical presence of a corporate officer for contract negotiations, regular purchases of equipment and training services from a business in the forum, and personnel training in the forum, were not sufficiently continuous and systematic so that the attempted exercise of general jurisdiction would satisfy the requirements of due process.

Syllabus

An out-of-state corporation's simple commercial contacts, unrelated to the plaintiff's claims, do not, standing alone, constitute continuous and systematic business contacts in Minnesota that form a basis for personal jurisdiction.

Counsel: Garrett D. Blanchfield, Jr., Mark Reinhardt, Reinhardt Wendorf & Blanchfield, St. Paul, MN, (for respondent).

William L. Greene, David R. Crosby, Leonard Street and Deinard, PA, Minneapolis, MN; and James D. Slear, Gibson, Dunn & Crutcher, LLP, Washington, D.C., (for appellants).

Judges: Considered and decided by Wright, Presiding Judge; Schumacher, Judge; and Willis, Judge.

Opinion by: WILLIS

Opinion

[*576]

WILLIS, Judge

On appeal from a district court order denying appellants' motion to dismiss for lack of personal jurisdiction, appellants argue that the district court erroneously concluded that it could exercise personal jurisdiction over appellants. Because we conclude that respondent has not shown sufficient contacts for the exercise of either specific or general jurisdiction, we reverse.

FACTS

Respondent Diane Lorix's amended class-action complaint alleges that appellants **[**2]** Flexsys NV and Flexsys America LP (collectively "Flexsys") conspired with the other named defendants to fix the prices of certain rubber-processing products, in violation of *Minn. Stat. §§ 325D.49-.66D* (2002), the Minnesota ***Antitrust Law***. The complaint alleges that Flexsys, along with the other defendants, produce most of the rubber-processing chemicals sold in the United States and, in turn, sell most of those chemicals to automobile-tire manufacturers. Lorix brought suit in Minnesota district court on behalf of a putative class consisting of "all persons who purchased tires in the State of Minnesota other than for resale from January 1, 1994 to the present which were manufactured using rubber-processing chemicals sold by Defendants." In her amended class-action complaint, Lorix maintains that (1) the alleged price-fixing conspiracy had the "effect of fixing, raising, stabilizing, and maintaining the price for rubber-processing chemicals sold to tire manufacturers," (2) **[*577]** the tire manufacturers passed the supracompetitive price on to consumers, and (3) thus, Minnesota consumers paid more for tires manufactured with Flexsys's rubber-processing chemicals than **[**3]** they would have paid absent the conspiracy. The complaint seeks recovery of the overcharges paid by Minnesota consumers as a result of the alleged conspiracy; similar actions have been filed against the same defendants in 18 other jurisdictions. [1]

Flexsys NV is headquartered in Belgium and Flexsys America LP, which is the United States subsidiary of Flexsys NV, is a Delaware limited partnership with its headquarters located in Akron, Ohio. Neither is licensed to do business in Minnesota or has any employees, sales agents, or business operations in Minnesota. Flexsys moved to dismiss **[**4]** Lorix's claim on the ground that the Minnesota district court lacks personal jurisdiction over Flexsys. The district court denied the motion, and this appeal follows.

ISSUE

Did the district court err by denying appellants' motion to dismiss for lack of personal jurisdiction?

ANALYSIS

HN1[] An order denying a motion to dismiss for lack of personal jurisdiction is appealable as a matter of right. *Stanek v. A.P.I., Inc., 474 N.W.2d 829, 831 (Minn. App. 1991)*, *review denied* (Minn. Oct. 31, 1991).

HN2[] Determining whether personal jurisdiction exists is a question of law, and this court need not defer to the district court's decision. *Id. at 832*. "When jurisdiction is challenged, the plaintiff bears the burden of proving that sufficient contacts exist with the forum state to support personal jurisdiction." *V.H. v. Estate of Birnbaum, 543 N.W.2d 649, 653 (Minn. 1996)*.

HN3[] A Minnesota court may assume jurisdiction over nonresident defendants only to the extent permitted by Minnesota's long-arm statute and by the *Due Process Clause of the Fourteenth Amendment*. *Marshall v. Inn on Madeline Island, 610 N.W.2d 670, 673 (Minn. App. 2000).* **[**5]** Because Minnesota's long-arm statute is coextensive with the constitutional limits of due process, the inquiry necessarily focuses on the personal-jurisdiction requirements of the federal constitution. *Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410-11 (Minn. 1992)*. To satisfy the *Due Process Clause*, a plaintiff must show that a defendant has "minimum contacts" with a forum state such that maintaining jurisdiction there does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)*. There must be

[1] Under the Supreme Court decision in *Illinois Brick Co. v. Illinois*, indirect purchasers have no recourse under federal law. *431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. Lorix's counsel stated at oral argument that the 18 other jurisdictions in which actions similar to this have been brought are states that permit indirect purchasers to recover for injuries as a result of violations of state ***antitrust law***.

"some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958)*. The defendant must reasonably anticipate the possibility of being haled into the state's courts. *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980)*.

HN4[] **[*578]** Minnesota courts use a five-factor test to determine **[**6]** whether the exercise of personal jurisdiction is proper:

(1) The quantity of the contacts with the forum state,

(2) The nature and quality of the contacts,

(3) The source and connection of the cause of action with these contacts,

(4) The interest of the state in providing a forum,

(5) The convenience of the parties.

Vikse v. Flaby, 316 N.W.2d 276, 282 (Minn. 1982). There is a distinction between specific and general personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 104 S. Ct. 1868* nn.8-9, *466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868, 1872* nn.8-9, *466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984)*; *Valspar, 495 N.W.2d at 411*. Specific jurisdiction exists when the cause of action arises out of or is related to the defendant's contacts with the forum. *Helicopteros Nacionales, 466 U.S. at 414 n.8, 104 S. Ct. at 1872 n.8*. Specific jurisdiction can exist as the result of a single contact with the forum if the cause of action arose out of that contact. *See* *McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957)*. General jurisdiction exists when a defendant has "continuous and **[**7]** systematic" contacts with the forum state. *Helicopteros Nacionales, 466 U.S. at 415-16, 104 S. Ct. at 1872-73*.

The district court denied Flexsys's motion to dismiss, finding that it could exercise personal jurisdiction over Flexsys; the district court, however, did not articulate whether it found that it had specific or general jurisdiction over Flexsys. Flexsys argues that its contacts with Minnesota were not related to the cause of action so as to establish specific jurisdiction and are not of a sufficient quantity or quality to establish general jurisdiction.

1. Specific Jurisdiction

Flexsys argues that it is not subject to specific jurisdiction because (1) its in-state sales are unrelated to Lorix's claim and (2) its out-of-state sales to tire manufacturers are not a purposeful contact directed at Minnesota. ***HN5***[] In judging minimum contacts for purposes of assessing whether the exercise of specific jurisdiction is appropriate, a court focuses on the "relationship among the defendant, the forum, and the litigation." *Id. at 414, 104 S. Ct. 1872*. Specific jurisdiction may be found when the nonresident defendant has "purposefully directed [its] **[**8]** activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528 (1985)* (citation omitted).

Flexsys argues first that because its only sales of rubber-processing chemicals in Minnesota were to 3M and HCI Worum, which used them to make products other than tires, there is no connection between Flexsys's sales in Minnesota and Lorix's alleged injury. Thus, Flexsys argues, its sales to 3M and HCI Worum did not provide "fair warning" of being sued in Minnesota for injuries resulting from the sales of tires because Lorix's claim does not "involve" and is not "connected with" or "directly related to" appellants' sales to 3M and Worum.

Lorix contends, however, that there must only be a "reasonably close connection" between the cause of action and the defendant's contacts with the forum state to support a finding of specific jurisdiction. Lorix argues that the sale of rubber-processing chemicals to Minnesota corporations to manufacture products other than tires is sufficiently related to a suit alleging that **[**9]** downstream indirect purchasers paid a supracompetitive price for tires that **[*579]** contained those same rubber-processing chemicals. ***HN6***[] But for specific jurisdiction to exist, a plaintiff must show a more direct connection between his alleged injury and the defendant's contacts with the forum state. *See* *Marshall, 610 N.W.2d at 676* (holding "entering into a contract with a Minnesota resident can justify the exercise of specific jurisdiction but only where the dispute involves the contract"); *Behm v. John Nuveen & Co., 555 N.W.2d 301, 307 (Minn. App. 1996)* (holding that specific jurisdiction requires plaintiff to show that defendant's forum contacts be "related directly" to the subject of the lawsuit). Because Flexsys's Minnesota sales were to companies that used the chemicals to make products other than tires, we conclude that Lorix's claim that Minnesota consumers were overcharged for tires did not arise out of or relate to Flexsys's Minnesota sales and, thus, do not constitute a basis for the exercise of specific jurisdiction.

Flexsys further argues that its out-of-state sales of rubber chemicals to tire manufacturers do not constitute a contact with Minnesota **[**10]** that would provide a basis for specific jurisdiction. Lorix counters that Flexsys could "clearly anticipate being haled into court in Minnesota" based on these sales because it would have had "full knowledge that the effects of [its] actions would likely be passed on through the chain of commerce to Minnesota consumers" and estimates that since 1994, Flexsys has indirectly derived more than $ 12.4 million in revenue from Minnesota based on its sales to tire manufacturers that sold to Minnesota tire purchasers. [2] **[**11]** Lorix asserts that the *Minnesota **Antitrust Law*** provides an avenue of redress for indirect purchasers and maintains that because the United States Supreme Court recognized in *Calif. v. ARC Am. Corp.* that the term "indirect purchaser" includes persons injured by the fixing of prices for a component part of a finished product, it is irrelevant that Flexsys's products were incorporated into tires before being sold to Minnesota consumers. [3] *490 U.S. 93, 97, 109 S. Ct. 1661, 1663, 104 L. Ed. 2d 86 (1989)*.

Lorix argues that it is "irrelevant" whether Flexsys's products were incorporated into tires before being sold to Minnesota consumers because it "is precisely this type of remote transgressor that the *Minnesota **Antitrust Law*** was intended to reach," and that, thus, it is appropriate for Minnesota courts to exercise specific jurisdiction over Flexsys. We disagree. While the *Minnesota **Antitrust Law*** may confer subject-matter jurisdiction, the issue here is personal jurisdiction. And it would put the cart before the horse to conclude that the entire constitutionally-mandated minimum contacts analysis may simply be jettisoned whenever a legislature enacts a statute which is intended to have extraterritorial application. On the **[**12]** contrary, ***HN8***[] we emphasize that the personal jurisdiction analysis must precede, and proceed independently of, the question whether a substantive [] statute has been violated.

See *Holder v. Haarmann & Reimer Corp., 779 A.2d 264, 276 n.13 (D.C. Cir. 2001)*.

HN9[] **[*580]** The Minnesota supreme court has held that a nonresident supplier does not have contacts with Minnesota that would support the exercise of personal jurisdiction by selling raw material to a nonresident manufacturer when (1) the manufacturer incorporated the raw material into a different product that the manufacturer then sold in Minnesota in accordance with its own business plans and (2) there was no showing that the supplier delivered its product into the stream of commerce with the expectation that it would be purchased by customers in Minnesota. *In re Minn. Asbestos Litigation, 552 N.W.2d 242, 246-47 (Minn. 1996)*. The supreme court stated that because there was no showing that the manufacturer's contacts with the forum were "on behalf of [the supplier] or with [the supplier's] approval," the manufacturer's actions in selling its finished product in Minnesota did not constitute a contact **[**13]** by the supplier that would permit Minnesota courts to exercise personal jurisdiction over the supplier. *Id. at 247*.

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[2] Lorix states that this estimated figure was arrived at "by comparing the value of the proportionate share of tire shipments in Minnesota with [Flexsys's] total [market] share of rubber-processing chemicals in the United States."

[3] *Minn. Stat. § 325D.57* provides that ***HN7***[] "any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of *sections 325D.49 to 325D.66*, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees."

Lorix argues that *Minn. Asbestos* is distinguishable, however, because the plaintiff there sought to exercise personal jurisdiction over a defendant company that had no direct contacts with Minnesota and asserts that, here, Flexsys had direct contacts with Minnesota through its sales to two Minnesota businesses and its website. [4] But the holding in *Minn. Asbestos* does not rest on the fact that the supplier did not have direct contacts with the forum; rather *Minn. Asbestos* held that the contacts that a manufacturer may have with the forum may not be imputed to a supplier when there is no showing that (1) the supplier intended to directly or indirectly market its product in the forum or that the supplier delivered its product into the stream of commerce with the expectation that it would be purchased by customers in the forum or (2) the manufacturer's actions were done "on behalf of [the supplier] or with [the supplier's] approval." *See id*. Because Flexsys sells its product to tire manufacturers located outside of Minnesota, which **[**14]** produce their own products and then sell in accordance with their own business plans, we conclude that any contacts that the tire manufacturers have with Minnesota may not be imputed to Flexsys.

This conclusion is supported by *Asahi Metal Indus. Co. v. Superior Court*, in which a plurality of ***HN10***[] the United States Supreme Court explained **[**15]** that the "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state." *480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92 (1987)*. *Asahi* holds that a showing is needed of "additional conduct" by a defendant evidencing an "intent or purpose" to serve the market in the forum state. *Id.* And, here, Lorix has not shown that Flexsys's out-of-state sales to tire manufacturers include any "additional conduct" by Flexsys, such as designing a product for the Minnesota market, advertising in Minnesota, or marketing the product through a distributor who had agreed to serve as a sales agent in Minnesota. *Id.* Thus, we conclude that Flexsys's out-of-state sales of rubber-processing chemicals to tire manufacturers **[*581]** are not a basis for the exercise of specific jurisdiction over Flexsys by a Minnesota court.

2. General Jurisdiction

Flexsys argues next that its contacts with Minnesota do not support the exercise of general jurisdiction over Flexsys by Minnesota courts. ***HN11***[] General jurisdiction exists when a nonresident defendant's contacts with the forum are so substantial and are of such **[**16]** a nature that the state may assert jurisdiction over the defendant even for causes of action unrelated to the defendant's contacts with the forum state. *See Valspar, 495 N.W.2d at 411*. "Conduct of single or isolated items of activities in a state in [a] corporation's behalf are not enough to subject it to [general jurisdiction]." *Int'l Shoe, 326 U.S. at 317, 66 S. Ct. at 159*. Only when a defendant's "continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities" may a court assert general jurisdiction over a defendant. *Id. at 318, 66 S. Ct. at 159*. For example, in *Helicopteros Nacionales*, the Supreme Court held that a defendant corporation's contacts with the forum state, which included the temporary physical presence of a corporate officer for contract negotiations, regular purchases of equipment and training services from a business in the forum, and personnel training in the forum, were not sufficiently continuous and systematic so that the attempted exercise of general jurisdiction **[**17]** would satisfy the requirements of due process. *466 U.S. at 418-19, 104 S. Ct. at 1874*; *cf. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445, 447-48, 72 S. Ct. 413, 418, 419, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952)* (holding that the exercise of general jurisdiction over a foreign corporation was "reasonable and just" when the corporation's president maintained an office in the forum where he conducted activities on behalf of the company, such as keeping company files, holding directors' meetings, carrying on business correspondence, and distributing salary checks drawn on forum bank accounts).

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[4] Although the record includes no information regarding the Flexsys website, Lorix alleges that Flexsys's website promotes its products in Minnesota, asserting that the website states "Flexsys is committed to developing web applications that benefit our customers and improve business efficiency. We offer our customers fast, secure, around-the-clock on-line ordering and access to the information you want - when you want it." Flexsys asserts, however, that its website is "aimed at no particular place in the world" and does not actually sell products to Internet users but instead gives existing customers who have user-identification numbers and passwords the ability to order online.

While the record shows that Flexsys sold its products directly to two Minnesota companies, Flexsys maintains that these sales, which amounted to $ 633,424 from January 2000 to December 2002 and represented 0.01% of Flexsys's gross annual sales, were "simple commercial contacts" and were not continuous and substantial contacts justifying the exercise of general jurisdiction. In *Burlington Indus., Inc. v. Maples Indus., Inc.*, the eighth circuit court of appeals held that a foreign corporation's sales to forum retailers, which were unrelated to the plaintiff's claims, constituted **[**18]** "simple commercial contacts" that were insufficient to form the basis of general jurisdiction in the forum, even though officers of the foreign corporation went to the forum to obtain business and the foreign corporation used machines built in the forum to manufacture its products. *97 F.3d 1100, 1103 (8th Cir. 1996)*. Thus, Flexsys maintains that "simple commercial contacts" unrelated to a plaintiff's claim are not transformed into an adequate constitutional basis for jurisdiction, even when the sales are of a much greater dollar volume than Flexsys's sales in Minnesota. *See* *Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1198 (4th Cir. 1993)* (finding insufficient to support the exercise of general jurisdiction defendant's annual sales of $ 9-13 million in the forum state over a five-year period, which constituted 2% of defendant's total sales, employment of sales people in the forum state, and purchases in the forum state); *Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573* ***[*582]*** *(2nd Cir. 1996)* (holding that "standing alone," defendant's $ 4 million in sales in the forum state over a seven-year period "may not have been sufficient" **[**19]** to support the exercise of general jurisdiction but that the numerous other contacts with the forum in the case, including advertising, relationships with dealers, and more than 150 visits "tipped the balance" and led the court to conclude that there were sufficient contacts to allow the exercise of general jurisdiction).

Lorix counters that Flexsys misstates the relevant test by arguing that the exercise of general jurisdiction is inappropriate because its in-state sales constituted only approximately 0.01% of its total sales and asserts that, instead, a general-jurisdiction analysis must focus on whether the defendant's contacts with the forum are substantial. *See* *Lakin v. Prudential Secs., 348 F.3d 704, 709 (8th Cir. 2003)* (stating that the "percentage of a company's sales in a given state [is] generally irrelevant . . . our relevant inquiry is not whether the percentage of a company's contacts is substantial for that company; rather, our inquiry focuses on whether the company's contacts are substantial for the forum"). We agree that the percentage of a company's sales in a particular state is generally irrelevant, but we conclude that, standing alone, **[**20]** Flexsys's contacts with 3M and HCI Worum are not substantial enough to justify the exercise of general jurisdiction. Thus, we must determine whether Flexsys has other contacts with Minnesota that would "tip the balance" and lead us to conclude that the exercise of general jurisdiction is appropriate.

Lorix asserts that Flexsys's out-of-state sales to tire manufacturers are substantial and continuous contacts with Minnesota because Flexsys elected to serve the Minnesota market indirectly by selling its products to tire manufacturers that it "knew would then sell those tires to Minnesota residents." But we do not find Lorix's argument persuasive because the evidence does not show (1) that Flexsys targeted Minnesota consumers for these sales, (2) apart from Lorix's own estimate, how much, if any, revenue Flexsys indirectly derived from Minnesota consumers as the result of its sales of rubber-processing chemicals to out-of-state tire manufacturers, or (3) that Flexsys used the tire manufacturers as its agents or distributors in Minnesota.

Lorix then argues that by having an interactive website, Flexsys had substantial and continuous contact with Minnesota, citing *Quality Improvement* **[**21]** *Consultants, Inc. v. Williams* for the proposition that the use of an interactive website has been recognized as a means to purposefully direct activities at Minnesota residents. No. Civ. 02-3994, 2003 WL 543393, *5-*6 (D. Minn. Feb. 24, 2003) (holding that interactive websites that permit users to exchange information with a host computer fall in the middle of the active-passive spectrum of commercial Internet activity and may support a finding of personal jurisdiction). Flexsys notes, however, that *Quality Improvement* further states that if every website that is accessible by the residents of a state formed a basis for jurisdiction, nearly every business in the world would be subject to suit in every state for any lawsuit and that, thus, without any evidence that an interactive website was used to conduct actual commercial transactions with forum residents, the website, standing alone, is not enough to satisfy the minimum-contacts standard. *Id.* at *6.

Courts have rejected efforts to undermine constitutional protections by invoking a defendant's mere presence on the Internet as reason for doing so:

[*583] This theory [of accessibility] simply cannot hold water. **[**22]** Indeed, under this view, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction. The *Due Process Clause* exists, in part, to give a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. *In the context of the Internet, [the defendant]'s expansive theory of personal jurisdiction would shred these constitutional assurances out of practical existence. Our sister circuits have not accepted such an approach, and neither shall we.*

Multi-Tech Sys., Inc. v. Vocaltec Communications, Inc., 122 F. Supp. 2d 1046, 1050 (D. Minn. 2000) (brackets and italics in original text; internal quotations omitted) (quoting *GTE New Media Servs., Inc. v. Bellsouth Corp., 339 U.S. App. D.C. 332, 199 F.3d 1343, 1350 (D.C. Cir. 2000))*. Because there is no evidence that any Minnesota resident has accessed the **[**23]** Flexsys website or that the Flexsys website targets Minnesota residents, we conclude that the website is not a contact with Minnesota supporting a finding of general jurisdiction. Thus, because Lorix has not shown that Flexsys's out-of-state sales and its website are contacts that would "tip the balance" in favor of finding that Flexsys has continuous and systematic contacts with Minnesota, we conclude that there is no basis for the exercise of general jurisdiction over Flexsys by Minnesota courts.

DECISION

Because Lorix has not shown sufficient contacts that would warrant the exercise of either specific or general jurisdiction over Flexsys by Minnesota courts, the district court erred by denying Flexsys's motion to dismiss for lack of personal jurisdiction.

Reversed.

Masimo Corp. v. Tyco Health Care Group, L.P.

United States District Court for the Central District of California

June 9, 2004, Decided ; June 10, 2004, Filed

CASE No. CV 02-4770 MRP

Reporter
2004 U.S. Dist. LEXIS 26916 *; 2004 WL 5907538

Masimo Corporation, Plaintiff, v. Tyco Health Care Group, L.P. and Mallinckrodt, Inc., Defendant.

Subsequent History: Summary judgment denied by *Masimo Corp. v. Tyco Health Care Group, L.P., 2004 U.S. Dist. LEXIS 26915 (C.D. Cal., Dec. 15, 2004)*

Prior History: *Masimo Corp. v. Tyco Health Care Grp., L.P., 2004 U.S. Dist. LEXIS 32404 (C.D. Cal., May 28, 2004)*

Disposition: Defendants' objections to declarations overruled; defendants' motions for summary judgment granted in part and denied in part.

Core Terms

discounts, contracts, foreclose, oximetry, products, bundled, rebates, relevant market, competitor, anticompetitive conduct, programs, summary judgment motion, sensors, Declaration, argues, monopoly power, anticompetitive, exclusionary, sole-source, foreclosure, customers, pulse, summary judgment, antitrust, monitors, de facto, volume, patent infringement, financing, rivals

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Evidence > Burdens of Proof > Burdens of Production

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Allocation

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate when the submissions show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56 (c)*. A defendant moving for summary judgment satisfies the initial burden of production by providing evidence negating any essential element of the nonmovants' claims or by showing that there is an absence of evidence to support the non-moving party's case. Once the moving party carries its burden of production, the nonmoving party must come forward with specific facts to support its claims. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Attempts to Monopolize, Elements**

Section 2 of the Sherman Antitrust Act prohibits monopolies, attempts to form monopolies, and combinations and conspiracies to do so. *15 U.S.C.S. § 2*. To establish a violation of *§ 2*, a plaintiff must show that (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that power through "anticompetitive conduct" as opposed to gaining that power as a consequence of a superior product, business acumen, or historical accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

The possession of monopoly power in and of itself does not amount to a *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*, violation; the monopoly power must be maintained unlawfully.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is defined as the power to control prices or exclude competition. Market power can be proved by either direct evidence of the "injurious exercise of market power" or through circumstantial evidence. When proving monopoly power by circumstantial evidence, the plaintiff must establish more than just market share; the plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and that existing competitors lack the capacity to increase their output in the short run.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Defenses**

A market share exceeding 65 percent will support a rebuttable presumption of monopoly power for purposes of *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Sherman Act, Claims**

The second element of a § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, monopoly claim, referred to as the "conduct" element, addresses the question of whether a defendant used its monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor. To prove a § 2 violation, the plaintiff must show that the defendant willfully acquired or maintained monopoly power. In addition, anticompetitive conduct does not invoke the Sherman Act until it harms consumer welfare.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The United States District Court for the Central District of California has previously considered § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, violations and has found it improper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Monopolies & Monopolization, Actual Monopolization**

The specific intent of an accused monopolist need not be proved by direct admissions of wrongdoing. Rather, the actions of the defendant, taken as a whole, can and should be considered. But this does not allow for clearly legal acts to be thrown into the mix to bolster a plaintiff's § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2, antitrust case.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

In assessing the antitrust liability of a defendant the court may look to the overall effects of a defendant's conduct in the relevant market. A district court acts properly in aggregating a defendant's contracts in the relevant market in order to assess the Sherman Act violations resulting from those contracts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

The United States Court of Appeals for the Ninth Circuit distinguishes between volume discount contracts and exclusive dealing contracts in violation of *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*, and holds that volume discount contracts, which do not foreclose consumers from entering into contracts with other delivery service providers, are legal under ***antitrust law***.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Bundled rebates may qualify as anticompetitive conduct within the meaning of *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*. Thus, the question becomes one of fact as to whether the bundled rebates in question act to foreclose the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

The United States Court of Appeals for the Ninth Circuit has held that 24 percent foreclosure for an "unreasonable length of time" can constitute a Sherman Act violation.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN13[] **Pleadings, Amendment of Pleadings**

To add a new theory of liability at the summary judgment stage would prejudice the defendant who faces new burdens and defenses.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Torts > Business Torts > Trade Libel > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

As a matter of law, patent infringement acts do not amount to anticompetitive conduct under § 2 of the Sherman Antitrust Act, 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN15[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Section 3 of the Clayton Act prohibits companies from making contracts on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor or competitors for the lessor or seller where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. 15 U.S.C.S. § 14.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN16[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Section 3 of the Clayton Act, 15 U.S.C.S. § 14, seeks to prevent the anticompetitive effects of exclusive dealing arrangements. To fall within the purview of § 14, the contract must be "truly an exclusive dealing one." Exclusivity alone is not sufficient to establish antitrust violation under §14; the contract must also foreclose competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

HN17[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Exclusivity and foreclosure for purposes of § 3 of the Clayton Act, 15 U.S.C.S. § 14, are typically considered together, since virtually every contract is arguably "exclusive." Once a contract is found to be exclusive, the first step -- or the "controlling factor" in the discussion -- must be to define the relevant competitive market area.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN18[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

In determining the relevant market for purposes of § 3 of the Clayton Act, *15 U.S.C.S. § 14*, the line of commerce (i.e., the type of goods, wares, or merchandise, etc.) involved must be specified. This inquiry is a question of fact, so where there is a dispute as to the line of commerce, the issue may not be resolved as a matter of law. Next, the area of effective competition in the known line of competition must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies. The relevant market must be defined before the court can move on to the next part of the inquiry and assess whether competition has been foreclosed in a substantial share of the relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Courts have analyzed foreclosure in § 3 of the Clayton Act, *15 U.S.C.S. § 14*, under a "rule of reason" analysis, meaning that only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected will violate *§ 14*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN20[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

The United States Supreme Court has accepted de facto exclusivity for purposes of § 3 of the Clayton Act, *15 U.S.C.S. § 14*. In clarifying what qualifies as an exclusive dealing contract, the Supreme Court has explained that even though a contract does not contain specific agreements not to use the goods of a competitor, if the practical effect is to prevent such use it comes within the condition of the section as to exclusivity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

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

HN21[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Determining the relevant product market is a highly fact intensive discussion for purposes of § 3 of the Clayton Act, *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Sherman Act, Claims**

It is easier to meet the threshold of foreclosure for a § 3 of the Clayton Act, *15 U.S.C.S. § 14*, violation than it is for a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, violation.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Sherman Act, Claims**

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. To prove a *§ 1* violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy imposes an unreasonable restraint on trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN24[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

The unreasonableness of a restraint on trade under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, is determined using either a per se standard or a rule of reason test that examines all of the circumstances. The United States Court of Appeals for the Ninth Circuit has found that exclusive dealing arrangements challenged under *§ 1* cannot be considered as per se violations. Thus, a court may not find that a defendant's alleged exclusive dealings are per se in violation of *§ 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN25[] **Antitrust & Trade Law, Sherman Act**

Under the rule of reason test, three principal criteria are used to evaluate the reasonableness of a contractual arrangement, including the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers. There is a similarity between the *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, rule of reason analysis and the § 3 of the Clayton Act, *15 U.S.C.S. § 14*, rule of reason analysis.

Counsel: [*1] For Masimo Corporation, a Delaware corportion, Plaintiff: Amy Thomas Brantly, David C Marcus, Marc M Seltzer, Maurice M Suh, Stephen E Morrissey, LEAD ATTORNEYS, Susman Godfrey LLP, Los Angeles, CA; David W Kesselman, Donald R Pepperman, Maxwell M Blecher, LEAD ATTORNEYS, Blecher & Collins, Los Angeles, CA; David C Marcus, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr LLP, Los Angeles, CA; Deborah Kay Croyle, LEAD ATTORNEY, Orrick Herrington and Sutcliffe LLP, San Francisco, CA; Maurice M Suh, LEAD ATTORNEY, Gibson Dunn and Crutcher LLP, Los Angeles, CA; Stephen D Susman, Vineet Bhatia, LEAD ATTORNEYS, Susman Godfrey, Los Angeles, CAHouston, TX.

For Tyco Health Care Group L.P., a Delaware partnership, Mallinckrodt Incorporated, a DelawareDelawre corporation, Defendants: Bruce A Blefeld, John P DeGeeter, John L Murchison, Jr, LEAD ATTORNEYS, Vinson & Elkins, Houston, TX; Christopher D Dusseault, Heather Lynn Richardson, LEAD ATTORNEYS, Gibson Dunn and Crutcher, Los Angeles, CA; Craig NNevin Hentschel, LEAD ATTORNEY, Dykema Gossett, PasadenaPLLC, Los Angeles, CA; Dominic Surprenant, LEAD ATTORNEY, Quinn Emanuel Urquhart Oliver & Hedges, Los Angeles, CA; James J Donato, LEAD ATTORNEY, Shearman & Sterling LLP, San Francisco, CA; John Francis Young, Neil [*2] J Stephens, LEAD ATTORNEYS, Cooley Godward, San Francisco, CA. Kronish, San Francisco, CA; Linda A F Callison, LEAD ATTORNEY, Cooley Godward Kronish, Palo Alto, CA; Stephen C Neal, LEAD ATTORNEY, Cooley LLP, Palo Alto, CA.

Judges: Honorable Mariana R. Pfaelzer, United States District Judge.

Opinion by: Mariana R. Pfaelzer

Opinion

MEMORANDUM OF DECISION RE: Defendant's Motion for Summary Judgment

BACKGROUND

Plaintiff Masimo Corporation ("Masimo") brings this antitrust action against Tyco Healthcare Group, L.P. and Mallinckrodt, Inc. (collectively "Tyco") alleging that Masimo "has been effectively shut out of a substantial portion of the market for pulse oximetry sensors **[*2]** and patient cables" through Tyco's use of "exclusive dealing arrangements," "strong-arm" tactics, and other "anticompetitive agreements" with hospital group purchasing organizations ("GPOs"), hospitals, Integrated Health Networks ("IHNs") and original equipment manufacturers ("OEMs") in violation of *Sections 1* and *2 of the Sherman Antitrust Act*, and *Section 3 of the Clayton Act*. Complaint at PP 17, 18, 24. [1]

[*3] Tyco brings this Motion for Summary Judgment on the grounds that: (1) Masimo's first cause of action for violations of *Section 2 of the Sherman Antitrust Act* fails because Tyco did not possess monopoly power in any relevant market and did not engage in any wrongful conduct to maintain its market position; (2) Masimo's second cause of action for violations of *Section 1 of the Sherman Act* fails because Masimo does not state a claim under *Section 3 of the Clayton Act* in that the challenged contracts are neither exclusive nor do they foreclose a substantial share of any relevant market; and (3) Masimo's third cause of action for violations of *Section 3 of the Clayton Act* fails because the challenged contracts are neither exclusive nor do they foreclose a substantial share of any relevant market. *See* Defendants' Notice of Motion and Motion for Summary Judgment ("Motion")(filed under seal Mar. 22, 2004). Tyco contends that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

The Court has read and considered the parties' submissions on this Motion, and has determined that oral argument would not assist the Court in its decisions. **[*4]** Accordingly, for the reasons discussed below, this Court rules as follows:

[1] Masimo's lawsuit follows a six week jury trial, during which various patents issued by Masimo and Nellcor (a subsidiary of Tyco) were litigated. The trial was bifurcated into stages, beginning with infringement and validity and then damages. The Court also heard equitable issues outside the presence of the jury. The jury found for Masimo on all claims, finding that Nellcor infringed either literally or through the doctrine of equivalents all of Masimo's patents at issue. Consequently, the jury awarded $ 134,528,960 in damages to Masimo in reasonable royalties and lost profits. Nellcor has since petitioned for judgment as a matter of law (JMOL) on several issues, and this Court is currently considering Nellcor's motions.

Tyco's Motion for Summary Judgment is DENIED with respect to Plaintiff Masimo's *Section 2 Sherman Act* claims regarding Tyco's (1) loyalty discounts in compliance-based agreements, (2) sole-source agreements, (3) bundled rebates, (4) equipment financing programs, and (5) co-marketing agreements because genuine issues of fact remain as to whether these acts, when viewed in combination, amount to exclusionary anticompetitive conduct. Tyco's Motion for Summary Judgment with respect to the remaining two *Section 2* claims, patent infringement and product disparagement, is GRANTED because as a matter of law such acts do not amount to anticompetitive conduct. Finally, Tyco's Motion for Summary Judgment with respect to Plaintiff Masimo's *Section 3 Clayton Act* claims and *Section 1 Sherman Act* claims is DENIED because genuine issues of fact remain as to whether Tyco's contracts create *de facto* exclusivity that substantially forecloses the relevant market.

I. Parties Filings

Tyco filed this Motion for Summary Judgment on March 22, 2004. *See* Defendants' Memorandum of Points and Authorities in Support **[*5]** of Motion for Summary Judgment ("Tyco Mot.") (filed under seal Mar. 22, 2004); *see also* supporting declarations (Neal J. Stephens (I) Declaration ("NJS I") and Neal J. Stephens (II) Declaration ("NJS II")) (filed under seal Mar. 22, 2004). At the same time, Tyco filed a separate statement of uncontroverted facts in support of its Motion for Summary Judgment. *See* Defendants' Separate Statement of Uncontroverted Facts in Support of Motion for Summary Judgment (filed under seal Mar. 22, 2004).

Masimo filed its Opposition under seal on April 19, 2004. *See* Memorandum of Points and Authorities in Opposition to Defendants Motion for Summary Judgment ("Masimo Opp."). In support of its Opposition, Masimo filed a number of Declarations under seal. *See* Declaration of Kevin Mosher ("Mosher Decl.") (filed April 19, 2004); Declaration of Joe E. Kiani ("Kiani Decl.") (filed April 19, 2004); Declaration of Professor Einer Elhauge ("Elhauge Decl.") (filed April 19, 2004); Declaration of Bradley R. Langdale ("Landgale Decl.") (filed April 20, 2004); Declaration of Frederick A. Robertson, M.D. ("Robertson Decl.") (filed April 20, 2004); Declaration of Dr. Jeffrey Leitzinger ("Leitzinger **[*6]** Decl.") (filed April 20, 2004); Declarations of Stephen E. Morrissey Volumes I-VII, Exhibits 1-269 ("Morrissey Decl.") (filed April 20, 2004).

In addition to the Opposition and Declarations, Masimo filed a statement of genuine issues of material fact. *See* Statement of Genuine Issues in Opposition of Defendants' Motion for Summary Judgment ("GI") (filed under seal April 19, 2004). Masimo also responded to Defendants' Separate Statement of Uncontroverted Facts. *See* Response to Defendants' Separate Statement of Uncontroverted Facts in Opposition to Motion for Summary Judgment ("Masimo Response to Uncontroverted Facts") (filed under seal April 20, 2004) and Corrected Response to Defendants' Separate Statement of Uncontroverted Facts in Opposition to Motion for Summary Judgment ("Masimo Corr. Response to Uncontroverted Facts") (filed under seal April 20, 2004).

On May 3, 2004, Tyco filed (under seal) a Reply (see Reply in Support of Motion for Summary Judgment ("Tyco Reply")) and Declaration (see Neal J. Stephens (III) Declaration ("NJS III"). In addition, Tyco replied to Masimo's response regarding uncontroverted facts. *See* Tyco's Reply to Masimo's Response Re: Undisputed **[*7]** Facts in Opposition to Motion for Summary Judgment ("Tyco's Reply Re: Undisput. Facts") (filed under seal May 3, 2003).

II. Masimo's Claims

Masimo alleges that Tyco monopolizes the U.S. market for pulse oximetry and has unlawfully abused its monopoly power to exclude competition. Masimo asserts that Tyco, through its exclusionary anticompetitive conduct, has worked to foreclose Masimo and other rivals from over 70% of the relevant market. The specific anticompetitive conduct that Masimo alleges Tyco engages in includes: (1) providing "loyalty discounts" to hospitals in exchange for a hospital's commitment to purchase not more than a specified percentage of the hospital's requirements for oximetry products (5%-15%) from Masimo or other rivals; (2) entering into "sole-source exclusive dealing arrangements" with hospital GPOs and IHNs that effectively prevent Masimo and other competitors from selling oximetry products to GPO and IHN member hospitals; (3) offering "bundled rebates" in which discounts on oximetry products were linked with discounts on completely unrelated Tyco products; (4) entering into oximetry "equipment financing programs" that impose financial penalties **[*8]** on hospitals who switch to rival products; (5) entering into contracts with OEMs that effectively foreclose rivals; (6) depriving Masimo of the competitive advantage of its technological advances by introducing products that infringed Masimo's patents; and (7) making false statements to potential customers about Masimo and its products. Masimo Opp. at 1; *see also* Complaint at PP 18, 21, 22, 24, 26, 27. Masimo alleges that these anticompetitive acts were in violation of *Section 2 of the Sherman Act*.

Masimo further alleges that Tyco's agreements with GPOs, IHNs, and OEMs created a *de facto* exclusivity that substantially foreclosed Masimo from entering the market in violation of both *Section 3 of the Clayton Act* and *Section 1 of the Sherman Act*. *See* Masimo Opp. at 2; *see also* Complaint at P 29 (alleging that "Tyco has used its GPO contracts and other anticompetitive agreements to lock-up more than 90% of the domestic market[]", substantially foreclosing the market for pulse oximetry from competition).

LEGAL STANDARD FOR SUMMARY JUDGMENT

HN1[] Summary judgment is appropriate when the submissions show that "there is no genuine issue as to any material fact and . . . **[*9]** the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56 (c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322-26, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. A defendant moving for summary judgment satisfies the initial burden of production by providing evidence negating any essential element of the nonmovants' claims or by showing ". . . that there is an absence of evidence to support the non-moving party's case." *Id. at 325*; *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-05 (9th Cir. 2000)*. Once the moving party carries its burden of production, the nonmoving party must come forward with specific facts to support its claims. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Nissan Fire & Marine, 210 F.3d at 1103*. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. *Celotex Corp., 477 U.S. at 322*; *Nissan Fire & Marine, 210 F.3d at 1103*. But if the nonmoving party produces "enough evidence to create a genuine issue of material fact, **[*10]** the nonmoving party defeats the motion." *Nissan Fire & Marine, 210 F.3d at 1103*.

ANALYSIS

I. Section 2 of the Sherman Antitrust Act (*15 U.S.C. § 2*)

HN2[] *Section 2 of the Sherman Antitrust Act* prohibits monopolies, attempts to form monopolies, and combinations and conspiracies to do so. *15 U.S.C. § 2*. To establish a violation of *Section 2 of the Sherman Antitrust Act*, a plaintiff must show that (1) the defendant possessed monopoly power in the relevant market and (2) the defendant willfully acquired or maintained that power through "anticompetitive conduct" as opposed to gaining that power as a "consequence of a superior product, business acumen, or historical accident." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202, 1208 (9th Cir. 1997)*.

HN3[] The possession of monopoly power in and of itself does not amount to a *Section 2* violation; the monopoly power must be maintained unlawfully. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872, 879 (2004)*.

A. Monopoly Power

HN4[] Monopoly power is defined as the "power to control **[*11]** prices or exclude competition." *Image Tech. Servs., Inc., 125 F.3d at 1202* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*); *see also* *United States v. Syufy Enters., 903 F.2d 659, 664 (9th Cir. 1990)*. Market power can be proved by either direct evidence of the "injurious exercise of market power" or through circumstantial evidence. *Image Tech. Servs., Inc., 125 F.3d at 1208*. When proving monopoly power by circumstantial evidence, the plaintiff must establish more than just market share; the plaintiff must: "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and . . . that existing competitors lack the capacity to increase their output in the short run." *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*.

In this Motion, Tyco argues that it does not possess the requisite monopoly power necessary for any claim under *Section 2*. Tyco Mot. at 16. Tyco concedes that it is "clearly a leader in the pulse oximetry market", but subsequently contends that it neither **[*12]** has the power to control prices nor to exclude competition. *Id.* Tyco offers evidence of how Masimo's appearance in the market drove Tyco's prices down 30%. Tyco Mot. at 16; NJS I Ex. A at M44747 (explaining that "Nellcor has already given up at least $ 100M annually in pricing to fight Masimo"). According to Tyco, "[t]his pricing history . . . is dispositive evidence of Tyco's lack of pricing discretion, and it completely negates any reasonable inference of monopoly power." Tyco Mot. at 16-17.

Tyco's arguments, however, fail to address controlling Ninth Circuit case law, which indicates that ***HN5***[] a market share exceeding 65% will support a rebuttable presumption of monopoly power. *See Image Tech. Servs., Inc., 125 F.3d at 1206* (explaining that proof of 65% market share establishes *a prima facie* case of monopoly power) (citing *American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (U.S. 1946))*; *Avery Dennison Corp. v. Acco Brands, Inc., 2000 U.S. Dist. Lexis 3938, at *38 (C.D. Cal. Feb. 22, 2000)* ("Courts have generally found that a 65% market share establishes a *prima facie* case of market power.") (internal citations omitted). **[*13]**

Based upon this precedent, Masimo argues that Tyco possessed market power because Tyco's market share averaged 80% at all relevant times. Masimo's GI 11; see Morrissey Decl., Ex. 209 at TH225628; Ex. 91 at TH 53550; Ex. 76 at TH 0031089; Ex. 74 TH30646.1; Masimo Opp. at 20 (noting Tyco's "self-described" 79% market share through 2002, Tyco's share of total installed sockets [2] which exceeded 80% from 1997 through 2000, as well as Tyco's share of total U.S. revenue, which averaged approximately 80% between 1996 and 2002).

Masimo further cites Tyco's alleged gross profit margins from 1997 to 2003 (GI 12-13), Tyco's alleged practices of price discrimination and discretion among different categories of purchasers (GI 14), Tyco's alleged power to exclude rivals (GI 16), and Tyco's **[*14]** alleged acts in creating substantial barriers to entry in the pulse oximetry market as further circumstantial proof of Tyco's market power (GI 17). The alleged barriers to entry that Masimo cites include: (1) significant up-front costs and lead times for research and development, to obtain FDA approval, and to achieve learning curve economies; (2) high capital costs to enter the market as compared to Tyco's "low cost manufacturing advantage"; (3) Tyco's brand recognition and brand loyalty produced by its long-standing dominance in sales and its installed base; (4) the tendency of hospitals to standardize their product choices in any given product category; (5) network effects that increase the minimum market share needed to compete efficiently in the oximetry market; (6) Tyco's intellectual property rights protecting sensor sales on its installed base of Nellcor-compatible sockets; and (7) Tyco's exclusionary agreements with oximetry purchasers, GPOs and IHN's. *Id.*

Masimo argues that all of the above factors provide at least circumstantial evidence of Tyco's monopoly power. Given the relevant case law and the evidence presented, this Court finds that there is at least a genuine **[*15]** issue of fact as to whether Tyco possessed monopoly power.

B. Wrongful Maintenance of Monopoly Power

HN6[] The second element of a *Section 2* monopoly claim, referred to as the "conduct" element, addresses the question of whether Tyco used its "monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Image Tech. Servs., Inc., 125 F.3d at 1208* (internal quotations omitted). To prove a *Section 2* violation, the plaintiff must show that the defendant "willfully acquired or maintained [monopoly] power". *City of*

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[2] Installed sockets have been described to mean any device into which an oximetry sensor can be plugged by means of a connecting cable, such as multi-parameter patient monitoring systems ("MPPMs"), stand-alone monitors, and hand-held units.

Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir. 1992). In addition, anticompetitive conduct "does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil Co., 51 F.3d at 1433*.

Masimo has alleged that Tyco engaged in anticompetitive conduct including (1) exclusionary loyalty discounts, (2) sole-source contracts with GPOs and IHNs, (3) bundled rebates, (4) equipment financing programs, (5) *de facto* exclusive dealing with OEMs, (6) patent infringement, and (7) product disparagement. Masimo Opp. at 25-26.

Masimo's theory of anticompetitive conduct **[*16]** relies heavily upon the "combined effect" of these acts when taken together. *See* Masimo Opp. at 27-28 (citing *LePage's Inc. v. Minnesota Mining & Manufacturing Co., 324 F.3d 141, 162 (3rd Cir. 2003))* (explaining that "[t]he relevant inquiry is the anticompetitive effect of [Tyco's] practices taken together"); *see also* Masimo Opp. at 2 ("The central issue in this case, however, is whether Tyco has unlawfully maintained monopoly power through the *combined effect* of its various anticompetitive practices.") (emphasis in original).

HN7[] This Court has previously considered *Section 2* violations and has found it improper "to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *See City of Anaheim, 955 F.2d at 1378* (affirming the lower court's decision); *see also City of Mishawaka v. American Electric Power, 616 F.2d 976, 986 (7th Cir. 1981)* (explaining that where a monopolist has engaged in a broad array of exclusionary conduct to maintain its monopoly, it is improper to consider "each aspect of [the monopolist's] conduct separately and in a vacuum"; rather "[i]t is the **[*17]** mix of various ingredients . . . in a monopoly broth that produces the unsavory flavor").

Masimo, however, takes the rationale in *City of Anaheim and Mishawaka* too far; Masimo throws into the "mix" every potential allegation of misconduct without regard as to whether such conduct is truly anticompetitive. Despite this Court's willingness to consider a "monopoly broth", this Court cannot allow Masimo to stretch these holdings beyond their intended purpose. The holding in *City of Anaheim* specifically discusses the need to show specific *intent* when proving specific acts of unlawful monopolistic conduct. *See id. at 1378* ("[W]e emphasize that ***HN8***[] the specific intent need not be proved by direct admissions of wrongdoing. Rather, the actions of the [defendant], taken as a whole, can and should be considered."). The holding does not allow for clearly legal acts to be thrown into the mix to bolster a plaintiff's antitrust case. *See id.* ("[I]f all we are shown is a number of perfectly legal acts, it becomes much more difficult to find overall wrongdoing.").

Nonetheless, the *Anaheim* Court does allow for some flexibility in deciding whether an act could be considered in the **[*18]** mix. *See id.* ("[A] finding of some slight wrongdoing in certain areas need not by itself add up to a violation. We are not dealing with a mathematical equation. We are dealing with what has been called the 'synergistic effect' of the mixture of the elements.").

1. Exclusionary Contracts/Agreements

Masimo alleges that Tyco, in response to the Masimo threat, has engaged in "a multi-faceted strategy to maintain its market domination and preserve its monopoly profits." Masimo Opp. at 7. As part of this strategy, Masimo claims that Tyco (1) imposed exclusionary contracts on hospitals, GPOs, and IHNs, that "severely restricted the ability of hospitals to buy Masimo's oximetry products;" and (2) provided financial incentives to OEMs to "ensure that the top MPPM (multi-parameter patient monitors) brands would only manufacture Tyco-compatible oximetry products and enter[] into agreements with OEMs that precluded the use of non-Tyco sensors with Tyco-compatible sockets." *Id.* Tyco's alleged exclusionary agreements include: sole-source contracts with GPOs and IHNs, market share volume/loyalty discounts in compliance-based contracts, bundled rebates, equipment financing **[*19]** programs, and co-marketing agreements with OEMs.

In assessing Tyco's potential liability for a *Section 2* violation, this Court considers the effect of all the contracts in the aggregate. *See Twin City Sportservice, Inc. v. Finley & Co., Inc., 676 F.2d 1291, 1302 (9th Cir. 1982)* (holding that ***HN9***[] in assessing the antitrust liability of a defendant the Court may look to the "overall effects of a defendant's conduct in the relevant market" and finding that the district court acted properly in aggregating defendant's contracts in the relevant market in order to assess the Sherman Act violations resulting from those contracts). When the contracts are analyzed together it becomes impossible for this Court to find as a matter of law that these agreements could not amount to anticompetitive conduct.

a. *Volume Share Discounts in Compliance-Based Agreements*

Tyco offered market share volume discounts to members of the following GPOs: Amerinet, Consorta, MedAssets, Novation and Premier. Masimo alleges that Tyco based "the availability of discounts on the condition that the hospitals refrain from purchasing competing products." Complaint at P 59. Specifically, these **[*20]** compliance-based contracts granted substantial discounts to Tyco customers in exchange for a contractual commitment: (1) to purchase no more than a small percentage (usually about 10%) of sensors from Tyco's rivals and the remaining percentage (usually about 90%) from Tyco; and (2) to utilize Tyco monitors or Tyco compatible monitors throughout 90% (or whatever the commitment level) of the hospital. Masimo Opp. at 7.

Masimo argues that "Tyco's loyalty discounts have helped Tyco to foreclose Masimo from 50% of the relevant market." GI 38; *see* Morrissey Decl. Ex. 228, TH284964; Leitzinger Decl., Ex A P 10; *see also* Masimo Opp. at 23. Masimo cites *LePage's*, a Third Circuit case, for the proposition that "a jury could reasonably find that these loyalty discounts are a *core component* of Tyco's unlawful effort to exclude Masimo from the oximetry market because they reflect pricing terms that are based on terms that operate to exclude competition rather than to reflect the supply and demand for Tyco's products on their own merits." Masimo Opp. at 23 (emphasis added) (citing *LePage's, 324 F.3d at 157-59*) (holding that evidence of discounts "designed to induce" **[*21]** key customers "to award business to 3M to the exclusion of LePage's" supported jury verdict on a monopolization claim).

Masimo relies upon Third Circuit authority, but fails to address Ninth Circuit case law on this issue. In *Western Parcel Express*, the Ninth Circuit discusses the viability of volume discount contracts within the meaning of *Section 2*. *See* *Western Parcel Exp. v. United Parcel Express Serv., 190 F.3d 974, 976 (9th Cir. 1999)*. The Western Parcel Court found that the contracts were not exclusive dealings contracts that preclude competition in violation of the Sherman Antitrust Act because a company which entered into one of these contracts with UPS could "nevertheless contract with another carrier for parcel delivery service." *See id.* Thus, *Western Parcel* ***HN10***[] distinguishes between volume discount contracts and exclusive dealing contracts in violation of *Section 2*, and holds that volume discount contracts, which do not foreclose consumers from entering into contracts with other delivery service providers, are "legal under ***antitrust law***". *Id.*

This Court finds that the holdings in *Western Parcel* and *LePage's* are not at odds; both holdings **[*22]** highlight the importance of exclusivity and foreclosure in a *Section 2 Sherman Act* anticompetitive conduct analysis. *See* *Western Parcel, 190 F.3d at 976* (explaining that since the volume discounts contacts "did not foreclose consumers from entering into contracts with other delivery service providers" they were not in violation of the Sherman Act); *LePage's, 324 F.3d at 159* ("The foreclosure of markets through exclusive dealing contracts is of concern under the antitrust laws . . . '[U]nilaterally imposed quantity discounts can foreclose the opportunities of rivals when a dealer can obtain its best discount only by dealing exclusively with the dominant firm.') (quoting 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 768b2, at 148 (2d Ed. 2002)).

Thus, whether Tyco's discounts are considered to be anticompetitive conduct will turn, in part, on the factual question of whether the discounts had the practical effect of making the contracts exclusive agreements that substantially foreclosed the market from competitors. Tyco offers evidence against exclusivity, showing that in 2002, 40% of Tyco's Premier accounts opted not to buy from Tyco at **[*23]** the highest level of discounts and 28% of Tyco's customers purchasing under the Novation contact opted not to participate in any share volume discounts. *See* Willig Report (NJS I Ex. J) at 42-43.

Despite Tyco's evidence, Masimo asserts that these compliance based discounts, in conjunction with the sole-source agreements, created *de facto* exclusivity that substantially foreclosed Masimo from 50% of the market. *See* Morrissey Decl. Ex. 228, TH284964; Leitzinger Decl., Ex A P 10; *id.* at 39-44 (arguing that "a customer facing even a relatively modest price break for maintaining 90% Nellcor compliance would find it very expensive to switch more than 10% of its sensor purchases to a competitor"). Thus, Masimo argues that the "compliance-based pricing structure provided a major roadblock to any would-be competitor, with or without actual customer commitments to be compliant." Leitzinger Decl., Ex. A, at 41.

Therefore, given the factual questions that remain as to whether the discounts offered in Tyco's compliance-based contracts actually became exclusive in practice and had the effect of substantially foreclosing the market, it would be premature for this Court to remove these **[*24]** compliance-based discounts from the monopoly mix.

b. *Sole-Source Contracts with GPOs and IHNs*

During the relevant time period, Tyco allegedly had "sole-source" contracts with three GPOs: Premier, Novation and Consorta. *See* Premier Contract, Decl. of Neal J. Stephens (II) ("NJS II") Ex. II. P0001-P0102; Novation Contract, NJS II, Ex. JJ, NOV000927-NOV001014; Consotra Contract, NJSII, Ex. KK, TH0019793-TH0019855. Masimo argues that Tyco's sole-source contracts have created a "strong disincentive" for GPO members and IHNs to deal with Tyco's competitors and have the "effect of excluding Masimo from a substantial portion of the oximetry market." Masimo Opp. at 24; *see also* Morrissey Decl., Ex. 127, at TH0102021 (explaining that in an internal presentation, Tyco stated of its Novation sole-source agreement: "Not only did this provide an opportunity to grow the existing installed base business, but more importantly shutout our competitor from gaining a stronghold within this key GPO").

Tyco argues that the sole-source agreements cannot qualify as exclusionary anticompetitive conduct because the agreements allow the hospitals to purchase "off contract", making them **[*25]** non-exclusive; nonetheless, as discussed *infra*, this Court should find that there is a genuine issue of material fact as to exclusivity and foreclosure regarding these contracts. *See* Masimo Opp. at 9 (alleging that "even if hospitals could technically buy "off contract," Tyco understood that hospitals generally did not"); *see also* Leitzinger Decl., Ex. A, at 41 (Nellcor's own documents note that: "GPOs continue to dictate a hospital's direction. Any attempts at business outside of a GPO contract has [sic] been very difficult and usually not worth the time and effort it takes to get them off contract.").

Thus, since this Court is not able to conclude as a matter of law that Tyco's sole-source agreements do not amount to exclusionary anticompetitive conduct, this Court will not remove the sole-source agreements from the monopoly broth.

c. *Bundled Rebates*

Tyco has "bundled" rebate programs within Premier and Novation. Tyco Mot. at 8; *see also* Letzinger Decl. Ex. A, at 44-47. Masimo alleges that by 2002, over 75% of Tyco's sensor sales to Premier members were to customers who were receiving bundled rebates across pulse oximetry and other unrelated product **[*26]** categories. *See* Leitzinger Decl. Ex. A, at 53 (observing that "the portion of Nellcor's oximetry sales that involved bundling arrangements increased substantially as Masimo was trying to enter the market").

Masimo argues that "Tyco introduced bundled discount programs that sought to leverage Tyco's dominant position in other products with its dominant position in pulse oximetry." Masimo Opp. at 10-11. Consequently, Masimo claims that Tyco bundled its oximetry products with non-oximetry markets, thereby creating an inducement to buy from Tyco that Masimo could not match because Masimo only offers oximetry. *See* Masimo Opp. at 24 (arguing that "[b]ecause Tyco's customers would lose significant discounts on oximetry products and other products if they bought Masimo's oximetry products, Masimo cannot efficiently compete against Tyco for the customers who are subject to Tyco's bundled rebate programs"). Finally, Masimo contends that these bundled rebates have "created a powerful disincentive for hospitals to buy Masimo's oximetry products for reasons that have nothing to do with the relative merits of the competing oximetry systems." *Id.*

Tyco does not deny that it offers these **[*27]** programs. Instead it argues that the rebates are "entirely voluntary" and no more exclusive than procompetitive lawful discount programs; Tyco asserts that "Masimo has always been free to seek these hospitals' business by offering a better deal." *See* Tyco Mot. at 8. Tyco further claims that since Masimo's own profit margins were between 45% and 83%, it was "well within Masimo's capabilities to offer a discount that exceeded the rebates provided by the bundled programs." *Id.*

Masimo cites *LePage's* for the proposition that when offered by a monopolist, bundled rebates may foreclose the market to competitors who do not offer a similarly diverse product line. *See* *LePage's, 324 F.3d at 155* ("The principal anticompetitive effect of bundled rebates as offered by [the defendant] is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.").

At the core of the Third Circuit's holding on bundled rebates is the idea that the defendant in that case "linked a product on which it faced competition with products **[*28]** on which it faced no competition." *Id. at 156* (citing with approval the Court's rationale in *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1065 (3d Cir. 1978))*. Such a practice, the Court explained, had the effect of "magnifying" the 3% rebate to a discount that was in actuality much larger, thereby "insulating" the defendant's product "from true price competition with [its competitor]". *See id.* ("The effect of the 3% bundled rebate was magnified by the volume of [defendant's] products sold, so that in order to offer a rebate of the same net dollar amount as [defendant's], [plaintiff] had to offer purchasers of [plaintiff's product] rebates of some 16% to hospitals of average size, and 35% to larger volume hospitals.") (internal quotations omitted).

Such bundled rebates have been compared to "packaging discounts" by Philip Areeda in his treatise on ***Antitrust Law***. Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 794, at 83 (Supp. 2002). This treatise discusses the anticompetitive effect of packaging discounts as follows:

> The anticompetitive feature of package discounting is the strong incentive it gives buyers to take **[*29]** increasing amounts or even all of a product in order to take advantage of a discount aggregated across multiple products. In the anticompetitive case, which we presume is in the minority, the defendant rewards the customer for buying its product B rather than the plaintiff's *B*, not because defendant's B is better or even cheaper. Rather, the customer buys the defendant's B in order to receive a greater discount on *A*, which the plaintiff does not produce. In that case the rival can compete in *B* only by giving the customer a price that compensates it for the foregone *A* discount. . . . Depending on the number of products that are aggregated and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.

Id. at 83-84.

While none of the law cited by Masimo is binding on this Court, neither Tyco nor this Court's independent research has revealed any controlling authority in this Circuit. Thus, given the similarity of the facts in this case to those in *LePage's*, this Court finds the Third Circuit's holding that ***HN11***[] bundled rebates may qualify as anticompetitive **[*30]** conduct within the meaning of *Section 2 of the Sherman Act* to be instructive.

Thus, the question becomes one of fact as to whether the bundled rebates act to foreclose the relevant market. On this issue, Tyco argues that "no more than 26% of total U.S. sales of pulse oximetry consumables in any single year were made by hospitals participating in bundled rebate programs." Tyco Mot. at 8; *see also* Willig Report, NJS I, Ex. J, at 37 Figure 4. Masimo argues in response that Tyco's expert failed to include Tyco's bundling programs with GPOs such as Amerinet, HSCA and VHA (Novation's predecessor) and with a number of IHNs. Masimo asserts that when the sales under these programs are included, Masimo was foreclosed from at least 31% of oximetry sales subject to programs that bundled oximetry discounts within other products. Masimo Opp at 12.

Given that ***HN12***[] the Ninth Circuit has held that 24% foreclosure for an "unreasonable length of time" can constitute a Sherman Act violation (*see* *Twin City, 676 F.2d at 1304*), it would be premature for this Court to decide at this stage that as a matter of law the bundled rebates cannot constitute anticompetitive conduct. Thus, the bundled **[*31]** rebates will be allowed to be shown as a possible part of the monopoly mix.

d. *Equipment Financing Programs*

Masimo claims that Tyco used its equipment financing programs with GPO and non-GPO hospitals, such as Co-OP and OTIS, to foreclose competition in the relevant market. Under Tyco's Co-OP program, hospitals that signed a written commitment to purchase a high percentage (80-95%) of their oximetry equipment from Tyco could receive new monitoring equipment without paying any cash at the outset. Tyco's OTIS program functioned in a similar fashion; Tyco would provide new monitors with no cash payment required to any hospital that was willing to trade in on a rival's product. Hospitals that participated in these two programs were required to purchase Tyco sensors for all their new and existing Tyco monitors. *See* Morrissey Decl., Ex. 200 at TH220359-70; EX 215 at TH228118.

Masimo claims that Tyco's system of not demanding monitor payment up front, but instead tacking it onto sensor sales paid slowly over time, is anticompetitive because to switch to a competitor the hospital would have to pay the remaining cost of the monitor. Masimo is unable to offer any authoritative **[*32]** legal basis for its contention that Tyco's equipment financing programs are anticompetitive within *Section 2 of the Sherman Act*. Instead, Masimo directs the Court to D.C. Circuit's decision in *Microsoft; Microsoft* holds that an exclusive dealing arrangement will not violate antitrust laws unless it has the effect of blocking a competitor's access to potential customers. *United States v. Microsoft Corp., 253 F.3d 34, 59-64, 346 U.S. App. D.C. 330 (D.C. Circuit 2001)*.

While this Court recognizes the general importance of that holding, this Court is not convinced by Masimo's attempt to use *Microsoft* to suggest that Tyco's equipment financing programs are anticompetitive. Masimo argues that approximately 40% of Tyco's sensor revenues came from hospitals who had entered into OTIS and Co-OP; the evidence seems to indicate that the actual percentage may between 30% to 40%. Leitzinger Decl., Ex A at 47-48 (estimating 30%); Morrissey Decl., Ex 143 at TH142543 (estimating 40%); *see also* GI 74. When considered on their own, Tyco's equipment financing programs are arguably not exclusive. Nonetheless, when viewed in conjunction with the sole-source agreements, compliance discounts, and bundled **[*33]** rebates discussed above, it is possible that a jury could find the overall combined effect is *de facto* exclusive and substantially forecloses the market. *See* *Twin City, 676 F.2d at 1302* (finding that the district court acted properly in aggregating defendant's contracts in the relevant market in order to assess the Sherman Act violations resulting from those contracts). Thus, this Court finds that Tyco's equipment financing programs should be considered as a possible part of the mix.

e. *Co-Marketing Agreements with OEMs*

Masimo argues that Tyco's co-marketing agreements with OEMs have prevented the OEMs from offering Masimo products, and have denied Masimo access to "vital" channels of the market. Masimo Opp. at 25. Masimo provides evidence that Tyco's standard form agreements to provide OEMs with modules for use in MPPMs "require that OEMs in their product manuals recommend only Tyco sensors for use with those modules, and state that no other sensors should be used (including sensors not manufactured by [Tyco])'". Elhauge Decl., Ex. A at 65. Masimo contends that these OEM agreements had the "effect of foreclosing the use of rival sensors with **[*34]** oximetry monitors that used Tyco technology even in those cases where use of rival sensors was, or could have been, technologically possible." *Id.* at 66.

Masimo also alleges that Tyco's standard license precluded technical innovations that designed around Tyco's patented oximetry technology, such as Masimo's Radical. GI 76. Specifically Masimo argues that the Radical could be used with Tyco's oximetry technology without violating Tyco's RCAL sensor patent and was "an efficient way for a competitor to sell sensors to Tyco's installed base of sockets." *Id.* Finally Masimo contends that Tyco's contracts with OEMs prohibited the OEMs from selling or using the Radical, even though the Radical could be utilized without violating Tyco's patents. *Id.*

Tyco counters that the co-marketing agreements did not contain any exclusivity provisions, and provides evidence that purports to show that "Tyco's OEMs could and did offer the pulse oximetry of other vendors (including Masimo's) at the same time they offered Tyco Oximetry on some of their patient monitors." Tyco Mot. at 9; *see* Bednarski Depo., NJS I Ex. 0, at 345 (arguing that the clause "[e]ndorsement of NPB brand sensors only" **[*35]** in the OEM co-marketing agreement did not preclude the use of competitor's sensors, and explaining that such a "condition" merely meant that the OEM would only be "*compensated* for endorsing NPB branded adhesive sensors" over other competitor's sensors) (emphasis added).

Tyco also asserts that Masimo's complaints about being shut out of the OEM channel by Tyco's OEM agreements are disingenuous, given the press release that Masimo issued proclaiming its own success in the pulse oximetry market. *See* Masimo Press Release (Dec. 1, 2003), NJS I, Ex. P ("To date, Masimo has licensed its Signal Extraction Pulse Oximetry Technology to over 35 international patient monitoring system providers, which make up over 70% of the world's pulse oximeter shipments.").

Tyco's evidence is shaky at best. First, Tyco is only able to provide deposition testimony of one person (Bednarski) as evidence in support of Tyco's claims that the OEM agreements were not exclusive. Further, Bednarski's testimony purports to evaluate only the plain meaning of the text and "conditions" of the agreement, rather than the preclusive effect that the agreement may have had on competitors. Such testimony about the **[*36]** literal interpretation of the OEM agreements is not helpful in light Masimo's claims that the agreements created *de facto* exclusivity.

Masimo's press release provides somewhat more compelling evidence against foreclosure of Masimo's SET technology from the market; presumably if Masimo is able to license technology to OEMs that represent over 70% of the world's pulse oximeter shipments, Masimo has not been foreclosed from the OEM channel as they suggest. Nonetheless, the press release, which was dated December, 2003 may not be reflective of Masimo's potential foreclosure from the market, as Masimo argues that it was only able to enter into OEM agreements with these OEMs after Tyco terminated its co-marketing agreements.

While this Court is not completely convinced that these OEM agreements taken in isolation would be anticompetitive, when placed within the overall context of the volume discounts and sole-source agreements discussed above, it is possible that given the material facts, a jury could find that such contracts create *de facto* exclusivity and thus violate the Sherman Act.

Thus, this Court finds that the *combined effect* of Tyco's (1)exclusionary loyalty discounts, **[*37]** (2) sole-source contracts with GPOs and IHNs, (3) bundled rebates, (4) equipment financing programs, and (5) *de facto* exclusive dealing with OEMs creates a genuine issue of fact as to whether these agreements constitute exclusionary anticompetitive conduct that is in violation of *Section 2 of the Sherman Act*. This Court therefore DENIES Summary Judgment as to these agreements.

2. Patent Infringement

Masimo claims that Tyco wrongfully appropriated Masimo's market share by infringing Masimo's technology. Masimo has not cited and this Court has not found any case where patent infringement has been considered anticompetitive conduct. The only case Masimo cites, *Conwood Co. v. U.S. Tobacco Co.*, is irrelevant. *See* *Conwood, 290 F.3d 768 (6th Cir. 2002)*. The *Conwood* Court considers whether tortious acts committed by one competitor against another competitor's display racks in retail shops may amount to anticompetitive conduct supporting a *Section 2* claim. *See* *id. at 787-88*. The case does not, as Masimo suggests, support the proposition that patent infringement may support antitrust claims brought by the patentee. Importantly, **[*38]** *Conwood* does not discuss patent infringement at all. Further, the analogy that Masimo aims to draw between its intellectual property and the property (display racks) at issue in *Conwood* is weak. As explained in this Court's prior Memorandum of Decision RE: Motions in Limine (issued May 28, 2004), the *Conwood* Court's concern was whether the Defendant's acts should be considered isolated tortious acts, which would not be an antitrust violation, or an exclusionary pattern, which would support an antitrust claim. *Conwood* is not analogous to this case. Thus, this Court does not find *Conwood* to be instructive on whether patent infringement may support an antitrust claim.

Further, Masimo's argument that Nellcor's patent infringement amounts to anticompetitive conduct was not a claim asserted in Masimo's Complaint or in any filing prior to its opposition to Tyco's Motion for Summary Judgment. *See* Tyco Reply at 14 (explaining that this theory of liability "first surfaced in Masimo's Opposition memorandum, long after the close of discovery and the Court's deadline of August 4, 2003 for amending the pleadings"). To allow Masimo to assert such a new theory of liability **[*39]** at this late stage would prejudice Tyco. *See* *Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292 (9th Cir. 2000)* (reasoning that ***HN13***[] to add a new theory of liability at the summary judgment stage would prejudice the defendant who faces new burdens and defenses).

Thus, for the reasons explained here and in this Court's prior Memorandum of Decision RE: Motions in Limine (issued May 28, 2004), this Court GRANTS summary judgment against Masimo on Masimo's *Section 2* patent infringement claim because ***HN14***[] as a matter of law such acts do not amount to anticompetitive conduct.

3. Product Disparagement

Masimo alleges that to persuade customers to purchase its products instead of Masimo's products, Tyco "has repeatedly made false and disparaging statements about the quality of Masimo's products." Masimo Opp. at 26. Specifically, Masimo contends that Tyco has (1) "circulated a false rumor that a baby in an Ohio hospital suffered cardiac arrest while being monitored by a Masimo pulse oximeter"; (2) "distributed an outdated letter from Philips concerning the compatibility of Masimo's Radical with Philips monitors, even though an updated letter stating that Masimo is compatible **[*40]** had been circulated by Philips"; and (3) "falsely told customers that Masimo was not a superior technology, even though Tyco privately conceded that Masimo was better." GI 88. Masimo concludes that such disparagement amounts to exclusionary anticompetitive conduct in violation of *Section 2 of the Sherman Act*. *See* Masimo Opp. at 26 (citing *Conwood, 290 F.3d at 787* for the proposition that misrepresentations to retailers could be exclusionary conduct).

As with Masimo's allegation of patent infringement, Masimo will not be allowed to present product disparagement as anticompetitive conduct supporting Masimo's *Section 2* claim. First, Masimo's argument that Tyco's "widespread disparagement of Masimo's products" amounts to anticompetitive conduct was not a claim asserted in Masimo's Complaint or in any filing prior to its Opposition to Tyco's Motion for Summary Judgment. *See* Tyco Reply at 14. Because adding a theory of liability at the summary judgment stage would prejudice the defendant (as discussed above in relation to Masimo's patent infringement theory), this Court will not allow Masimo's product disparagement theory to be added to the mix. *Coleman, 232 F.3d at 1292.* **[*41]**

Further, Masimo has not cited and this Court has not found any persuasive case law holding mere product disparagement to be anticompetitive conduct. Again, the one Sixth Circuit case that Masimo cites, *Conwood*, does not offer guidance because, as discussed above, the issues in that case are not analogous. *Conwood, 290 F.3d at 787*. Thus, this Court GRANTS summary judgment with respect to Masimo's product disparagement theory of liability.

II. Section 3 of the Clayton Act (*15 U.S.C. § 14*)

HN15[] *Section 3 of the Clayton Act* prohibits companies from making contracts "on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors for the lessor or seller" where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *15 U.S.C. § 14*.

HN16[] *Section 3 of the Clayton Act* seeks to prevent the anticompetitive effects of exclusive dealing arrangements. *See* *Twin City, 676 F.2d at 1302*. To fall within the purview of *Section 3*, the contract must be "truly an exclusive dealing **[*42]** one." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329-30, 5 L. Ed. 2d 580, 81 S. Ct. 623*. Exclusivity alone is not sufficient to establish antitrust violation under *Section 3*; the contract must also foreclose competition. *See* *Tampa Elec. Co., 365 U.S. at 327* (explaining that even though a contract may be found to be an exclusive dealing arrangement, it does not violate *Section 3* unless the court "believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected") (emphasis added); *see also* *Omega Envtl. v. Gilbarco, 127 F.3d 1157, 1162 (9th Cir. 1997)* ("[T]he main antitrust objection to exclusive dealing is its tendency to foreclose existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement").

HN17[] Exclusivity and foreclosure are typically considered together, since the Ninth Circuit has recognized that "virtually every contract" is arguably "exclusive." *Gilbarco, 127 F.3d at 1162* (explaining that "virtually every contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the **[*43]** market, namely the portion consisting of what was bought"). Once a contract is found to be exclusive, the first step -- or the "controlling factor" in the discussion -- must be to define the relevant competitive market area. *See* *Tampa Elec. Co., 365 U.S. at 329*.

HN18[] In determining the relevant market, the line of commerce (i.e., the type of goods, wares, or merchandise, etc.) involved must be specified. *Id. at 327*. This inquiry is a question of fact, so where there is a dispute as to the line of commerce, the issue may not be resolved as a matter of law. *See id.* Next, the "area of effective competition in the known line of competition must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practically turn for supplies." *Id.* (explaining that "the threatened foreclosure of competition must be in relation to the market affected").

The relevant market must be defined before the court can move on to the next part of the inquiry and "assess whether competition has been foreclosed in a substantial share of the relevant market." *Twin City, 676 F.2d at 1302*.

HN19[] Courts have analyzed foreclosure **[*44]** in *Section 3* under a "rule of reason" analysis, meaning that "only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected will violate *Section 3*." *Gilbarco, 127 F.3d at 1162* (indicating through citation to *Twin City* that the rule of reason analysis used to determine a *Section 1 Sherman Act* violation is also the appropriate test for a *Clayton Section 3* violation); *see also* *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (O'Connor, J. concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

A. Exclusivity

Masimo asserts that Tyco's exclusive dealing contracts with its hospitals foreclose a significant portion of the relevant market and consequently violate *Section 3*. Tyco argues that for a contract to be deemed exclusive, it must "completely preclude a consumer from dealing with the competition." Tyco Mot. at 4. As a result, Tyco argues that since none of its agreements require total commitment, none of them can be considered **[*45]** to be "exclusive" within the meaning of *Section 3*. *Id.* Tyco cites to several circuit court opinions in an attempt to justify its narrow definition of exclusivity. *See e.g.,* *Western Parcel Express., 190 F.3d at 976* ("An exclusive dealing contract involves a commitment by a buyer to deal only with a particular seller."); *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000)* (explaining that because consumers "were not required to either purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount" and because consumers "were free to walk away from Brunswick's discounts at any time," there was no basis for antitrust injury).

This Court is hesitant to accept Tyco's quick dismissal of the *Section 3* violations for several reasons. First, Tyco's strong reliance upon both *Concord Boat* and *Western Parcel* is less persuasive because neither case deals specifically with a *Section 3* violation. *See* *Concord Boat, 207 F.3d 1039* (addressing exclusivity in the context of the Sherman Act); *see* *Western Parcel, 190 F.3d 974* (same). In addition, the facts in the **[*46]** present case are distinguishable from the facts in *Concord Boat* because this case involves an alleged monopolist who has engaged in a broad range of exclusionary conduct, while *Concord Boat* involved "only one product" and "no allegations of tying or bundling with another product." *Concord Boat, 207 F.3d at 1062*. Further, in *Western Parcel*, the court's holding on exclusivity is based largely upon the "short duration and easy terminability" of the contract as opposed to any purchase provision requiring 100% commitment. *See* *Western Parcel, 190 F.3d at 976*.

Finally, and most importantly, this Court does not find Tyco's exclusivity arguments convincing in light of **HN20**[] the Supreme Court's acceptance of *de facto* exclusivity. In clarifying what qualifies as an exclusive dealing contract; the Supreme Court has explained that "even though a contract does 'not contain specific agreements not to use the [goods] of a competitor,' if 'the *practical effect* . . . is to prevent such use' it comes within the condition of the section as to exclusivity.'" *Tampa Elec. Co., 365 U.S. at 329-30* (emphasis added) (quoting *United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 (1922))* **[*47]** (explaining that *de facto* exclusivity is sufficient to qualify under *Section 3*).

Masimo has argued that Tyco's contracts are *de facto* exclusive. *See, infra* at 15 (discussing the potential exclusivity of the agreements in the *Section 2* analysis); *see also Leitzinger Decl.*, Ex. A, at 41 (explaining that

Nellcor's own documents recognize the *de facto* exclusivity of the agreements when they concede that the contractual ability to buy "off-contract" does not guarantee the practical ability to do so).

For this Court to find that the contracts are not de facto exclusive would require this Court to embark upon a factual inquiry into the question of whether Tyco's contracts in practice effectively result in a 100% commitment level, even though in actuality they only require commitment levels up to 95%. Such an inquiry presents a genuine issue of material fact, and is not appropriate for resolution on a motion for summary judgment.

Thus, this Court will not use exclusivity as a basis to grant summary judgment with respect to the *Section 3* claims. Instead this Court inquires into the second part of the analysis to see whether the potentially exclusive contracts are anticompetitive **[*48]** (i.e. to see whether they foreclose a substantial part of the relevant market).

B. Foreclosure

Tyco argues in the alternative that even if their contracts were considered to be exclusive dealing arrangements, they would not violate *Section 3* because they do not foreclose a substantial part of the relevant market. The Supreme Court has made clear that the first part of this inquiry must be to determine the relevant market. *See* *Tampa Elec. Co., 365 U.S. at 329*. Tyco makes no effort to specifically define the relevant product market; instead, Tyco proceeds on the assumption that the market is limited to sale of products to "intermediate-level entities, such as GPO's or distributors." *See Tyco* Mot. at 11. From that assumption, Tyco uses Ninth Circuit case law to argue that when intermediaries compose the market, "the required foreclosure showing is even higher." Tyco Mot. at 11 Tyco (*citing* *Gilbarco, 127 F.3d at 1162* for the proposition that "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern").

Tyco argues that "if the allegedly foreclosed competitor could **[*49]** access end-users through alternate distribution channels, or if the allegedly restrictive covenants (assuming they were exclusive) were easily terminable, the market is not foreclosed." Tyco Mot at 12; *See* *Gilbarco, 127 F.3d at 1163* (explaining that if the competitor is "free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors[,] [a]ntitrust laws require no more.").

While Tyco makes legitimate points, their ultimate argument fails because of their assumptions regarding the relevant market. First, Tyco fails to specifically define the relevant product market. Tyco describes it as the pulse oximetry market; while Masimo argues that the "relevant product market involves two complementary products (the monitors and the sensors) that form a pulse oximetry system. GI 7. Masimo also suggests that oximetry sensors can be considered a separate antitrust product market. GI 8. ***HN21***[] Determining the relevant product market is a highly fact intensive discussion. *See* *Image Tech. Servs., Inc., 125 F.3d at 1203* ("Ultimately what constitutes a relevant market is a factual determination for the jury."). Thus, failure **[*50]** to designate, without dispute, the relevant product market precludes the granting of summary judgment.

Further, if this Court were to find that the relevant product market was not a genuine issue of material dispute, then the analysis turns to the question of whether Tyco engaged in anticompetitive conduct, meaning whether the market was substantially foreclosed. This too is a factual dispute depending upon to what extent Tyco's sales actually foreclosed the market. *See infra*, at 15 (discussing whether Tyco's compliance-based volume discounts in connection with bundled rebates and sole-source agreements foreclose 50% of the market); *id.* at 20 (evidencing that Tyco's bundled rebates alone arguably foreclose from 26%-31%). As noted, a court in the Ninth Circuit has held that a contract restricting 24% of the relevant market resulted in a cognizable foreclosure in a *Section 1* case. *See* *Twin City, 676 F.2d at 1298, 1304* (noting that the appropriate foreclosure analysis is to consider all exclusionary contracts in the aggregate). The Ninth Circuit has also explained that ***HN22***[] it is easier to meet the threshold of foreclosure for a *Section 3* violation than it is for **[*51]** a *Section 1* violation. *See* *id. at 1304, n.9* (noting that "a greater showing of anticompetitive effect is required to establish a Sherman Act violation than a *Section 3 Clayton Act* violation in exclusive-dealing cases").

Thus, given that substantially less than complete foreclosure can, in some cases, constitute an antitrust violation, a reasonable jury could find that Tyco's agreements have foreclosed a substantial portion of the relevant market in violation of *Section 3 of the Clayton Act*. This Court, therefore, DENIES Summary Judgment on the *Section 3 Clayton Act* claims.

III. Section 1 of the Sherman Act (*15 U.S.C. § 1*)

HN23[] *Section 1 of the Sherman Antitrust Act* prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *See 15 U.S.C. § 1*; *see also Twin City, 676 F.2d at 1304* (explaining that *Section 1 of the Sherman Act* seeks to prevent exclusive dealing arrangements that place an unreasonable restraint on trade). To prove a *Section 1* violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy **[*52]** imposes an unreasonable restraint on trade. *See id.* (explaining that "any particular exclusive dealing arrangement does not violate *Section 1* unless it is found to be unreasonable").

HN24[] The unreasonableness of a restraint on trade is determined using either a per se standard or a rule of reason test that examines all of the circumstances. *See id.* The Ninth Circuit has found that "exclusive dealing arrangements challenged under *Section 1 of the Sherman Act* cannot be considered as per se violations." *Id.*, n.9 (citing *Tampa Elec. Co., 365 U.S. at 327*). Thus, this Court may not find that Tyco's alleged exclusive dealings are per se in violation of *Section 1*. *See Tampa Elec. Co., 365 U.S. at 327*.

HN25[] Under the rule of reason test, three principal criteria are used to evaluate the reasonableness of a contractual arrangement, including the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers. *See Twin City, 676 F.2d at 1304*. However, given the similarity between the *Section 1* Sherman rule of reason analysis and the **[*53]** *Section 3* Clayton rule of reason analysis, this Court need not engage in an involved discussion of the *Section 1* claims. *See infra*, at 29; *see also Gilbarco, 127 F.3d at 1162*.

This Court recognizes that the Ninth Circuit has held that a contract restricting as little as 24% of the relevant market resulted in a cognizable foreclosure in a *Section 1* case (*see Twin City, 676 F.2d at 1298, 1304)*. Thus, this Court may not grant summary judgment as a matter of law on the *Section 1* claims since Tyco's alleged exclusionary agreements arguably foreclose up to 50% of the relevant market. This Court, therefore, DENIES Summary Judgment on the *Section 1 Sherman Act* claims.

TYCO'S OBJECTIONS

Tyco objects, pursuant to *Federal Rule of Civil Procedure 56(e)*, to the declarations of Joe E. Kiani, Kevin Mosher, Bradley R. Langdale, and Frederick A. Robertson, M.D., offered by Masimo in opposition to Defendants' Motion for Summary Judgment. The Court has read and considered the parties' submissions on this Objection. The Court did not rely upon any of the questionable statements in reaching its conclusion to DENY Summary Judgement. Consequently, the Court **[*54]** rules as follows:

Tyco's Objection regarding the declaration of Joe E. Kiani is OVERRULED.

Tyco's Objection regarding the declaration of Kevin Mosher is OVERRULED.

Tyco's Objection regarding the declaration of Bradley R. Langdale is OVERRULED.

Tyco's Objection regarding the declaration of Frederick A. Robertson, M.D. is OVERRULED.

CONCLUSION

For the foregoing reasons: this Court DENIES Defendant Tyco's Motion for Summary Judgment with respect to Plaintiff Masimo's *Section 2 Sherman Act* claims regarding Tyco's (1) loyalty discounts in compliance-based agreements, (2) sole-source agreements, (3) bundled rebates, (4) equipment financing programs, and (5) co-marketing agreements. This Court GRANTS Defendant Tyco's Motion for Summary Judgment with respect to Plaintiff Masimo's remaining *Section 2 Sherman Act* claims, including patent infringement and product disparagement. This Court DENIES Defendant Tyco's Motion for Summary Judgment with respect to Plaintiff Masimo's *Section 3 Clayton Act* claims and *Section 1 Sherman Act* Claims.

This Court also OVERRULES Tyco's objections to the declarations of Joe E. Kiani, Kevin Mosher, Bradley R. Langdale, and Dr. Frederick A. Robertson.

[*55] IT IS SO ORDERED

DATED: June 9, 2004

/s/ Mariana R. Pfaelzer

Honorable Mariana R. Pfaelzer

United States District Judge

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Roquette Am., Inc. v. Amylum N.V.

United States District Court for the Southern District of New York

June 9, 2004, Decided ; July 1, 2004, Filed

03 Civ. 0434 (DC)

Reporter

2004 U.S. Dist. LEXIS 12297 *; 2004 WL 1488384

ROQUETTE AMERICA, INC. and ROQUETTE FRERES, Plaintiffs, - against - AMYLUM N.V., AMYLUM FRANCE SAS, A.E. STALEY MANUFACTURING COMPANY, INC., TATE & LYLE PLC., LAURENT GERBER, and CAROLE PIWNICA, Defendants.

Subsequent History: Affirmed by Roquette Am., Inc. v. Amylum N.V., 2005 U.S. App. LEXIS 20643 (2d Cir. N.Y., Sept. 21, 2005)

Disposition: **[*1]** Defendants' motions to dismiss granted. First Amended Complaint dismissed, with prejudice as to federal claims and without prejudice as to state law claims (or any claims under foreign law brought in appropriate court).

Core Terms

sorbitol, plaintiffs', effects, extraterritorial, allegations, unfair competition, trade secret, misappropriation, proprietary information, confidential, technology, manufactured, subject matter jurisdiction, state law claim, defendants', powder, plant, breach of fiduciary duty, negotiations, antitrust, cases, lack of subject matter jurisdiction, motion to dismiss, parent company, conduct test, Lanham Act, resignation, documents

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

In considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), federal courts need not accept as true contested jurisdictional allegations. As the party seeking to invoke the subject matter jurisdiction of the district court, the plaintiff bears the burden of demonstrating that there is subject matter jurisdiction in the case.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Dispute Resolution > Remedies > General Overview

Trademark Law > Foreign & International Protection > International Treaties

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Trademark Law > Foreign & International Protection > General Overview

HN2[] International Aspects, International Application of US Law

Section 44(h) of the Lanham Act, *15 U.S.C.S. § 1126(h)*, entitles foreign nationals of countries that are party to certain international conventions with the United States the right to effective protection against unfair competition. To guarantee this protection, *§ 1126(h)* makes available the remedies provided in the Lanham Act so far as they may be appropriate in repressing acts of unfair competition.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Trademark Law > Foreign & International Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] International Aspects, International Application of US Law

While § 44(h) of the Lanham Act, *15 U.S.C.S. § 1126(h)*, plainly extends protection against unfair competition to foreign nationals, it does not apply extraterritorially to unfair competition occurring in foreign countries. The benefits of the Lanham Act are limited to application within the United States. It is true that they are not expressly so limited, but it seems inconceivable that Congress meant to extend to all foreign nationals a remedy in the United States against unfair competition occurring in their own countries.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN4[] Private Actions, Racketeer Influenced & Corrupt Organizations

Although the United States Court of Appeals for the Second Circuit has not specified a precise standard regarding the extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act (RICO), courts in the Second Circuit have generally applied two alternative tests derived from transnational and antitrust cases in RICO extraterritoriality cases: the "conduct test" and the "effects test." Because it is not clear which test should be used in the context of RICO, jurisdiction will exist where either test is satisfied.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN5[] International Aspects, International Application of US Law

Under the conduct test, for purposes of extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act, subject matter jurisdiction exists only where conduct material to the completion of the fraud occurred in the United States. The conduct in the United States must have "directly caused" the loss for subject matter jurisdiction to exist. Mere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Securities

HN6[] Private Actions, Racketeer Influenced & Corrupt Organizations

There are two versions of the effects test for purposes of extraterritorial application of the Racketeering Influenced and Corrupt Organizations Act. One version is derived from securities cases and the other is derived from ***antitrust law***. Under the effects test borrowed from securities cases, jurisdiction exists over a predominantly foreign transaction when it has substantial effects within the United States. Remote and indirect effects do not qualify as substantial. The "effect" must be a direct and foreseeable result of the conduct alleged. In antitrust cases, liability may attach when the extraterritorial conduct is intended to and actually does have an effect on United States imports or exports which the state reprehends. Under both versions of the effects test, the reasoning behind the test is to protect domestic markets from corrupt foreign influences.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN7[] Jurisdiction, Jurisdictional Sources

When the federal claims in a case are dismissed, leaving only state law claims, it is within the discretion of the district court to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C.S. § 1367(c)(3). When all bases for federal jurisdiction have been eliminated, the federal court should ordinarily dismiss the state claims.

Counsel: For Plaintiffs: Oleg Rivkin, Esq., Eric Lindquist, Esq., FOX HORAN & CAMERINI LLP, New York, New York.

For Tate & Lyle PLC, and AE Staley Manufacturing Company, Inc., Defendants: Robert M. Buschmann, Esq., Sheri N. Lewis, Esq., WINSTON & STRAWN LLP, New York, New York.

For Amylum France SAS, Amylum N.V., Laurent Gerber, and Carole Piwnica, Defendants: Jonathan K. Cooperman, Esq., Alison L. MacGregor, Esq., Damon W. Suden, Esq., KELLEY DRYE & WARREN LLP, New York, New York.

Judges: DENNY CHIN, United States District Judge.

Opinion by: DENNY CHIN

Opinion

MEMORANDUM DECISION

CHIN, D.J.

In this unfair competition case, plaintiffs Roquette Freres ("Roquette") and Roquette America, Inc. ("RAI") assert claims under § 44(h) of the Lanham Act, *15 U.S.C. § 1126(h)*, and the Racketeering Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1962(c)* and*1964*. Plaintiffs also bring state law claims **[*2]** alleging breach of contract, breach of fiduciary duty, conversion of confidential information, misappropriation of trade secrets, intentional interference with contract, and procurement of breach of fiduciary duty. Before the Court are defendants' motions to dismiss. For the reasons set forth below, this Court lacks jurisdiction over plaintiffs' federal claims. The federal claims are therefore dismissed with prejudice and the state law claims are dismissed without prejudice.

STATEMENT OF THE CASE

I. *The Facts*

A. *The Parties*

Roquette is a French corporation that manufactures starch-derived food ingredients and other starch-based products, including sorbitol and maltitol. (Compl. P 2). [1] Roquette is the parent company and sole owner of RAI, an American subsidiary incorporated in Delaware with its principal place of business in Keokuk, Iowa. (Compl. P 1).

Defendant Tate & Lyle PLC ("Tate & Lyle") is a **[*3]** United Kingdom limited company, with its principal place of business in London, England. (Compl. P 3). Tate & Lyle is the parent company of defendants Amylum N.V. ("Amylum"), a Belgian company, and A.E. Staley Manufacturing Company, Inc. ("Staley"), a Delaware corporation with its principal place of business in Illinois. (Compl. PP 3-5).

Amylum is the parent of a group of companies (the "Amylum Group"). (*Id.* P 4). One of Amylum's subsidiaries is defendant Amylum France SAS ("Amylum France"), a French company. (*Id.*).

Individual defendant Carole Piwnica is a Belgian citizen domiciled in France. (*Id.* P 7). During the relevant time period, she was the Chairman of the Board of the Amylum Group and a member of the Staley and Tate & Lyle Boards. (*Id.* P 7).

Individual defendant Laurent Gerber is a French citizen living in Belgium. (*Id.* P 6). Gerber worked for Roquette from 1976 to 1982 as an engineer in Roquette's manufacturing facilities in France. (*Id.* P 32). From 1982 to 1988, and again from 1993 to 1997, Gerber worked for RAI in Illinois and Iowa. (*Id.* P 32, 34). In 1997, Gerber returned to France where he continued to work for Roquette until his resignation **[*4]** in 1998. (*Id.* P 42).

B. *Gerber's Non-Compete and Non-Disclosure Agreement*

In March 1994, during his assignment with RAI in Iowa, Gerber signed a standard RAI non-competition/non-disclosure agreement. (*Id.* PP 38-39). The language of the agreement is as follows:

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[1] References to "Compl." are to the First Amended Complaint filed on July 30, 2003.

> 1. No employee of [RAI] shall, during his employment or at any time after his termination, disclose to any third party any proprietary information relating to the business of … [Roquette] or any of [its] affiliates obtained by the employee while in its … employ without … [written consent] … and upon leaving the employ of [RAI] no employee shall take with him, without like consent, any drawing, blueprint or other reproduction, or any special data, formulae, know-how, or any tables, calculations, letters or other documents, or copies of any thereof, or any proprietary information pertaining to … [Roquette] or any of [its] affiliates or any of the activities thereof.
>
> 3. No employees of [RAI] shall, during his employment and for two years thereafter, without … written consent …, engage in any other employment or business, directly or indirectly, alone or as a member of **[*5]** a partnership or as an officer or employee of or consultant to a corporation, firm or business, engaged in the manufacture or sale of sorbitol … or any other products developed by … [Roquette or any of its affiliates].

(*Id.* P 39).

C. *Amylum's "Master Plan" and the Decision to Recruit Gerber*

In 1994-95, Amylum conceived a "Master Plan," encompassing the Amylum Group, with the ultimate goal of entering the sorbitol market on a global basis. (*Id.* P 46). In furtherance of the plan, Amylum formed a joint venture in 1996 with SPI Polyols, Inc. ("SPI"), a Delaware company chosen for its technology, know-how, and customer base. (*Id.* P 50). The Amylum/SPI joint venture then began construction of a $ 400,000,000 powder sorbitol plant in Nesle, France (the "Nesle Plant"). (*Id.* PP 47, 50).

In March 1998, Amylum provided sorbitol samples to Warner-Lambert, one of the largest world-wide purchasers of powder sorbitol. (*Id.* P 52). Warner-Lambert rejected these samples because the sorbitol produced by Amylum was not in conformity with the requirements of the European market. (*Id.*). Amylum determined that the technology supplied by SPI for the Nesle **[*6]** Plant was only capable of producing a type of powder sorbitol acceptable in the North American market. (*Id.*). Amylum then decided that the objectives of its joint venture with SPI could be achieved only through technology capable of varying the characteristics of powder sorbitol so that it would be suitable for both the European and North American markets. (*Id.* P 53). Allegedly, Amylum knew that only the Roquette group possessed such technology. (*Id.*).

In March 1998, at an Amylum Group Policy Board meeting, Larry Pillard, the CEO of Tate & Lyle, Roderick Burden, Amylum Group's Managing Director, and Piwnica decided to recruit Gerber to work as Amylum's "Vice President-Technical." (*Id.* PP 54-55). Pillard, Burden, and Piwnica knew and intended that by recruiting Gerber they would be obtaining plaintiffs' highly confidential and proprietary information. (*Id.* P 55).

Amylum retained a corporate recruiting firm whose representatives contacted Gerber and met with him on April 4, 1998. (*Id.* 56-57). Subsequently, representatives of Amylum met with Gerber on eight separate occasions. (*Id.* P 58). On July 30, 1998, Gerber accepted a position as the Vice-President **[*7]** Technical of the Amylum Group. (*Id.* P 71). A few days later Gerber resigned from Roquette. (*See id.* P 62). [2]

D. *Gerber Seeks and Obtains Confidential Information From Roquette*

1. *The MBH-Sorbitol Plan*

On June 29 or 30, 1998, RAI's director of polyols and sweeteners, Richard O'Hara, was in France visiting Roquette. (*Id.* P 60). While O'Hara was in France, Gerber asked him for a copy of a document entitled the Mass Balance of Hydrogenation (the "MBH-sorbitol plan"). (*Id.* P 60). The MBH-sorbitol plan is a highly confidential document that provides a complete description of RAI's proprietary processes for production of its various grades and qualities of liquid sorbitol. (*Id.*). When O'Hara returned to RAI's Keokuk plant, he directed the author of the MBH-sorbitol plan, John McAndrew, to download a copy for **[*8]** delivery to Gerber. (*Id.* P 62). On August 5 or 6, 1998, O'Hara

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[2] Although the First Amended Complaint does not specifically allege where these meetings in the spring and early summer of 1998 took place, they must have occurred in Europe.

returned to France with McAndrew. (*Id.*). Although Gerber had tendered his resignation a few days earlier, he met with O'Hara and McAndrew and received a copy of the MBH-sorbitol plan, apparently in France. (*Id.*). At the time, neither O'Hara nor McAndrew was aware of Gerber's resignation. (*Id.*).

2. *Information Regarding Raw Materials*

On July 27, 1998, three days before accepting the job as Vice President-Technical, Gerber telephoned Phillippe Rousseaux, Roquette's purchasing director of raw materials. [3] (*Id.* P 67). From his office in France, Gerber questioned Rousseaux in detail regarding the net cost and sources of wheat and corn as projected to 2003. (*See id.* P 67). After about 15 or 20 minutes, Rousseaux told Gerber that he did not have time to talk because he was preparing to leave on vacation. (*Id.* P 68). Rousseaux advised Gerber that he could get the information he wanted from some documents. (*Id.*). Gerber, however, did not officially have access to these documents and asked Rousseaux for copies. (*Id.*). Rousseaux refused because his secretary had left for the day and **[*9]** he did not have time to make copies for Gerber. (*Id.*).

3. *The MBH-Maltitol Plan*

Gerber also attended an internal Roquette working group meeting on August 5 or 6, 1998. (*Id.* P 63). The meeting focused on a project to construct a maltitol plant using highly confidential and proprietary technology developed jointly by RAI and Roquette. (*Id.*). During the meeting, Gerber asked detailed questions regarding the size of the equipment installed in the new plant, the status of the construction, and the new technology involved. (*Id.*). Gerber also obtained a highly confidential document that effectively provided instructions for the production of maltitol using RAI's and Roquette's proprietary technology (the "MBH-maltitol plan").

E. *Gerber Joins Amylum*

Gerber's July 30, 1998 employment agreement with Amylum provided that Gerber would assume the duties of "Group Vice President-Technical" **[*10]** as of November 4, 1998. (*Id.* P 71). [4] The agreement also obligated Amylum to indemnify Gerber "for any legal claims and costs" brought against him by Roquette or its affiliates. (*Id.* P 72).

Amylum was concerned that Gerber's non-compete/non-disclosure agreement could lead to litigation. To conceal the nature of Gerber's work for Amylum, the July 30, 1998 employment agreement was cancelled. (*Id.* P 74). In its place, Amylum and Gerber executed an agreement making Gerber the Technical Director of Orsan, an entity that produces monosodium gluconate ("MSG"). (*Id.* P 75). Gerber had no experience producing MSG during his twenty-three year career with Roquette. (*Id.*). A second agreement made Gerber the Group Vice President-Technical of the Amylum Group starting September 2, 1999 -- the same day his **[*11]** non-competition/non disclosure agreement expired. (*Id.* P 74). As part of an additional effort to conceal Gerber's involvement in Amylum's sorbitol production, Amylum allegedly assigned the internal code "FKP" to refer to Gerber in all internal documents until September 2, 1999. (*Id.* P 76).

F. *Gerber's Role at Amylum*

From the very beginning of his employment by Amylum, Gerber was actively involved in Amylum's sorbitol production. (*Id.* P 79). As a result, Amylum adopted technology substantially identical to Roquette's and RAI's unique process for manufacturing powder sorbitol. (*Id.* P 84). Once Amylum began using the new process, it was able to qualify its sorbitol for sale to Warner-Lambert for use in its gum products in all of its global locations. (*Id.* at 85).

G. *Amylum's Efforts to Enter the United States Sorbitol Market*

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[3] The First Amended Complaint does not indicate where Rousseaux was located when he received Gerber's call.

[4] The First Amended Complaint does not specifically allege the location of Gerber's job with Amylum, but because Amylum is a Belgian company with offices in France, Gerber must have worked in Europe.

In June 1999 Amylum began negotiations with Ashland Inc. ("Ashland"), one of the largest distributors in North America, to distribute sorbitol produced by Amylum France. (*Id.* P 88). At the time, RAI was also in negotiations with Ashland. (*Id.*). On February 18, 2000, Ashland informed RAI that Amylum was offering its **[*12]** sorbitol at a lower price. (*Id.*). As a result, RAI was forced to lower its price to compete. (*Id.* P 91). Although Amylum eventually withdrew from its negotiations with Ashland, RAI remained obligated to sell its sorbitol at the lower price.

H. *Roquette I*

On March 25, 1999, plaintiffs sued Gerber, Amylum, and Piwnica in Iowa state court alleging common law claims ("Roquette I"). (Compl. P 92). During discovery, Amylum, Piwnica, and Gerber allegedly submitted a number of false and improperly redacted documents in an effort to perpetuate and conceal their scheme to misappropriate Roquette's and RAI's technology. (*Id.* P 94). Specifically, each of these defendants submitted false interrogatory responses indicating that Gerber's work for the Amylum Group was limited to Orsan. (*Id.*). Despite these false responses, the Iowa trial court found that Gerber functioned as the Group Vice President-Technical and was responsible for all of Amylum's operations. (*Id.*).

Roquette I was subsequently dismissed by the Iowa Court of Appeals for lack of personal jurisdiction. (*Id.* P 100).

I. *Roquette II*

In August 2000, Tate & Lyle acquired control over Amylum's **[*13]** board of directors and began operating Amylum as a unit or division of Tate & Lyle. (*Id.* P 102). As the parent company of Staley, Tate & Lyle's acquisition of control over Amylum enabled it to transfer information from Amylum to Staley. (*Id.* P 116). On November 17, 2000, while the Roquette I appeal was pending, Roquette and RAI commenced a second lawsuit in Iowa state court ("Roquette II") seeking to enjoin the transfer of Roquette's and RAI's trade secrets from Amylum to Staley. (D'Amore Decl., Exh. 2). After eight months of discovery, and three and one half days of live testimony, the Iowa court denied the motion for injunctive relief on December 27, 2001. (*Id.,* Exh. 3). Plaintiffs did not appeal the decision and on January 2, 2003, Roquette II was dismissed for want of prosecution. (*Id.,* Exh. 5).

II. *Procedural History*

Plaintiffs filed this action on January 17, 2003. After defendants moved to dismiss the original complaint, plaintiffs filed the First Amended Complaint on July 30, 2003 asserting claims under *Section 44(h) of the Lanham Act*, RICO and RICO conspiracy claims, breach of the non-competition covenant, breach of the non-disclosure covenant, **[*14]** breach of fiduciary duty, conversion of confidential information, misappropriation of trade secrets, intentional interference with contract, and procurement of breach of fiduciary duty. Defendants' motions to dismiss the original complaint were denied as moot on August 11, 2003.

Defendants filed new motions to dismiss the First Amended Complaint for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*, for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)*, and for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. [5] These motions are now before the Court. For the reasons set forth below, plaintiffs' claims are dismissed.

DISCUSSION

A. *Subject Matter Jurisdiction*

HN1[] In considering a motion to dismiss **[*15]** for lack of subject matter jurisdiction under *Rule 12(b)(1)*, federal courts "need not accept as true contested jurisdictional allegations." *Jarvis v. Cardillo, No. 98 Civ. 5793(RWS), 1999 U.S. Dist. LEXIS 4310, at *7 (S.D.N.Y. Apr. 5, 1999)*. As the party "seeking to invoke the subject matter

[5] Tate & Lyle, Amylum, Amylum France, Staley, Gerber, and Piwnica each submitted separate motion papers in support of the motion to dismiss.

jurisdiction of the district court," the plaintiff bears the burden of demonstrating that there is subject matter jurisdiction in the case. *Scelsa v. City Univ. of New York, 76 F.3d 37, 40 (2d Cir. 1996)*.

B. *The Lanham Act Claim*

1. *Applicable Law*

Plaintiffs' first claim for relief is brought pursuant to Section 44(h) of the Lanham Act, *15 U.S.C. § 1126(h)*. ***HN2***[] *Section 44(h)* entitles foreign nationals of countries that are party to certain international conventions with the United States the right to "effective protection against unfair competition." To guarantee this protection, *Section 44(h)* makes available "the remedies provided in this chapter ... so far as they may be appropriate in repressing acts of unfair competition." *15 U.S.C. § 1126(h) (2002)*.

HN3[] While *Section 44(h)* plainly extends protection **[*16]** against unfair competition to foreign nationals, it does not apply extraterritorially to unfair competition occurring in foreign countries. The benefits of the Lanham Act "are limited to application within the United States. It is true that they are not expressly so limited, but it seems inconceivable that Congress meant ... to extend to all foreign nationals a remedy in the United States against unfair competition occurring in their own countries." *Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d. Cir. 1956)*; *see also* *Am. White Cross Labs., Inc. v. H.M. Cote, Inc., 556 F. Supp. 753, 758 (S.D.N.Y. 1983)*("I regard *Vanity Fair Mills* as controlling authority for the proposition that insofar as [plaintiff] alleges ... unfair competition occurring [outside the United States], the complaint does not state a claim arising under the laws of the United States.").

2. *Application*

Each of the parties here is either a European corporation, a subsidiary of a European corporation, or a European citizen. (*See* Compl. P 1). The decision to recruit Gerber allegedly was made at a meeting of the Amylum Group Policy Board. (*Id.* P 55). **[*17]** Amylum is a European corporation and plaintiffs do not claim that this meeting took place in the United States. Moreover, the allegations of unfair competition focus predominately on the actions of Gerber, a French citizen who worked in France for a French company throughout the relevant time period. (*Id.* PP 42-45). Gerber's acts of misappropriation occurred in Europe. His alleged efforts to obtain information from Rousseaux and his misappropriation of information regarding Roquette's planned maltitol production plant took place entirely in Europe. (*Id.* P 63, 67, 68). Even crediting plaintiff's allegations that Gerber used O'Hara as an "instrumentality" to obtain the MBH-sorbitol plan from RAI in the United States, the fact remains that Gerber and O'Hara were both in France when Gerber allegedly requested and then later received the plan. (*Id.* PP 60-62).

Staley, the only American defendant, is not alleged to have been involved in the recruitment of Gerber. In fact, Staley's only interaction with Gerber occurred when its CEO, John Doxsie, along with the CEO of Tate & Lyle and the managing director of the Amylum Group, attended a "meeting/interview" with Gerber on September 27, 1998 -- **[*18]** almost two months after Gerber's resignation from Roquette. (*See id.* PP 54, 55, 58, 62). Even assuming this meeting is somehow relevant to plaintiffs' claims, the meeting is not alleged to have taken place in the United States.

Plaintiffs' allegation that Staley has received or may receive plaintiffs' proprietary information (*id.* P 115-20) does not change the overwhelmingly European nature of plaintiffs' complaint. [6] Staley is wholly owned and controlled by European-based Tate & Lyle, and it allegedly received the information not from Gerber but from Tate & Lyle, its parent company. Moreover, Tate & Lyle did not even acquire control over Amylum until well after the alleged misappropriation.

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[6] Notably, the Iowa court in Roquette II expressed its view that plaintiffs' allegations against Staley are baseless: "Despite voluminous discovery from the March 1999 filing of [Roquette I] until the July 3, 2001 hearing [in Roquette II], the plaintiffs have found no clear evidence that any of their proprietary information has found its way directly or indirectly to Staley." (D'Amore Decl., Ex. 3 at P 44).

[*19] Finally, there is no allegation that any of the defendants ever engaged in unfair competition in the United States by selling any product manufactured using plaintiffs' trade secrets. (*See id.* P 88). Although Amylum allegedly tried to sell sorbitol to a distributor in the United States, it withdrew from negotiations a few months later. [7] (*Id.* P 90).

The gravamen of this complaint is a dispute between European rivals, Roquette and Amylum, that arose in Europe. Despite some arguable minor connections to the United States, the crucial acts of unfair competition all took place in Europe. Because the *Lanham Act* does not apply extraterritorially, plaintiffs' Lanham Act claim must be dismissed for lack of subject matter jurisdiction.

[*20] C. *The RICO Claims*

1. ***Applicable Law***

The Second Circuit has noted that "the RICO statute is silent as to any extraterritorial application." *North South Fin. Corp. v. Al-Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)*. Although "a corporate defendant that is a foreign entity is not for that reason alone shielded from the reach of RICO," the Second Circuit has acknowledged ambiguity as to the "character and amount of activity in the United States that will justify RICO subject matter jurisdiction over a foreign entity." *Id. at 1052* (citing *Alfadda v. Fenn, 935 F.2d 475, 479 (2d Cir. 1991))*. The Second Circuit has noted that "guidance [regarding the extraterritorial application of RICO] is furnished by precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters." *North South Fin., 100 F.3d at 1052*. The Second Circuit, however, has not specified the test for extraterritorial applications of RICO. "The ultimate inquiry is … whether 'Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted **[*21]** to [foreign transactions] rather than leave the problem to foreign countries.'" *Id.* (quoting *Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975))*.

HN4[] Although the Second Circuit has not specified a precise standard, courts in this circuit have generally applied two alternative tests derived from transnational and antitrust cases in RICO extraterritoriality cases: the "conduct test" and the "effects test." *See* *North South Fin., 100 F.3d at 1051-52* (affirming district court's dismissal of RICO action for lack of subject matter jurisdiction for absence of U.S. conduct material to fraud); *Wiwa v. Royal Dutch Petroleum Co.,2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *21 (S.D.N.Y. Feb. 28, 2002)*; *Giro v. Banco Espanol De Credito, S.A., 1999 U.S. Dist. LEXIS 9673, No. 98 CIV. 6195 (WHP), 1999 WL 440462, at *2 (S.D.N.Y. June 28, 1999)*; *Madanes v. Madanes, 981 F. Supp. 241, 250 (S.D.N.Y. 1997)*. "Because it is not clear which test should be used in the context of RICO, jurisdiction will exist where either test is satisfied." *Johnson Elec. N. Am. Inc. v. Mabuchi Motor Corp., 98 F. Supp. 2d 480, 486-87 (S.D.N.Y. 2000).* **[*22]**

HN5[] Under the conduct test, subject matter jurisdiction exists "only where conduct material to the completion of the fraud occurred in the United States." *Giro, 1999 U.S. Dist. LEXIS 9673, 1999 WL 440462, at *3* (citing *Alfadda, 935 F.2d at 479*); *see also* *Madanes, 981 F. Supp. at 251*; *but see* *C.A. Westel de Venezuela v. Am. Tel. & Tel. Co., 1993 U.S. Dist. LEXIS 16857, No. 90 Civ. 6665 (PKL), 1993 WL 497971, at *4 (S.D.N.Y. 1993)* (rejecting conduct and effects tests in RICO context but asserting jurisdiction because predicate acts occurred in U.S.). The conduct in the United States must have "directly caused" the loss for subject matter jurisdiction to exist. *North South Fin., 100 F.3d at 1050* (citing *Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1046 (2d Cir. 1983)* (quoting *Bersch, 519 F.2d at 993*)). "Mere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction." *North South Fin., 100 F.3d at 1051* (quoting *Psimenos, 722 F.2d at 1046*)).

HN6[] There are two versions of the effects test. *Id. at 1051-52*. One version **[*23]** is derived from securities cases and the other is derived from ***antitrust law***. *Id.* Under the effects test borrowed from securities cases, jurisdiction exists over a predominantly foreign transaction when it has "substantial effects within the United States."

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[7] Plaintiffs allege that Amylum only withdrew from negotiations because of litigation commenced by RAI and Roquette. (*Id.* P 90). Even if true, the fact remains that Amylum is not alleged to have sold any sorbitol in the United States in competition with plaintiffs.

North South Fin., 100 F.3d at 1051; *see also* Giro, 1999 U.S. Dist. LEXIS 9673, 1999 WL 440462, at *3; Madanes, 981 F. Supp. at 250 (quoting Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989)). "Remote and indirect effects" do not qualify as substantial. North South Fin., 100 F.3d at 1052. The "effect" must be a "direct and foreseeable result" of the conduct alleged. Consol. Gold Fields, 871 F.2d at 261-62. In antitrust cases, liability may attach when the extraterritorial conduct is "intended to and actually does have an effect on United States imports or exports which the state reprehends." North South Fin., 100 F.3d at 1052. Under both versions of the effects test, "the reasoning behind the test is 'to protect … domestic markets from corrupt foreign influences.'" Wiwa, 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *21 **[*24]** (quoting Madanes, 981 F. Supp. at 250).

2. *Application*

I. *The Conduct Test*

The allegations underlying the RICO claim do not satisfy the conduct test for extraterritorial application of RICO. As discussed above in reference to plaintiff's Lanham Act claims, the crucial events comprising plaintiffs' allegations took place in Europe. Indeed, plaintiffs do not even argue that the RICO claims asserted in this action satisfy the conduct test for extraterritorial application of RICO. (*See* Plts.' Opp. Br. at 26-30). [8] Accordingly, the RICO claims must satisfy the effects test to withstand dismissal.

[*25] ii. *The Effects Test*

a. *The Securities Effects Test*

The alleged effects of the RICO claim in the United States were not substantial or direct. The direct results of the RICO allegations were Gerber's immediate involvement in Amylum's sorbitol production in France, his alleged disclosure of plaintiffs' confidential and proprietary information to Amylum, and the creation of the Orsan and "FKP" schemes to conceal Gerber's role at Amylum. (Compl. PP 74-84). These "effects" occurred in Europe.

Although Amylum allegedly entered into negotiations to sell sorbitol in the United States, there is no allegation that Amylum ever actually sold sorbitol here. In fact, the only alleged effect of Amylum's negotiations with Ashland is that RAI, on a single occasion, was allegedly forced to "lower its sorbitol price to meet Amylum's offer." (Compl. P 91). This falls short of the "substantial effects" set forth in cases applying the securities-based effects test and is, at worst, a remote and indirect effect that is not sufficient. *See e.g.,* Johnson Elec. North Am., Inc. v. Mabuchi Motor Am. Corp., 98 F. Supp. 2d 480, 486-87 (S.D.N.Y. 2000) (holding that a loss of sales **[*26]** in the United States constitutes a substantial effect sufficient to justify extraterritorial application of RICO).

Plaintiffs also claim that the alleged transfer of their proprietary information from Amylum to Staley, an American corporation and competitor of RAI, had a substantial effect in the United States. (Plts.' Opp. Br. at 29). Although plaintiffs allege that the result of this transfer is "severe damage to RAI's market position and possible elimination of RAI as a polyols manufacturer" (Compl. P 113), the allegations of the First Amended Complaint do not support this claim. Because plaintiffs do not allege a single instance of Staley, or any other defendant, ever selling anything in the United States manufactured using plaintiffs' trade secrets, the alleged damage to RAI's market position is purely speculative.

Furthermore, Amylum's corporate relationship to Staley is so attenuated that the transfer of plaintiffs' proprietary information from Amylum to Staley cannot be considered a direct effect. As the parent company of both Amylum and Staley, Tate & Lyle served as an intermediary of any information that passed between its subsidiaries. (*See* Compl. PP 3-5). Because **[*27]** of defendants' corporate structure, plaintiffs' proprietary information would have to pass from Gerber to Amylum France, to Amylum N.V., and then to Tate & Lyle before it could be transferred to

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[8] Plaintiffs do argue that their allegations satisfy the Second Circuit's test for personal jurisdiction in a section of their opposition brief entitled "Amended Complaint Satisfies The 'Conduct' Test." (Plts.' Opp. Br. at 6-7). This test, however, differs from the conduct test used to determine RICO's extraterritorial application. Because plaintiffs' claims fail to adequately allege this Court's subject matter jurisdiction, I do not address the merits of their arguments for personal jurisdiction.

Staley. Moreover, Tate & Lyle did not even acquire Amylum until after the alleged misappropriation. Accordingly, Staley's receipt of the proprietary information is too far removed from the fraud allegations underlying the RICO claims to be considered a direct effect. (*See id.* P 115).

b. *The Antitrust Effects Test*

Plaintiffs' RICO allegations do not satisfy the antitrust effects test. First, the complaint does not allege that the defendants' extraterritorial conduct was intended to cause an effect in the United States. The scheme to recruit Gerber and misappropriate plaintiffs' trade secrets was allegedly conceived to further Amylum's "Master Plan" to enter the global sorbitol market. (*Id.* P 46). At the time of the decision to recruit Gerber, Amylum was already capable of producing a type of powder sorbitol acceptable in the North American Market. (*Id.* P 52). Amylum's inability to develop a powder sorbitol for sale in Europe prompted its decision to seek plaintiffs' trade **[*28]** secrets from Gerber. (*See id.* PP 52-55). Therefore, Amylum's scheme to obtain plaintiffs' trade secrets was intended to cause its greatest effect in Europe by enabling Amylum to sell sorbitol there.

Second, plaintiffs fail to adequately allege that defendants' extraterritorial conduct had an effect on United States imports or exports. Not only is there no allegation that defendants ever sold any product in the United States using plaintiffs' misappropriated trade secrets, plaintiffs also fail to allege that defendants' extraterritorial conduct interfered in any way with exports from the United States.

For these reasons, plaintiffs' allegations fail to satisfy either the antitrust-based or the securities-based effects test for extraterritorial application of RICO. Based on the facts alleged, a European tribunal is the proper forum for resolution of plaintiffs' claims. Accordingly, plaintiffs' RICO claims are dismissed for lack of subject matter jurisdiction.

C. *State Law Claims*

HN7[] When, as here, the federal claims in a case are dismissed, leaving only state law claims, it is within the discretion of the district court to exercise supplemental jurisdiction over the **[*29]** remaining state law claims. *See* *28 U.S.C. § 1367(c)(3)*; *Purgess v. Sharrock, 33 F.3d 134, 138-39 (2d Cir. 1994)*. "When all bases for federal jurisdiction have been eliminated … the federal court should ordinarily dismiss the state claims." *Bhd. of Locomotive Eng'rs Div. 269 v. Long Island R.R. Co., 85 F.3d 35, 39 (2d Cir. 1996)* (quoting *Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir. 1988))*. Here, I decline to exercise supplemental jurisdiction over plaintiffs' state law claims. Accordingly, the claims for breach of contract, breach of fiduciary duty, conversion of confidential information, misappropriation of trade secrets, intentional interference with contract, and procurement of breach of fiduciary duty are dismissed without prejudice.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are granted. The First Amended Complaint is dismissed, with prejudice as to the federal claims and without prejudice as to the state law claims (or any claims under foreign law brought in the appropriate court).

The Clerk of Court shall enter judgment accordingly.

SO ORDERED.

[*30] Dated: June 9, 2004

DENNY CHIN

United States District Judge

B-S Steel of Kan. v. Tex. Indus.

United States District Court for the District of Kansas

June 14, 2004, Decided

Case No. 01-2410-JAR, Case No. 03-2664-JAR, Case No. 04-4053-JAR

Reporter
321 F. Supp. 2d 1214 *; 2004 U.S. Dist. LEXIS 11196 **; 2004-2 Trade Cas. (CCH) P74,477

B-S STEEL OF KANSAS, INC., Plaintiff, v. TEXAS INDUSTRIES, INC., et al., Defendants. CHAPARRAL STEEL MIDLOTHIAN, L.P., Plaintiff, v. B-S STEEL OF KANSAS, INC., Defendant; B-S STEEL OF KANSAS, INC., Plaintiff, v. CHAPARRAL STEEL MIDLOTHIAN, L.P., Defendant

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by, Stay denied by *B-S Steel of Kan., Inc. v. Tex. Indus., 327 F. Supp. 2d 1252, 2004 U.S. Dist. LEXIS 12819 (D. Kan., July 9, 2004)*

Prior History: *B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 2004 U.S. Dist. LEXIS 7736 (D. Kan., Apr. 28, 2004)*

Disposition: **[**1]** Midlothian's motion to confirm arbitration award granted and B-S Steel's motion to vacate award denied.

Core Terms

Steel, arbitrators, arbitration award, vacated, confirm, antitrust, damages, parties, fair hearing, Conditions, partiality, manifest, transactions, argues, suggests, motion to vacate, unfair, arbitration clause, fraud claim, proceedings, discounts, signature, modified, procured, bias

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Stay Pending Arbitration

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Judgments > Entry of Judgments > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN1[] **Federal Arbitration Act, Arbitration Agreements**

9 U.S.C.S. § 3 of the Federal Arbitration Act provides that a court can stay proceedings upon being satisfied that claims are referable to arbitration under an agreement. The court has the power to stay the action pursuant to § 3, and the power to stay is not conditioned on the power to compel arbitration under 9 U.S.C.S. § 4.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

HN2[] Contract Conditions & Provisions, Arbitration Clauses

As a general rule, arbitration agreements do not require a signature, so long as the agreement is in writing.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN3[] Alternative Dispute Resolution, Judicial Review

A federal district court's power to review an arbitration panel award is quite limited; indeed, it is among the narrowest known to the law. A court may only vacate an arbitration award for reasons enumerated in § 10 of the Federal Arbitration Act, 9 U.S.C.S. § 10, or for a handful of judicially created reasons. Section 10 allows vacation of an arbitration award only where (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or corruption on the part of the arbitrators; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded or imperfectly executed their powers. A judicially created reason to set aside an arbitration award exists when an award violates public policy, is based upon a manifest disregard of the law, or the arbitrators did not conduct a fundamentally fair hearing. If an arbitration award is not vacated, modified or corrected, the award must be confirmed.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN4[] Alternative Dispute Resolution, Judicial Review

A manifest disregard of the law means willful inattentiveness to the governing law. Mere error or misunderstanding of law is not enough for a finding of manifest disregard; instead, the record must show that the arbitrators knew the law and explicitly disregarded it.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN5[] **Clayton Act, Claims**

To recover treble damages, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent and must prove more than a violation of § 2(a) of the Robinson-Patman Act, since such proof only establishes that injury may result. Moreover, a plaintiff is required not only to show actual injury, but that injury must have been causally linked to the violation.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Remedies, Damages**

A plaintiff is required under *§ 4* of the Clayton Act to show more than a violation of the antitrust laws; rather, it must present some direct evidence of injury to support an award of damages. The direct evidence may be evidence of lost sales, evidence that substantial price discrimination reflected in the resale prices of the favored competitors directly resulted in the plaintiff losing certain sales and losing profits on others, or an expert report outlining the magnitude of the price difference. Additionally, once the fact of damage has been shown, the burden of showing the precise amount of injury is eased somewhat because the vagaries of the marketplace make it difficult to ascertain business damages.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

HN7[] **Alternative Dispute Resolution, Validity of ADR Methods**

Arbitrators need not discuss every case cited by a party; in fact, arbitrators need not explain their reasons for an award.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > Procedural Matters > Conflict of Law > Significant Relationships

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Torts > Procedural Matters > Conflict of Law > General Overview

HN8[] **Choice of Law, Significant Relationships**

Texas courts do not apply contract choice of law provisions to claims sounding in tort, but rather use the most significant relationship test.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN9[] **Alternative Dispute Resolution, Judicial Review**

Mere error does not constitute manifest disregard for the law.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Evidence > Burdens of Proof > Clear & Convincing Proof

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

HN10[] **Alternative Dispute Resolution, Judicial Review**

Under the Federal Arbitration Act, a court may vacate an arbitration award where the award was procured by corruption, fraud, or undue means. *9 U.S.C.S. § 10(a)(1)*. However, to protect the finality of arbitration decisions, courts must be slow to vacate an arbitration award on the ground of fraud. The party asserting fraud must establish it by clear and convincing evidence, and must show that due diligence could not have resulted in the discovery of the fraud prior to the arbitration.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

International Trade Law > Dispute Resolution > International Commercial Arbitration > Arbitration

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN11[] **Alternative Dispute Resolution, Judicial Review**

Pursuant to *9 U.S.C.S. § 10(a)(1)*, an arbitration award may be vacated when there was evident partiality or corruption in the arbitrators. Evident partiality requires something more than the appearance of bias, but literal proof of bias is not required either. To set aside an award, the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative. Evident partiality will be found where a reasonable person would have to conclude that the arbitrators were partial to one party to the arbitration.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

Civil Procedure > ... > Arbitration > Federal Arbitration Act > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

HN12[] **Alternative Dispute Resolution, Judicial Review**

Absent a fundamentally fair hearing, an arbitration award may be set aside. In the Tenth Circuit, a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decisionmakers, and that the decisionmakers are not infected with bias. Thus, every exclusion of relevant evidence does not require vacatur of an arbitration award. Vacatur is only required when the refusal to consider the proffered evidence so affects the rights of the party so as to deny a fair hearing. Neither the arbitrators' refusal to admit cumulative or irrelevant evidence provides a basis to set aside an arbitration award.

Counsel: For B-S Steel of Kansas, Inc., a Kansas corporation, Plaintiff (2:01-cv-02410-JAR): David A. Rameden, Shook, Hardy & Bacon L.L.P., Overland Park, KS. James R Eiszner, Shook, Hardy & Bacon L.L.P., Kansas City, MO. Jerrod A. Westfahl, Shook, Hardy & Bacon L.L.P., Overland Park, KS.

For Texas Industries Inc, a Delaware corporation aka TXI, Chaparral Steel Company, a Delaware Corporation aka TXI Chaparral, Chaparral Steel Texas, Inc., a Delaware Corporation, Chaparral Steel Midlothian, L.P., a Delaware limited partnership, Defendants (2:01-cv-02410-JAR): Dennis D. Palmer, Shughart Thomson & Kilroy, PC, Kansas City, MO. George E Leonard, Shughart Thomson & Kilroy, PC, Kansas City, MO.

For Chaparral Steel Midlothian LP, Plaintiff (2:03-cv-02664-JAR-JPO): Dennis D. Palmer, Shughart Thomson & Kilroy, PC, Kansas City, MO.

For B-S Steel of Kansas, Inc., Defendant (2:03-cv-02664-JAR-JPO): Jerrod A. Westfahl, Shook, Hardy & Bacon L.L.P., Overland Park, KS. David A. Rameden, Shook, Hardy & Bacon L.L.P., Overland Park, KS.

For B-S Steel of Kansas Inc, Plaintiff (5:04-cv-04053-JAR-KGS): **[**2]** David A. Rameden, Shook, Hardy & Bacon L.L.P., Overland Park, KS. Jerrod A. Westfahl, Shook, Hardy & Bacon L.L.P., Overland Park, KS.

For Chaparral Steel Midlothian LP, Defendant (5:04-cv-04053-JAR-KGS): George E Leonard, Shughart Thomson & Kilroy, PC, Kansas City, MO.

Judges: Judge Julie A. Robinson, United States District Judge.

Opinion by: Julie A. Robinson

Opinion

[*1215] MEMORANDUM AND ORDER DENYING MOTION TO VACATE AND GRANTING MOTION TO CONFIRM ARBITRATION AWARD

This matter comes before the Court on Chaparral Steel Midlothian, L.P.'s (Midlothian) Petition for Order Confirming Arbitration Award (Case No. 03-2664 - Doc. 1) and B-S Steel of Kansas, Inc.'s (B-S Steel) Answer and Opposition to Confirm and Suggestions in Support of Vacating Arbitration Award (Case No. 01-2410 - Doc. 291). B-S Steel also filed a Motion to Vacate the Arbitration Award in the Northern District of Texas, which has since been transferred to this Court (Case No. 04-4053 - Doc. 1) and will be addressed in this Order. For the reasons **[*1216]** stated below, Midlothian's motion to confirm the arbitration award is granted and B-S Steel's motion to vacate the award is denied.

I. Background

On August 15, 2001, B-S **[**3]** Steel filed suit in Case No. 01-2410, naming as defendants Texas Industries, Inc. and Chaparral Steel Company. B-S Steel filed an amended complaint on December 6, 2001, naming as additional defendants Chaparral Steel Texas, Inc. and Midlothian. B-S Steel's amended complaint alleged that the four defendants committed various violations of state and federal law by entering into a "secret deal" to sell steel at a lower price to B-S Steel's competitors. By its Order dated September 3, 2002, [1] (September 2002 Order) this Court referred B-S Steel's claims against Midlothian, which were based on transactions occurring before April 3, 2001, to arbitration pursuant to the Conditions of Sale Contract between B-S Steel and Midlothian. This Court found in its Order that the Conditions of Sale Contract signed in February 1997 and effective after July 1, 1996 was "valid and enforceable."

B-S Steel voluntarily dismissed **[**4]** Midlothian from Case No. 01-2410 on September 17, 2002. On that same day, B-S Steel informed Midlothian by letter that it was unwilling to proceed to arbitration. Subsequently, Midlothian filed a Demand for Arbitration with the American Arbitration Association seeking an order declaring that Midlothian was not liable to B-S Steel on its claims against Midlothian. On November 6, 2002, B-S Steel filed counterclaims against Midlothian in the arbitration, which were based on the same transactions and representations that the original claims in B-S Steel's Amended Complaint were based upon. A three member panel of arbitrators was appointed, and after a nine day hearing and the designation of many exhibits, the arbitrators issued a reasoned award.

Initially, Midlothian sought to confirm the arbitration award by filing a Motion for Order Confirming Arbitration Award in Case No. 01-2410, but then Midlothian voluntarily dismissed the motion and filed a new action. In the new action, Case No. 03-2664, Midlothian sought only a Petition for Order Confirming Arbitration Award, which was nearly a verbatim recitation of its previously filed Motion to Confirm in Case No. 01-2410. Subsequently, Case **[**5]** Nos. 01-2410 and 03-2664 were consolidated.

On December 31, 2003, the same day Midlothian filed its original motion to confirm the arbitration award, B-S Steel filed in the Northern District of Texas a motion to vacate the arbitration award. Subsequently, Midlothian petitioned the Texas court for a motion to transfer B-S Steel's motion to vacate the award to the District of Kansas, pursuant to *28 U.S.C. § 1404*. On May 10, 2004, Judge Sam Lindsay ordered the Texas case transferred to the District of Kansas. Midlothian's motion to confirm and B-S Steel's motion to vacate the arbitration award are now before the Court.

II. Discussion

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[1] *B-S Steel of Kansas, Inc v. Texas Indus, Inc., 229 F. Supp. 2d 1209 (D. Kan. 2002)*.

B-S Steel argues that the Court should vacate the arbitration award because 1) the reasoned award is void ab initio due to this Court's and the arbitrators' lack of jurisdiction; 2) the underlying claims were not arbitrable in the first place; and 3) the arbitration was fundamentally flawed and unfair.

A. This Court Lacks Jurisdiction

B-S Steel suggests that the arbitration award is void ab initio because this Court **[*1217]** lacked jurisdiction to stay proceedings and refer the case to arbitration in the first place **[**6]** based upon a forum selection clause, which B-S claims makes the Northern District of Texas the only proper forum for its claims. Additionally, B-S Steel argues that the arbitration award is void because this Court did not have jurisdiction to "compel" arbitration pursuant to *9 U.S.C. § 4*. Since the arbitrators based their jurisdiction on the Court's Order staying the proceedings to refer the case to arbitration, B-S Steel avers that the arbitrators did not have jurisdiction either.

The Court has already considered B-S Steel's suggestion that the Court lacked jurisdiction and noted that the forum selection clause raises concerns not of subject matter jurisdiction but of venue. [2] **[**7]** Further, the Court rejected B-S Steel's argument, noting that B-S Steel originally chose this forum when it filed suit in Case No. 01-2410, that B-S Steel had originally argued that venue was proper in the District of Kansas, and that B-S Steel long ago waived venue. [3] The Court's prior ruling that it has jurisdiction is law of the case; [4] consequently, the Court rejects B-S Steel's misguided suggestion that jurisdiction is lacking due to the forum selection clause.

Likewise, B-S Steel's contention that this Court compelled arbitration pursuant to *§ 4 of the Federal Arbitration Act* [5] (FAA) in its September 2002 Order is mistaken. The only mention of compelling arbitration is in the caption to the Court's Order, "Memorandum & Order . . . Granting in Part Chaparral Steel Midlothian's Motion to Stay and Compel Arbitration." The text of the Order, however, states that "the Court grants Chaparral Midlothian's motion to stay and refer to arbitration claims with respect to transactions occurring before April 3, 2001." [6] Moreover, the Order discusses only *§ 3 of the FAA*, [7] which ***HN1***[] provides that a court can stay proceedings upon being satisfied that claims are referable to arbitration under an agreement. **[**8]** The Court clearly had the power to stay the action pursuant to *§ 3*, and the power to stay is not conditioned on the power to compel arbitration under *§ 4 of the FAA*. [8]

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[2] *B-S Steel of Kansas, Inc. v. Texas Indus., Inc., 2004 U.S. Dist. LEXIS 7736, 2004 WL 946894 at *2 (D. Kan. April 29, 2004)* ("B-S Steel's contention that this Court's subject matter jurisdiction is somehow implicated by the forum selection clause . . . defies reason.").

[3] *Id. 2004 U.S. Dist. LEXIS 7736 at *3-4*.

[4] *United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir. 1991)* ("The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *Wilson v. Meeks, 98 F.3d 1247, 1250 (10th Cir. 1996)*.

[5] *9 U.S.C. § 4*.

[6] *B-S Steel of Kansas, Inc., 229 F. Supp. 2d at 1213*. This statement appears under the heading "Relief to be Given to Defendants." Further, the Court ordered that Midlothian's "Motion to Stay Proceedings and to Refer Case to Arbitration" be granted. *Id. at 1229*.

[7] *9 U.S.C. § 3*.

[8] *See* *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 453, 55 S. Ct. 313, 79 L. Ed. 583 (1935)* ("We think the Court of Appeals was clearly right in concluding that there is no reason to imply that the power to grant a stay is conditioned upon the existence of power to compel arbitration in accordance with *section 4* of the [FAA].").

The Court never addressed *§ 4*, which allows a district court to compel arbitration when **[**9]** a party has been aggrieved by the refusal of another to arbitrate under a written agreement, because Midlothian did not ask the Court to compel arbitration as contemplated by *§ 4*. Indeed, B-S Steel has stated that it was not even aware of an **[*1218]** arbitration agreement until the motion to stay and refer the matter to arbitration was filed. Thus, at the time Midlothian filed its motion for a stay, it had not yet asked B-S Steel to arbitrate the claims, and therefore could not have been aggrieved by B-S Steel's refusal to arbitrate. In sum, not only was the Court's Order devoid of a directive compelling arbitration pursuant to *§ 4*, it would have been improper for the Court to have done so because B-S Steel had not yet refused to arbitrate the claims. [9]

[10] B. The Underlying Claims were not Arbitrable**

B-S Steel argues that the underlying claims were not arbitrable because the 1997 Agreement, containing the arbitration clause, does not apply to the dispute, the claims are not arbitrable under the 1997 Agreement, and, alternatively, that the 2001 Agreement, which contains no arbitration clause, superceded the 1997 Agreement. Finally, B-S Steel suggests that *Clary v. The Stanley Works* [10] demonstrates that there was no agreement to arbitrate in the first instance.

B-S Steel first argues that the 1988 Conditions of Sale, which does not contain an arbitration clause, applies to the dispute, rather than the 1997 Agreement. The Court notes that the validity and scope of the 1997 Agreement were before the Court in its September 2002 Order and the Court found the 1997 Agreement to be valid and enforceable and to apply to shipments after its effective date and until the effective **[**11]** date of the 2001 Agreement. This determination is law of the case, and B-S Steel's argument must fail.

Even if the Court were to entertain B-S Steel's argument that the 1988 Conditions of Sale applies to the disputed claims because the "1997 Agreement never complied with Paragraph 19 of the 1988 Conditions of Sale: to wit, the 1997 Agreement was not "executed by both parties," as required by the 1988 Conditions of Sale," B-S Steel would still fall short. The 1997 Agreement was not a modification of the 1988 Conditions of Sale such that it was required to be "executed by both parties." Rather, the 1997 Agreement was a new contract. Paragraph 22 of the 1997 Agreement provides:

> This agreement constitutes the entire understanding of the parties with respect to the subject matter hereof, *supplant and supercedes any prior agreements* or understandings and may only be amended or modified by an agreement in writing executed by both parties. (emphasis added).

Thus, by its own terms, the integration clause in the 1997 Agreement supplanted and superceded the 1988 Conditions of Sale. [11]

[12]** The Court has also previously held that B-S Steel's antitrust claims are arbitrable under the 1997 Agreement. In the Court's September 2002 Order, it stated that the **[*1219]** arbitration clause of the 1997 Agreement was "quite broad." [12] "It covers not only claims or controversies tied to the parties' conduct, but to any

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[9] *See* *9 U.S.C. § 4* (requiring a party seeking to compel arbitration to be aggrieved); *Hartford Acc. & Indem. Co. v. Equitas Reinsurance Ltd., 200 F. Supp. 2d 102, 108 (D. Conn. 2002)* ("Absent a refusal by the other party to arbitrate, arbitration cannot be compelled under *section 4*" because the party seeking to compel arbitration would not have been aggrieved).

[10] *2003 U.S. Dist. LEXIS 12747, 2003 WL 21728865 (D. Kan. July 24, 2003)*.

[11] *See* ***Wayman v. Amoco Oil Co., 923 F. Supp. 1322, 1338 (D. Kan. 1996)*** ("The credit card contracts . . . have an integration clause. It provides that all prior agreements and understandings pertaining to the subject matters covered in the credit card contracts are cancelled and superseded and that there are no other agreements, written or oral, between the parties pertaining to those matters. Hence, the credit card contracts . . . are 'final expressions' and cannot be contradicted by evidence of any prior agreement.").

[12] *B-S Steel of Kansas, Inc., 229 F. Supp. 2d at 1226*.

other transactions between the parties, And, it covers transactions that are related, even if they don't arise out of the contract. Such broad language covers [B-S Steel's] antitrust and tort claims . . . ." [13] B-S Steel's arguments therefore fail as this Court's prior holding is controlling.

B-S Steel's suggestion that the 2001 Agreement, which contained no arbitration clause, superceded the 1997 Agreement was also previously considered and rejected by this Court. The Court held that:

> The 2001 Agreement, signed on April 3, 2001, is expressly limited to *future transactions."* Thus its subject matter **[**13]** is entirely separate and distinct from the 1997 agreement, which is limited to transactions after its effective date, but before the effective date of the 2001 agreement. Because transactions pre-dating April 3, 2001 are still subject to the terms of the 1997 contract, the arbitration clause applies. [14]

Because the Court finds no error in its September 2002 Order, it declines to modify its prior holding.

Finally, B-S Steel argues that *Clary v. The Stanley Works,* which was decided in July 2003, after this Court's September 2002 Order, demonstrates that there was no agreement to arbitrate in the first instance. The *Clary* court first noted that ***HN2***[] "as a general rule, arbitration agreements do not require a signature, so long as the agreement is in writing." [15] But, the contract at issue in *Clary* expressly required the signature of both parties before becoming effective. [16] Only one party signed the contract and the court held that because the contract required **[**14]** both parties' signature, "no enforceable, written agreement to arbitrate ever came into existence." [17] In contrast to the contract in *Clary,* the 1997 Agreement does not require signatures of both parties to become effective. Thus, the general rule applies and Midlothian need not have signed the 1997 Agreement for the arbitration clause to be effective. [18]

Nor is B-S Steel's argument that the 1988 Agreement contained an express signature requirement, which mandated that the 1997 Agreement be signed by both parties, persuasive. B-S Steel points to paragraph 19 of the 1988 Agreement which states that it could "only be amended or modified **[**15]** by an agreement in writing executed by both parties." But, as previously discussed, the 1997 agreement is not an amendment of the 1988 agreement; rather, it is an entirely new agreement. Moreover, the Court has already determined that the 1997 Agreement is valid and enforceable.

C. The Arbitration was Fundamentally Flawed and Unfair

B-S Steel argues that the arbitration award is fundamentally flawed because the arbitrators manifestly disregarded the applicable law, the award was procured by fraud, the arbitrators were partial to Midlothian, and the arbitrators created a fundamentally **[*1220]** unfair arbitration process by excluding specific evidence.

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[13] *Id.*

[14] *Id. at 1225-26*.

[15] *2003 U.S. Dist. LEXIS 12747, 2003 WL 21728865 at *3*.

[16] *Id.*

[17] *Id.2003 U.S. Dist. LEXIS 12747 at *4*.

[18] *See Med. Dev. Corp. v. Indus. Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973)*; *Clary, 2003 U.S. Dist. LEXIS 12747, 2003 WL 21728865 at *3* (distinguishing *Clary,* which contained an express signature requirement from *Medical Development,* which contained no such requirement)).

HN3[] The Court's power to review an arbitration panel award is quite limited; indeed, it is "among the narrowest known to the law." [19] A court may only vacate an arbitration award for reasons enumerated in § 10 of the FAA, [20] or for a handful of judicially created reasons. [21] Section 10 allows vacation of an arbitration award only where 1) the award was procured by corruption, fraud, or undue means; 2) there was evidence of partiality or corruption on the part of the arbitrators; 3) the arbitrators were guilty of misconduct; or 4) the **[**16]** arbitrators exceeded or imperfectly executed their powers. [22] A judicially created reason to set aside an arbitration award exists when an award violates public policy, is based upon a manifest disregard of the law, or the arbitrators did not conduct a fundamentally fair hearing. [23] If an arbitration award is not vacated, modified or corrected, the award must be confirmed. [24]

1. The Arbitrators Acted with Manifest Disregard for the Law

B-S Steel suggests that the arbitration award must be vacated because "in making the award the arbitrators **[**17]** acted with manifest disregard for the law." HN4[] A manifest disregard of the law means "willful inattentiveness to the governing law." [25] Mere error or misunderstanding of law is not enough for a finding of manifest disregard; instead, the record must show that "the arbitrators knew the law and explicitly disregarded it." [26]

The Arbitrators Ignored ***Antitrust Law***

Specifically, B-S Steel avers that the arbitrators were presented with the applicable standards for proving antitrust injury in the Robinson-Patman Act context, but despite being presented with these standards, the arbitrators disregarded them. B-S Steel asserts that the arbitrators required it "to show, through direct evidence or admissions, that the Favored Buyers passed through some or all of the discount they received from Midlothian before antitrust injury could occur," rather than allowing B-S Steel to show antitrust injury through other **[**18]** methods.

B-S Steel blurs the standard for recovering antitrust damages by citing cases discussing the standards for proving antitrust injury pursuant to § 2(a) of the Robinson-Patman Act, but yet seeking treble damages under § 4 of the Clayton Act. It is well-settled that HN5[] "to recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent . . . [and] must prove more than a violation of § 2(a), since such proof only establishes that injury may result." [27] **[**19]** Moreover, B-S Steel was required not only to show actual injury, but that injury must have been causally linked to the violation. [28] **[*1221]**

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[19] Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001).

[20] 9 U.S.C. § 10.

[21] Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co., 119 F.3d 847, 849 (10th Cir. 1997).

[22] *See* 9 U.S.C. § 10(a).

[23] Id. (citations omitted).

[24] 9 U.S.C. § 9; P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 870 (10th Cir. 1999).

[25] Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001).

[26] Id.

[27] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981); World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1479 (10th Cir. 1985).

The arbitrators recognized this when they wrote: "Accordingly B-S Steel faces a much higher standard in order to prove injury for purposes of recovering damages under its *Clayton Act* claim; it must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered."

The arbitrators also correctly stated the quantum of proof in a *§ 4* claim. ***HN6***[] B-S Steel was required to show more than a violation of the antitrust laws; rather, it must have presented some direct evidence of injury to support an award of damages. [29] **[**20]** The direct evidence may be evidence of lost sales, evidence that substantial price discrimination reflected in the resale prices of the favored competitors directly resulted in B-S Steel losing certain sales and losing profits on others, or an expert report outlining the magnitude of the price difference. [30] Additionally, once the fact of damage has been shown, the burden of showing the precise amount of injury is eased somewhat because the vagaries of the marketplace make it difficult to ascertain business damages. [31]

After carefully synthesizing the law and considering B-S Steel's evidence, the arbitrators determined that the injuries asserted by B-S Steel, its lost sales and margin squeeze damages, "fell far short of the quality of evidence needed to demonstrate that any lost sales or margin squeeze was materially caused by Chaparral's conduct." The Court finds no error in the arbitrators' determination that B-S Steel failed to carry its burden of proving antitrust injury or damages, as required by *Payne* and its progeny, given the Court's limited power to review an arbitration award. B-S Steel's contention that the arbitrators required it to show that the favored buyers passed through the discounts they received misconstrues the arbitrators' award. The arbitrators simply noted that because BS-Steel was unable to establish that the favored buyers passed on the discounts, B-S Steel had failed to prove the requisite *causal connection* between the discounts and B-S Steel's **[**21]** damages. As discussed above, a causal connection is a necessary component of a *§ 4 Act* claim.

B-S Steel's suggestion that the arbitrators acted with manifest disregard by failing to discuss the cases cited in its briefs or the testimony of Dr. White, is also misplaced. It is established that the ***HN7***[] arbitrators need not discuss every case cited by a party; in fact, arbitrators need not explain their reasons for an award. [32] And, B-S Steel has not indicated how the arbitrators' failure to discuss the testimony of Dr. White, Midlothian's expert, was in error. More importantly, even if the arbitrators erred, B-S Steel has presented no evidence that such error would amount to a "willful inattentiveness to the governing law." Thus, B-S Steel's suggestion that the arbitrators acted with a manifest disregard for the law must fail.

[22]** *The Arbitrators Failed to Apply Texas Law to the Fraud Claims*

B-S Steel also argues that the arbitrators acted with manifest disregard for the parties choice of Texas law when resolving B-S Steel's fraud claims. Because this Court in its September 2002 Order found the 1997 Agreement valid and enforceable and that "the parties chose Texas **[*1222]** as their choice of law in this 1997 Agreement," B-S Steel suggests that the arbitrators erred when they applied Kansas law to the fraud claims.

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[28] *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572-73, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*; *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990))*.

[29] ***Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1274 (3d Cir. 1995)*** (quoting *Feeser, 909 F.2d at 1540*).

[30] *See Feeser, 909 F.2d at 1540*.

[31] *J. Truett Payne Co., 451 U.S. at 566-67, 101 S. Ct. 1923*.

[32] *See Wilko v. Swan, 346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed. 168 (1953), overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)*.

Because this case was arbitrated in Texas, the choice of law rules for Texas applied to determine the substantive law governing B-S Steel's claims for fraud. [33] **[**23]** *HN8*[] Texas courts do not apply contract choice of law provisions to claims sounding in tort, but rather use the Restatement's "most significant relationship test." [34] The arbitrators determined that Kansas was the state with the most significant relationship to B-S Steel's fraud claims, and therefore applied Kansas law. Thus, the arbitrators correctly applied Texas choice of law rules. Even if the arbitrators erred in their application of Texas choice of law rules, *HN9*[] mere error does not constitute "manifest disregard for the law."

2. Midlothian Procured the Arbitration Award through Fraud

B-S Steel urges that the arbitration award be vacated because the award was procured through fraud. Essentially, B-S Steel argues that Midlothian misrepresented that it was the true seller of steel, and once B-S Steel added Midlothian as a party, Midlothian took advantage of its fraud by filing a motion to stay proceedings and refer the matter to arbitration.

HN10[] Under the FAA, a court may vacate an arbitration award where the "award was procured by corruption, fraud, or undue means." [35] However, "to protect the finality of arbitration decisions, courts must be slow to vacate an arbitration award on the ground of fraud." [36] "The party asserting fraud must establish it by clear and convincing evidence, and must show that due diligence could not have resulted in the discovery of the fraud prior to the arbitration." [37] Tellingly, B-S Steel does not discuss the due diligence standard. The Court concludes that, through due diligence, B-S Steel **[**24]** could have discovered the true seller of steel, between August 15, 2002, when the case was first filed, and July 28, 2003, when the arbitration hearing occurred. Thus, the Court rejects B-S Steel's suggestion that the award be vacated due to fraud.

3. The Arbitrators were Partial to Midlothian

B-S Steel next suggests that the arbitration award must be vacated because the arbitrators were improperly impartial to Midlothian. As evidence of impartiality, B-S Steel notes that the arbitrators failed to award it damages for its fraud or *Texas Deceptive Trade Practices Act* claims, "sua sponte bickered with B-S Steel's damage expert," and made other "derogatory and/or loaded remarks" during the arbitration.

HN11[] Pursuant to *9 U.S.C. § 10(a)(1)*, an arbitration award may be vacated when "there was evident partiality or corruption in the arbitrators." Evident **[**25]** partiality requires something more than the appearance of bias, but literal proof of bias is not required either. [38] To set aside an award, **[*1223]** the evidence of bias or interest of an arbitrator must be direct, definite and capable of demonstration rather than remote, uncertain or speculative. [39]

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[33] *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)* (A federal court sitting in diversity, or the arbitrators in this case, apply the choice of law rules of the forum state).

[34] *Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420-21, 27 Tex. Sup. Ct. J. 213 (Tex. 1984)*.

[35] *9 U.S.C. § 10(a)(1)*.

[36] *Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986)*.

[37] *Id.*

[38] *Morelight Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 83-84 (2d Cir. 1984)*; *Peoples Sec. Life Ins. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993)*; *Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 325 (6th Cir. 1998)*.

[39] *Ormsbee Dev. Co., v. Grace, 668 F.2d 1140, 1147 (10th Cir. 1982)* (citing *Tamari v. Bache Halsey Stuart Inc., 619 F.2d 1196 (7th Cir. 1980))*.

"Evident partiality will be found where a reasonable person would have to conclude that the arbitrators were partial to one party to the arbitration." [40]

[26]** B-S Steel has failed to demonstrate that the arbitrators acted with "evident partiality." B-S Steel's complaint that the arbitrators failed to award certain damages is not evidence of bias; rather it is simply an attack on the validity of the arbitration award. [41] Nor do B-S Steel's other complaints demonstrate impartiality. Essentially B-S Steel claims that the arbitrators were rude, but rudeness is not a basis to vacate an arbitration award. [42] B-S Steel has failed to show that a reasonable person would have to conclude that the arbitrators were partial to Midlothian.

[27]** *4. The Arbitration Process was Fundamentally Unfair*

B-S Steel suggests that, by excluding certain evidence, the arbitrators stripped it of a fundamentally fair hearing. Specifically, B-S Steel complains that the exclusion of Exhibit 570 created such an unfair hearing that the arbitration award must be vacated. B-S Steel states that the exclusion was "tantamount to denying B-S Steel's antitrust claim," and if Exhibit 570 had been admitted, "even the arbitrators would have been forced to find that B-S Steel was harmed by the illegal discounts . . . ."

HN12[] Absent a fundamentally fair hearing, an arbitration award may be set aside. [43] The Tenth Circuit has outlined what constitutes a fundamentally fair hearing: "the courts seem to agree that a fundamentally fair hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decisionmakers, and that the decisionmakers are not infected with bias." [44] Thus, every exclusion of relevant evidence does not require vacatur of an arbitration award. [45] Vacatur is only required when the refusal to consider the proffered evidence "so affects the rights of the party" so as to deny **[**28]** a fair hearing. [46] Neither the arbitrators refusal to admit cumulative or irrelevant evidence provides a basis to set aside an arbitration award. [47]

The exclusion of Exhibit 570 did not deny B-S Steel a fair hearing. The arbitrators **[*1224]** excluded Exhibit 570 because B-S Steel missed the deadline for filing exhibits, and the arbitrators had "a problem allowing this document in at this late stage of the game." Absent self-serving argument **[**29]** as to the importance of Exhibit 570, B-S Steel has not demonstrated that the exclusion of a single exhibit deprived it of a fundamentally fair hearing, particularly in light of the large amount of evidence presented to the arbitrators. [48] If Exhibit 570 was indeed so pivotal that its exclusion resulted in an unfair hearing, how could B-S Steel have missed the deadline for filing such

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[40] *Morelight, 748 F.2d at 84*; *Andersons, 166 F.3d at 325*.

[41] *See* *Andersons, 166 F.3d at 330* (An adverse award, in and of itself, is not evidence of arbitrator bias absent some evidence of improper motivation).

[42] *See* *Fairchild & Co. v. Richmond, F. & P. R. Co., 516 F. Supp. 1305, 1313 (D.D.C. 1981)* (Absent some sort of overt misconduct, a disappointed party's perception of rudeness on part of an arbitrator is not the sort of evident partiality contemplated by FAA as grounds for vacating an award).

[43] *Denver & Rio Grande W. R.R. v. Union Pac. R.R., 119 F.3d 847, 849 (10th Cir. 1997)*.

[44] *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1013 (10th Cir. 1994)*.

[45] *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 599 (3d Cir.)*, *cert. denied*, ***393 U.S. 954, 89 S. Ct. 378, 21 L. Ed. 2d 365 (1968)***.

[46] *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985)*.

[47] *Id.*

[48] *Bad Ass Coffee Co. v. Bad Ass Coffee, Ltd. P'ship., 25 Fed. Appx. 738, 2001 WL 1334377 at *3 (10th Cir. October 30, 2001)* (holding that the exclusion of one piece of evidence did not deprive a party of a fundamentally unfair hearing).

a key exhibit? Far from working an injustice upon B-S Steel, the arbitrators' admission of Exhibit 570, in violation of clearly established deadlines, would have worked an injustice upon Midlothian. In sum, B-S Steel has fallen far short of satisfying its burden that it was denied a fundamentally fair hearing.

III. Conclusion

A **[**30]** primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings. [49] If an arbitration award is not vacated, modified, or corrected, it must be confirmed. [50] B-S Steel has not demonstrated that any statutory basis exists for vacating the arbitration award. Nor has B-S Steel convinced the Court that application of a limited judicial exception to set aside the award is proper. Consequently, the Court must confirm the arbitration award.

IT IS THEREFORE ORDERED BY THE COURT that Midlothian's Petition for Order Confirming Arbitration Award (Doc. 1) originally filed in Case No. 03-2664, which has been consolidated with Case No. 01-2410, shall be GRANTED.

IT IS FURTHER ORDERED BY THE COURT that B-S Steel's Motion to Vacate the Arbitration Award (Doc **[**31]** 1) in Case No. 04-4053 shall be DENIED, and Case No. 04-4053 shall be dismissed.

IT IS SO ORDERED.

Dated this 14th of June, 2004.

Judge Julie A. Robinson

United States District Judge

End of Document

[49] *ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995)*.

[50] *9 U.S.C. § 9*; *P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 870 (10th Cir. 1999)*.

F. Hoffmann-La Roche Ltd v. Empagran S.A.

Supreme Court of the United States

April 26, 2004, Argued ; June 14, 2004, Decided

No. 03-724

Reporter

542 U.S. 155 *; 124 S. Ct. 2359 **; 159 L. Ed. 2d 226 ***; 2004 U.S. LEXIS 4174 ****; 72 U.S.L.W. 4501; 2004-1 Trade Cas. (CCH) P74,448; 17 Fla. L. Weekly Fed. S 374

F. HOFFMANN-La ROCHE LTD, et al., Petitioners v. EMPAGRAN S.A. et al.

Subsequent History: Appeal after remand at *Empagran S.A. v. F. Hoffman-Laroche, Ltd., 2004 U.S. App. LEXIS 13431 (D.C. Cir., June 21, 2004)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Empagran S.A. v. F. Hoffman-Laroche, LTD., 354 U.S. App. D.C. 257, 315 F.3d 338, 2003 U.S. App. LEXIS 647 (2003)

Disposition: Vacated and remanded.

Core Terms

domestic, commerce, Sherman Act, export, import, anti trust law, anticompetitive conduct, price-fixing, transactions, antitrust, vitamin, foreign nation, causes, comity, give rise, anticompetitive, cases, circumstances, prices, customers, Appeals, effects, courts, plaintiff's claim, private plaintiff, general rule, reasonably foreseeable, statutory language, district court, respondents'

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

The Foreign Trade Antitrust Improvements Act of 1982 excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations. *15 U.S.C.S. § 6a*. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] International Aspects, Foreign Trade Antitrust Improvements Act

When the case before the court concerns significant foreign anticompetitive conduct with an adverse domestic effect and an independent foreign effect, a purchaser in the United States can bring a Sherman Act claim under the Foreign Trade Antitrust Improvements Act based on domestic injury, but a purchaser in a foreign country can not bring a Sherman Act claim based on foreign harm.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN3[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act (FTAIA) seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Exemptions & Immunities

See *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Exemptions & Immunities

The Foreign Trade Antitrust Improvements Act's general rule applies where the anticompetitive conduct at issue is foreign.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] International Aspects, Foreign Trade Antitrust Improvements Act

When price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the domestic-injury exception, *15 U.S.C.S. § 6a*, of the Foreign Trade Antitrust Improvements Act does not apply (and thus, the Sherman Act does not apply).

Governments > Legislation > Interpretation

International Law > Dispute Resolution > General Overview

International Law > Sources of International Law

HN7[] Legislation, Interpretation

The court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law; law that (the court must assume) Congress ordinarily seeks to follow.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Courts > Judicial Comity

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

Courts hold that application of federal antitrust laws to foreign anticompetitive conduct is reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN9[] **Private Actions, Standing**

A government plaintiff bringing a Sherman Act claim, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a government plaintiff has legal authority broad enough to allow it to carry out this mission. *15 U.S.C.S. § 25*. Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief.

Lawyers' Edition Display

Decision

[*226]** Alleged price-fixing activity held excluded from reach of Sherman Act (15 USCS §§ 1 et seq.) by Foreign Trade Antitrust Improvements Act of 1982 (15 USCS § 6a) where plaintiff's claim rested solely on independent foreign harm.

Summary

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*) excludes from the reach of the Sherman Act (*15 USCS §§ 1 et seq.*) much anticompetitive conduct that causes only foreign injury, by (1) setting forth a general exclusionary rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"; and (2) creating a domestic-injury exception bringing such conduct back within the Sherman Act's reach, provided that the conduct (a) has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) such effect gives rise to a Sherman Act claim.

In the United States District Court for the District of Columbia, a purported class action was filed on behalf of foreign and domestic purchasers of vitamins under provisions including § 1 of the Sherman Act (*15 USCS § 1*). The complaint alleged that the defendants, foreign and domestic vitamin manufacturers and distributors, had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries. The manufacturers and distributors moved to dismiss the suit as to some foreign-purchaser plaintiffs--vitamin distributors located in Ukraine, Australia, Ecuador, and Panama--each of which allegedly bought vitamins for delivery outside the United States. The District Court applied the FTAIA and dismissed the foreign purchasers' claims.

[*227]** On appeal, the United States Court of Appeals for the District of Columbia Circuit--in reversing, vacating the judgment against the foreign purchasers, and ordering a remand--expressed the view that (1) the FTAIA's general exclusionary rule applied to the case at hand, but (2) the FTAIA's domestic-injury exception also applied (*354 U.S. App. D.C. 257, 315 F.3d 338*).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that:

(1) On the assumption, for the purposes of decision, that the alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule.

(2) Moreover, on this assumption--and on consideration of the FTAIA's basic purposes, international comity, and Sherman Act history--such alleged price-fixing activity did not fall within the FTAIA's domestic-injury exception where a plaintiff's Sherman Act claim rested solely on the independent foreign harm.

(3) The foreign-purchaser plaintiffs in the case at hand remained free to ask the Court of Appeals, on remand, to consider the plaintiffs' argument that the foreign injury alleged in the case at hand was not independent.

Scalia, J., joined by Thomas, J., concurring in the judgment, expressed the view that (1) the FTAIA's language was readily susceptible of the interpretation which the Supreme Court provided; and (2) only this interpretation was consistent with the principle that federal statutes ought to be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

O'Connor, J., did not participate.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- foreign trade > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

On the assumption, for the purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule that the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Moreover, on this assumption, such alleged price-fixing activity did not fall within the FTAIA's domestic-injury exception--which made the Sherman Act nonetheless applicable when conduct within the general rule (1) had a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (2) such **[***228]** effect gave rise to a Sherman Act claim--where a plaintiff's Sherman Act claim rested solely on the independent foreign harm. Thus, in a scenario in which it was assumed, for the purposes of decision, that vitamin sellers around the world had agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador, (1) a purchaser in the United States could properly bring a Sherman Act claim under the FTAIA on the basis of the asserted domestic injury; but

(2) a purchaser in Ecuador could not properly bring a Sherman Act claim under the FTAIA on the basis of the asserted foreign harm.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- foreign trade > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

On the assumption, for purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule that (subject to a domestic-injury exception) the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," for the general rule (1) placed all (non-import) activity involving foreign commerce outside the Sherman Act's reach; (2) did not apply to only conduct involving exports; and (3) applied where the anticompetitive conduct at issue was foreign.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- independent foreign harm > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]***LEdHN[3E]***[] [3E]***LEdHN[3F]***[] [3F]***LEdHN[3G]***[] [3G]***LEdHN[3H]***[] [3H]***LEdHN[3I]***[] [3I]

On the assumption, for purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, the alleged activity did not fall within the FTAIA's domestic-injury exception--to the FTAIA's general exclusionary rule that the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"--where a plaintiff's Sherman Act claim rested solely on the independent foreign harm. The United States Supreme Court's reading of the domestic-injury exception in this manner furthered the FTAIA's basic purposes, properly reflected considerations of international comity, and was consistent with Sherman Act history, for:

(1) The domestic-injury exception made the Sherman Act nonetheless applicable when conduct within the general exclusionary rule (a) had a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) such effect gave rise to a Sherman Act claim.

(2) No one denied that America's antitrust laws, when applied to foreign conduct, could interfere with a foreign nation's ability independently to regulate its own commercial affairs.

[*229]** (3) While federal courts had long held that application of America's antitrust laws to foreign anticompetitive conduct was nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as America's antitrust laws reflected a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct caused, it was not reasonable to apply those antitrust laws to foreign conduct insofar as (a) that conduct caused independent foreign harm, and (b) that foreign harm alone gave rise to a plaintiff's claim.

(4) A proposed alternative approach, under which courts would take account of comity considerations case by case, was too complex to prove workable in this antitrust situation.

(5) The FTAIA's language and history suggested that Congress had designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.

(6) The Supreme Court had found no significant indication that at the time Congress had written the FTAIA, American courts would have thought the Sherman Act applicable in this antitrust situation.

(7) While some linguistic arguments might show, at most, that a contrary reading of the FTAIA's language was the more natural one, those arguments did not show that the Supreme Court had to accept the contrary reading.

(8) The answer to some conflicting policy arguments was neither clear enough, nor of such likely empirical significance, as to change the Supreme Court's conclusion.

(Scalia and Thomas, JJ., dissented in part from this holding.)

APPEAL §1750.6 > -- civil antitrust case -- issues left open > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]***LEdHN[4D]***[] [4D]

Given that, for the purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), the United States Supreme Court had assumed that alleged price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, the Supreme Court, in holding that the FTAIA excluded such conduct from the reach of the Sherman Act (*15 USCS §§ 1 et seq.*) where a plaintiff's claim rested solely on the independent foreign harm--and in reversing a Federal Court of Appeals' judgment in favor of the foreign-purchaser plaintiffs in the case at hand--left those plaintiffs free to ask the Court of Appeals, on remand, to consider the plaintiffs' argument that the foreign injury alleged in the case at hand was not independent. In such circumstances, the Court of Appeals might properly determine whether the plaintiffs properly preserved the argument, and, if so, the Court of Appeals might properly consider the argument and decide the issue.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > -- foreign trade > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*) seeks to make clear to American exporters--and to firms doing business abroad--that the Sherman Act (*15 USCS §§ 1 et seq.*) does not prevent them from entering into business arrangements (such as joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. For this purpose, the FTAIA excludes from the Sherman **[***230]** Act's reach much anticompetitive conduct that causes only foreign injury, by (1) setting forth a general exclusionary rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"; and (2) creating a domestic-injury exception which brings such conduct back within the Sherman Act's reach, provided that the conduct both (a) sufficiently affects American commerce, by having a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) has an effect of a kind that ***antitrust law*** considers harmful, by giving rise to a Sherman Act claim. Thus, the FTAIA seeks to release domestic and foreign anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm, while making an exception when that conduct also causes domestic harm.

STATUTES §82 > -- noninterference with foreign sovereign authority > Headnote:
LEdHN[6][] [6]

The United States Supreme Court ordinarily construes ambiguous federal statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of statutory construction (1) reflects principles of customary international law that the Supreme Court assumes Congress ordinarily seeks to follow; (2) cautions federal courts to assume that legislators take account of the legitimate sovereign interests of other nations when legislators write American laws; and (3) thereby helps the potentially conflicting laws of different nations to work together in harmony.

CONFLICT OF LAWS §3 > -- comity > Headnote:
LEdHN[7][] [7]

With respect to regulation of the commercial affairs of the United States and foreign nations, principles of comity provide Congress greater leeway when Congress seeks to control through legislation the actions of United States companies.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > -- relief -- factors > Headnote:
LEdHN[8][] [8]

In antitrust cases under the Sherman Act (*15 USCS §§ 1 et seq.*), a Federal Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. Moreover, under *15 USCS § 25*, a Federal Government plaintiff has legal authority broad enough to allow the plaintiff to carry out this mission, while private plaintiffs are far less likely to be able to secure broad relief.

Syllabus

[*231]** *The Foreign Trade Antitrust Improvements Act of 1982*

(FTAIA or Act) provides that the *Sherman Act* "shall not apply to conduct involving trade or commerce . . . with foreign nations," *15 USC § 6a* [*15 USCS § 6a*], but creates exceptions for conduct that significantly harms imports, domestic commerce, or American exporters. In this case, vitamin purchasers filed a class action alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising vitamin prices in the United States and foreign countries, in violation of the *Sherman* and Clayton Acts. As relevant here, defendants **[****2]** (petitioners) moved to dismiss the suit as to the *foreign* purchasers (respondents), foreign companies located abroad, who had purchased vitamins only outside United States commerce. In dismissing respondents' claims, the District Court applied the FTAIA and found none of its exceptions applicable. The Court of Appeals reversed, concluding that the FTAIA's exclusionary rule applied, but so did its exception for conduct that has a "direct, substantial and reasonably foreseeable effect" on domestic commerce that "gives rise to a [*Sherman Act*] claim," *§§ 6a(1)(A), (2)*. Assuming that the foreign effect, *i.e.,* higher foreign prices, was independent of the domestic effect, *i.e.,* higher domestic prices, the court nonetheless concluded that the Act's text, legislative history, and policy goal of deterring harmful price-fixing activity made the lack of connection between the two effects inconsequential.

Held:

Where the price-fixing conduct significantly and adversely affects both customers outside and within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the FTAIA exception does not apply, and thus, neither does the **[****3]** *Sherman Act,* to a claim based solely on the foreign effect. Pp. 161-175

(a) Respondents' threshold argument that the transactions fall outside the FTAIA because its general **[***232]** exclusionary rule applies only to conduct involving exports is rejected. The House Judiciary Committee changed the bill's original language from "export trade or export commerce," H. R. 5235, to "trade or commerce (other than import trade or import commerce)" deliberately to include commerce that did not involve American exports but was wholly foreign. Pp. 162-163

(b) The FTAIA exception does not apply here for two reasons. *First*, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority. This rule of construction reflects customary international law principles and cautions courts to assume that legislators take account of other nations' legitimate sovereign interests when writing American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony. While applying America's antitrust laws to foreign conduct can interfere with a foreign nation's ability to regulate its own commercial affairs, courts have **[****4]** long held such application nonetheless reasonable, and hence consistent with prescriptive comity principles, insofar as the laws reflect a legislative effort to redress domestic antitrust injury caused by foreign anticompetitive conduct. However, it is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim. The risk of interference is the same, but the justification for the interference seems insubstantial. While some of the anticompetitive conduct alleged here took place in America, the higher foreign prices are not the consequence of any domestic anticompetitive conduct sought to be forbidden by Congress, which rather wanted to release domestic (and foreign) anticompetitive conduct from *Sherman Act* constraint when that conduct causes foreign harm. Contrary to respondents' claim, the comity concerns remain real as other nations have not in all areas adopted antitrust laws similar to this country's and, in any event, disagree dramatically about appropriate remedies. Respondents' alternative argument that case-by-case comity analysis is preferable to an across the board exclusion of **[****5]** foreign injury cases is too complex to prove workable. *Second*, the FTAIA's language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand, the *Sherman Act*'s scope as applied to foreign commerce. There is no significant indication that at the time Congress wrote the FTAIA courts would have thought the *Sherman Act* applicable in these circumstances, nor do the six cases on which respondents rely warrant a different conclusion. Pp. 163-173

(c) Respondents' additional linguistic arguments might show a natural reading of the statute, but the comity and history considerations previously discussed make clear that respondents' reading is not consistent with the FTAIA's basic intent. Their deterrence-based policy argument is also unavailing in light of the contrary arguments by the antitrust enforcement agencies. Pp. 173-175

(d) On remand, the Court of Appeals may consider whether respondents properly preserved their alternative argument that the foreign injury here was not in fact independent of the domestic effects; and, if so, it may consider and decide the related claim. P. 175

[*233]** *354 U.S. App. D.C. 257, 315 F.3d 338*, vacated and remanded. **[****6]**

Counsel: Stephen M. Shapiro argued the cause for petitioners.

R. Hewitt Pate argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas C. Goldstein argued the cause for respondents.

Judges: Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. O'Connor, J., took no part in the consideration or decision of the case.

Opinion by: BREYER

Opinion

[*158] **[**2363]** Justice **Breyer** delivered the opinion of the Court.

LEdHN[1A][] [1A]***LEdHN[2A]***[] [2A]***LEdHN[3A]***[] [3A]***LEdHN[4A]***[] [4A]***LEdHN[5A]***[] [5A]*The Foreign Trade Antitrust Improvements Act of 1982* (FTAIA) ***HN1***[] excludes from the *Sherman Act*'s reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." 96 Stat 1246, *15 USC § 6a* [*15 USCS § 6a*]. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury. We ask two questions about the price-fixing conduct and the foreign injury that it causes. First, does **[****7]** that conduct fall within the FTAIA's general rule excluding the Sherman Act's application? That is to say, does the price-fixing activity constitute "conduct involving trade or commerce . . . with foreign nations"? We conclude that it does.

[*159] Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim." *§§ 6a(1)(A), (2)*. We conclude that the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm.

To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. ***HN2***[] We conclude that, in this scenario, **[****8]** a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

I

The plaintiffs in this case originally filed a class-action suit on behalf of foreign and domestic purchasers of vitamins under, *inter alia*, § 1 of the Sherman Act, 26 Stat 209, as amended, *15 U.S.C. § 1* [*15 USCS § 1*], and §§ 4 and 16 of the Clayton Act, 38 Stat 731, 737, as amended, *15 U.S.C. §§ 15*, *26* [*15 USCS §§ 15*, *26*]. Their complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, had **[***234]** engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries.

As relevant here, petitioners moved to dismiss the suit as to the *foreign* purchasers **[**2364]** (the respondents here), five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from petitioners **[*160]** for delivery outside the United States. *No. Civ. 001686TFH, 2001 U.S. Dist. LEXIS 20910, 2001 WL 761360, *4 (D. D. C., June 7, 2001)* (describing the relevant transactions as "wholly foreign"). Respondents **[****9]** have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant "transactions occurr[ed] entirely outside U. S. commerce", Pet. for Cert. (i). The District Court dismissed their claims. *2001 U.S. Dist. LEXIS 20910, 2001 WL 761360, at *4*. It applied the FTAIA and found none of the exceptions applicable. *Id., 2001 U.S. Dist. LEXIS 20910 at *3-*4*. Thereafter, the *domestic* purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal. *354 U.S. App. D.C. 257, 315 F.3d 338, 343 (CADC 2003)*.

A divided panel of the Court of Appeals reversed. *354 U.S. App. D.C. 257, 315 F.3d 338*. The panel concluded that the FTAIA's general exclusionary rule applied to the case, but that its domestic-injury exception also applied. It basically read the plaintiffs' complaint to allege that the vitamin manufacturers' price-fixing conspiracy (1) had "a direct, substantial, and reasonably foreseeable effect" on ordinary domestic trade or commerce, *i.e.*, the conspiracy brought about higher domestic vitamin prices, and (2) "such effect" gave "rise to a [Sherman Act] claim," *i.e.*, an injured *domestic* customer could have brought a Sherman Act suit, *15 USC §§ 6a(1)*, *(2)* [*15 USCS §§ 6a* **[****10]** *(1)*, *(2)*]. Those allegations, the court held, are sufficient to meet the exception's requirements. *315 F.3d at 341*.

The court assumed that the foreign effect, *i.e.*, higher prices in Ukraine, Panama, Australia, and Ecuador, was independent of the domestic effect, *i.e.*, higher domestic prices. *Ibid.* But it concluded that, in light of the FTAIA's text, legislative history, and the policy goal of deterring harmful price-fixing activity, this lack of connection does not matter. *Ibid.* The District of Columbia Circuit denied rehearing *en banc* by a 4-to-3 vote. App. to Pet. for Cert. 44a.

We granted certiorari to resolve a split among the Courts of Appeals about the exception's application. Compare *Den **[*161]** Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427 (CA5 2001)* (exception does not apply where foreign injury independent of domestic harm), with *Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (CA2 2002)* (exception does apply even where foreign injury independent); *315 F.3d at 341* (similar).

II

LEdHN[1B][] [1B] ***LEdHN[2B]***[] [2B] ***LEdHN[3B]***[] [3B] ***LEdHN[4B]***[] [4B] ***LEdHN[5B]***[] [5B] ***HN3***[] The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the **[****11]** Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H. R. Rep. No. 97-686, pp 1-3, 9-10 (1982) (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial **[***235]** activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

The FTAIA says:

> ***HN4***[] "*Sections 1 to 7* of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> **[**2365]** "(1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> "(A) on trade or commerce which is not trade or commerce with foreign nations [*i.e.*, domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> "(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [*i.e.* **[****12]** , on an American export competitor]; and
>
> **[*162]** (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.
>
> "If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(B), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States." *15 U.S.C. § 6a* [*15 USCS § 6a*].

This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim." *§§ 6a(1), (2)*.

We ask here how this language applies to price-fixing activity that is in significant part foreign, that has the requisite domestic effect, and that also has independent foreign **[****13]** effects giving rise to the plaintiff's claim.

III

LEdHN[2C][] [2C] Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations." *§ 6a* (emphasis added). The word "with" means *between* the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce--a kind of commerce irrelevant to the case at hand.

[*163] The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H. R. 5235, 97th Cong., 1st Sess., *§ 1* (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade **[***236]** or import commerce)." *15 U.S.C. § 6a* [*15 USCS § 6a*]. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign.

The House Report **[****14]** says in relevant part:

> "The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. . . . *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions*--that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to 'export' trade, **[**2366]** and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment,* but that import transactions are not." House Report, at 9-10 (emphases added).

For those who find legislative history useful, the House Report's account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion, namely, that ***HN5***[] the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign.

IV

LEdHN[3C][] [3C] ***LEdHN[4C]***[] [4C] We **[****15]** turn now to the basic question presented, that of the exception's application. Because the underlying antitrust **[*164]** action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: ***HN6***[] The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the *Sherman Act* does not apply) for two main reasons.

LEdHN[6][] [6] *First*, ***HN7***[] this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963)* (application of *National Labor Relations Act* to foreign-flag vessels); *Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)* (application of Jones Act in maritime case); *Lauritzen v. Larsen, 345 U.S. 571, 578, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)* (same). This rule of construction reflects principles **[****16]** of customary international law--law that (we must assume) Congress ordinarily seeks to follow. See *Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2)* (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); *Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64, 2 L. Ed. 208 (1804)* ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible **[***237]** construction remains"); *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 817, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity").

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony--a harmony particularly **[*165]** needed in today's highly interdependent commercial world.

LEdHN[3D][] [3D] No one denies that America's antitrust laws, when applied to foreign conduct, **[****17]** can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our ***HN8***[] courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. See *United States v. Aluminum Co. of **[**2367]** America, 148 F.2d 416, 443-444 (CA2 1945)* (L. Hand, J.); 1 P. Areeda & D. Turner, ***Antitrust Law*** P 236 (1978).

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See *Restatement § 403(2)* (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent **[****18]** to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

LEdHN[3E][] [3E] ***LEdHN[5C]***[] [5C] ***LEdHN[7]***[] [7] We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies, see *Restatement § 402*; and some of the anticompetitive price-fixing conduct alleged here took place in *America.* But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence **[*166]** of any domestic anticompetitive conduct *that Congress sought to forbid*, for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i.e.*, insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct **[****19]** also causes domestic harm. See House Report 13 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct **[***238]** causes here has, by definition, little or nothing to do with the matter.

LEdHN[3F][] [3F] We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appeals' interpretation of the statute

> "a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for **[****20]** private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U. S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have **[*167]** intended that result." P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 273, pp 51-52 (Supp 2003).

We agree with the comment. We can find no convincing justification for the extension **[**2368]** of the Sherman Act's scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, *e.g., Hartford Fire, 509 U.S., at 797-799, 125 L. Ed. 2d 612, 113 S. Ct. 2891* (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy); see also, *e.g.*, 2 W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints).

[**21]** Regardless, even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, *e.g.*, 2 ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 1208-1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. *E.g.*, Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 2 (setting forth German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs--whose injuries were sustained in transactions entirely outside United States commerce--seeking treble damages in private **[***239]** lawsuits against German companies"); Brief for Government **[*168]** of Canada as *Amicus Curiae* 14 ("treble damages remedy would supersede" Canada's **[****22]** "national policy decision"); Brief for Government of Japan as *Amicus Curiae* 10 (finding "particularly troublesome" the potential "interfere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 28-30; Brief for Government of Canada as *Amicus Curiae* 11-14. See also Brief for United States as *Amicus Curiae* 19-21 (arguing the same in respect to American antitrust enforcement).

Respondents alternatively argue that comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board.* Rather, courts can take (and sometimes have taken) account of comity considerations case by case, abstaining where comity considerations so dictate. Cf., *e.g.*, *Hartford Fire, supra, at 797, n. 24, 125 L. Ed. 2d 612, 113 S. Ct. 2891*; *United States v. Nippon Paper Industries Co., 109 F.3d 1, 8 (CA1 1997)*; **[****23]** *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1295 (CA3 1979)*.

In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, **[**2369]** and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could **[*169]** themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damages liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty **[****24]** programs). Compare, *e.g.*, Brief for Certain Professors of Economics as *Amici Curiae* 2-4 with Brief for United States as *Amicus Curiae* 19-21. How could a court seriously interested in resolving so empirical a matter--a matter potentially related to impact on foreign interests--do so simply and expeditiously?

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to **[***240]** other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Second, the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce. See House Report, at **[****25]** 2-3. And we have found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances.

The Solicitor General and petitioners tell us that they have found no case in which any court applied the *Sherman Act* to redress foreign injury in such circumstances. Tr. of Oral Arg. 21; Brief for United States as *Amicus Curiae* 13; Brief **[*170]** for Petitioners 13; see also *Den Norske, 241 F.3d at 429* ("[W]e have found no case in which jurisdiction was found in a case like this--where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market"). And respondents themselves apparently conceded as much at a May 23, 2001, hearing before the District Court below. *2001 U.S. Dist. 20910, 2001 WL 761360, at *4*.

Nevertheless, respondents now have called to our attention six cases, three decided by this Court and three decided by lower courts. In the first three cases the defendants included both American companies and foreign companies jointly engaged in anticompetitive behavior having both foreign and domestic effects. See **[****26]** *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 595, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)* (agreements among American, British, and French corporations to eliminate competition in the manufacture and sale of antifriction bearings in world, including United States, markets); *United States v. National Lead Co., 332 U.S. 319, 325-328, 91 L. Ed. 2077, 67 S. Ct. 1634 (1947)* (international cartels with American and foreign members, restraining international commerce, including United States commerce, in titanium pigments); *United States v. American Tobacco Co., 221 U.S. 106, 171-172,* ***[**2370]*** *55 L. Ed. 663, 31 S. Ct. 632 (1911)* (American tobacco corporations agreed in England with British company to divide world markets). In all three cases the plaintiff sought relief, including relief that might have helped to protect those injured abroad.

LEdHN[3G][] [3G] ***LEdHN[8]***[] [8] In all three cases, however, the plaintiff was the Government of the United States. ***HN9***[] A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. *15 U.S.C. § 25* [*15 USCS § 25*]; **[****27]** see also, *e.g.*, *United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)* ("[I]t is well settled that once the Government has **[*171]** successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor"). Private plaintiffs, by way of contrast, are far less likely to be able to secure **[***241]** broad relief. See *California v. American Stores Co., 495 U.S. 271, 295, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990)* ("Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief"); 2 P. Areeda, H. Hovenkamp, & R. Blair, ***Antitrust Law*** PP 303d-303e, pp 40-45 (2d ed. 2000) (distinguishing between private and government suits in terms of availability, public interest motives, and remedial scope); Griffin, Extraterritoriality in U. S. and EU Antitrust Enforcement, 67 Antitrust L. J. 159, 194 (1999) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental **[****28]** sensibilities generally exercised by the U. S. Government"). This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Neither did the Court focus explicitly in its opinions on a claim that the remedies sought to cure only independently caused foreign harm. Thus the three cases tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.

LEdHN[3H][] [3H] Respondents also refer to three lower court cases brought by private plaintiffs. In the first, *Industria Siciliana Asfalit, Biutmi, S.p.A. v. Exxon Research & Engineering Co., No. 75 Civ. 5828-CSH, 1977 U.S. Dist. LEXIS 17851, 1977 WL 1353 (SDNY, Jan. 18, 1977)*, a District Court permitted an Italian firm to proceed against an American firm with a *Sherman Act* claim based upon a purely foreign injury, *i.e.*, an injury suffered in Italy. The court made clear, however, that the foreign injury was "*inextricably* ***[*172]*** *bound up with . . . domestic restraints of trade*," and **[****29]** that the plaintiff *"was injured . . . by reason of an alleged restraint of our domestic trade,"* *id., 1977 U.S. Dist. LEXIS 17851 at *11, *12* (emphasis added), *i.e.*, the foreign injury was dependent upon, *not independent of*, domestic harm. See Part VI, *infra.*

In the second case, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (SDNY 1979)*, a District Court permitted Dominican and American firms to proceed against a competing American firm and the Dominican Tourist Information Center with a Sherman Act claim based upon injury apparently suffered in the Dominican Republic. The court, in finding the Sherman Act **[**2371]** applicable, weighed several different factors, including the participation of American firms in the unlawful conduct, the partly domestic nature of both conduct and harm (to American tourists, a kind of "export"), and the fact that the domestic harm depended in part upon the foreign injury. *Id., at 688*. The court did not separately analyze the legal problem before it in terms of independently caused foreign injury. Its opinion simply does not discuss the matter. It consequently cannot be taken as significant support for **[****30]** application of the Sherman Act here.

The third case, *Hunt v. Mobil Oil Corp., 550 F.2d 68, 72 (CA2 1977)*, involved a claim by Hunt, an independent oil producer with reserves in Libya, that other major oil producers in Libya and the Persian Gulf **[***242]** (the "seven majors") had conspired in New York and elsewhere to make it more difficult for Hunt to reach agreement with the Libyan Government on production terms and thereby eliminate him as a competitor. The case can be seen as involving a primarily foreign conspiracy designed to bring about foreign injury in Libya. But, as in *Dominicus,* the court nowhere considered the problem of independently caused foreign harm. Rather, the case was about the "act of state" doctrine, and the sole discussion of Sherman Act applicability--one brief paragraph--refers to other matters. *550 F.2d at 72*, and n 2. **[*173]** We do not see how Congress could have taken this case as significant support for the proposition that the Sherman Act applies in present circumstances.

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume. Indeed, a leading **[****31]** contemporaneous lower court case contains language suggesting the contrary. See *Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (CA9 1976)* (insisting that the foreign conduct's domestic effect be "sufficiently large to present a cognizable injury *to the plaintiffs*" (emphasis added)).

Taken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.

V

LEdHN[3I][] [3I] Respondents point to several considerations that point the other way. For one thing, the FTAIA's language speaks in terms of the Sherman Act's *applicability* to certain kinds of *conduct.* The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both *apply to the conduct* when one person sues but *not apply to the same conduct* when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the *Clayton Act*) to determine.

Moreover, the exception **[****32]** says that it applies if the conduct's domestic effect gives rise to "*a* claim," not to "*the plaintiff's* claim" or "*the* claim *at issue.*" *15 U.S.C. § 6a(2)* [*15 USCS § 6a(2)*] (emphases added). The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically **[*174]** speaking, they say, that is beside the point. Nor did Congress place the relevant words "gives rise to a claim" in the FTAIA to suggest any geographical limitation; rather it did so for a here neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect. **[**2372]** See House Report 11 (citing *National Bank of Canada v. Interbank Card Asso., 666 F.2d 6, 8 (CA2 1981))*.

Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic **[***243]** sense **[****33]** to read the words "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."

At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned--those of comity and history--make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.

Finally, respondents point to policy considerations, namely, that application of the Sherman Act in present circumstances will (through increased deterrence) help protect Americans against foreign-caused anticompetitive injury. Petitioners and supporting enforcement-agency *amici,* however, have made important experience-backed arguments (based upon amnesty-seeking incentives) to the contrary. We cannot **[****34]** say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither **[*175]** clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.

For these reasons, we conclude that petitioners' reading of the statute's language is correct. That reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.

VI

LEdHN[4D][] [4D] We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents **[****35]** would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.

The Court of Appeals, however, did not address this argument, *315 F.3d at 341*, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

[2373]** It is so ordered.

Justice **O'Connor** took no part in **[***244]** the consideration or decision of this case.

Concur by: SCALIA,

Concur

[*176] Justice **Scalia,** with whom Justice **Thomas** joins, concurring in the judgment.

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own **[****36]** territories.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 17-*20*

15 USCS § 6a

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 36.7

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

Annotation References

Propriety and scope of injunctive relief in federal antitrust case--Supreme Court cases. *55 L Ed 2d 892*.

Extraterritorial application of federal antitrust laws to acts occurring in foreign commerce. 40 ALR Fed 343.

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LexisNexis

GOLKA v. AWNINGS

Court of Appeal of California, Fourth Appellate District, Division Three

June 14, 2004, Filed

G031952

Reporter
2004 Cal. App. Unpub. LEXIS 5676 *

DANIEL J. GOLKA, Plaintiff and Appellant, v. ELEGANT AWNINGS, Defendant and Respondent.

Notice: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

Prior History: Appeal from a judgment of the Superior Court of Orange County. Super. Ct. No. 00CC07501. James P. Gray, Judge.

Disposition: Affirmed.

Core Terms

awnings, antitrust, franchise, buy, trade-marked, Chicken, economic power, market power, install, tying arrangement, patented, products, consumers, fast-food, mobile, seller, cases

Counsel: Daar & Newman and Barry R. Laubscher for Plaintiff and Appellant.

Tredway, Lumsdaine & Doyle, Michael A. Lanphere and Shannon M. Jenkins for Defendant and Respondent.

Judges: SILLS, P.J.; MOORE, J., FYBEL, J. concurred.

Opinion by: SILLS

Opinion

Seldom do we see an easier case in such a tough area of law.

This is a franchise tying case under state ***antitrust law***. Daniel Golka, the plaintiff, an installer of retractable awnings, was an installer for Home Base -- note, Home *Base*, which is in bankruptcy, not Home *Depot*, which is currently going great guns (at least judging by its advertising). Golka, however, refused to purchase awnings exclusively from defendant Elegant Awnings and was terminated for it. He then sued both Home **[*2]** Base and Elegant. With Home Base's bankruptcy, Golka and Home Base settled and he was allowed to press his claim against Elegant, a small manufacturer of awnings which, at the relevant time, had all of ten employees.

Two preliminary explanations are in order at this point in the opinion. First, a quick word on "tying" claims: They are the most common nonprice antitrust claims in franchise cases. (See Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a "Kodak Moment"?* (2001) 21 Sum. Franchise L. J. 1, 1.) In their simplest form, of course, they present a self-explanatory model: To get a product you want (the *tying* product), you are forced to buy a product you don't want (the *tied* product). In the franchise context, however, the nomenclature can get confusing because the tying "product" is the abstract opportunity to become a franchisee, and the tied product is something that the would-be franchisee must buy to operate that franchise. Thus what we are really talking about is the market among entrepreneurs who want to operate franchised hamburger stands rather than the market among the much larger class of general consumers for hamburgers.

Second, an almost as **[*3]** quick word on proof of antitrust violations. There are two ways to establish antitrust violations -- the hard way and the easy way. The hard way is known as the "rule of reason" approach, which involves highly factual economic data about the anticompetitive effects of a given practice. (See *Chicago Board of Trade v. United States (1918) 246 U.S. 231, 238, 62 L. Ed. 683* [listing general factors needed to show violation under rule of reason, including "the nature of the restraint and its effect, actual or probable"].) At trial counsel for Golka readily acknowledged that he had not even attempted to produce evidence of an antitrust violation using the rule of reason approach, because the "economic analysis" would be an "unbearable task for a small plaintiff" like Golka.

The easy way is a "per se" violation, where a practice, e.g., price fixing, is *presumed* to be illegal because of its history of anticompetitive effects. (See *U.S. v. Realty Multi-List (5th Cir. 1980) 629 F.2d 1351, 1363* ["The per se rule is the trump card of ***antitrust law***. When an antitrust plaintiff successfully plays it he need only tally his score."].)

In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde (1984) 466 U.S. 2, 80 L. Ed. 2d 2*, **[*4]** the United States Supreme Court made showing a per se violation in tying arrangements difficult, by requiring that a "substantial volume of commerce" or "market power" on the seller's (the ty-er's) part be shown. [1] (See *id. at pp. 16* ["we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby" and the "same strict rule is appropriate in other situations in which the existence of market power is probable"], 17-18 [when the "seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by" the rule of reason, i.e., "evidence of an unreasonable restraint on competition in the relevant market"], 18 ["In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact."]; see also *Lloyd Design Corp. v. Mercedes Benz-of North America, Inc. (1998) 66 Cal.App.4th 716, 721* ["'sufficient economic power'" required to **[*5]** make tying arrangements per se illegal under *Business and Professions Code section 16727*].)

Commentators have noted that in the wake of *Jefferson Parish*, antitrust tying claims have dried up except in situations where the seller of the tying product has a very large share of the relevant market or has a unique product. (See Allan P. Hillman, *Franchise Tying Claims: Revolution or Just a "Kodak Moment"?, supra,* 21 Sum. Franchise L. J. at p. 31 **[*6]** ["But under Jefferson Parish, except in the most extraordinary circumstances involving a patented or 'unique' product, unless the seller (or franchisor) has more than a 30 percent share of the relevant market for the tying (desired) product, the courts will not presume anticompetitive effects of the tie on the market for the tied (undesired) product, and the per se rule will not apply."].)

So now we come to the appeal before us. After the parties rested, the trial judge granted a motion for nonsuit on Golka's antitrust cause of action because of the absence of evidence that Home *Base* had any appreciable market power in the market for home awnings, much less the market for what are in effect home awning installation franchises. Furthermore, the trial judge noted that there was no evidence that Home Base's "SFI" program -- for

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[1] *Jefferson Parish* is not mentioned in appellant Golka's briefs. There are two reasons we know the omission was deliberate: One, Golka's counsel is clearly extremely learned in ***antitrust law***, and would naturally know of the case in any event; and, two, it was discussed at oral argument on the nonsuit motion which led to this appeal. We presume that he has not discussed the case on the assumption that it is inapplicable because it does not involve franchisors with valuable trade names, a point we discuss in a few more paragraphs.

"sell, furnish and install," geared to contractors who wanted to install awnings sold by Home Base -- was in any sense a trademark.

The jury disposed of the remainder of Golka's claims against Elegant (for violation of the Unfair Practices Act and inducing Home Base to breach its contract with Golka). This appeal involves only the nonsuit of the antitrust **[*7]** claim.

We affirm. Clearly *Jefferson Parish* is dispositive. The absence of any evidence that a substantial volume of commerce was affected (or potentially affected) by a requirement that awning installation contractors who wanted to work out of Home Base hardware stores had to use Elegant awnings is fatal. There was no evidence that Home Base had any sort of perceptible market share among would-be installers of retractable awnings, or home awnings themselves, for that matter. (After all, there is obviously going to be some corrolation between the market for McDonald's franchises and the market for Big Macs.) Indeed, Home Base was two years away from bankruptcy at the time it terminated Golka from its program.

At trial Golka's counsel argued that *Jefferson Parish* was inapplicable because it didn't involve a trade name (true, it involved anesthesiological services at a hospital), further asserting that under *Siegel v. Chicken Delight, Inc. (9th Cir. 1971) 448 F.2d 43*, the existence of a trade name creates a presumption of economic power, a point which is the centerpiece of the appeal before us. We reject application of *Siegel* for no less than five reasons. **[*8]**

In the first place, *Siegel* was decided prior to *Jefferson Parish*, which did not limit its discussion of tying cases to those where no trade names were involved. Thus it is not surprising that the case has not been followed by federal courts after *Jefferson Parish*. (E.g., *Valley Products Company v. Landmark (6th Cir. 1997) 128 F.3d 398, 405* [*Siegel* no longer considered reliable]; *Tominaga v. Shepard (C.D. Cal. 1988) 682 F. Supp. 1489, 1494* [noting academic criticism].)

In the second place, the idea that trademarks by themselves can be the basis of per se violations has been disowned by the very court that decided *Siegel*. (See *Mozart v. Mercedes-Benz of North America, Inc. (9th Cir. 1987) 833 F.2d 1342, 1346* [even a "prestigious trademark is not itself persuasive evidence of economic power"].)

In the third place, the idea that a trade name *by itself* is enough to create a presumption of economic power is easily shown to be untrue. Just ask any former Yugo dealer.

In the fourth place, *Siegel's* internal analysis is flawed. The case involved the requirement that franchisees buy certain kitchen equipment **[*9]** and dry-mix food items to operate a fast-food chicken franchise. The discussion of economic power is found on pages 49 through 51 of the opinion. Most of that discussion is merely devoted to refuting the idea that market *dominance* is required for a per se violation, a point with which it is compatible with *Jefferson Parish* but otherwise establishes nothing. (Even if a seller lacks market *dominance* it can still have *substantial* market power.)

The *Siegel* court next says that it could "hardly be denied" that the Chicken Delight "trade-mark is distinctive" and Chicken Delight "possesses goodwill and public acceptance unique to it and not enjoyed by other fast food chains." (*Siegel, supra, 448 F.2d at p. 50*.) Bookmark that thought for a second. The phrase "Good will and public acceptance unique" overstates the "unique" desirability of the product at issue in *Siegel*. No doubt there are a few connoisseurs of fast-food chicken out there, but the *Siegel* court could not logically have been talking about them. If there is any "unique" goodwill to a Chicken Delight franchise, it is to the devotees of fast-food *Chicken Delight* chicken -- the sort **[*10]** of folks who whose brand loyalty will cause them to drive past the Popeye's and KFC.

Next, the *Siegel* decision makes its fatal wrong turn. The court notes that "sufficient economic power" is presumed if the tying product is "patented or copyrighted" (*Siegel, supra, 448 F.2d at p. 50*) and from that observation leaps to the conclusion that there is "no reason why the presumption that exists in the case of the patent and copyright does not equally apply to the trade-mark." (*Ibid*.)

Arguing from a "no reason why not" position is always tenuous, because it carries an insinuated, unarticulated preference not overtly disclosed by the arguer. Deconstructed, the logic goes like this: "This idea is so good that unless there is a reason not to do it, let's do it, and since we don't see any reason not to do it, we should do it." It is a logic of exhaustion of alternatives, and it necessarily collapses upon the discovery of any good contrary reason not to select the insinuated course of action.

And as regards the *Siegel* case, there is at least one very good reason that did not occur to the Siegel panel not to apply the rule which governs patented and copyrighted **[*11]** products to trade-marked products: The latter do *not* involve truly "unique" products in the way that the former do.

Let's take a copyrighted product -- say books. People don't buy "books" just to be buying books (unless, to paraphrase an old joke, they are literally buying "self-respect," i.e., books just to put on the shelf). They buy specific books. If you are looking to buy David McCullough's book on John Adams, you want to buy *that* book. Only in very rare cases might Richard Brookhiser's book on Alexander Hamilton serve as a market substitute (e.g., you have to do a book report on an American founding father); in most cases it won't do at all.

But when it comes to trade-marked products, the possibility of market substitutes are much wider, and therefore the "unique" value of the trade-marked product tends to be much less important relative to the "unique" nature of a patented or copyrighted product. Accordingly, consumer demand for a trade-marked product is likely to be much less intense than it is for patented or copyrighted products. Buyers of McCullough's book generally want only McCullough's book, but few people are so droolingly loyal to a trade mark that they will **[*12]** go hungry rather than accept a KFC drumstick if a Chicken Delight drumstick is unavailable.

And finally, even if despite all we have said, *Siegel* were still a viable case, it is distinguishable from the one before us. Fast-food implicates a different set of dynamics than retractable awnings, where consumer brand preferences are, if anything, quite *un*intense indeed. There may indeed be a few people whose fealty to Burger King is so strong that their lips will never ever touch a Big Mac, but *nobody* has that kind of subjective brand preference for awnings. When it comes to awnings, customers generally have objective sets of preferences: They want the cheapest, or the longest lasting, or what is available, or the right color, or whatever suits their needs under the circumstances. Compare that with the kind of subjective preferences that might, under *Siegel*, argubly lead a fast-food customer to bypass 17 secret herbs and spices in favor of Chicken Delight's "special batter."

At oral argument before this court Golka stressed another case, *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc. (1980) 101 Cal. App. 3d 532, 161 Cal. Rptr. 811*. *Suburban* **[*13]** , however, cannot be considered good law in the wake of *Jefferson Parish*, which it antedated by about four years.

Insofar as the market power element of antitrust tying law is concerned, *Suburban* clearly articulated a rule at odds with *Jefferson Parish*. Specifically, the *Suburban* court relied on a model of antitrust tying law in which the ty-er need only have "sufficient economic power in the tying market to coerce the purchase of the tied product." (*Suburban, supra, 101 Cal. App. 3d at p. 542*.) And, as *Suburban* stated two pages later, sufficient economic power could be found even if only "some buyers in the market" are affected. (*Id. at p. 544*.) Contrast that model with the substantially higher thresholds for market power quoted above from *Jefferson Parish*. The clincher is that *Suburban* itself specifically looked to then-existent federal law to develop its model. (See *id. at p. 540* ["federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act"].)

Moreover, even if *Suburban* were currently viable, it is easily distinguishable from the case at hand. *Suburban* **[*14]** involved a truly scarce, indeed "unique" resource -- land sites in a "five-star" mobile home park in Daly City, i.e., within commuting distance of San Francisco. The tying arrangement was that of 501 sites in a newly developed "five-star" mobile home park, 288 were exclusively reserved for four dealers (57 percent of the lots). Given the geography involved, one could practically take judicial notice that if a dealer wasn't one of the favored four, not only would *its* sales be hurt, but there would be a relatively huge impact on the market for the sales of mobile homes in the San Francisco area. After all, how many people in living in the San Francisco area in the early 1970's were prepared to spend a large sum of money on a mobile home *unless* they had access to a coveted spot in a well-maintained mobile home park -- it would be a task more daunting than trying to find a parking spot on Columbus Street in North Beach. In a small sailing pond you can have a big effect if you cordone off about 57 percent of it for just your friends. Contrast that situation with the market for awnings in Southern California. Awnings are available to consumers at every corner hardware store and any **[*15]** number of other places. Correspondingly, the market for awning *installers* is not significantly affected if one moribund hardware store chain enters into a tying arrangement with one small awning manufacturer.

Our analysis obviates the need to consider another question which often dominates antitrust tying analysis, the one-product two-product distinction: The idea is that if you are only dealing with a product that is an integrated whole, like a Mercedes Benz, consumers don't care about the right to component parts like their own floormats. Thus there is no tying to begin with if the company decides to make floormats standard equipment instead of being an optional accessory. (E.g., *Lloyd Design Corp. v. Mercedes-Benz of North America, Inc., supra, 66 Cal.App.4th at p. 721* [no illegal tying arrangement where customers are "forced" to buy Mercedes' cars standard floormats].) Here, since we conclude that the absence of evidence of market power on the part the "franchisor" is dispositive, there is no need to address the unitary product issue.

The judgment is affirmed. Respondent shall recover its costs on appeal.

SILLS, P.J.

WE CONCUR:

MOORE, J.

FYBEL, J.

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Alpha Sch. Bus Co. v. Wagner

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

June 15, 2004, Decided ; June 17, 2004, Docketed

Case No. 03 C 5009

Reporter

2004 U.S. Dist. LEXIS 11031 *; 2004-1 Trade Cas. (CCH) P74,451

Alpha School Bus Company, Inc., and Cook-Illinois Corp., Plaintiffs, v. Michael W. Wagner, Barbara Ann Hackel, Leroy Meister, Southwest Transit, Inc., Chicago Bear Bones Leasing, Inc., and Southwest Transit Leasing, LLC, Sunrise Southwest, L.L.C., Sunrise Transportation, Inc., Defendants.

Subsequent History: Related proceeding at *Alpha Sch. Bus Co. v. Wagner, 2009 Ill. App. LEXIS 275 (Ill. App. Ct. 1st Dist., May 15, 2009)*

Prior History: *Alpha Sch. Bus Co. v. Wagner, 2004 U.S. Dist. LEXIS 82 (N.D. Ill., Jan. 5, 2004)*

Disposition: **[*1]** Defendants' motions to dismiss granted. Case dismissed.

Core Terms

bid, plaintiffs', Contracts, defendants', Leasing, school bus, competitors, conspired, antitrust, interstate commerce, motion to dismiss, allegations, conspiracy, mail, restraint of trade, anti trust law, racketeering activity, school district, wire fraud, racketeering, bid-rigging, antitrust claim, prices, transit service, Sherman Act, misrepresentation, price-fixing, fraudulent, underbid, busing

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN1[] **Sherman Act, Jurisdiction**

In considering a motion to dismiss for lack of jurisdiction, the trial court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of plaintiff.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] Antitrust & Trade Law, Sherman Act

For a plaintiff's antitrust claim to survive, it must provide a short and plain statement which demonstrates that plaintiff suffered an injury caused by defendant's restraint of interstate commerce. *Fed. R. Civ. P. 8(a)*. Importantly, plaintiff's injury must be an antitrust injury, which is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices, as opposed to mere economic loss.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Securities Law > ... > Elements of Proof > Pattern > Fraud as Predicate Act

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Securities Law > RICO Actions > Heightened Pleading Requirements

HN3[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

For a plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, alleging predicate acts of mail and wire fraud, to survive, they must describe with particularity the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to plaintiff. *Fed. R. Civ. P. 9(b)*. A successful RICO claim also requires a plaintiff to show that his injury was proximately caused by defendant's racketeering activity.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, forbids conspiracies in restraint of trade or commerce among the states or with foreign nations. Though all an antitrust claim need allege to survive a motion to dismiss is that a plaintiff suffered an injury due to a defendant's unlawful restraint of interstate commerce, it is quite possible for a plaintiff to plead himself out of court by alleging facts that could not under any circumstances constitute an antitrust violation.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Claims**

A successful claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, requires proof that (1) a contract, combination, or conspiracy between two or more persons (2) to restrain interstate commerce in the relevant market (3) caused an injury of the sort Congress intended to prevent by enacting the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN6[] **Antitrust & Trade Law, Sherman Act**

An antitrust claim requires an improper purpose, an anticompetitive effect, and an effect on interstate commerce. The interstate commerce requirement is jurisdictional in antitrust suits, and the trial court must assure itself from allegations in the complaint that it is not about to hear a case that it is not supposed to have the power to hear. In diversity suits, for example, the complaint must allege the citizenship of the parties and the amount in controversy, not just that the claim is within the diversity jurisdiction. But when the jurisdictional prerequisite is effect on interstate commerce, the pleading of a conclusion should be good enough, since the number of cases that fail at that threshold has become minuscule.

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7[] **Per Se Rule & Rule of Reason, Per Se Violations**

An antitrust conspiracy requires an agreement between two or more persons to restrain trade in a given market. Usually, as in a per se violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the conspirators are direct competitors in the market. Sometimes, however, as in the case of a clothing manufacturer attempting to eliminate competition among retailers of its products, a single individual may attempt, by conspiring with market competitors, to control a market from the outside. In the latter case, the non-market conspirator must have some kind of "market power," or ability to raise prices above a competitive level without losing its business, to be found capable of restraining trade in the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

An antitrust injury is an injury caused by the kind of conduct that the antitrust laws seek to prevent. The antitrust injury doctrine was created as a way to screen out complaints by competitors and others who were hurt not by anticompetitive practices, but by productive efficiencies, higher output, and lower prices, the very things antitrust laws are designed to encourage. Thus, a plaintiff competitor who seeks a kind of relief that would injure customers, such as less competition or higher prices for his product, does not suffer antitrust injury. Similarly, a defendant competitor who undertakes to squeeze out his market competitors by underbidding them or increasing output or discounting prices does not cause an antitrust injury, unless his activities are undertaken in concert with another competitor and involve anticompetitive conduct like fixing prices, shorting supply, or tying.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Price-fixing, in general terms, occurs when competitors in a given market get together and agree to sell at a uniform price.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Bid-rigging has a more specialized meaning in ***antitrust law*** and is analogous to bid rotation. Bid rigging or bid rotation occurs when two or more competitors agree which of them should be the low bidder for a particular job, and the others submit higher bids to make sure the designated bidder wins.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Education Law > Administration & Operation > School Property > Competitive Bids

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN11[] **Heightened Pleading Requirements, Fraud Claims**

To state a cause of action under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, a plaintiff must allege with particularity (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, and that plaintiffs' injury occurred "by reason of" defendants' racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To recover under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961 et seq.*, a plaintiff must show some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by defendant's acts is generally said to stand at too remote a distance to recover. For plaintiff to satisfy RICO's requirement of proximate causation, it must allege a relation between its injury and defendant's violation that is neither indirect nor remote.

Counsel: For ALPHA SCHOOL BUS COMPANY, INC., plaintiff: Harold E. Collins, Michael Raymond Collins, John P. Collins, Collins & Collins, Chicago, IL.

For MICHAEL W WAGNER, SOUTHWEST TRANSIT LEASING, LLC, defendants: Cristofer E. Lord, Attorney at Law, Chicago, IL. Bruce M. Rose, Law Office of Bruce Rose, Westchester, IL.

For BARBARA ANN HACKEL, SOUTHWEST TRANSIT, INC., defendants: Lisa H. Shapero, Tina Marie Paries, Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C., Chicago, IL.

For LEROY MEISTER, defendant: Jeff Douglas Harris, Figliulo & Silverman, Chicago, IL.

For SUNRISE SOUTHWEST, L.L.C., SUNRISE TRANSPORTATION, INC., defendants: Susan H. Walcoff, Gary B. Shulman, Levun, Goodman & Cohen, Northbrook, IL.

For COMMUNITY HIGH SCHOOL DISTRICT 218, intervenor: James P. Bartley, Lance C. Malina, Thomas M. Melody, Klein, Thorpe & Jenkins, Ltd., Chicago, IL.

Judges: JOAN B. GOTTSCHALL, United States District Judge.

Opinion by: JOAN B. GOTTSCHALL

Opinion

MEMORANDUM OPINION AND ORDER

Before the court are defendants' motions to dismiss plaintiffs' Alpha School Bus Co.'s ("Alpha") and Cook-Illinois **[*2]** Corp.'s ("Cook-Illinois") Third Amended Complaint for failure to state a claim and for lack of subject matter jurisdiction. Addressing the jurisdictional arguments first, *Baker v. IBP, Inc., 357 F.3d 685, 687* ("subject matter jurisdiction is the first question . . . in all suits filed in federal court"), defendants Southwest Transit, Inc. ("Southwest"), Southwest Leasing, L.L.C. ("Southwest Leasing"), Chicago Bear Bones Leasing, Inc. ("Bear Bones Leasing"), Barbara Ann Hackel, Michael Wagner, and Leroy Meister contend that this court lacks jurisdiction because plaintiffs fail to establish a violation of federal law in their allegations that defendants violated the Sherman Act, *15 U.S.C. § 1, et seq.*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961-68*. [1] For the reasons that follow, defendants' motions to dismiss are granted.

[1] The remaining named defendants in this case, Sunrise Southwest, L.L.C., and Sunrise Transportation, Inc., filed a motion to dismiss the state law claims against them for failure to state a claim. However, since they were not named in plaintiffs' Sherman Act or RICO claims, they did not join the other defendants in moving to dismiss the claims for lack of jurisdiction. Therefore, unless otherwise specified, all references to "defendants" in this case refer only to Southwest, Southwest Leasing, Bear Bones Leasing, Hackel, Wagner, and Meister.

[*3] I. Background

Alpha is a school bus contractor located in Crestwood, Illinois, and is a wholly owned subsidiary, along with twelve other subsidiaries licensed as interstate carriers of passengers, of Cook-Illinois. Alpha provides student transportation services for a number of school districts in the greater Chicago and Cook County, Illinois, area. At issue in this case are the 2003-2006 contracts for busing services for the Chicago Board of Education non-public routes, Southwest Cook County Cooperative Association for Special Education, and Oak Lawn School District 218 (collectively, the "School Bus Contracts"). In the spring of 2003, when Alpha prepared and submitted its bids to the Chicago Board of Education, Southwest Cook County Cooperative Association for Special Education, and Oak Lawn Board of Education (collectively, the "School Districts"), Michael Wagner and Leroy Meister were employed by Alpha as General Manager and Director of Operations, respectively. According to Alpha, both men had access to confidential Alpha business information, including details of Alpha's past and present contracts with the School Districts (for many years prior to 2003, Alpha provided **[*4]** busing services to all three districts), and both helped prepare Alpha's bid for the School Bus Contracts for 2003-2006.

In addition to incumbent contract holder Alpha, a number of other transportation companies also bid for the 2003-2006 School Bus Contracts; the winner was Southwest. Southwest is an Illinois corporation, owned and controlled by Barbara Hackel, that provides busing services in competition with Alpha. Southwest Leasing, an Illinois limited liability company, and Bear Bones Leasing, a *de jure or de facto* Illinois corporation, are owned and controlled by Wagner and operate to lease buses to Southwest. Plaintiffs allege that Hackel, Wagner, and Meister contracted to form Southwest and the leasing companies, and that together they conspired to underbid Alpha for the School Bus Contracts and eliminate Alpha as a competitor in the special education student transportation business.

According to the complaint, Wagner and Meister were still employed by Alpha when they stole Alpha's confidential bid information and gave it to Hackel and Southwest, who then used it to prepare Southwest's bid for the School Bus Contracts. As a result of Wagner's, Meister's, Hackel's and **[*5]** Southwest's allegedly unlawful conduct, Southwest submitted a lower bid to the School Districts and won the 2003-2006 contracts. Soon after the contracts were awarded to Southwest, Wagner and Meister notified Alpha of their intent to retire and began working for Southwest and the leasing company defendants.

In summer of 2003 Plaintiffs filed suit in federal court, arguing that defendants' conduct amounted to forbidden restraint of trade under the federal and state antitrust laws, civil conspiracy, violation of Illinois trade secret laws, tortious interference with business opportunity, breach of fiduciary duty, racketeering, and fraudulent transfer of assets. Defendants moved to dismiss all claims against them. Because federal jurisdiction in this case depends on the existence of a claim under either the Sherman Act or RICO, the court's opinion will address these claims first.

II. Discussion

A. Standard of Review

HN1[] In considering a motion to dismiss for lack of jurisdiction, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 701 (7th Cir. 2003).* **[*6]** Plaintiffs here assert that federal jurisdiction exists because defendants violated the Sherman Act, *15 U.S.C. § 1*, and RICO, *18 U.S.C. § 1962*. *See* *28 U.S.C. § 1337*. Defendants, however, contend that this court is without jurisdiction because plaintiffs have failed to state a claim under either federal statute.

Plaintiffs' federal claims are subject to two different standards of pleading under the Federal Rules of Civil Procedure. ***HN2***[] For plaintiffs' antitrust claim to survive, it must provide a short and plain statement which demonstrates that plaintiffs suffered an injury caused by defendants' restraint of interstate commerce. *Midwest Gas Servs. v. Indiana Gas Co., 317 F.3d 703, 711 (7th Cir. 2003)*; *FED. R. CIV. P. 8(a)*. Importantly, plaintiffs' injury must be an "antitrust injury -- which is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices," as opposed to mere economic loss. *Gypsum Co. v. Indiana Gas Co., 350 F.3d 623, 626-27 (7th Cir. 2003)*; *Loeb Indus. v. Sumitomo Corp., 306 F.3d 469, 481 (7th Cir. 2001).* **[*7]** ***HN3***[] For plaintiffs' RICO claims alleging predicate acts of mail and wire fraud to survive, they must describe with particularity "the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Slaney v. International Amateur Athletic Fed'n, 244 F.3d 580, 599 (7th Cir. 2001)*; *FED. R. CIV. P. 9(b)*. A successful RICO claim also requires a plaintiff to show that his injury was proximately caused by defendants' racketeering activity. *Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. Since plaintiffs fail to state a claim under either federal law and they assert no other basis for federal jurisdiction, this case must be dismissed pursuant to *FED. R. CIV. P. 12(h)(3)*.

B. Sherman Act Antitrust Claim

Section 1 of the Sherman Act, which defendants' act of underbidding Alpha for the School Bus Contracts by using Alpha's confidential information is alleged to violate, ***HN4***[] forbids conspiracies in restraint of **[*8]** trade or commerce among the states or with foreign nations. *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002)*. Though all an antitrust claim need allege to survive a motion to dismiss is that a plaintiff suffered an injury due to a defendant's unlawful restraint of interstate commerce, *Midwest Gas, 317 F.3d at 711*, it is quite possible for a plaintiff to plead himself out of court by alleging facts that could not under any circumstances constitute an antitrust violation, *Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 782 (7th Cir. 1994)*. Plaintiffs in this case have done exactly that.

HN5[] A successful claim under *§ 1 of the Sherman Act* requires proof that (1) a contract, combination, or conspiracy between two or more persons (2) to restrain interstate commerce in the relevant market (3) caused an injury of the sort Congress intended to prevent by enacting the antitrust laws. *See* *Denny's Marina Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*; *Hammes, 33 F.3d at 782*. Defendants here argue that plaintiffs fail to establish a *§ 1* violation in all respects, **[*9]** including (1) failure to plead a sufficient nexus with interstate commerce, (2) failure to show a conspiracy among market competitors, and (3) failure to allege an antitrust injury.

Though not artfully pleaded, plaintiffs' allegations of a nexus with interstate commerce are sufficient to withstand defendants' motions to dismiss. ***HN6***[] An antitrust claim requires an improper purpose, an anticompetitive effect, and an effect on interstate commerce. *See* *BCB Anesthesia Care v. Passavant Memorial Area Hosp. Ass'n, 36 F.3d 664, 666 (7th Cir. 1994)*. The interstate commerce requirement is jurisdictional in antitrust suits, *United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 948 (7th Cir. 2003)*, and the court must assure itself from allegations in the complaint that it is not about to hear a case that it is not supposed to have the power to hear. *Hammes, 33 F.3d at 778*. In diversity suits, for example, the complaint must allege the citizenship of the parties and the amount in controversy, not just that the claim is within the diversity jurisdiction. *Id.* "But when the jurisdictional prerequisite is effect on interstate commerce, the pleading of a conclusion **[*10]** should be good enough, since the number of cases that fail at that threshold has become minuscule." *Id.* Here, plaintiffs claim that "Student transportation services [including the School Bus contracts at issue] . . . and the competitive bidding process to let those contracts, affect interstate commerce." Given the low threshold for satisfying the interstate commerce nexus in antitrust suits, *see* *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 333, 114 L. Ed. 2d 366, 111 S. Ct. 1842 (1991)*, and liberal federal pleading standards, plaintiffs' allegations in this case are sufficient to establish this court's jurisdiction.

Defendants also argue that plaintiffs' Sherman Act claim must be dismissed for failure to allege a conspiracy. Plaintiffs contend that defendants Wagner, Meister, Southwest Leasing, and Bear Bones Leasing conspired with Hackel and Southwest to restrain trade. The complaint also asserts that Wagner and Meister were employed by Alpha at the time of the alleged conspiracy. It appears from the complaint, and plaintiffs' brief confirms, that Wagner and Meister acted solely to benefit Southwest, Hackel, and the leasing defendants. Thus, defendants argue, Wagner and Meister **[*11]** are either agents acting on behalf Southwest and therefore cannot conspire with their principal, or are employees of Alpha and therefore Alpha cannot recover for damages incurred through its own conspiracy with Southwest. Plaintiffs' response to defendants' argument is confounding, as it argues simultaneously that Wagner and Meister are not agents of Southwest because they are Alpha employees and that Alpha is not responsible for their actions because Wagner and Meister were acting on behalf of Southwest. The court need not decipher this illogic, however, because as explained below, there is a possibility, however slight, that the complaint alleges a conspiracy between Southwest and the leasing defendants to restrain trade.

HN7[] An antitrust conspiracy requires an agreement between two or more persons to restrain trade in a given market. *Denny's Marina, 8 F.3d at 1220*. Usually, as in a *per se* violation of *§ 1*, the conspirators are direct competitors in the market. Sometimes, however, as in the case of a clothing manufacturer attempting to eliminate competition among retailers of its products, a single individual may attempt, by conspiring with market competitors, **[*12]** to control a market from the outside. *See, e.g., 42nd Parallel North v. E Street Denim Co., 286 F.3d 401 (7th Cir. 2002)*. In the latter case, the non-market conspirator must have some kind of "market power," or ability to raise prices above a competitive level without losing its business, to be found capable of restraining trade in the relevant market. *Id. at 404-5*.

Of all the named defendants in this case, only Southwest actually competes with Alpha in the relevant market. The complaint does not specifically define the market, but the court presumes from facts therein that it is the market for special education student transportation services in the greater Chicago and Cook County, Illinois, area. Though plaintiffs charge the individual defendants, Meister and Wagner, and the leasing company defendants, Southwest Leasing and Bear Bones Leasing, with conspiring to restrain trade, none of these defendants provides student transportation services and none of them is alleged to have the kind of market power that would enable them to control competition in the busing market. If this is true, only Alpha and Southwest would be capable of the "bid-rigging" **[*13]** and "price-fixing" conduct complained of here, and Alpha would have no cause of action to recover for its own illegal activities. *See 42nd Parallel North, 286 F.3d at 405* ("antitrust laws protect competition, not competitors").

But the court cannot draw this inference against plaintiffs in ruling on a motion to dismiss. Plaintiffs allege repeatedly that "Wagner, Meister, Chicago Bear Bones and Southwest Leasing together with Hackel and Southwest" conspired to restrain trade. Since the court must take this and other facts in the complaint as true, and since plaintiffs need not allege the market power of potential conspirators to state a claim under *§ 1*, the court must assume that the individual and leasing company defendants were in fact capable of conspiring with Southwest and Hackel to commit the alleged antitrust violation.

Though the court finds that plaintiffs have pleaded an interstate commerce nexus and a conspiracy, their antitrust claim still must fail because plaintiffs have not alleged an antitrust injury. ***HN8***[] An antitrust injury is an injury caused by the kind of conduct that the antitrust laws seek to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977).* **[*14]** The antitrust injury doctrine was created as a way to screen out complaints by competitors and others who were hurt not by anticompetitive practices, but by productive efficiencies, higher output, and lower prices -- the very things antitrust laws are designed to encourage. *Gypsum, 350 F.3d at 627*. Thus, a plaintiff competitor who seeks a kind of relief that would injure customers, such as less competition or higher prices for his product, does not suffer antitrust injury.*Id.* Similarly, a defendant competitor who undertakes to squeeze out his market competitors by underbidding them or increasing output or discounting prices does not cause an antitrust injury, *unless* his activities are undertaken in concert with another competitor and involve anticompetitive conduct like fixing prices, shorting supply, or tying.

In the instant case, defendants' acts of pilfering Alpha's proprietary information in order to undercut Alpha's bid and win the School Bus Contracts is not the kind of wrongful conduct that the antitrust laws forbid. Though plaintiffs label defendants' activities as "price-fixing" and "bid-rigging," two practices that are considered *per se* violations **[*15]** of *§ 1*, the conduct alleged in the complaint belies such description. ***HN9***[] Price-fixing, in general terms, occurs when competitors in a given market get together and agree to sell at a uniform price. *Khan v. State Oil Co., 93 F.3d 1358, 1361 (7th Cir. 1996) rev'd on other grounds, 522 U.S. 3, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*; *United States v. Heffernan, 43 F.3d 1144, 1149 (7th Cir. 1994)*. ***HN10***[] Bid-rigging has a more specialized meaning in ***antitrust law*** and is analogous to bid rotation. *Heffernan, 43 F.3d at 1150*. Bid rigging or bid rotation occurs when two or more competitors agree which of them should be the low bidder for a particular job, and the others submit higher bids to make sure the designated bidder wins. *Id. at 1146*.

What happened in this case, at least as far as the complaint describes, amounts neither to price-fixing nor bid-rigging. *See* *BCB Anesthesia Care, 36 F.3d at 667* ("pinning a label on conduct, such as 'tying' or 'boycott,' is not enough if the conduct does not necessarily have the pernicious effect the label suggests"). Plaintiffs allege that Meister and Wagner secretly conspired **[*16]** with Hackel and Southwest to use Alpha's confidential bid information, which Meister and Wagner compiled while still working for Alpha, in preparing Southwest's bid for the School Bus Contracts. This conduct is not price-fixing because there is no allegation that any two market competitors (and there are only two actual market competitors named in this case, Alpha and Southwest) conspired to submit noncompetitive bids or to sell their student transportation services at a uniform price. *See* *United States v. Brighton Bldg. & Maint. Co., 598 F.2d 1101, 1106 (7th Cir. 1979)*.

Nor is the complained-of conduct bid-rigging since there is no allegation that Alpha or Southwest agreed in advance of submitting their bids that one of them would offer a higher bid in order for the other to win the contracts. *See* *Heffernan, 43 F.3d at 1146*. Instead, the complaint repeatedly asserts that Southwest *secretly* underbid Alpha and that, had Alpha known it was going to be underbid, it would have lowered its own bid to win the contracts. Plaintiffs do not contend and no inference can be drawn from these allegations that Southwest and Alpha had any kind of agreement in **[*17]** place to rotate their bids on the School Bus Contracts.

Because the complaint does not allege a *per se* violation of *§ 1* and is otherwise devoid of any allegation that defendants' conduct restrained trade in a manner prohibited by the antitrust laws, it fails to state an antitrust claim and is therefore dismissed. *See, e.g.,* *BCB Anesthesia Care, 36 F.3d at 666* ("only unreasonable restraints of trade are illegal" under *§ 1*); *42nd Parallel North, 286 F.3d at 404* (upholding dismissal of *§ 1* claim due to lack of anticompetitive effect on the market).

C. RICO Mail and Wire Fraud Claims

Plaintiffs also charge defendants with conspiring to and committing numerous acts of mail and wire fraud in violation of RICO, *18 U.S.C. § 1962 (a)-(d)*. Plaintiffs allege that defendants are associated in fact and constitute an enterprise within the meaning of *§ 1962(d)* and that defendants' mail and wire fraud constitute a pattern of racketeering activity, the purpose of which was to "rig-bids" on the School Bus Contracts and acquire the contracts and Alpha's property "by fraudulent, deceptive and illegal means." ***HN11***[] To state a cause of action **[*18]** under RICO a plaintiff must allege with particularity (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, *Slaney, 244 F.3d at 597*, and that plaintiffs' injury occurred "by reason of" defendants' racketeering activity, *Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268-69, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992)*. Defendants in this case argue that plaintiffs' RICO claims fail as a matter of law because (1) plaintiffs fail to plead the predicate mail and wire fraud claims with the specificity required by *FED. R. CIV. P. 9(b)*, (2) the racketeering allegations do not establish a "pattern," and (3) plaintiffs' injury did not occur by reason of defendants' alleged racketeering activity.

As an initial matter, plaintiffs' RICO claims do not satisfy *Rule 9(b)*'s particularity requirements. Federal rules require mail and wire fraud, the predicate acts underlying plaintiffs' RICO claims in this case, to be pleaded with particularity. *FED. R. CIV. P. 9(b)*; *Slaney, 244 F.3d at 597*. This means that plaintiffs must allege the time, place, and **[*19]** content of the misrepresentations as well as the method by which they were communicated to plaintiffs. *Slaney, 244 F.3d at 597*; *Pizzo v. Bekin Van Lines Co., 258 F.3d 629, 631 (7th Cir. 2001)*. Here, plaintiffs' complaint enumerates 13 separate instances of mail and wire fraud and not one of them contains all of the factual specificity required by *Rule 9(b)*. Most are infirm because they do not explain how defendants' fraud was communicated to plaintiffs, and some are inadequate because they do not specify when the alleged misrepresentation occurred. However, even if plaintiffs were to cure the pleading deficiencies, their RICO claims cannot be salvaged because it is clear from the facts in the complaint that plaintiffs' alleged injury -- monetary losses in excess of $ 3,000,000 due to the lost School Bus Contracts -- was not proximately caused by defendants' alleged racketeering activity.

HN12[] To recover under RICO a plaintiff must show some direct relation between the injury asserted and the injurious conduct alleged. *See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 532-33, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*; **[*20]** *Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1012 (7th Cir. 2002)*. "Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts is generally said to stand at too remote a distance to recover." *Holmes, 503 U.S. at 268-69*. For plaintiffs in this case to satisfy RICO's requirement of proximate causation, they must allege a relation between their injury and the defendants' violation that is neither indirect nor remote. *Loeb Indus., 306 F.3d at 496*. Plaintiffs allegations fall well short of establishing this necessary relationship.

From the face of the complaint, it is evident that plaintiffs view their injury as the loss of the School Bus Contracts due to defendants' theft of Alpha's proprietary bid information and "bid-rigging." Plaintiffs portray defendants' alleged racketeering activity, however, as fraudulent use of the mail and wires to incorporate, secure loans, solicit investment income, recruit employees, and obtain insurance. In most of these allegations, plaintiffs assert that because of defendants' deception of others -- including banks, investors, insurance **[*21]** companies, and accounting firms -- defendants were able to create their racketeering enterprise. This is too remote a connection for plaintiffs to recover under RICO. If this court were to find otherwise, any individual who reads in the newspaper that a racketeering enterprise was created by falsely incorporating and swindling investors could recover under RICO whether or not the enterprise's illegal activities caused any direct harm to that individual. This kind of ephemeral injury is not the sort that RICO is designed to prevent.

Two other of plaintiffs' allegations come closer to making a direct connection between plaintiffs' injury and defendants' "racketeering" actions. Specifically, plaintiffs allege that "In or about January 2003 the defendants used emails sent through the interstate wires to solicit bid bonds and performance bonds for bids for the school district contracts" and that "defendants used the wires and mails to submit rigged bids" to the School Districts. The first of these does not help plaintiffs' case because it contains no allegation of fraud with respect to the solicitation of bid bonds or performance bonds. The accusation does not suggest that defendants were **[*22]** not entitled to obtain the bonds, and the complaint does not contain anything that would permit the court to so infer.

As for the second allegation, that defendants submitted a rigged bid, the court has already explained that defendants did not as a matter of law engage in "bid-rigging" as that term is meant in ***antitrust law***. Moreover, even if defendants used the mail or wires to submit their bid to the School Districts, and even if the bid was fraudulent, one act of fraud does not establish a "pattern" of racketeering sufficient to state a claim under RICO, especially where there is no evidence that defendants intended to repeat the criminal activity in the future. *See Pizzo, 258 F.3d at 633* (finding that two disputes of fraud five months apart with no other evidence of ongoing criminal activity were not sufficient to establish a pattern of fraudulent activity required under RICO). Plaintiffs' RICO claims are therefore dismissed for failure to state a claim.

III. Conclusion

Plaintiffs have failed to allege any facts that would entitle them to relief under either *§ 1 of the Sherman Act* or *§ 1962 of RICO*, so defendants' motions to dismiss are granted. As **[*23]** plaintiffs' remaining claims all seek recovery for violations of state law and no other basis for federal jurisdiction exists, the court will not address the merits of plaintiffs' state law claims. Case dismissed for lack of jurisdiction.

JOAN B. GOTTSCHALL

United States District Judge

DATED: June 15, 2004

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this matter is dismissed for lack of subject matter jurisdiction. Defendant Meister's motion to dismiss and defendants Wagner's, Hackel's, Bear Bones Leasing, Inc.'s, Southwest Transit, Inc.'s, and Southwest Leasing L.L.C.'s motion to dismiss are granted. Because plaintiffs fail to state a claim under federal law and there is no other basis for this court's jurisdiction, the court will not address the merits of plaintiffs' state law claims.

Date: 6/15/2004

Champagne Metals v. Ken-Mac Metals, Inc.

United States District Court for the Western District of Oklahoma

June 15, 2004, Decided ; June 15, 2004, Entered

No. CIV-02-528-C

Reporter
2004 U.S. Dist. LEXIS 27313 *

CHAMPAGNE METALS, an Oklahoma limited liability company, Plaintiff, v. KEN-MAC METALS, INC., an Ohio corporation; SAMUEL, SON & CO., LIMITED, an Ontario, Canada, corporation; SAMUEL SPECIALTY METALS, INC., a New Jersey corporation; METAL WEST, L.L.C., an Alabama limited liability company; INTEGRIS METALS, INC., a New York corporation; EARLE M. JORGENSEN COMPANY, a Delaware corporation; and RYERSON TULL, INC., an Illinois corporation, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Costs and fees proceeding at *Champagne Metals v. Ken-Mac Metals, Inc., 2005 U.S. Dist. LEXIS 3194 (W.D. Okla., Feb. 22, 2005)*

Prior History: *Champagne Metals v. Ken-Mac Metals, Inc., 2002 U.S. Dist. LEXIS 27722 (W.D. Okla., Oct. 1, 2002)*

Disposition: Defendants' motions for summary judgment granted, and judgment entered on behalf of all Defendants.

Core Terms

Metals, conspiracy, service center, distributor, summary judgment, customers, competitors, complaints, aluminum, prices, tortious interference, threats, antitrust, sales, comments, conspire, compete, entrants, circumstantial evidence, motive, direct evidence, selling, trailer, argues, restraint of trade, no evidence, consolidation, predecessor, agreeing, contends

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is proper only if the moving party shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Entitlement as Matter of Law, Genuine Disputes**

On a motion for summary judgment, an issue is "genuine" if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Summary Judgment, Entitlement as Matter of Law**

When deciding whether summary judgment is appropriate, the court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

At the summary judgment stage, the court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN6[] **Summary Judgment, Burdens of Proof**

When the nonmovant will bear the burden of proof at trial, summary judgment is avoided only by going beyond the pleadings and presenting evidence sufficient to establish the existence, as a triable issue, of an essential and contested element of the case.

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN7[] Supporting Materials, Affidavits

At summary judgment, evidence does not need to be in a form that would be admissible at trial, but the content or substance must be. Thus, the court may consider affidavits, interrogatory answers, admissions, and deposition testimony to the extent that they are based on personal knowledge and do not contain otherwise inadmissible hearsay. *Fed. R. Civ. P. 56*.

Evidence > Authentication > General Overview

HN8[] Evidence, Authentication

Transcripts must be properly authenticated before they can be admitted.

Evidence > ... > Exceptions > State of Mind > General Overview

HN9[] Exceptions, State of Mind

Admission under *Fed. R. Evid. 803(3)* does not include a statement of memory or belief to prove the fact remembered or believed.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN10[] Summary Judgment, Entitlement as Matter of Law

On a motion for summary judgment, a third party may not simply describe another witness's supposed testimony and such descriptions are not suitable grist for the summary judgment mill.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Rule Components > Truth of Matter Asserted

HN11[] Inchoate Crimes, Conspiracy

A threat may be deemed non-hearsay as a "verbal act" because the fact that the words were uttered has independent legal significance. *Fed. R. Evid. 801(c)* advisory committee's note states that if the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. Thus, apart from the co-conspirator exception, statements that may be fairly characterized as threats may be admitted as probative of the operation of the conspiracy (as opposed to the truth of what was said.).

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN12[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Fed. R. Civ. P. 8(c) defenses are waived if not affirmatively pleaded, asserted under *Fed. R. Civ. P. 12(b)*, or tried by consent.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > De Facto Mergers

Torts > Vicarious Liability > Corporations > Predecessor & Successor Corporations

Mergers & Acquisitions Law > General Business Considerations > General Overview

Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview

Mergers & Acquisitions Law > Liabilities & Rights of Successors > Mere Continuation

HN13[] **Liabilities & Rights of Successors, De Facto Mergers**

Generally a successor corporation or the purchaser of assets is not responsible for the debts and liabilities of its predecessor. However, the rule is subject to four exceptions. A purchaser is liable for its predecessors' liabilities if: (1) there is an express or implied agreement to assume the other companies' debts and obligations; (2) the transaction was fraudulent; (3) there was a de facto consolidation or merger of companies; or (4) the purchasing company was a mere continuation of the selling company.

Mergers & Acquisitions Law > Liabilities & Rights of Successors > General Overview

HN14[] **Mergers & Acquisitions Law, Liabilities & Rights of Successors**

In the context of a successor liability determination, consolidation occurs when two or more corporations are combined to form a new corporation after the previous corporate entities are dissolved. The descriptions used by the entities themselves to describe the combination are not controlling.

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

HN15[] Exemptions, Statements by Party Opponents

Despite the admission of statements made by a predecessor-in-interest or employees of a predecessor at common law as "against a party opponent" under the concept of "privity of interest," commentators agree that this practice did not survive the enactment of the Federal Rules of Evidence.

Evidence > ... > Exceptions > Residual Exception > General Overview

Evidence > ... > Hearsay > Exceptions > Statements Against Interest

Evidence > ... > Hearsay > Rule Components > Statements

HN16[] Exceptions, Residual Exception

Statements by predecessors-in-interest are commonly admitted as statements against interest or under the residual clause. *Fed. R. Evid. 804(b)(3)* & *807*. However, both of these hearsay exceptions are only applicable under certain conditions. *Fed. R. Evid. 804* requires that the declarant be unavailable before the statement is admitted. *Fed. R. Evid. 807* requires that the plaintiff make a showing as to the probative value of the statement and the plaintiff's efforts to obtain the evidence from other sources.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN17[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 1 prohibits agreements that unreasonably, restrain trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] Antitrust & Trade Law, Sherman Act

Whether an agreement constituted an unreasonable restraint of trade under either a per se or rule of reason analysis follows a determination of whether sufficient evidence of agreement exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN19[] Monopolies & Monopolization, Conspiracy to Monopolize

By its terms, *15 U.S.C.S. § 1* covers contracts, combinations, or conspiracies in restraint of trade. Courts and commentators frequently employ the short-hand "concerted action" to describe the prohibited conduct. Regardless of the nominative term, the essence of a *§ 1* claim is the agreement. Although less than what would be required to form a contract, the agreement must be a conscious commitment to a common scheme. In other words, the participants or conspirators must have a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement. In contrast, unilateral acts, regardless of their motivation, will not support a § 1 violation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN20[] Monopolies & Monopolization, Conspiracy to Monopolize

15 U.S.C.S. § 1, as opposed to 15 U.S.C.S. § 2 of the Sherman Act, is unconcerned with businesses acting independently, even where a single firm's restraints directly affect prices and would have comparable economic effects as concerted action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN21[] Monopolies & Monopolization, Conspiracy to Monopolize

In a 15 U.S.C.S. § 1 case, to survive summary judgment, the plaintiff must adduce significant probative evidence tending to exclude the possibility of independent action by the defendants.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN22[] Monopolies & Monopolization, Conspiracy to Monopolize

An antitrust plaintiff may demonstrate the existence of an agreement with either direct or circumstantial evidence.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN23[] Monopolies & Monopolization, Conspiracy to Monopolize

Direct evidence in a 15 U.S.C.S. § 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN24[] Monopolies & Monopolization, Conspiracy to Monopolize

Although a 15 U.S.C.S. § 1 antitrust plaintiff may, and often must, establish a conspiracy with circumstantial evidence, that evidence must tend to exclude the possibility of independent action.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

Evidence > Inferences & Presumptions > General Overview

HN25[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Antitrust law limits the range of permissible inferences that may be drawn from ambiguous evidence in order to avoid indiscriminately chilling potentially procompetitive conduct. Thus, the United States Court of Appeals for the Tenth Circuit has articulated a two-part evidentiary test. First, the court considers whether the plaintiff's conspiracy evidence is ambiguous, that is, as consistent with the defendants' permissible independent interests as with an illegal conspiracy. If so, the court considers whether there is evidence tending to exclude the possibility that the defendants were merely pursuing those independent interests. To rebut the defendants' claim that they were acting unilaterally, the plaintiff might identify additional facts that are consistent with concerted action but not with their proffered business justification or facts demonstrating that their explanation is pretext. No triable issue of fact exists if independent and concerted actions are equally reasonable explanations on the record.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Evidence > Inferences & Presumptions > General Overview

HN26[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The range of acceptable inferences that may be drawn from circumstantial evidence in any given *15 U.S.C.S. § 1* case will depend on the plausibility of a plaintiff's economic theory and the danger associated with such inferences. The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of *Fed. R. Civ. P. 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if the defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN27[] **Sherman Act, Claims**

The requirement that a *15 U.S.C.S. § 1* antitrust claim make economic sense does not introduce a special burden on plaintiffs facing summary judgment. Throughout, the focus remains on the plaintiff's evidence and whether it tends to exclude the possibility of independent action. Antitrust defendants are not entitled to summary judgment merely by showing that there is a plausible explanation for their conduct. The explanations offered by both plaintiffs and defendants must accurately reflect the actual market. When a theory makes little economic sense, the plaintiff's burden of production is higher. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted. Similarly, a plausible theory, but nothing more, will not suffice to create a triable issue. Ultimately, the court must ascertain whether the plaintiff has presented evidence that is sufficiently unambiguous showing that the defendants conspired.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > Inferences & Presumptions > General Overview

HN28[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In the context of a *15 U.S.C.S. § 1* case, ambiguous evidence, that is, evidence that is equally consistent with independent as with concerted action, still cannot reasonably support an inference of a conspiracy.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN29[] **Summary Judgment, Entitlement as Matter of Law**

In passing on a motion for summary judgment, even where the underlying facts are undisputed, it is hornbook law that the court must indulge every reasonable inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do. If a frog be found in the party punch bowl, the presence of a mischievous guest but not the occurrence of spontaneous generation may reasonably be inferred.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > General Overview

Evidence > ... > Testimony > Lay Witnesses > General Overview

HN30[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Even a defendant's reference to "the rules" or to its agreement with competitors is not "smoking gun" evidence of a *15 U.S.C.S. § 1* conspiracy if there is an alternative explanation for the reference.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN31[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Tacit agreements, although within the scope of *15 U.S.C.S. § 1*, are of questionable viability. The court requires evidence tending to establish an explicit agreement.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN32[] Monopolies & Monopolization, Conspiracy to Monopolize

In the context of a *15 U.S.C.S. § 1* claim, "conscious parallelism," without more, is insufficient to support a reasonable inference of agreement or concerted action. Simply put, a defendant may, in pursuing its own business interests, take parallel or "synchronous" actions with the expectation or belief that its competitors will do the same without violating *15 U.S.C.S. § 1*. Conscious parallelism occurs when a company predicates a decision on the conduct of its competitors. Parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions. Thus, there must be some "plus factor" or additional evidence from which an understanding among the parties may be inferred. The additional evidence might be a showing that actions were against individual business interests (i.e., contrary to a good faith business judgment) or that there was a strong motive to conspire.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN33[] Monopolies & Monopolization, Conspiracy to Monopolize

In the context of a *15 U.S.C.S. § 1* claim, mere complaints are not sufficient proof of a conspiracy where the complaints are equally consistent with both an independent and a collusive interpretation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN34[] Monopolies & Monopolization, Conspiracy to Monopolize

In the context of a *15 U.S.C.S. § 1* claim, liability for acts of the entire conspiracy accrues only after showing joinder with knowledge of the enterprise and action in furtherance of it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN35[] Monopolies & Monopolization, Conspiracy to Monopolize

Pressuring a supplier not to deal with a rival is not actionable under *15 U.S.C.S. § 1* unless the supplier and competitor conspire (which is not alleged here) or a horizontal conspiracy among competitors exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN36[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In the context of a *15 U.S.C.S. § 1* claim, a plaintiff cannot, as a matter of law, survive summary judgment by pointing to behavior as consistent with the defendants' individual business interests as with a collective effort.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN37[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Under *15 U.S.C.S. § 1*, a defendants' concern about a price-cutting/customer-coveting competitor does not supply a sufficiently strong motive to compensate for the considerable economic evidence that suggests a group boycott would offer few benefits and considerable risk to the defendants.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN38[] **Public Enforcement, State Civil Actions**

Although similar to its federal counterpart in many respects, Oklahoma's statutory regime is unique in that it reaches purely unilateral acts in restraint of trade. *Okla. Stat. tit. 79, § 203(A)*. Therefore, even absent evidence of a conspiracy, defendants' independent acts may support state antitrust liability.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN39[] **Public Enforcement, State Civil Actions**

Notwithstanding the Oklahoma Act's more expansive reach, it, like *15 U.S.C.S. § 1*, only applies to unreasonable restraints of trade. The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public. To amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiffs business. That is, the conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged. An antitrust plaintiff must show that the challenged conduct adversely impacts competition in general because the antitrust laws were enacted for the protection of competition, not competitors.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

HN40[] **Intentional Interference, Defenses**

In Oklahoma, to state a claim for tortious interference, a plaintiff must allege that: (1) the plaintiff had a business or contractual right that was interfered with by the defendants; (2) the interference was malicious and wrongful and was neither justified, privileged, nor excusable; and (3) that the plaintiff suffered damage that was proximately caused by the complained-of interference.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Commercial Interference > Contracts > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN41[] Statute of Limitations, Time Limitations

In Oklahoma, a claim for tortious interference is governed by a two-year statute of limitations. *Okla. Stat. tit. 12, § 95(3)*. The limitations period begins to run as soon as the interference is fully accomplished.

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN42[] Commercial Interference, Business Relationships

In Oklahoma, in a claim for tortious interference with a business relationship, the business right interfered with is equivalent to a property right, not an expectation of future profits.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN43[] Intentional Interference, Elements

In Oklahoma, to state a claim for tortious interference with prospective business relationship, a plaintiff must prove that: (1) it had a valid business relation or expectancy; (2) defendants knew of the relationship or expectancy; (3) defendants intentionally and improperly interfered with the relationship or expectancy and such interference was not privileged; (4) this interference caused a breach or termination of the relationship or expectancy; and (5) the plaintiff suffered damage as a proximate result.

Governments > Legislation > Effect & Operation > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN44[] Legislation, Effect & Operation

In Oklahoma, on a claim for tortious interference with prospective business relationship, even if acts are considered "interference," the plaintiff must also present evidence that the interference was malicious and wrongful, and neither justified, privileged nor excusable. It is not necessary to show that the defendants were actually motivated by ill will to demonstrate malice, but rather that they intentionally committed an unreasonable and unlawful act without justification or excuse. Therefore, it appears that the use of the term "malicious" in this context adds no additional element of proof other than that the defendants committed the wrongful and unjustified act intentionally. The defendants acted intentionally if they acted with the sole or primary purpose of inflicting an injury by interfering in the business relationship.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN45[] Commercial Interference, Contracts

In Oklahoma, on a claim for tortious interference with prospective business advantage, in addition to being malicious, the interference must also be wrongful in either its objective or in the means employed to accomplish the objective. The interference is wrongful if it was unlawful or unfair or enacted by lawful means without justification. Actions such as fraud or misrepresentation or physical or moral intimidation or persuasion may be considered unlawful or unfair.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN46[] Commercial Interference, Contracts

It is not unlawful for an entity to use fair and lawful argument and persuasion to interfere with another's contractual relations so long as it was done to protect or better one's own business and not done with the primary objective of destroying honest competition. A competitor may exert economic pressure on or refuse to deal with third persons so long as the pressure is not intended to illegally restrain competition. If the plaintiff cannot demonstrate that the defendants' actions rise to an unreasonable restraint of trade, as a matter of law, it cannot overcome the competitor's privilege on a tortious interference claim.

Counsel: [*1] For Champagne Metals, an Oklahoma Limited Liability Company, Plaintiff: Carissa K Leonard, Clyde A Muchmore, D Kent Meyers, Geren T Steiner, Mack J Morgan, III, Mark S Grossman, Crowe & Dunlevy-OKC, Oklahoma City, OK. Michael Burrage, Burrage Law Firm, Durant, OK.

For Ken-Mac Metals Inc., an Ohio corporation, Defendant: David A Ettinger, Honigman Miller Schwartz & Cohn-DETROIT, Detroit, MI. Laurence M Huffman, McAfee & Taft, Oklahoma City, OK. M Richard Mullins, McAfee & Taft, Oklahoma City, OK. Stephanie L Reaugh, McAfee & Taft, Oklahoma City, OK.

For Samuel Son & Co Ltd, an Ontario, Canada corporation, Samuel Specialty Metals Inc, a New Jersey corporation, Defendants: George W Dahnke, Murray E Abowitz, Abowitz Timberlake & Dahnke PC, Oklahoma City, OK. Harvey C Kaish, William J O'Shaughnessy, McCarter & English LLP, Newark, NJ.

For Metalwest LLC, an Alabama limited liability company, Defendant: Michael A Rubenstein, Mitzner Rubenstein Bryan McCormick & Pitts PLLC, Edmond, OK. Richard B Benenson, Timothy R Beyer, Brownstein Hyatt & Farber PC, Denver, CO.

For Integris Metals Inc, a New York corporation, Defendant: David L Hashmall, Felhaber Law Firm, Minneapolis, **[*2]** MN. Glen D Huff, Steven J Johnson, Foliart Huff Ottaway & Bottom, Oklahoma City, OK.

For Earle M Jorgensen Company, a Delaware corporation, Defendant: Allan B Goldman, Katten Muchin Zavis Rosenman-LOS ANGELES, Los Angeles, CA. Fred A Leibrock, Phillips McFall McCaffrey McVay Murrah-OKC, Oklahoma City, OK. Jennifer M Kirkpatrick, Phillips McFall McCaffrey McVay Murrah-OKC, Oklahoma City, OK.

For Ryerson Tull Inc, an Illinois corporation, Defendant: Bernard J Rothbaum, Jr, Charles E Geister, III, Drew Neville, Jr, Hartzog Conger Cason & Neville, Oklahoma City, OK. Mark McLaughlin, Mayer Brown Rowe & Maw LLP-CHICAGO, Chicago, IL. Susan Nystrom Ellis, Mayer Brown Rowe & Maw LLP-CHICAGO, Chicago, IL.

Judges: ROBIN J. CAUTHRON, United States District Judge.

Opinion by: ROBIN J. CAUTHRON

Opinion

ORDER

Defendants filed, either individually or collectively, seven motions for summary or partial summary judgment. The issues and arguments have been debated in no less than 350 pages of opening, response, reply, and surreply briefs. Moreover, a number of relevant evidentiary points have been raised or elaborated on in the numerous pretrial motions that are now at issue. Having carefully **[*3]** considered the evidence in the light most favorable to Plaintiff and the relevant legal issues, the Court holds that summary judgment in Defendants' favor is appropriate on Plaintiff's federal antitrust, Oklahoma antitrust, and tortious interference claims. The reasons for this decision are set out below.

BACKGROUND

In 1996, Mike Champagne started Champagne Metals, a metals service center, out of his home. Pl.'s Resp. P 4, at 2. Earle M. Jorgensen Company ("EMJ"), Mike Champagne's employer before that time, was de-emphasizing sales to the horse trailer industry, and he "saw an opportunity to parlay [his] good relationship in the industry into a successful new service center." Pl.'s Ex. 1 (Champagne Aff.) P 3, at 1. Plaintiff's subsequent difficulties acquiring necessary aluminum products at a competitive price is the principle focus of this case. Specifically, Plaintiff claims that its competitors conspired to deny it access to necessary suppliers (i.e., the leading domestic aluminum mills) by threatening to move their business away from mills that dealt with Plaintiff. According to Plaintiff, the conspiracy's aim was not only to ruin Plaintiff but also to deter others from **[*4]** entering the market, thus maintaining prices and market share. [1] Plaintiff asserts claims against Defendants for unreasonable restraint of trade, as well as for tortious interference with business relations.

Like Plaintiff, Defendants EMJ, Ken-Mac Metals, Inc., Samuel Son & Co. Limited and Samuel Specialty Metals, Inc. (collectively "Samuel"), Metalwest, Inc., Integris Metals, Inc., and Ryerson Tull are metals service centers. Service centers purchase aluminum products in a variety of alloys and finishes to sell to original equipment manufacturers ("OEMs") and other customers. Pl.'s Resp. at 1 n.3. Service centers provide an important link in the aluminum

[1] Defendants' expert uses the term "upstream market" to refer to sales between mills and service centers, and "downstream market" to refer to sales (by mills and service centers) to end users. The Court finds the nomenclature helpful and uses it accordingly.

distribution chain by offering sales coverage for smaller accounts, serving an inventory and a just-in-time **[*5]** delivery function, and providing processing services, which are frequently to tighter-than-standard mill tolerances. Campbell Report at 2-3; Pl.'s Resp. at 1 n.3. [2] However, they compete with mills and other service centers for the sales to end users. See Pl.'s Ex. 98 (Murry Report) at 1; Murry Dep. at 229-32.

Approximately 60% of sales to end users are made by the mills directly. Campbell Report at 3; Pl.'s Ex. 97 (Wilsey Report) P 6, at 2 (reporting that distributors sell about 35% of aluminum sheet, plate, rod, bar, wire, extrusions, pipe, and tube to end users and more than 40% of sheet and plate). Although estimates vary, there are at least 65 service centers (and possibly more than a hundred) operating in North America **[*6]** in more than 750 locations. Wiggins Report P 86, at 29; Murry Dep. at 190 (agreeing that there are more than 100 different service centers in the United States). Defendants' expert, Dr. Wiggins, identifies 41 service centers operating at 150 locations in this region. Wiggins Report P 87, at 29; Wiggins Ex. C (covering Colorado, Kansas, Missouri, Illinois, New Mexico, Texas, Arkansas, and Louisiana). Plaintiff contends that not all of those service centers compete directly with one another on the same aluminum products or for the same business. See Pl.'s Resp. at 46. "For example, there are a limited number of companies that go after the horse trailer business." Id. Plaintiff identifies the Defendants as its day-to-day competitors. Pl.'s Ex. 9 (Champagne Dep.) at 113 (listing Ryerson, Integris, Ken-Mac, Metalwest, and Samuel) & 89 (explaining that EMJ has a plant in Oklahoma); see also Pl.'s Ex. 29 (Sneigle Dep., Vol. II) at 71-72 (explaining that the horse trailer market covers Texas, Oklahoma, and Kansas).

The leading mills in North America are Alcan Aluminum Corporation, Alcoa Inc., Kaiser Aluminum Corporation, Ormet Corporation, Pechiney, and Commonwealth Industries, Inc. Compl. **[*7]** P 11, at 3. Each mill specializes in one or more of the following categories of aluminum products: (1) mill finish common alloy aluminum (i.e., sheet and .250 plate); (2) heat-treated aluminum; (3) common alloy tread; (4) common alloy painted aluminum; and (5) aluminum roof. Pl.'s Ex. 98 (Murry Report) at 2. The parties sell other aluminum products in addition to those listed. Murry Dep. at 149. However, "a great amount of tread, painted, and roof coil" is used in the horse trailer manufacturing industry. Pl.'s Ex. 97 (Wilsey Report) P 12, at 3. The Plaintiff contends the five products are not readily exchangeable. Pl.'s Ex. 98 (Murry Report) at 2. For this reason, and because customers have certain mill preferences and because more sourcing options allow a service center to negotiate a better price, Plaintiff argues that access to more than one mill is critical to its ability to compete in the downstream market. See Pl.'s Ex. 97 (Wilsey Report) P 6, at 2 (explaining that access to multiple mills provides a competitive advantage in terms of price and product availability).

Although a number of factors contribute to whether an end user will buy directly from a mill or particular service **[*8]** center, Plaintiff's supply and sourcing options are the focus of this case. See Pl.'s Ex. 97 (Wilsey Report) P 7, at 2 (explaining that service centers compete on availability, price, quality, responsiveness/service timeliness, and delivery); Campbell Report at 3. The leading domestic mills have select or appointed distribution networks. Id. at 4. Thus, although they have reduced their total number of distributors in recent years, each continues to sell to multiple service centers. Id.; Pl.'s Ex. 98 (Murry Report) at 2. No Defendant is a distributor for all of the mills but each is recognized by at least two mills. However, even among a mill's distributors, prices may vary. [3] **[*9]** In addition to mill purchases, a service center might purchase aluminum from brokers, mill depots, other service

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[2] Steven N. Wiggins' full report and John R. Campbell's report are included in Volume II of Samuel's summary judgment appendix (Dkt. No. 171). Donald Murry's full deposition transcript is included in the appendix to Defendants' motion to preclude his testimony (Dkt. No. 230) as exhibit 3.

[3] A key pricing component of aluminum is the spot price of aluminum ingot, which is set on international commodity markets. Wiggins Report P 46, at 15; Murry Report at 2. "[A] conversion factor covering the cost of converting aluminum ingot into a product such as coiled sheet" is added to the ingot price. Wiggins Report P 46, at 15. In addition, various "contractual mechanisms" including list prices, contract prices, special terms contracts, and annual contracts affect mill prices. Wiggins Report P 47, at 15. Volume discounts, incumbency policies, and rebates also affect the prices a mill will offer to a particular service center. See Pl.'s Ex. 97 (Wilsey Report) P 13, at 3; Pl.'s Resp. P 74, at 38-39.

centers, or foreign mills. [4] However, those options are frequently less desirable because of upcharges, as well as extended lead times and quality concerns. See Pl.'s Ex. 97 (Wilsey Report) P 12, at 3.

After some initial set-backs, Plaintiff was able to begin buying from Commonwealth and was subsequently recognized by it as a distributor. Plaintiff has purchased limited products from Kaiser and Pechiney in the past and from other mills through a third party, but is not a recognized distributor. Nevertheless, Plaintiff claims that difficulties securing competitively priced products (and the resulting problems winning end user business) have prevented it from operating at full capacity. Even so, Plaintiff has remained in business and experienced continued growth. Murry Dep. at 175.

STANDARD

HN1[] Summary judgment is proper only if the moving party shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. ***HN2***[] "An issue of fact is 'material' if under the substantive law it is essential **[*10]** to the proper disposition of the claim." See *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. ***HN3***[] "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." Id. (citing *Anderson, 477 U.S. at 248*). ***HN4***[] When deciding whether summary judgment is appropriate, the Court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. See *Anderson, 477 U.S. at 255*; *Simms v. Oklahoma ex rel. Dep't of Mental Health, 165 F.3d 1321, 1326 (10th Cir. 1999)*. ***HN5***[] At the summary judgment stage, the Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Willis v. Midland Risk Ins. Co., 42 F.3d 607, 611 (10th Cir. 1994)*. ***HN6***[] When the nonmovant will bear the burden of proof at trial, summary judgment is avoided only by going beyond the pleadings and presenting evidence sufficient to establish the existence, as a triable **[*11]** issue, of an essential and contested element of the case. Perry v. Woodward, *199 F.3d 1126, 1131 (10th Cir. 1999)*.

DISCUSSION

As noted, Defendants collectively challenge each of Plaintiffs claims on multiple grounds. Due to the number of motions and their considerable overlap, this section is organized around Plaintiff's claims and the key arguments without reference to particular filings. Before reaching the substance of those challenges, however, it is necessary to resolve a few outstanding issues and address Integris' successor liability argument.

1. Preliminary Issues

A. Summary Judgment Evidence

HN7[] At summary judgment, evidence does not need to be in a form that would be admissible at trial, but the content or substance must be. See *Thomas v. Int'l Bus. Machs., 48 F.3d 478, 485 (10th Cir. 1995)*. Thus, the Court may consider affidavits, interrogatory answers, admissions, and deposition testimony to the extent that they are based on personal knowledge and do not contain otherwise inadmissible hearsay. See *Fed. R. Civ. P. 56*; *Thomas, 48 F.3d at 485*; *Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995).* **[*12]**

Because there are a number of evidentiary issues raised in the summary judgment briefs and subsequent pretrial filings that merit consideration, the Court considers the most pertinent below. First, Plaintiff offers a number of

[4] Plaintiff also claims to have purchased metal from its customers, but at a markup. See Pl.'s Resp. at 38 n.31 (referring to Merritt Equipment Company and Sundowner Trailers).

transcribed conversations as evidence. These conversations present both hearsay and authentication concerns. See *Fed. R. Evid. 801(c)* and *901*; *United States v. Devous, 764 F.2d 1349, 1354-55 (10th Cir. 1985)* (stating that ***HN8***[] "transcripts . . . must be properly authenticated before they can be admitted."). Altposes of summary judgment, that Plaintiff could authenticate the transcripts, they are not admissible because their contenthough the Court is willing to assume, for pur is undeniably hearsay. Similarly, the non-deposition statements of mill representatives are hearsay. [5] Nevertheless, the Court will consider all deposition testimony, when available and accurately cited by Plaintiff, as to what those individuals observed and what they have previously said, if adopted. See *Fed. R. Evid. 801(d)(1)* advisory committee's note. Hearsay statements **[*13]** of mill representatives may be considered for the non-hearsay purpose of showing the state of mind of mill decision makers (to the extent relevant), but not for the purpose of showing why the mills were concerned. See *Fed. R. Evid. 803(3)* (stating that ***HN9***[] admission under this exception does not include a statement of memory or belief to prove the fact remembered or believed); *United States v. Joe, 8 F.3d 1488, 1493 (10th Cir. 1993)*.

[*14] Second, Plaintiff attaches a number of internal memoranda, E-mails, or reports to its response. The Court assumes that those documents are authentic and would meet the requirements of *Fed. R. Evid. 803(6)* to be admissible at trial as records of regularly conducted activity.

Third, Plaintiff offers a number of statements about how the aluminum industry works as "lay opinion." Without deciding whether those opinions would more aptly fall under *Fed. R. Evid. 702*, the Court finds adequate assurance in the record that Mike Champagne and Lewis Krausse are sufficiently familiar with the aluminum business to offer their opinions about its operation and are able to relay their own perceptions and experiences.

Fourth, some Defendants, notably EMJ, challenge whether statements by an employee constitute admissions by a party opponent. Under *Fed. R. Evid. 801(d)(2)*, a statement may be offered against a party if it was made by the party's agent or servant during the existence of that relationship and concerns a matter within the scope of the agency or employment. There is sufficient support in the record to assume that the **[*15]** relevant statements regarding Champagne Metals and the effect of a mill's recognition of it were related to the individual's employment. With the exception of Craig Coyler, all appear to have been current employees at the time they made those statements. Similarly, the Court will consider statements as admissions by a party opponent if, under the circumstances, they appear reasonably attributable to a Defendant's employee and related to his or her duties, even if a deponent was unable to specifically identify the declarant.

Finally, the parties fiercely dispute whether complaints or threatening statements by one Defendant to a mill are admissible against the other Defendants. Plaintiff argues that they are either admissible under *Fed. R. Evid. 801(d)(2)(E)* as co-conspirator statements made in furtherance of the conspiracy or as verbal acts. ***HN11***[] A threat may be deemed non-hearsay as a "verbal act" because the fact that the words were uttered has independent legal significance. See *Fed. R. Evid. 801(c)* advisory committee's note (stating, "if the significance of an offered statement lies solely in the fact that it was **[*16]** made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay"); *Echo Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1087 (10th Cir. 2001)*. Thus, apart from the co-conspirator exception, statements that may be fairly characterized as threats may be admitted as probative of the operation of the conspiracy (as opposed to the truth of what was said). See *29*

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[5] Plaintiff offers no explanation of why it did not acquire the sworn affidavits of these witnesses and chose instead to rely solely on the hearsay testimony of Mike Champagne and Plaintiff's employees. Relayed in such a manner, the underlying statements are clearly hearsay. Notwithstanding this, Plaintiff argues that these statements should be considered as he can produce the declarants at trial. See *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 470 (3d Cir. 1998)*. To consider these statements would run contrary to Tenth Circuit precedent. See *Thomas, 48 F.3d at 485* (stating that ***HN10***[] a third party may not simply describe another witness's supposed testimony and such descriptions are "not suitable grist for the summary judgment mill."). However, in more than one instance, other witnesses, who Plaintiff alleges made similar statements to those made by the mill representatives, deny during deposition having made those statements at all or clarify and explain the statements in a way that is directly opposite to the meaning assigned to the statement by Plaintiff. This, of course, just underscores the reliability concerns surrounding the admission of hearsay, the risk of inaccuracies in perception, memory, or narration, deliberate or otherwise. See 30 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 6324 (1997).

Am. Jur. 2d Evidence § 665. The applicability of the co-conspirator exception is a more difficult matter in this case because there is no clearly unambiguous, independent evidence of a conspiracy. However, to ensure that Plaintiff's evidence has not been unfairly limited, the Court will consider statements that might not rise to the level of a threat (and thus admissible as a verbal act) but would nonetheless be in furtherance of the alleged conspiracy when evaluating whether, when viewed as a whole, the evidence makes the existence of a conspiracy more likely than not.

Additional objections will be addressed, to the extent necessary, in the body of the text. Integris' hearsay objections also are discussed below.

B. Mike [*17] Champagne's Affidavit

Defendants also argue that Mike Champagne's affidavit conflicts with his deposition testimony regarding his conversation with Ken-Mac's Larry Parsons and should be disregarded at summary judgment. In his affidavit, Mike Champagne explains that he and Mr. Parsons discussed "the fact that EMJ and some of the other service centers had gotten together and the resulting problems [Champagne Metals] had experienced being recognized by Commonwealth." Pl.'s Ex. 1 (Champagne Aff.) P 9, at 2. Such language clearly suggests that Mr. Parsons was aware of some collective action by the other service centers to foil Commonwealth's recognition of Champagne Metals. However, during his deposition, Mr. Champagne was asked about that conversation and did not include this aspect in his answers. Moreover, he was specifically asked whether he had "heard anything to suggest that Ken-Mac ever communicated with any of the other defendants about any threats or pressure or actions to cause mills not to supply Champagne." Pl.'s Ex. 9 (Champagne Dep.) at 264. In response, Mr. Champagne explained that he was not aware of any evidence of communication between Ken-Mac and the other Defendants. **[*18]** Id. at 264-65. Thus, that portion of the affidavit either contradicts Mr. Champagne's deposition testimony or is simply intended to convey what *he* told Larry Parsons. Plaintiff explains in its Surreply that the affidavit "did not say that Parsons brought up this subject or EMJ specifically." Surreply at 2. Accordingly, the Court will not rely on that portion of the affidavit as evidence of an agreement.

In his affidavit, Mr. Champagne also explains, "Mr. Parsons made the comment that he would have gotten it done, meaning kept Commonwealth from selling to Champagne Metals." Pl.'s Ex. 1 (Champagne Aff.) P 9, at 2. During his deposition, he explained that Mr. Parsons had said "he'd have stopped" Champagne Metals but did not specify exactly how he would have achieved that end. Pl.'s Ex. 9 (Champagne Dep.) at 262-64. However, Mr. Champagne assumed he was referring to "telling the mills not to sell [to] us." Id. at 263. The Court agrees that Mr. Champagne's affidavit presents a much less hesitant accounting of what was actually said. Nevertheless, in both instances, Mr. Champagne explains what he understood the import of Mr. Parsons' statements to be under the circumstances. **[*19]** Moreover, to the extent there is a conflict, it is insufficient to warrant exclusion. See *Burns v. Bd. of County Comm'rs of Jackson County, 330 F.3d 1275, 1281-82 (10th Cir. 2003)* (discussing circumstances in which inconsistent affidavit should be excluded).

C. Integris

Integris raises a successor liability argument and hearsay objections that must be addressed before proceeding to the Defendants' other arguments. Integris was formed in November 2001 following an "asset contribution" by NAMD (a BHP Billinton subsidiary) and Reynolds Metals Company (an Alcoa subsidiary), which consisted of RASCO and Vincent Metal Goods ("VMG") (plus other Reynolds' subsidiaries). See Integris Ex. 1A (Agreement). Both RASCO and VMG were metals distribution businesses which Integris was to hold and operate collectively. Id. at 1. Although Integris continues those businesses, the Contribution and Dissolution Agreement specifically limited the liabilities it assumed. NAMD was dissolved except for limited existence to respond to liabilities, but Reynolds Metals survived.

Regardless of the argument's merit, Integris' failure to raise it in its answer precludes further consideration, **[*20]** at summary judgment or at trial. *Fed. R. Civ. P. 8(c)* provides that a party must set forth any "matter constituting an avoidance or affirmative defense" in a responsive pleading. Notwithstanding the debate regarding what generally falls under this catchall provision, Integris' contention that it is not liable for its predecessors' actions clearly qualifies as such a defense in this instance. See generally 5 Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1271 (West 2004) (critiquing the logical inference approach and explaining that considerations of policy, fairness, and even probability often determine whether a defense should be plead); Kelly J. Williams, Allocating the Burden of Pleading Successor Corporation Status in Texas Products Liability Cases, *48 Baylor L. Rev. 529, 534 (Spring 1996)* (considering access to evidence, unusual circumstances, and the underlying substantive law). Nothing about Plaintiff's claims suggests that the rule against imposing successor liability on purchasing companies would apply. Moreover, information publically available characterized Integris as the product **[*21]** of a "merger" of VMG and RASCO. Because Integris' argument constitutes an affirmative defense to liability (as opposed to, for example, merely disputing Plaintiffs allegations), it was waived. *Youren v. Tintic Sch. Dist., 343 F.3d 1296, 1302 (10th Cir. 2003)*; *Radio Corp. of Am. v. Radio Station KYFM, Inc., 424 F.2d 14, 17 (10th Cir. 1970)* (explaining that ***HN12***[] *Rule 8(c)* defenses are waived if not affirmatively pleaded, asserted under *Fed. R. Civ. P. 12(b)*, or tried by consent).

There is absolutely no reason why Integris should have waited to assert this defense (as opposed to seeking summary judgment immediately and avoiding the expenses of discovery). In this regard, the Court is not persuaded that its intent to preserve the defense is evident in its answer. Integris' affirmative defense number 10 generically states, "Plaintiffs claims against Integris are barred because the alleged injuries or damages, if any, were not the result of any act or omission by Integris, but were due to the acts or omissions of others over whom Integris had no control, or by other superseding interventions outside Integris' control. **[*22]** " Integris' Ex. 22 (Answer) at 6. Absent some indication that Integris had merely purchased assets from VMG's and RASCO's respective parent companies, the general wording of this defense was insufficient to put Plaintiff on notice. A contrary decision would be particularly unfair because Integris produced RASCO and VMG documents during discovery, referred to itself as the result of a merger, and did not disclose the agreement detailing transaction specifics until after the close of fact discovery. Pl.'s Resp. at 41-43. Under the circumstances, Integris is estopped from arguing that it has no successor liability.

Even so, the evidence indicates that the de facto merger or consolidation exception to the general rule against successor liability applies. [6] Integris is correct that ***HN13***[] generally a successor corporation or the purchaser of assets is not responsible for the debts and liabilities of its predecessor. See, e.g., *R.C.M. Executive Gallery Corp. v. Rols Capital Co., 901 F. Supp. 630, 635 (S.D.N.Y. 1995)*; *Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535, 540 (D. Del. 1988)*. However, the rule is subject to four exceptions. A purchaser is liable for **[*23]** its predecessors' liabilities if. (1) there is an express or implied agreement to assume the other companies' debts and obligations; (2) the transaction was fraudulent; (3) there was a de facto consolidation or merger of companies; or (4) the purchasing company was a mere continuation of the selling company. *Diaz v. South Bend Lathe Inc., 707 F. Supp. 97, 99-100 (E.D.N.Y. 1989)*; *Elmer, 698 F. Supp. at 540*; see also *Pulis v. U.S. Elec. Tool Co., 1977 OK 36, 561 P.2d 68, 69*.

Although the transaction was structured as an asset contribution between NAMD and **[*24]** Reynolds, the contributed assets were incorporated businesses which were consolidated into a new entity and ceased to exist. ***HN14***[] A consolidation occurs when two or more corporations are combined to form a new corporation after the previous corporate entities are dissolved. See William Meade Fletcher, 15 Fletcher Cyclopedia of the Law of Private Corporations § 7077 (West 2003). The descriptions used by the entities themselves to describe the combination are not controlling. *Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 838 (S.D.N.Y. 1977)*. As a practical matter, then, it appears that Integris would be liable for VMG's and RASCO's actions under the de facto

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[6] Plaintiff also argues that Integris impliedly assumed VMG's and RASCO's liability by "agreeing to a highly inclusive definition of liabilities." Pl.'s Resp. at 119. However, the agreement is quite clear that only certain liabilities were assumed. See Integris' Ex. 1A. The expansive definition of liabilities does not eviscerate those provisions. Therefore, the implied assumption exception would not apply.

consolidation or merger exception. Moreover, notwithstanding the parties' treatment of the issue, it is not clear to the Court on what basis Plaintiff could hold the parent companies or corporate shareholders of RASCO and VMG, the alleged conspirators, liable under these facts. Therefore, Integris' motion is denied with respect to the successor liability issue.

However, this ruling does not decide the hearsay objections raised in Integris' motion in limine. See Integris Mot. (Dkt. No. 238). As **[*25]** correctly noted by Integris, statements made by a predecessor-in-interest or employees of a predecessor are not admissible under *Fed. R. Evid. 801(d)(2)*. See *Calhoun v. Baylor, 646 F.2d 1158, 1162-63 (6th Cir. 1981)*; *Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979)*. ***HN15***[] Despite the admission of these statements at common law under the concept of "privity of interest," commentators agree that this practice did not survive the enactment of the Federal Rules of Evidence. See 30B Michael H. Graham, Federal Practice & Procedure § 7019 (3d Interim ed. 2000); Christopher B. Mueller and Laird C. Kirkpatrick, Federal Evidence § 430 (2d ed. 2003); Jack B. Weinsten and Margaret A. Berger, Weinstein's Evidence Manual Student Edition § 15.02[5] (5th ed. 2001). The Court acknowledges the contrary result in the unpublished case of *Sherif v. Astrazeneca, 2002 U.S. Dist. LEXIS 11408, No. CIV.A. 00-3285, 2002 WL 32350023 (E.D. Pa. May 9, 2002)*, but notes that the Sherif court did not explain why it was departing from the widely accepted view articulated above except to say that "to decline to accept these statements as **[*26]** admissions against a party-opponent solely because [the successor company] is the only named party would elevate form over substance." *Sherif, 2002 U.S. Dist. LEXIS 11408, [WL] at *3*. In the absence of any legal analysis to support this minority position, the Court declines to depart from the majority view.

The fact that the statements made by Integris' predecessors-in-interest are not admissible under *Fed. R. Evid. 801 (d)(2)* does not mean that all predecessor statements are inadmissible against Integris. For instance, some of the statements may be admissible as verbal acts because they do not rely on the truth of the statement for their probative value, but on the very fact that the statement was made. See *29 Am. Jur. 2d Evidence § 665*. Most commonly, these statements are threats by RASCO or VGM employees directed at the mills. [7]

[*27] II. Federal Antitrust Claim

HN17[] *Section 1* prohibits agreements that unreasonably, restrain trade. See *15 U.S.C. § 1*; *SCFC, ILC. v. Visa USA, Inc., 36 F.3d 958, 962 (10th Cir. 1994)*. As indicated above, Plaintiff alleges that the Defendants conspired to exclude it as a competitor by agreeing to pressure mills not to deal with Plaintiff. Specifically, Defendants allegedly engaged in a group boycott effort to cut off Plaintiff's access to essential suppliers by collectively threatening to move their business away from noncompliant mills. Although Defendants advance a number of arguments in their briefs why summary judgment on Plaintiffs *Section 1* claim is proper, the Court begins with whether there is sufficient evidence that an agreement among the Defendants existed. See *AD/SAT v. AP, 181 F.3d 216, 232 (2d Cir. 1999)* (explaining that ***HN18***[] whether an agreement constituted an unreasonable restraint of trade under either a per se or rule of reason analysis follows a determination of whether sufficient evidence of agreement exists).

Agreement in Restraint of Trade

[7] ***HN16***[] Statements by predecessors-in-interest are commonly admitted as statements against interest or under the residual clause. See *Fed. R. Evid. 804(b)(3)* & *807*. However, both of these hearsay exceptions are only applicable under certain conditions, and Plaintiff has not attempted to argue that it will be able to satisfy those conditions. See *Fed. R. Evid. 804* (requiring that the declarant be unavailable before the statement is admitted); *Fed. R. Evid. 807* (requiring that the Plaintiff make a showing as to the probative value of the statement and Plaintiff's efforts to obtain the evidence from other sources); see also *Herrick v. Garvey, 298 F.3d 1184, 1192 (10th Cir. 2002)* (discussing the burdens on a party when seeking to admit evidence under *Fed. R. Evid. 807*); *United States v. Tome, 61 F.3d 1446, 1452 (10th Cir. 1995)* (emphasizing that admitting evidence under the residual exception is reserved for "extraordinary circumstances").

HN19[] By its terms, *Section 1* covers contracts, combinations, or **[*28]** conspiracies in restraint of trade. Courts and commentators frequently employ the short-hand "concerted action" to describe the prohibited conduct. Regardless of the nominative term, the essence of a *Section 1* claim is the agreement. *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*. Although less than what would be required to form a contract, the agreement must be a conscious commitment to a common scheme. *Monsanto Co. v. Spray-Rite Svc. Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; 1 ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 5 (5th ed. 2002). In other words, the participants or conspirators must have a "unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (internal quotations and citation omitted). In contrast, unilateral acts, regardless of their motivation, will not support a *Section 1* violation. See *Monsanto, 465 U.S. at 761*; *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)*. ***HN20***[] *Section 1*, as **[*29]** opposed to *Section 2 of the Sherman Act*, is unconcerned with businesses acting independently, even where a single firm's restraints directly affect prices and would have comparable economic effects as concerted action. *Fisher v. City of Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)*.

Defendants contend that their actions were entirely consistent with their individual business interests and that Plaintiff has no evidence of any agreement among them. Thus, ***HN21***[] to survive summary judgment, Plaintiff must adduce significant probative evidence tending to exclude the possibility of independent action by the Defendants. *Monsanto, 465 U.S. at 768*; *Key Financial Planning Corp. v. ITT Life Ins. Corp., 828 F.2d 635, 638* (quotation omitted). ***HN22***[] An antitrust plaintiff may demonstrate the existence of an agreement with either direct or circumstantial evidence. *Mitchael v. Intracorp., Inc., 179 F.3d 847, 857 (10th Cir. 1999)*. Plaintiff attempts to do both.

A. Direct Evidence

Plaintiff contends that certain statements by different Defendant representatives constitute direct evidence of the alleged conspiracy. Plaintiff identifies **[*30]** the following three statements in its Response: (1) comments by Larry Parsons (of Ken-Mac) during a 1999 buyout negotiation with Mike Champagne, in which he referred to the service centers' power over Champagne Metals, stating that he would have stopped Champagne Metals from securing recognition from Commonwealth had he known about it, and implied that the others had messed up but that "he could get everyone together to make it happen;" (2) statements by EMJ's Debbie Veale to Commonwealth representative Bill Thomas in 1996 that she had been in contact with her counterparts at NAAD [8] **[*31]** , that none were happy about Commonwealth's relationship with Champagne Metals, and that they had enough clout to make Commonwealth listen; [9] and (3) repeated complaints by Ryerson's Phil Wiley to Commonwealth representative Matthew Zundel from 1998 to 1999 that Commonwealth's recognition of Champagne Metals hurt the industry and would cause Ryerson and other distributors in the area to source their metal elsewhere. Pl.'s Resp. at 80-82. For the reasons set out below, these admissions are not direct evidence of an agreement among the Defendants.

Although the statements suggest contact among service centers and/or seemingly appreciate their collective strength or influence over mills, there is a gap between what was said and the conclusion that a conspiracy existed. *HN23*[] "Direct evidence in a *Section 1* conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.), 166 F.3d 112, 118 & 122 (3d Cir. 1999)* (explaining that direct evidence evinced only an exchange of information and not a price-fixing conspiracy). In *Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998)*, a case upon which Plaintiff relies heavily for its characterization of this evidence, a conspirator's threat constituted direct evidence that a conspiracy or unlawful agreement existed. There, Rossi testified, ". **[*32]** . . Joe

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[8] NAAD is the National Association of Aluminum Dealers. Pl.'s Ex. 1 (Champagne Aff.) P 10, at 2. It was an invitation-only organization that has since merged with the Metals Service Center Institute. Id.

[9] Because Bill Thomas was unsure that Debbie Veale actually referred to a "circling of the wagons" during their conversation, the Court does not consider that as part of her statement. See Pl.'s Ex. 34 (Thomas Dep.) at 121.

Licciardello came over and threatened me that if I went into business that he and Arzee Supply would do anything they could, stop supplies, cut the prices, whatever they had to do they were going to do to keep me out of business." *Id. at 468*. In contrast, although Mike Champagne may have attributed a similar meaning to Larry Parsons' words and implications, what was actually said is notably different. [10]

[*33] Similarly, Debbie Veale's and Paul Wylie's statements to Commonwealth representatives do not necessarily indicate an agreement among the Defendants to boycott (or to threaten to boycott) mills who supplied Plaintiff. They may merely be recognitions that other service centers would likely complain and/or refuse to deal with Commonwealth, neither of which would be surprising in this industry. If a statement is reasonably susceptible to an alternative, legal explanation, which may include the acknowledgment of a competitive reality, it is important circumstantial evidence of a conspiracy but not direct evidence. See *Richards v. Neilson Freight Lines, 810 F.2d 898, 903 (9th Cir. 1987)* (explaining that seemingly incriminating statement may have been mere acknowledgment of an "industrywide acceptance of the competitive reality that back solicitation was an abuse of the interlining relation"). Because this evidence lacks the requisite "clarity" to constitute direct evidence, the Court is unable to conclude that a jury could reasonably find a conspiracy existed based on those statements alone. See *InterVest, Inc., 340 F.3d at 162-163* (listing examples of **[*34]** direct evidence in other *Section 1* cases).

B. Circumstantial Evidence

HN24[] Although an antitrust plaintiff may, and often must, establish a conspiracy with circumstantial evidence, that evidence must tend to exclude the possibility of independent action. ***HN25***[] "***Antitrust law*** limits the range of permissible inferences" that may be drawn from ambiguous evidence in order to avoid indiscriminately chilling potentially procompetitive conduct. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348*. Thus, the Tenth Circuit has articulated a two-part evidentiary test. First, the Court considers whether the Plaintiff's conspiracy evidence is ambiguous, that is, as consistent with the Defendants' permissible independent interests as with an illegal conspiracy. See *Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)*. If so, the Court considers whether there is evidence tending to exclude the possibility that the Defendants were merely pursuing those independent interests. See id. To rebut Defendants' claim that they were acting unilaterally, Plaintiff might identify additional facts that are consistent **[*35]** with concerted action but not with their proffered business justification or facts demonstrating that their explanation is pretext. See 1 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 11.02[2] (2d ed.); see also *Key Financial Planning Corp., 828 F.3d at 639*. No triable issue of fact exists if independent and concerted action are equally reasonable explanations on the record. See *Lemelson v. Bendix Corp., 621 F. Supp. 1122, 1130 (D. Del. 1985)*.

Importantly, ***HN26***[] the range of acceptable inferences that may be drawn from circumstantial evidence in any given case will depend on the plausibility of a plaintiff's economic theory and the danger associated with such inferences. See *Mitchael, 179 F.3d at 858*.

> The absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of *Rule 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if [the defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, **[*36]** equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

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[10] The following description of group boycott mechanics underscores the qualitative difference between Plaintiff's examples and direct evidence of a conspiracy:

The boycotting group members, in effect, say to their suppliers . . ., "If you don't stop dealing with non-group members, we will stop dealing with you." If continued trade with group members is more important to a supplier . . . than is trading with non-group members, this threat will be effective.

L. Sullivan, Handbook of the Law of Antitrust § 83, at 230 (1977) (quoted in *Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984))*.

Matsushita, 475 U.S. at 596-97. However, ***HN27***[] the requirement that an antitrust claim make economic sense does not introduce a special burden on plaintiffs facing summary judgment. *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. Throughout, the focus remains on the Plaintiff's evidence and whether it tends to exclude the possibility of independent action. "Antitrust defendants are [not] entitled to summary judgment merely by showing that there is a plausible explanation for their conduct." *InterVest, 340 F.3d at 160* (quoting *Rossi, 156 F.3d at 466*). The explanations offered by both Plaintiff and Defendants must accurately reflect the actual market. See *Eastman Kodak Co., 504 U.S. at 468*.

When a theory makes *little* economic sense, the plaintiffs burden of production is higher. See, e.g., *Merck-Medco Managed Care, Inc. v. Rite Aid Corp., 22 F. Supp. 2d 447, 458 (D. Md. 1998)* (considering whether group boycott theory made economic **[*37]** sense in context). "If the plaintiff's theory is economically *senseless,* no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak Co., 504 U.S. at 468-69* (emphasis added). Similarly, a plausible theory, but nothing more, will not suffice to create a triable issue. See See *Matsushita, 475 U.S. at 597 n.21*. Ultimately, the Court "must ascertain whether [Plaintiff has] presented evidence that is sufficiently unambiguous showing that the Defendants conspired." *InterVest, 340 F.3d at 160* (internal quotations and citations omitted).

1. Economic Theory [11]

[*38] The Court turns first to the vigorously debated issue of whether Plaintiff's theory makes economic sense. Defendants argue that they would have no motive to participate in a group boycott because they lack the power to raise prices or to decrease output in the downstream market. Dr. Wiggins explains that, absent a competitive benefit, the risk of antitrust liability would make it irrational for service centers to collude. Wiggins Report P 117, at 40. In its Response, Plaintiff argues that the Defendants were not attempting to maintain supracompetitive prices but rather to avoid price cutting and to maintain their respective market share. It describes the conspiracy as a "joint campaign . . . to preserve the allocation and price structure in the industry by making it clear to the world that new entrants are not acceptable, and savaging any who dare try to enter." Pl.'s Resp. at 86-87. However, notwithstanding the allegations that Defendants were concerned about prices and market allocation, Plaintiff does not allege that the group boycott was formed to enforce a separate price-fixing or market allocation agreement. Cf. *Rossi, 156 F.3d at 472* (explaining that group **[*39]** boycott was motivated to destroy a competitor who would not cooperate in effort to raise prices above their competitive levels). Nor is there any evidence of collusion on supply or price. See Murry Dep. at 204-05 & 211-12. To the contrary, there is ample evidence of fierce competition in the downstream market and among the Defendants themselves. See id. at 214-15 (agreeing Defendants competed "hammer and tongs"); Pl.'s Ex. 9 (Champagne Dep.) at 261-62. During his deposition, Dr. Murry begrudgingly agreed that, absent collusion on price and assuming a strict theoretical microeconomic interpretation of the market, colluding service centers attempting to keep out a new entrant would not achieve any "sustained benefit." Murry Dep. at 216-24. The significance of that concession, with its caveats, is not entirely clear.

Nonetheless, Dr. Murry was also unwilling to opine as to whether any Defendant had sufficient market power (in the upstream market) to influence the mills. He was unsure whether the biggest Defendants could *not* affect price but made no effort to calculate the market share among the service centers purchasing from the mills. Murry Dep. at 173 & 211. This uncertainty **[*40]** is particularly distressing because Plaintiff's theory is premised on the idea that the Defendants needed to work together in order to reach all of the domestic mills (to accomplish the alleged objective of destroying Plaintiff). [12] In addition, because the different mills produce different products, and because

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[11] In its Response, Plaintiff cites authority for the proposition that when the alleged conduct is "facially anticompetitive and exactly the harm the antitrust laws aim to prevent, no special care need be taken in assigning inferences to circumstantial evidence." Pl.'s Resp. at 82-83. However, ***HN28***[] ambiguous evidence, that is, evidence that is equally consistent with independent as with concerted action, still cannot reasonably support an inference of a conspiracy. Thus, notwithstanding the plausibility issues identified below, the Court would be unwilling to characterize the Defendants' actions, on this record, as facially anticompetitive. See *InterVest, 340 F.3d at 163*. To do so, would risk allowing unsupported group boycott allegations to pass summary judgment without any evidentiary support.

of customer preferences, it is not clear whether a smaller, more strategically designed group could have been formed to accomplish the alleged objective. Certainly, what Metalwest contributed to the "campaign" is not readily apparent.

Under the circumstances, the Court cannot help but conclude that, at a minimum, Plaintiff has failed to substantiate its claim that its group boycott **[*41]** theory is economically sound. Cf. *Mitchael, 179 F.3d at 859-60* (agreeing that the plaintiffs theories were unsupported by the evidence). Incredibly, Plaintiff failed to cite any evidence in its Response in support of its theory. Plaintiffs predicament is exacerbated because, to the extent that it might have wanted to rely on Dr. Murry's report, the Court has determined, by separate order, that those opinions are deficient under *Fed. R. Evid. 702* and would be unhelpful to the jury. Faced with uncontroverted evidence that the benefits of collusion in this instance are outweighed by its risks, the Court would have no qualms granting summary judgment for Defendants on the ground that Plaintiff's theory does not make economic sense.

However, the Court is willing, for the purpose of testing Plaintiff's evidence, to assume that the theory makes "some" sense. With a plausible but weak economic theory, a plaintiff must adduce more than minimal circumstantial evidence. See *Merck-Medco, 22 F. Supp.2d at 459* (explaining that plausible but weak economic theory required more than minimal circumstantial evidence to support an **[*42]** inference of conspiracy). Plaintiff's non-economic evidence is considered below.

2. Non-Economic Evidence

The extensive briefing and number of exhibits in this case, though not unexpected in an antitrust case, is considerable. In an effort to duly consider each piece of evidence and mindful that liability must be established for each Defendant, the Court has carefully sifted through the record. Although the following discussion invariably focuses on particular statements or actions, the Court is not, as Plaintiff cautions against, tightly compartmentalizing the evidence or, more generally, losing the forest for the trees. Moreover, although the Court does not weigh the evidence or make credibility determinations, it is required to determine what inferences are reasonable as a matter of law. *Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1304 (11th Cir. 2003)*. [13]

[*43] In a nutshell, Plaintiff's circumstantial evidence of a conspiracy consists of: the threats that Commonwealth would lose business from more than one service center because of its relationship with Plaintiff (discussed above); complaints or threats by each of the Defendants to one or more of the leading mills regarding Plaintiff; buy-out offers by two of the Defendants; the unauthorized presence of two of the Defendants' representatives in Champagne Metals' plant; EMJ's drastically reduced price quote to a customer for which Plaintiff was doing some sample work; a Metalwest representative's statement to a customer that Plaintiff could not secure Ormet products; and EMJ's refusal to sell its cut-to-length ("CTL") line directly to Plaintiff after agreeing to do so. Plaintiff contends that this evidence, when viewed against the backdrop of service centers' historic hostility towards new competitors,

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[12] Plaintiff also contends that collective action was necessary because of the risk associated with moving business or threatening mills. Because that argument attempts to undercut the Defendants' contention that their complaints and threats were consistent with independent business judgments, it is addressed more fully below.

[13] The Fifth Circuit explains:

HN29[] In passing on motion for summary judgment, even where the underlying facts are undisputed, it is hornbook law that the court must indulge every Reasonable inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do. If a frog be found in the party punch bowl, the presence of a mischievous guest but not the occurrence of spontaneous generation may reasonably be inferred.

A T & T v. Delta Communications Corp., 590 F.2d 100, 101-02 (5th Cir. 1979).

tips the balance towards a conspiracy being the more likely explanation for Defendants' actions than their making similar business judgments independently. For the reasons set forth below, the Court does not agree.

a. A "Mature Conspiracy"

The Court begins with the notion of a "mature **[*44]** conspiracy" or established industry doctrine briefly described above. In fleshing out this idea, Plaintiff argues:

> Champagne does not contend a concerted plan of action had to be newly created, specifically in response to Champagne's attempt to start a new aluminum service center, and requiring extended meetings, discussions, or correspondence among the existing service centers and mill suppliers. Although there have been some consolidations or changes in corporate form over the years, the major players in the aluminum service center industry have been in place for many, many years. This mature industry has begotten a mature conspiracy, in which there is little need for direct discussions, let alone face to face meetings, to enforce behavior which has been fully understood and repeated for decades. The evidence which has been uncovered here, shows that spoken reminders--or what Defendants euphemistically would refer to as "buzz" in the industry--together with the occasional withholding of business or transfer of mill orders when a reminder is ignored, are more than sufficient to assure each participant that new entrants will be denied access to the same sources of mill supply. **[*45]**

Pl.'s Resp. 77-78 (footnotes omitted); see also Pl.'s Resp. at 71 (referring to the established doctrine that "new entries were not allowed among the ranks of aluminum distributors").

Whatever evidentiary value this history may have, Plaintiff has offered insufficient evidence that the "mature conspiracy" is itself a conspiracy for *Section 1* purposes. Plaintiff suggests that it is decades old, includes not only those service centers interested, like Plaintiff, in courting the horse trailer business, but at least a significant number of the many other service centers currently in existence, and has followed the major mills through their many "permutations." To borrow from the Third Circuit, "it stretches credibility to suggest that they all agreed on rules' in a manner approximating an illegal conspiracy." *InterVest, 340 F.3d at 162*. Plaintiff offers anecdotal evidence that service centers have complained in the past, not just about new entrants but about each other, and that mills "fear" their distributors. See Pl.'s Resp. P 24, at 11-12 (recounting industry "stories" of existing distributors pressuring mills in the past). Furthermore, the Court is **[*46]** invited to see a conspiracy at work because only two "green-fielding" service centers have succeeded in the last twenty years. Given the highly competitive nature of the service center business, as well as the mills' consolidation of their distribution networks and the financial difficulties affecting even established mills and service centers in recent years, those numbers are far from striking. See Wiggins Report PP 51-54, at 16-17; Murry Dep. at 185-87 (agreeing that given a competitive industry without super competitive profits it would be improper to infer that barriers or deterrents exist simply because there is no entry) & 209.

Finally, even a "good ol' boy" business in which service centers are proprietary about their mill relationships should not be heedlessly labeled an "established doctrine" against new entrants. As additional support for its characterization of service centers as a powerful club or force over mills, Plaintiff refers to testimony from Mike Champagne and Lewis Krausse. Mike Champagne testifies that he "knew that new service center entrants were unwelcome and that the major service centers exercised leverage over the mills to dictate to whom they sold" **[*47]** and "it was common knowledge … that [independent service centers could not enter the market] because the major service centers controlled the mills and did not allow new entrants." Pl.'s Ex. 1 (Champagne Aff.) P 2, at 1. Similarly, Louis Krausse recounts his own difficulties securing mill recognition for Professional Metals (an independent service center ultimately acquired by Metals USA) and explains his view that a mill had to have "the blessing of the other service centers" before it recognized a new distributor. Pl.'s Ex. 19 (Krausse Dep.) at 29-30. [14]

This "lay opinion" evidence is unavailing. The perception that service centers controlled the mills, that mills needed the blessing of their service center customers, or even that the service centers were a "club" is circumstantial

[14] The Court considers this evidence as Mr. Krausse's opinion based on his twenty-some year experience in the industry, rather than as repeating what unidentified mill representatives had actually told him in the past.

evidence. **[*48]** [15] ***HN30***[] Even a Defendant's reference to "the rules" or to *its* agreement with competitors is not "smoking gun" evidence of a conspiracy if there is an alternative explanation for the reference. See *Richards, 810 F.2d at 902* (recognizing alternative explanations for defendant's admission that there was a rule or gentlemen's agreement against back solicitation); *InterVest, 340 F.3d 144 at 162-63* (construing reference to "the rules" as a reference to the operation of the bond market as a whole, rather than an agreement to unreasonably restrain trade). Here, there is evidence already in the record that the mills considered the reaction of their existing service centers in deciding whether to recognize a competing service center. See, e.g., Pl.'s Ex. 8 (Campbell Dep.) at 82-84. That admission is neither surprising nor suggestive of a conspiracy. There is also considerable evidence to the effect that mills did not afford undue weight to distributor complaints. See, e.g., id.

[*49] Thus, the probative value of Champagne's and Krausse's observations, when considered in context, is minimal. This is especially so with respect to Mike Champagne's testimony. To the extent that he recognized that new entrants were not allowed but considered himself exempt because of his good relationships and because EMJ was exiting the horse trailer business suggests, at a minimum, that the "rules" were not as rigid as Plaintiff now contends. See Pl.'s Ex. 1 (Champagne Aff.) PP 3-4, at 1. There is simply insufficient evidence that the entire U.S. aluminum industry adheres to strict rules designed to artificially limit the number of service centers that can compete. See *InterVest, 340 F.3d at 149* (refusing to believe that the entire bond market--including thousands of broker--dealers trading various types of securities--can fairly be described as a conspiracy).

Nevertheless, it appears that Plaintiff offers this history as a surrogate for an explicit agreement or at least as a kind of "plus factor" to shade otherwise ambiguous conduct or substitute for the lack of evidence of any communication. ***HN31***[] Tacit agreements, although within the scope of *Section 1*, are of **[*50]** questionable viability. See *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002)*, cert. denied, *537 U.S. 1188, 154 L. Ed. 2d 1019, 123 S. Ct. 1254 (2003)* (noting general belief that an express, manifested agreement involving actual, verbalized communication must be proved); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 780 (7th Cir. 1999)* (describing tacit agreement argument as "novel" and requiring the advocate to offer explanation and support). Absent any persuasive argument by Plaintiff on this point, the Court requires evidence tending to establish an *explicit* agreement. [16] **[*52]** Likewise, even if there were evidence that any Defendant had participated in a prior conspiracy, the Court does not agree that past collusion makes current collusion more likely than not. Compare *Williamson Oil Co., 346 F.3d at 1317-18*, aff'g *Holiday Wholesale Grocery Co. v. Philip Morris Inc., 231 F. Supp. 2d 1253, 1305 (N.D. Ga. 2002)* (discounting tobacco industry's history of collusion), with *In re High Fructose Corn Syrup Antitrust Litig, 295 F.3d 651* (finding company's price fixing agreements **[*51]** related to other products relevant). Here, there is no admissible evidence that any of the Defendants participated in a larger, concerted effort

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[15] Elsewhere, Plaintiff refers to John Guest's testimony about the "rules of the game" which require a service center to be a member of a "club" before it would be recognized by a mill. The Court has been unable to locate that testimony in the excerpted deposition transcript. Plaintiff cites to pages 9 and 10 in its motion in limine response, but those pages were not included as part of the summary judgment materials. See Pl.'s Resp. (Dkt. No. 260) at 16. The memo from Mr. Guest recommending that Alcoa not recognize Champagne Metals, which is attached as summary judgment evidence, may lend support to Plaintiff's theories about a club and rules, but it does not specifically employ such terms. See Pl.'s Ex. 57 (Guest Memo) (identifying Champagne Metals as a competitor of VMG, RASCO, and Ryerson "with respect to market coverage" and noting, "Ideally, [Champagne Metals] would be a location to recognize, if one of our existing distributors acquired them."). Regardless, such evidence is inconclusive as to the critical issue of whether a long- standing agreement or understanding existed among service centers and would not alter the conclusion reached above.

[16] Because Plaintiff never directly asserts that the Defendants engaged in a tacit agreement, the Court is loathe to construct an argument on its behalf. Nevertheless, the Court is mindful that the Tenth Circuit has given tacit agreements at least a passing nod. In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 963 (10th Cir. 1990)*, the Court observed that a challenged *Section 1* agreement "need not be in writing or even be explicit." However, except for that single sentence, which was unrelated to the issues on appeal, the Court is not aware of anything to suggest that the Circuit's views are contrary to those identified above. Thus, had Plaintiff intended to pursue a tacit agreement theory, it should have done so explicitly and provided argument and authority for that result in addition to the colorful references to history.

to keep out entrants in the past. The only evidence possibly linking any Defendant to this mature conspiracy is their actions regarding Plaintiff. [17]

Notwithstanding its protests to the contrary, Plaintiff's strongest evidence of a conspiracy is that all of the Defendants complained about Plaintiff to mills and/or threatened to move or to withhold business from mills that dealt with Plaintiff. Debbie Veale's statement to Bill Thomas and Phil Wiley's comments to Matthew Zundel suggest that at least EMJ and Ryerson recognized that other similarly situated service centers might react negatively to Commonwealth's recognition of Plaintiff. However, ***HN32***[] "conscious parallelism," without more, is insufficient to support a reasonable inference of agreement or concerted action. Simply put, a defendant may, in pursuing its own business interests, take parallel or "synchronous" (*Williamson Oil Co., 346 F.3d at 1302*) actions with the expectation or belief that its competitors will do the same without violating *Section 1*. See, e.g., *Merck-Medco, 22 F. Supp. 2d at 469 n.50* **[*53]** (explaining that conscious parallelism occurs when a company predicates a decision on the conduct of its competitors).

"Parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." *Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174, 2003 WL 22304824, at *4 (S.D.N.Y. 2003)*. Thus, there must be some "plus factor" or " additional evidence from which an understanding among the parties may be inferred.'" *Monument Builders of Greater Kansas City, Inc. v. Am. Cemetery Association of Kansas, 891 F.2d 1473, 1481 (10th Cir. 1989)* (quoting 2 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 6.01[3][a][ii] at 6-36 (1989)). The additional evidence might be a showing that actions were against individual business interests (i.e., contrary to a good faith business judgment) or that there was a strong motive to conspire. See *Monument, 891 F.2d at 1481 (10th Cir. 1989)*.

Plaintiff attempts to discredit the Defendants' representations that they each acted independently **[*54]** and in their own profit-maximizing interest when they complained to or threatened mills. Plaintiff makes two arguments, notably without any cited support. See Pl.'s Resp. at 86. First, a rational service center would not move business away from the vendor-of-choice for purely retaliatory reasons and thereby disadvantage itself in the downstream market, as compared to non-retaliating service centers. Second, a service center's risk of spoiling its mill relationships with threats and incivility is lessened when other service centers behave similarly. Thus, the critical question is whether unilateral action was so risky that it would not have been rational for any service center, acting alone, to have acted the way it did. Stated differently, are Defendants' seemingly independently motivated complaints and pressuring of mills explicable only if there were an agreement that all would act?

Given the highly competitive, low margin nature of downstream market, Plaintiff s first argument has initial appeal. However, there is minimal evidence that Defendants actually followed through with their threats. See Pl.'s Ex. 25 at 46-48 (Pierce Dep.) (explaining that he was unsuccessful "in really **[*55]** increasing" sales with Ryerson after Wylie's. warning that Commonwealth's recognition of Champagne Metals was not good for the industry and would cost Commonwealth potential customers); Pl.'s Ex. 13 (Fruhwirth Dep.) at 76-79 (suggesting that Commonwealth was subjected to verbal abuse and "punished" but unable to confirm any lost business as a result); Pl.'s Ex. 43 (Zundel Dep.) at 57 (explaining that Commonwealth did not get VMG's Sooner Trailer business); but see Pl.'s Ex. 75 (showing that VMG/Integris remained a major Commonwealth customer). Moreover, because there are a number of unknown variables that would affect whether those isolated instances were, in fact, contrary to a Defendant's business interests, Plaintiffs argument fails.

Although there is considerably more evidence of Defendants complaining and/or threatening to relocate or to withhold business, Plaintiff makes no effort to quantify this risk and only haphazardly refers to the Defendants' industry expert John Campbell's admission that threats involve a "certain risk." Pl.'s Resp. at 86. Again, the Court recognizes that incivility is seldom appreciated or rewarded in any context. Yet, the evidence suggests that **[*56]** the Defendants faced little danger of harming, in any appreciable sense, their mill relationships and, even so, those risks were outweighed by the possible benefits. All parties seem to agree that threats and complaints are rather

[17] Plaintiff's evidence regarding Ryerson's alleged complaints to Alcoa regarding EMJ 15 years ago is hearsay. See Pl.'s Ex. 31 (Stevenson Dep.) at 20, 183-93 & 286-87.

common and that everyone complains about everyone else. See, e.g., Pl.'s Resp. P 24, at 11-12; Samuel's Ex. 37 (Mize Dep.) at 112-116 (explaining that Mike Champagne threatened to cause Sundowner Trailers to move its business from Alcoa if Alcoa did not recognize Champagne Metals as a distributor). More importantly, the experts, even Plaintiff's Dr. Murry, agree that it would not be irrational for a service center to threaten its mills regardless of whether other service centers did the same. Murry Dep. at 209 (agreeing that he could not say that any particular threat by any of the Defendants individually would be irrational); Wiggins Report P 116, at 40 & P 125, at 43 (explaining that the Defendants' conduct was consistent with individual profit-maximizing behavior).

Without some additional evidence tending to show that Defendants were not acting independently, Plaintiff has not made a threshold showing that a conspiracy existed. The Court considers **[*57]** the evidence with respect to each Defendant to determine whether such additional evidence is present.

b. EMJ

Plaintiffs evidence that EMJ participated in a conspiracy to drive Champagne Metals out of business and to send a message to other potential entrants consists of EMJ's refusal to sell its CTL line directly to Champagne Metals after stating that it would likely do so, complaints by EMJ representatives to Commonwealth in 1996 and 1997, and EMJ's attempt in April 1999 to ensure that Auto Crane did not move its business away from EMJ by quoting drastically reduced prices. [18] In response, EMJ explains that it never had a formal agreement to sell its CTL line to Champagne Metals and that it had no motivation to join an anti-Champagne Metals conspiracy because it left the aluminum sheet market in April 1997. Furthermore, EMJ argues that its complaints to Commonwealth are insufficient to raise an inference of a conspiracy. Although the Court accepts Plaintiff's contention that EMJ had a motive to conspire because it continued to compete with Champagne Metals in some regard (see Pl.'s Resp. at 7 n.6), Plaintiff's evidence nonetheless falls short.

[*58] i. Complaints by EMJ Representatives

Plaintiff presents evidence of complaints by two EMJ Representatives to Commonwealth regarding Plaintiff. Debbie Veale's statements to Bill Thomas at the time Plaintiff was setting up its business were summarized above. In brief, she expressed displeasure that Commonwealth was recognizing Plaintiff and asserted that she "had been in contact with her counterparts [at] the National Association of Aluminum Distributors group . . . and that they were not at all happy about [Commonwealth recognizing Plaintiff] and they had more clout and [Commonwealth] . . . would have to listen to them." Pl.'s Ex. 34 (Thomas Dep.) at 79. In addition, Max Rigdon, a sales manager at EMJ, allegedly told Thomas that he wished Commonwealth would not sell to Plaintiff. Id. at 85. However, Rigdon's comments were not intimidating, and he was "nice" about the situation. Id.

As already explained, Ms. Veale's reference to her counterparts' clout with Commonwealth is not direct evidence of a conspiracy. There is a reasonable, legal interpretation for what was said, which, when viewed in context, seems as plausible as the interpretation advocated by Plaintiff. **[*59]** Even her exploitation of Commonwealth's concern about other lost business does not tend to establish that the Defendants conspired. ***HN33***[] "Mere complaints are not sufficient proof [of a conspiracy] where the complaints are equally consistent with both an independent and a collusive interpretation." *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1582 (11th Cir. 1988)*. At most, her statements are evidence that EMJ (or at least Debbie Veale on EMJ's behalf) was discussing Champagne Metals with other competitors and that none were happy about it. [19] However, Veale testifies that she did not know who at the Defendants were her "counterparts" and did not discuss Champagne Metals with anyone at those companies. EMJ's Ex. 6 (Veale Aff.) PP 3-4. Absent evidence from Plaintiff that Ms. Veale was referring to the Defendants, the

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[18] Statements by Bruce Colin and Ron McClure regarding Kaiser's concern that EMJ would retaliate if Kaiser sold to Champagne Metals are hearsay and inadmissible to show that EMJ actually threatened Kaiser. Similarly, Plaintiff has offered no hearsay analysis with respect to EMJ's alleged call to Commonwealth reporting that Samuel would not be selling its CTL line to Champagne Metals as described in Mike Champagne's affidavit. See Pl.'s Ex. 1 (Champagne Aff) P 5, at 1-2. Therefore, the Court will not consider that testimony.

[19] The Court treats Ms. Veale's reference to her counterparts' unhappiness as non-hearsay for purposes of summary judgment.

probative value of her statement is greatly reduced. Moreover, to the extent that Ms. Veale was threatening Commonwealth, it was short-lived. According to Mr. Thomas, EMJ continued to purchase from Commonwealth and his subsequent conversations with Ms. Veale were "strictly business." Pl.'s Ex. 34 (Thomas Dep.) at 84.

[*60] Max Rigdon's statements are even less suggestive. According to Bill Thomas, Mr. Rigdon expressed his wish that Commonwealth would not sell to Champagne Metals pleasantly. Because these statements are not inconsistent with EMJ acting independently, Plaintiff must identify additional circumstantial evidence that would tend to establish that a conspiracy is a more likely explanation for EMJ's actions.

ii. The Auto Crane Incident & EMJ's Refusal to Sell Its CTL Line

Plaintiff identifies two other pieces of evidence to show that EMJ acted to thwart Champagne Metals' success. The first relates to EMJ's alleged promise to sell Mike Champagne its CTL line in 1996. Pl.'s Ex. 1 (Champagne Aff.) P 3, at 1. EMJ contends that the agreement to which Mr. Champagne refers was based on an EMJ employee's speculation that he was 99% sure that EMJ would sell to Mr. Champagne. EMJ's Reply at 1-2 (citing Champagne Dep. at 904). Although Plaintiff ultimately purchased the line at a higher price and through a broker, there is nothing about this incident to suggest that EMJ was working in tandem with the other Defendants to drive Plaintiff out of business. See also Wiggins Report P 167, at 57 **[*61]** (citing EMJ documents as showing that EMJ received a higher price for its CTL line from the broker than Mike Champagne had offered to pay).

Moreover, EMJ's aggressive tactics to please a customer being courted by Plaintiff are equally inconclusive. In April 1999, Auto Crane, an EMJ customer, asked Champagne Metals to do a test cut on a part in order to evaluate its performance. [20] Pl.'s Ex. 2 (Holloway Aff.) P 2, at 1. When EMJ learned that Plaintiff was in contact with Auto Crane, Chris Mathey of EMJ called Theresa Holloway, the metal buyer for Auto Crane, and "asked what EMJ was doing wrong, and why EMJ was not getting the business that Champagne Metals apparently had." Id. PP 1 & 3, at 1. Ms. Holloway's subsequent attempt to confirm EMJ's availability and prices was met with drastically reduced pricing. Id. P 4, at 1. John Reid, an EMJ salesperson, confirmed that he was told to do whatever it took to ensure that Champagne Metals did not get Auto Crane's business. Id. P 6, at 2. In referring to Mr. Champagne, Mr. Reid added that he couldn't "stand that little son of a bitch." Id.

[*62] Both the Auto Crane incident and EMJ's refusal to sell its CTL to Plaintiff suggest that EMJ was protective of its customer base and, possibly, hoping not to give Champagne Metals any competitive advantage or assistance. Such sentiment is hardly unexpected or contrary to legitimate business decision-making, especially if EMJ continued to compete with Plaintiff. Even when considered in conjunction with its complaints to Commonwealth in 1996 and 1997, Plaintiff's evidence against EMJ is wholly consistent with independent business practices and does not tend to establish the existence of a conspiracy or EMJ's participation in it.

c. Ryerson

Plaintiff's evidence that Ryerson participated in a conspiracy includes complaints to Commonwealth about its relationship with Champagne Metals, a Ryerson employee's presence in Champagne Metals' plant, and Alcoa's concern that recognizing Champagne. Metals might result in lost business from Ryerson and Integris. [21] Ryerson, in turn, contends that there is no evidence that it participated in any concerted activity regarding Plaintiff. Again, the Court agrees.

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[20] Auto Crane manufactures cranes, crane service bodies, hydraulic air compressors, and crane accessories. Pl.'s Ex. 2 (Holloway Aff.) P 1, at 1.

[21] Craig Colyer's statements to Mike Champagne are hearsay. Plaintiff has not provided an affidavit or indicated that Mr. Coyler would testify at trial about his experiences in the industry and how the "game" works. Moreover, Plaintiff's evidence that Ryerson threatened Alcoa in the past not to recognize EMJ is hearsay. Pl.'s Ex. 31 (Stevenson Dep.) at 20, 183-93 & 286-87. However, Defendants' effort to rely on that evidence to show that the Defendants were adversarial is contrary to their evidentiary objection. Nevertheless, even if stipulated to, its probative value on the conspiracy issue is minimal. Finally, Mr. Champagne's recounting of what Janet Kazinski of Acme Engineering told him is hearsay. Pl.'s Ex. 9 (Champagne Dep.) at 1127-29 (reporting that Ryerson told Acme that Champagne Metals "would not be able to buy metal or compete in that business").

[*63] i. Complaints by Ryerson Representatives

Although Gary Fehr of Ryerson reportedly told Tom Warner that Ryerson wished Commonwealth "had come to [Ryerson] to try to penetrate further in that market," Pl.'s Ex. 36 (Werner Dep.) at 17-18, most of Plaintiff's evidence centers around the statements made by Ryerson representative, Phil Wylie. Wylie was apparently "incredulous" that Commonwealth was doing business with Champagne Metals and apparently had several conversations with Matthew Zundel of Commonwealth, complaining:

> That he felt mainly that the price that Champagne Metals would take to the marketplace would be such that margins as a whole for everyone that needed to compete at that price would compress to such a narrow number that it would be im - impossible to compete and still make a profit.
>
> . . .
>
> He felt that -- he felt that by [Commonwealth's] participation with Champagne Metals, that himself and other potential customers within the industry would find that Commonwealth selling to Champagne, they -- they would find that as, again, not in the best interest of the industry, and would cause other distributors in that area of the country to source their **[*64]** metal from other mill sources, and that by developing a relationship with Champagne Metals, we would be putting other business with other potential customers at risk.

Pl.'s Ex. 43 (Zundel Dep.) at 22-24. No specific customers were mentioned by name. Id. at 24-25.

Later, after Garry Pierce took over Mr. Zundel's accounts, he and Wylie also had an "impassioned discussion" about Champagne Metals. Pl.'s Ex. 25 (Pierce Dep.) at 41-42. Mr. Wiley reiterated his belief that Plaintiff did not meet the distributor criteria, that there was already adequate product coverage, and that the most likely result of recognition would be to bring prices down. Id. at 42. Wiley apparently implied that Commonwealth would find it difficult to sell to Ryerson in the future, and Pierce suggested that he was unsuccessful increasing sales afterwards. Id. at 46-48.

For the reasons already explained, Ryerson's complaints and even a decision not to increase its business with Commonwealth as "punishment" are consistent with Ryerson's independent business interests. Again, like Debbie Veale's statements, Wylie may just as likely have been commenting on the likelihood that other service centers **[*65]** were equally concerned about Champagne Metals when he said that Commonwealth risked losing potential customers because of that relationship. That Wylie referred to the industry in general terms rather than a specific group of current customers does nothing to aid Plaintiff. See *Mitchael, 179 F.3d at 860* (finding common concern about costs inconclusive, even when coupled with information sharing and parallel use of third party review). Moreover, even if Ryerson withheld certain business, it had been a major Commonwealth customer through 2001. See Pl.'s Ex. 75. Thus, notwithstanding its representative's passion, Ryerson's purchasing practices appeared largely unaffected.

ii. Ryerson Employee at Plaintiff's Plant

Additionally, the Ryerson employee speeding away from Champagne Metals' plant (followed by an "embarrassed" call from Ryerson's General Manager) does not indicate that Ryerson was participating in a conspiracy. See Pl.'s Ex. 9 (Champagne Dep.) at 1179-80, 1182-85 & Pl.'s Ex. 16 (Hull Dep.) at 104-08. In Rossi, the monitoring and enforcement evidence supported an inference of conspiracy when viewed together with other evidence (including direct) **[*66]** tending to show that the defendants had conspired to cut off the plaintiff's supply. *156 F.3d at 470*. However, in this case, spying is as consistent with a zealous competitor acting independently as it is with a conspiracy theory.

Alcoa's Concern About Losing Business

Finally, Alcoa's decision-making process about whether to develop a relationship with Champagne Metals does not suggest that its major distributors engaged in a concerted campaign against recognition. John Guest, an Alcoa district manager, was aware that Plaintiff competed with Integris and Ryerson and was concerned that recognizing

Plaintiff would result in a net loss of business. See Pl.'s Ex. 57 (Guest Memo). Specifically, Guest wrote, "Relative to market coverage, [Champagne Metals does] compete with Ryerson, RASCO, VMG and we risk losing more than we would gain." Id. In his deposition, Guest explained that Alcoa had lost business from a disgruntled distributor (i.e., Reliance Steel) years before and that selling to Plaintiff would have been inconsistent with Alcoa's recent consolidation of its distribution network. See Pl.'s Ex. 14 (Guest Dep.) at 92. Moreover, Mr. Guest could not **[*67]** recall any communication between himself and a Ryerson representative regarding Plaintiff. Id. at 104-105.

Regardless, it does not follow from Alcoa's acknowledgment that its distributors could react negatively to such a change that Ryerson and Integris were in cahoots to pressure Alcoa and the other mills into refusing to deal with Champagne Metals. Even in cases of a vertical conspiracy allegation, courts recognize a supplier's right to bow to customer pressure as long as it acts independently. See *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1226 n.4 (10th Cir. 1986)* (permitting a manufacturer to weigh the threat of losing dealer loyalty when making distributorship decisions); *Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 909 (4th Cir. 1986)* (requiring additional evidence of a price-fixing conspiracy even if competing distributor is terminated as a result of complaints that "constitute economic duress, coercion, and threats"). Here, Plaintiff repeatedly disclaims any allegation that the mills were co-conspirators or otherwise complicit in a price maintenance scheme. Thus, even in the aggregate, there is no evidence **[*68]** connecting Ryerson to a conspiracy.

d. Ken-Mac

With respect to Ken-Mac, Plaintiff's evidence of its involvement in a conspiracy consists of complaints to Commonwealth and Ormet, Larry Parsons' threat to stop Champagne Metals, and the attempt to purchase the business in 1999. Like the prior Defendants, Ken-Mac characterizes Plaintiff's case as a composite of ambiguous circumstantial evidence and argues that it, in particular, had no motive to conspire because it made relatively few sales in the region.

i. Complaints to Mills

In 1996, Dean Sturges (then with Ken-Mac) told Bill Thomas that Ken-Mac wished Commonwealth would not recognize Champagne Metals, but was not intimidating. Pl.'s Ex. 34 (Thomas Dep.) at 181-82. Like Max Rigdon's statement discussed above, nothing about Mr. Sturges' comment is extraordinary or indicative of a conspiracy.

However, Plaintiff offers more extensive evidence that Ken-Mac was interested in Ormet's consideration of Champagne Metals as a distributor in 2001 and 2002. [22] Harry Sneigle of Ormet testified that he received innuendos, comments, and posturing from Larry Parsons about Champagne Metals but denied that Parsons specifically pressured **[*69]** him not to recognize Plaintiff as a distributor. Pl.'s Exs. 28 (Sneigle Dep., Vol. I) at 123 & 29 (Sneigle Dep., Vol. II) at 18-19. Mr. Sneigle also had a series of discussions with Clark Borgelt of Champagne Metals in which he attempted to explain Ormet's hesitation in selling to Champagne Metals directly. Mr. Sneigle testified that there was "constant pressure in the marketplace" and that he would have to explain to customers, including Larry Parsons, why Ormet was recognizing Champagne Metals, it if did. Pl.'s Ex. 28 (Sneigle Dep., Vol. I) at 122-23. He also admits that he told Mr. Borgelt that Ormet would be "punished" if it sold to Champagne Metals and, specifically, that "they"ll punish us," but explains that none of the service centers ever threatened to "pull pounds" because of sales to Champagne Metals. Id. at 124; Pl.'s Ex. 29 (Sneigle Dep., Vol. II) at 42. Sneigle confirmed that he proposed that Ormet sell to Champagne Metals through a third party, at least partly to evaluate Champagne Metals as a long-term partner, but that he probably would have stopped the process had there been complaints. Pl.'s Ex. 28 (Sneigle Dep., Vol.I) at 119-121.

[*70] Ormet's Keith Forniss confirmed during his deposition that a key issue in recognizing Champagne Metals was the "potential fallout from Samuel, Metalwest and possibly Ken-Mac." Pl.'s Ex. 53 (Call Report). However, it appears that Mr. Champagne's candid comments about what he considered the "uproar" from competitors may

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[22] Apparently, Ormet had previously considered and rejected Champagne Metals as a distributor in 1998. See Pl.'s Ex. 9 (Champagne Dep.) at 406.

have been the impetus for Mr. Forniss' specific reference rather than his own appreciation of the risks or any communication from the Defendants. See id.

Thus, although Ken-Mac engaged in posturing and innuendo, there is no basis to find that displeasure or complaints escalated to a direct threat. Moreover, even if they had, Ken-Mac would not have been acting against its own interests. Complaints by Ken-Mac to Commonwealth and Ormet were rational expressions of its not wanting another competitor to have relationships with the same mills that it did. To the extent that Ormet was afraid of Ken-Mac "punishing" it for recognizing Champagne Metals, those concerns do not suggest that its distributors were complaining as part of a concerted effort. That Ormet personnel were concerned about losing business from more than one Defendant or referred to them collectively as **[*71]** "they" might suggest that each was complaining but does not tend to show, on this record, that any or all of the Defendants were acting together.

ii. Buy-Out Attempt and Larry Parsons' Comments

Between the time Mr. Sturges expressed his disappointment to Bill Thomas in 1996 and Champagne Metal's 2001 efforts to become an Ormet distributor, Ken-Mac attempted to purchase Champagne Metals. According to Mike Champagne, during the meeting:

> Mr. Parsons made the comment that he would have gotten it done, meaning kept Commonwealth from selling to Champagne Metals. It is common knowledge that Larry Parsons wields substantial power in the aluminum industry. Mr. Parsons further stated that Champagne Metals was the biggest mistake in his career, and that if he would have known about Champagne Metals, it would have been stopped. Mr. Parsons implied that the other service centers had messed up, but he could get everyone together to make it happen. Mr. Parsons also stated that if Ken-Mac owned Champagne Metals, Champagne Metals would have access to domestic aluminum mills, which would affect Champagne's bottom line instantly with a better buying price for aluminum-seven to nine or **[*72]** ten percent better.

Pl.'s Ex. 1 (Champagne Aff.) P 9, at 2.

Plaintiff places significant emphasis on Larry Parsons' statements as suggesting that a conspiracy existed. Although inculpatory as to attempts to disrupt or prevent Commonwealth's dealings with Champagne Metals early on, the comments may show that Parsons intended to form or to join a subsequent effort to stop Champagne Metals. Plaintiff's best argument, it would seem, would be that that implication combined with Ormet's bowing to pressure from its major customers (which included Ken-Mac, Samuels, and Metalwest) tends to establish a conspiracy. Were there more than Mr. Parsons' implications during a buy-out attempt and some evidence of a threat to Ormet (rather than shoptalk and innuendo), Plaintiff might have tipped the balance towards a conspiracy being more likely than not, at least with respect to Ken-Mac. However, given Ken-Mac's comparably low sales in the region and the absence of any strong motive to conspire (detailed above), a finding that such a conspiracy existed would be speculation rather than reasonable inference. See Wiggins Report P 68, at 57-58 (discussing Ken-Mac's sales).

e. Metalwest

[*73] Plaintiff's evidence with respect to Metalwest includes negative statements to Commonwealth and Ormet, Ormet's concern about losing Metalwest's business, and comments to a customer regarding Champagne Metals' ability to secure required products. [23] Metalwest contends that Plaintiffs evidence does not reasonably support an inference that Metalwest joined an existing conspiracy after it entered the aluminum business in 1998.

i. Complaints to Mills

Although Metalwest expressed displeasure regarding Commonwealth's relationship with Champagne Metals, there is no evidence that it was threatening or acting contrary to independent business interests. Bill Thomas explained

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[23] The Court does not consider Clark Borgelt's "belief' that Metalwest probably exerted pressure on Ormet. It is either hearsay or pure speculation.

that he was told, in a non-intimidating way, that Metalwest wished Commonwealth would not sell to Champagne Metals. Pl.'s Ex. 34 (Thomas Dep.) at 104. Pam Fruhwirth of Commonwealth admitted that **[*74]** she told Mike Champagne that "people asked [her] to do something about [Mr. Champagne], and … that pretty much everywhere [she] went people were throwing rocks at him." Pl.'s Ex. 13 (Fruhwirth Dep.) at 65-66. With respect to Metalwest in particular:

> The rock throwing … was more like target practice rather than a buckshot. If there was a specific event, Dean [Sturges] would get, you know, pretty negative about the fact that they were selling--that we were selling [to] Champagne Metals, but I don't know. I would say that on this scale he swung both--you know, went from one extreme to the other.

Id. at 89. By "target practice," she was referring to competitor's displeasure when Champagne Metals received an OEM contract, and "buckshot" encompassed "the general whining about Mike's personality, the fact that we recognized him, the prices that were being sold in the market." Id. at 89-90. However, although he made buying decisions for Metalwest for a time, Mr. Sturges never suggested that he might use his authority to the detriment of Commonwealth, and Ms. Fruhwirth had "zero concern" about losing Metalwest business. Id. at 92-96.

Ormet's Harry **[*75]** Sneigle testified that he received innuendos, comments, posturing and position posturing from Metalwest's Carol McSwain. Pl.'s Ex. 29 (Sneigle Dep., Vol. II) at 18. However, Ms. McSwain apparently told Sneigle, "Harry, it's your business, and you need to do what you want to do with it." Metalwest's Ex. 22 (Sneigle Dep., Vol. II) at 53. Except for a single conversation, Mr. Sneigle heard no other complaints from Ms. McSwain, even after Ormet began selling to Plaintiff through Metal Exchange. Id. at 52-53.

ii. Comments to a Customer and Ormet's Concern

In addition, Plaintiff argues that Metalwest used Plaintiff's supply limitations to secure customers. Dean Sturges admits that he told Mel Pierce of Exiss Trailers that Plaintiff could not supply the requisite painted product because Ormet would not sell painted product to Champagne Metals. Pl.'s Ex. 32 (Sturges Dep.) at 120-21. As his reason, Mr. Sturges described an incumbency practice the gist of which is that mills "protect the people that currently have the business." Id. at 122. Plaintiff does not suggest that Mr. Sturges' comments were untrue. Nor does there appear to be anything about them to indicate an agreement **[*76]** among the Defendants. Plaintiff also cites Ormet's concern about losing business, including from Metalwest. The same analysis set forth above with respect to Ken-Mac applies here.

In sum, Plaintiff fails to show that Metalwest acted in any manner inconsistent with its own best interests. Moreover, Plaintiff offers no explanation why Metalwest, representing such a small share of the market, would be brought into the conspiracy after entering the aluminum business in 1998. Under the circumstances, there is insufficient evidence that Metalwest knowingly joined a conspiracy and acted to further its objectives. See *Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 663 (E.D.N.C. 2003)* (explaining that ***HN34***[] liability for acts of the entire conspiracy accrues only after showing joinder with knowledge of the enterprise and action in furtherance of it).

f. Samuel

Except for the 1996 purchase offer, the evidence against Samuel consists of statements to mills later in Plaintiff's history and two mills' concerns about lost Samuel's business if they recognized Champagne Metals as a distributor. As before, Samuel claims that Plaintiff has insufficient evidence that a conspiracy **[*77]** existed.

i. Complaints to Mills

Plaintiff attaches an October 2000 E-mail to Kevin Yonker of Pechiney Rolled Products from Samuel's Gary Rea inquiring about its recognition of Champagne Metals and forwarding an internal E-mail from Brenda MacInnis to Rea stating in part, "Hope it's not true!" Pl.'s Ex. 62. Later that year, Ms. MacInnis discussed Ormet's potential recognition of Champagne Metals with Keith Forniss, at which time she suggested that Samuel would view the recognition of Champagne Metals negatively. See Pl.'s Exs. 12 (Forniss Dep.) at 46-50 & 48 (12/20/01 E-mail). In internal correspondence, Forniss referred to the potential fallout from Samuel (and Ken-Mac and Metalwest) and cautioned, "this could be a very sticky situation with MacInnis/Samuels. . . . We must tread very lightly on this one." Pl.'s Exs. 12 (Forniss Dep.), 50 (12/6/01 E-mail) & 53 (12/19/01 Call Report).

Paul Sutcliffe of Samuel also testified during his deposition that he was in contact with Ormet representatives during this time regarding its consideration of a Champagne Metals distributorship. Pl.'s Ex. 33 at 71 (Sutcliffe Dep.). Sutcliffe also E-mailed Wayne Basset, President and CEO of **[*78]** Samuel, Son & Co., suggesting, "Perhaps a word with Emmett [Boyle, Ormet's Chairman and CEO] would help?" Pl.'s Ex. 61 (1/21/02 E-mail). However, Mr. Boyle testified that no distributor has ever complained to him or expressed concern about sales to a new customer. EMJ's Ex. 28 (Boyle Dep.).

Viewing all the evidence in the light most favorable to Plaintiff does not support a reasonable inference of conspiracy. ***HN35***[] Pressuring a supplier not to deal with a rival is not actionable under *Section 1* unless the supplier and competitor conspire (which is not alleged here) or a horizontal conspiracy among competitors exists. There is no evidence of collaboration or agreement among the Defendants apart from their similar behavior towards the mills. Without more, a jury could not reasonably find that a conspiracy existed. Moreover, there are also indications that Samuel's animus was not simply the product of concern about Mike Champagne's reputation for aggressive pricing, but involved Plaintiff's courting a Samuel employee and coveting its business. See Pl.'s Exs. 48 (12/20/01 E-mail), 50 (12/6/01 E-mail), 61 (1/21/02 E-mail), 33 (Sutcliffe Dep.) at 76-77.

ii. Early Purchase Offer

[*79] Samuel's purchase offer adds nothing. Mike Champagne testifies that Paul Sutcliffe offered to purchase his business within its first week for "upwards to a million dollars." Pl.'s Ex. 9 (Champagne Dep.) at 257-58. It is not inherently irrational for a company to attempt to purchase a potential rival at its inception, even for an inflated amount. To the extent that Plaintiff is suggesting that Samuel's price (which incidentally was rejected) was too high and contrary to sound business judgment, the Court cannot agree. As it stands, the Court is not prepared to second guess Samuel's judgment or view its offer as indicative of a conspiracy. See *Williamson Oil Co., 346 F.3d at 1310* (warning that prudence must be exercised before labeling a given action as being contrary to the actor's economic interests); *In re Citric Acid Litig., 191 F.3d 1090, 1101 (9th Cir. 1999)*. Consolidation and merger may be common in this industry, for the reasons outlined in the experts' reports or otherwise, but Samuel's failed buy-out attempt does not tend to establish an agreement among the Defendants to drive Plaintiff out of business.

iii. Mill Concern

Again, Keith **[*80]** Forniss' reference to potential fallout from recognizing Champagne Metals as a distributor does not show that the Defendants were complaining or that, if so, they were engaged in a campaign of complaining. Similarly, the fact that Ravenwood (pre-Pechiney acquisition) was concerned about potential loss of Samuel and VMG business and that this concern played a part in its decision not to recognize Champagne Metals as a distributor does not alter the above conclusion. Scott Easter of Ravenwood testified that neither Samuel nor VMG voiced a concern or threatened to move business if sales were made to Champagne Metals. Pl.'s Ex. 11 (Easter Dep.) at 31-33.

g. Integris

Finally, Plaintiff's evidence against Integris consists of threats against Commonwealth, Guy Stoker's presence in Champagne Metals' plant, and mills' concern about potential lost business. Arguing that Plaintiff's evidence is fatally deficient, Integris contends that the only evidence linking it to the alleged conspiracy are threats directed at Commonwealth, which failed to have any effect on the mill's relationship with Champagne Metals.

i. Threats and Complaints to Mills

In 1998 and 1999, VMG's sales manager **[*81]** was particularly vocal about Commonwealth's business relationship with Champagne Metals. Pl.'s Ex. 43 (Zundel Dep.) at 34. The objections included disbelief:

> that Commonwealth would do business with Champagne Metals, that Commonwealth is hurting the amount of business that [it does] with Vincent Metals Goods as a result of doing business with Champagne Metals, and

> referenced several specific pieces of business … that [Commonwealth] would never see that or never have an opportunity to participate in that business with Vincent Metal Goods as long as that relationship with Champagne was in effect.

Id. The particular piece of business in question was with Sooner Trailer. Id. at 56-57. Matthew Zundel believes that VMG sourced the business with Alcan, and, although he did not know Alcan's price, he believes Commonwealth's prices were extremely competitive. Id. at 58-59. Stephen Williamson of Commonwealth also heard comments about market impact and market position from representatives of VGM and RASCO that he characterized as implied threats. Pl.'s Ex. 39 (Williamson Dep.) 19-25, 32.

In 2001, Henry Spies of VMG also told Commonwealth's Garry Pierce that there **[*82]** would be "a price to pay" for selling to Champagne Metals. Pl.'s Ex. 25 (Pierce Dep.) at 58, 84, 119-20. [24] Spies and Al Hunter admit that they expressed concern and were disappointed about Champagne Metals' recognition as a Commonwealth distributor. Pl.'s Exs. 17 (Hunter Dep.) at 19-22 & 30 (Spies Dep.) at 39-40. Pam Fruhwirth also included Mr. Spies and Mr. Hunter among those who were "throwing rocks" at Mike Champagne. See Pl.'s Ex. 13 (Fruhwirth Dep.) at 65, 87-89.

However, since 1996, Integris or its predecessors collectively have been an important Commonwealth customer. See Pl.'s Ex. 75. Notwithstanding these threats, Commonwealth renegotiated its annual supply contract with Plaintiff with favorable pricing. See Integris **[*83]** Reply Br. at 2. Under the circumstances, it hardly seems reasonable to assign much significance to those threats much less to consider them as part of a collective effort.

ii. Monitoring and Mill Concern

Plaintiff's remaining evidence specific to Integris includes VMG's Guy Stoker's presence in Champagne Metals' plant in 1998 and Alcoa and Ormet's concern about lost business. [25] **[*84]** As with Ryerson's alleged spying, Mr. Stoker's unauthorized presence at Plaintiff's facility is not suggestive of a conspiracy. Moreover, Alcoa's concern about jeopardizing its business with Integris and Ryerson was also addressed above. See Ryerson discussion, supra, pp. 45-47. Similarly, it is unnecessary to repeat the analysis regarding Scott Easter's testimony regarding the concern Ravenwood had about recognizing Champagne Metals as a distributor. [26] None of this evidence, viewed in isolation or collectively, tends to exclude the possibility that Integris' predecessors were acting independently. In sum, there is insufficient evidence that Integris or its predecessors participated in a conspiracy to harm Plaintiff with Commonwealth or any other mill.

Conclusion

HN36[] Plaintiff cannot, as a matter of law, survive summary judgment by pointing to behavior as consistent with the Defendants' individual business interests as with a collective effort. ***HN37***[] Defendants' concern about a price-cutting/customer-coveting competitor does not supply a sufficiently strong motive to compensate for the considerable economic evidence that suggests a group boycott would offer few benefits and considerable risk to the Defendants. Furthermore, the failure to achieve the alleged objective is strong evidence that the conspiracy did not exist. See *Matsushita, 475 U.S. at 592*.

[24] The Court considers only statements made before November 2001 that could be characterized as threats in conformity with the hearsay ruling above. Plaintiff explains that Pierce's conversations with Henry Spies and Dave Nuccetelli occurred in mid-2001. Pl.'s Resp. P 59, at 31.

[25] Because Mr. Stoker's alleged statements were not threats, they are not considered under the verbal act exception.

[26] The Court does not consider Alcan documents referring to Rasco and VMG's "displeasure" at Commonwealth's recognition of Champagne Metals for the truth of those references. Pl.'s Exs. 68 & 69. Plaintiff fails to lay a proper foundation for their admission.

Viewed in the light most favorable to Plaintiff, the evidence does not tend to establish that the Defendants agreed to act together, or that their individual actions were likely part of a coordinated effort. In short, **[*85]** Plaintiff fails to rebut evidence that Defendants acted rationally and in accordance with their own profit-maximizing interests or to adduce other evidence that tends to exclude the possibility of independent action. Ultimately, Plaintiff paints a picture of a highly competitive business that is historically inhospitable to new. entrants--one that Mike Champagne not only knowingly entered after more than twenty years in the business but also in which he has managed to build a profitable business at a time when others have failed or suffered financial setbacks. Even when every piece of evidence is considered against the Defendants collectively, Plaintiff fails to offer significant probative evidence that a conspiracy is a more likely explanation for the Defendants' statements and conduct than not. Therefore, summary judgment on Plaintiff's *Section 1* claim is granted in Defendants' favor.

III. *Oklahoma Antitrust Reform Act*

In addition to its *Section 1* claim, Plaintiff argues that Defendants' conduct violated the Oklahoma Antitrust Act. ***HN38***[] Although similar to its federal counterpart in many respects, Oklahoma's statutory regime is unique in that it reaches purely unilateral acts **[*86]** in restraint of trade. *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc., 82 F.3d 1533, 1550 (10th Cir. 1996)*; *79 Okla. Stat. § 203(A)*. [27] Therefore, even absent evidence of a conspiracy, Defendants' independent acts may support state antitrust liability.

A. Unilateral Restraints of Trade

Notwithstanding their extensive briefing, the parties have done little to flesh out arguments made in the context of the federal claim but incorporated and relevant as to the Oklahoma antitrust claim. Specifically, no effort is made to discuss whether a common law continuing violation theory could be a viable exception to the four-year statute of limitations. Absent persuasive argument to the contrary, the Court considers **[*87]** only those acts that could reasonably be considered restraints of trade occurring within the four years preceding the filing of the Complaint. Based on Plaintiffs presentation of the facts, and affording Plaintiff every possible benefit, only Ryerson, Integris, Samuel, Metalwest, and Ken-Mac arguably acted in restraint of trade during that time period. Specifically, those Defendants allegedly pressured or threatened mills not to do business with Champagne Metals.

B. Injury to Competition

However, there is no evidence that those individual acts harmed competition. Defendants' arguments against a rule of reason approach in the context of *Section 1* analysis apply to the state statutory claim with equal, if not greater, force. ***HN39***[] Notwithstanding the Oklahoma Act's more expansive reach already identified, it, like *Section 1*, only applies to *unreasonable* restraints of trade. See *Fine Airport Parking, Inc. v. City of Tulsa, 2003 OK 27, P 13, 71 P.3d 5, 10*; *Harolds Stores, 82 F.3d at 1548*.

> The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public. To amount to an unreasonable **[*88]** restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiffs business. That is, the conduct must have an adverse impact on the competitive conditions in general as they exist within the field of commerce in which the plaintiff is engaged. An antitrust plaintiff must show that the challenged conduct adversely impacts competition in general because the antitrust laws were enacted for the protection of competition, not competitors.

Harolds Stores, 82 F.3d at 1548 (internal quotations and citations omitted).

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[27] The Court notes that the conclusion that the Oklahoma Antitrust Act reaches unilateral acts has not actually been decided by an Oklahoma appellate court. However, it has been so interpreted by the Tenth Circuit and that interpretation is binding on this Court.

In response, Plaintiff argues competition is injured because Defendants' concerted effort to harm it (and the long-standing practice of service centers pressuring mills) deters entry. Plaintiff observes, "Competitors may not concertedly exclude another from their market because they want to keep it for themselves . . . . Freedom of entry is independently an antitrust value. It is entitled to protection irrespective of allocative consequences or impact on output and prices." Pl.'s Resp. at 70-71 (quoting Sullivan and Grimes, The Law of Antitrust: An Integrated Handbook, Boycotts & Other Concerted Refusal **[*89]** to Deal, § 5.8, p. 269 (West 2000)). Dr. Murry confirms that, here, the relevant "competitive harm" would be to other potential entrants in the service center business. Murry Dep. at 192.

Although Plaintiff's recitation of antitrust principles is correct, its theory lacks evidentiary support in this instance. Dr. Murry did not consider to what extent others in the industry were aware of Champagne Metals' supply problems and the Defendants' alleged role in causing those difficulties. Murry Dep. at 181-84. Dr. Murry also could not identify a particular, potential entrant that was discouraged from entering the market because of Champagne Metals' experiences. Id. Regardless of industry rumor and speculation, to the extent that Plaintiff remains in business and continues to grow, whatever theoretical deterrent value Defendants' actions might have had appears lost.

Moreover, Dr. Murry agreed that, in competitive markets in which no super competitive profits are available, the lack of entry is not necessarily evidence of a barrier to entry. Id. at 185-87; see also Wiggins Report P 105, at 35. The evidence available suggests, as discussed in greater depth above, that service **[*90]** centers compete among themselves and against mills for end users and that the products are largely homogeneous, customers are sophisticated buyers, and profit margins are low. Thus, this description of the industry seemingly fits the parameters defined by Dr. Murry. There is no evidence or reason to believe that Defendants could control price or output (Wiggins-Report PP 109-114, at 37-38), yet Plaintiff attempts to argue itself out of this corner. "Defendants' argument that price and output are not affected by their exclusionary conduct depends on the supposed absence of barriers to entry." Pl.'s Resp. at 69. But, again, there is no evidence of any barriers, natural or artificial. There was no effort by Dr. Murry to verify whether Champagne Metals was not actually receiving competitive prices. Murry Dep. at 154-162. Nor is there evidence that any mill or end user would be harmed by Champagne Metals' failure. Id. at 192-93 (explaining that he did not investigate any potential impact on mills) & 191 (explaining that he did not attempt to quantify an impact on customers). [28]

[*91] Finally, and most importantly, perhaps, with respect to the state antitrust claim, Plaintiff offers no argument or evidence regarding what deterrent or anticompetitive effect the Defendants' individual acts had on competition. The evidence in this case stands in sharp contrast to that in Harolds Stores, where the same Dr. Murry had testified that competition was harmed by Dillard's copyright infringement not only because of a free rider concern but also because of Dillard's size. *82 F.3d at 1549*. The net effect was to send "a signal to anybody else that wants to enter this market, that if you come in here, you're going to get squashed because this big company will exercise its power and take your copyrights." Id. Similarly, in Reazin, Blue Shield's threatened termination of its competitor's affiliate hospital excluded competition because it inhibited Kansas hospitals from pursuing alternative delivery systems, which would have benefitted consumers by causing lower future health care costs. *899 F.2d at 966 & 971*. [29] Notably, Blue Shield's size or dominance in the market translated into "clout" over hospitals, giving it the power to exclude competition **[*92]** in this way.

Here, whatever problems Plaintiff has endured in securing necessary aluminum products at "competitive" prices, it has remained in business and experienced continued growth. There is no evidence that any Defendant, as it existed at the time of the alleged restraint, had the ability to influence mills or to deter prospective competitors. See Wiggins Report P 107, at 36 (explaining that Dr. Murry overstated market share by failing to account for competition with mills); Murry Dep. at 211 (refusing to say that any Defendant could alter price in his relevant market). Thus,

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[28] These and additional problems with Dr. Murry's opinions, including those related to his definition of the relevant market, are detailed in the Court's separate Daubert Order.

[29] Blue Cross engaged in a horizontal conspiracy by conspiring with certain hospitals to harm their competitor, another hospital. *899 F.2d at 965*.

Plaintiff has failed to identify evidence of an actual injury to competition attributable to any Defendant. Therefore, summary judgment on the state antitrust claims is granted in favor of all Defendants.

IV. Tortious Interference

Plaintiff has additionally asserted **[*93]** a state-law claim against Defendants for tortious interference with business relations. ***HN40***[] To state a claim for tortious interference, Plaintiff must allege that: (1) Plaintiff had a business or contractual right that was interfered with by Defendants; (2) the interference was malicious and wrongful and was neither justified, privileged, nor excusable; and (3) that Plaintiff suffered damage that was proximately caused by the complained-of interference. *Morrow Dev. Corp. v. Am. Bank & Trust Co., 1994 OK 26 P 10, 875 P.2d 411, 416*.

HN41[] The claim for tortious interference is governed by a two-year statute of limitations. *12 Okla. Stat. § 95(3)*; *Neff v. Willmott, Roberts & Looney, 1935 OK 119 P 10, 170 Okla. 460, 41 P.2d 86, 88*. The limitations period begins to run as soon as the "interference [is] fully accomplished." *Neff, 1935 OK 119 at P 10, 41 P.2d at 88*; see also *Metro Oil Co., Inc. v. Sun Refining & Marketing Co., 936 F.2d 501, 504 (10th Cir. 1991)* (explaining that statute begins to run the day the tortious act occurred). Therefore, the Court will consider only evidence of alleged acts of interference that **[*94]** occurred after April 22, 2000. After a careful review of Plaintiff's evidence, it appears that the alleged acts of interference were directed at Plaintiff's relationship with two mills - Ormet and Commonwealth. [30] As none of these alleged acts involve EMJ, summary judgment for Plaintiff's tortious interference claim against EMJ is granted.

A. Alleged Interference with Plaintiff's Business Relationship with Ormet

Plaintiff's claims for tortious interference with its business relationship with Ormet never gets off the ground because Plaintiff cannot establish that it had a business "right" to a distributorship with Ormet. ***HN42***[] In a claim for tortious interference with a business relationship, the **[*95]** business right interfered with is equivalent to a property right, not an expectation of future profits. *Schonwald v. Ragains, 1912 OK 210 P 4, 32 Okla. 223, 122 P. 203, 205*; *Overbeck v. Quaker Life Ins. Co., 1984 OK CIV APP 44 P 4, 757 P.2d 846, 847-48*, cited with approval in *Gaylord Ent. Co. v. Thompson, 1998 OK 30 P 49 n.96, 958 P.2d 128, 150*.

The claim for tortious interference with prospective business advantage appears to be more appropriate for these facts. ***HN43***[] To state a claim for tortious interference with prospective business advantage, Plaintiff must prove that: (1) it had a valid business relation or expectancy; (2) Defendants knew of the relationship or expectancy; (3) Defendants intentionally and improperly interfered with the relationship or expectancy and such interference was not privileged; (4) this interference caused a breach or termination of the relationship or expectancy; and (5) Plaintiff suffered damage as a proximate result. See *Gaylord, 1998 OK 30 at P 30 n.96, 958 P.2d at 150 n.96*; *Boyle Servs., Inc. v. Dewberry Design Group, Inc., 2001 OK CIV APP 63 at P 6, 24 P.3d 878, 880*; *Overbeck, 1984 OK CIV APP 44 P 4, 757 P.2d at 848-49.* **[*96]**

However, Plaintiff does not ask the Court to construe its claim as one for tortious interference with prospective business advantage. In fact, in its Response, Plaintiff denies that it needs to bring a claim for prospective economic advantage, choosing instead to rely solely on its claim for unreasonable interference with a contract or business right. [31] Pl.'s Resp. at 113. However, under either theory, Plaintiff's claim must fail.

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[30] Although Plaintiff has presented evidence that in July 2000 Alcoa considered designating Plaintiff as a distributor but decided against it, at least in part, because Alcoa stood to lose business from Ryerson and Integris, it did not present any evidence of communication, much less interference by the Defendants.

[31] However, Plaintiff goes onto cite cases that were analyzing claims of tortious interference with prospective business advantage for support that it can state a claim for relief for interference in business relationships that have not been reduced to a contract. From this analysis, Plaintiff does not appear to appreciate the distinction between these two claims. Nonetheless, Plaintiff is unable to state a claim for these Defendants' interference with its relationship with Ormet under either theory.

Plaintiff presented evidence that Ormet received "innuendos and comments and . **[*97]** .. position posturing" from Ken-Mac, Metalwest, and Samuel. Pl.'s Ex. 29 (Sniegle Dep., Vol. II) at 19. However, Ormet's mill representative, Harry Sneigle, testified that none of these Defendants ever threatened to pull their business or punish Ormet if Ormet were to recognize Plaintiff as a distributor. Id. at 42. Ormet considered the innuendos and position-posturing as ordinary business "buzz," or "shoptalk" in which all competitors engage. Id. at 90-91, 96. In addition, Plaintiff has presented evidence that Samuel indicated to Ormet that it would view with disfavor any recognition of Champagne Metals as a distributor. Pl.'s Ex. 12 (Forniss Dep.) at 49-50. However, the evidence indicates that the threat of ramifications stemmed from bad blood between Samuel and Plaintiff; specifically, Plaintiff's courting and hiring away an employee of Samuel's and its desire to take over one or more of Samuel's existing accounts. Pl.'s Exs. 48 (12/20/01 E-mail), 50 (12/6/01 E-mail), 61(1/21/02 E-mail), 33 (Sutcliffe Dep.) at 76-77.

HN44[] Even if these acts were considered "interference," Plaintiff must also present evidence that the interference was *"malicious* and wrongful, *and ...* **[*98]** neither justified, *privileged* nor excusable." *Morrow Dev. Corp., 1994 OK 26 at P 10, 875 P.2d at 416*. It is not necessary to show that these Defendants were actually motivated by ill will to demonstrate malice, but rather that they intentionally committed an unreasonable and unlawful act without justification or excuse. Id. Therefore, it appears that the use of the term "malicious" in this context adds no additional element of proof other than that these Defendants committed the wrongful and unjustified act *intentionally.* These Defendants acted intentionally if they acted with the sole or primary purpose of inflicting an injury by interfering in the business relationship. Id.; *Boyle Servs., Inc., 2001 OK CIV APP 63 P 6, 24 P.3d at 880*.

HN45[] In addition to being malicious, the interference must also be wrongful in either its objective or in the means employed to accomplish the objective. *Gaylord Ent. Co., 1998 OK 30 at P 30 n.96, 958 P.2d at 150*. The interference is wrongful if it was unlawful or unfair or enacted by lawful means without justification. Id. Actions such as "fraud or misrepresentation or physical or moral **[*99]** intimidation or persuasion" may be considered unlawful or unfair. See *Schonwald, 1912 OK 210 at P 30, 122 P. at 210*.

HN46[] It is not unlawful for an entity to use fair and lawful argument and persuasion to interfere with another's contractual relations so long as it was done to protect or better one's own business and not done with the primary objective of destroying honest competition. Id. A competitor may exert economic pressure on or refuse to deal with third persons so long as the pressure is not intended to illegally restrain competition. See *Restatement (Second) of Torts § 768 cmts. e* & *f*. If Plaintiff cannot demonstrate that these Defendants' actions rise to an unreasonable restraint of trade, as a matter of law, it cannot overcome the competitor's privilege on a tortious interference claim. *Krebsbach v. Henley, 1986 OK 58 P 32, 725 P.2d 852, 859*.

Plaintiff has not produced any evidence that suggests that the acts of Ken-Mac, Metalwest, and Samuel in relation to Ormet were anything other than self-protective. Nothing about these Defendants' position-posturing suggests that they were acting with the primary **[*100]** purpose of injuring Plaintiff. Thus, Plaintiff is unable to demonstrate that any alleged interference by these parties was malicious. Further, Samuel's threat to view negatively any recognition of Plaintiff by Ormet is protected by the competitor's privilege. Samuel may threaten or refuse to deal with Ormet so long as Samuel's actions do not rise to the level of an unreasonable restraint on trade. As discussed in the previous sections, they do not. Therefore, Plaintiff's claims against Ken-Mac, Metalwest, and Samuel for tortious interference with Plaintiff's business relationship with Ormet, even if construed as claims for tortious interference with prospective economic advantage, fail as a matter of law. See *Krebsbach v. Henley, 1986 OK 58 at P 32, 725 P.2d at 859*. Accordingly, Ken-Mac, Metalwest, and Samuel are all entitled to summary judgment on Plaintiff's claim of tortious interference.

B. Alleged Interference with Plaintiff's Relationship with Commonwealth

Plaintiff has presented evidence of alleged interference with its relationship with Commonwealth by only two Defendants--Integris and Ryerson. The evidence against both Defendants stems from the deposition **[*101]** testimony of Gary Pierce, a Commonwealth representative. [32] Pierce testified that Henry Spies, of Integris' predecessor, VGM, told him that "there would be a price to pay" for selling to Plaintiff. Pl.'s Ex. 25 (Pierce Dep.) at 58, 84, 119-20. Pierce further testified that, to the extent of his knowledge, Integris has not subsequently reduced its purchases through Commonwealth. Id. at 85. As to Ryerson, Pierce testified that he and Phil Wiley of Ryerson had an "impassioned discussion" and that Wiley felt that the recognition of Plaintiff by Commonwealth would loot the marketplace and bring the prices down. Id. at 41-42. Pierce also testified that while he serviced the Ryerson account, it was not a great account and he was unable to increase the sales. Id. at 47. Pierce felt that this lack of growth in his sales to Ryerson was due, in part, to Commonwealth's decision to continue to recognize Plaintiff as a distributor. Id. at 48.

[*102] Integris' threat that there would be a "price to pay" for Commonwealth's recognition of Champagne Metals is an act of interference. Plaintiff has not suggested that this threat was a threat of physical violence; instead it argues that the threat was one of retaliation against Commonwealth by pulling Integris' business if Commonwealth continued to recognize Plaintiff as a distributor. As previously discussed, a competitor may threaten to, or, in fact, refuse to deal with a third party so long as it does not rise to the level of an unreasonable restraint of trade. As the evidence does not support a claim of unreasonable restraint of trade, it cannot support a claim for tortious interference against Integris and summary judgment is therefore granted.

Similarly, nothing about the impassioned discussion between Ryerson and Commonwealth supports an inference that Ryerson was acting outside its competitors' privilege. Ryerson's concerns that recognizing Plaintiff would result in flooding the market and bring prices down are legitimate business concerns. The fact that Pierce was unable to increase his sales to Ryerson after this discussion does not operate to defeat Ryerson's privilege for **[*103]** the reasons previously discussed. Therefore, Plaintiff's tortious interference claim against Ryerson also fails and Ryerson is entitled to summary judgment on this claim.

CONCLUSION

Accordingly, Defendants' individual motions for summary judgment (Dkt. Nos. 159, 169, 172, 178, 181, and 183) are GRANTED. No genuine issue exists for trial on any of Plaintiff's claims. All pending motions are stricken, as moot. Judgment shall enter forthwith.

IT IS SO ORDERED this 15th day of June, 2004.

Entered in Judgment 6/15/04

JUDGMENT

Upon consideration of the pleadings herein, the Court finds that Defendants' motions for summary judgment (Dkt. Nos. 159, 169, 172, 178, 181, and 183) should be granted, and judgment is therefore entered on behalf of all Defendants and against Plaintiff.

DATED this 15th day of June, 2004.

ROBIN J. CAUTHRON

United States District Judge

Entered in Judgment 6/15/04

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[32] Although there are additional statements made by Integris' predecessors-in-interest which are relevant to this claim, these statements are hearsay and, as discussed above, not subject to the statutory exclusion provided by *Fed. R. Evid. 801(d)(2)*. Therefore, they are not admissible and are not considered.

End of Document

Ass'n of Am. Med. Colleges v. Princeton Review, Inc.

United States District Court for the District of Columbia

June 22, 2004, Filed

Civil Action 03-00716 (HHK)

Reporter

332 F. Supp. 2d 11 *; 2004 U.S. Dist. LEXIS 17458 **; 04 Copy. L. Rep. (CCH) P28,870

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, Plaintiff, v. THE PRINCETON REVIEW, INC. Defendant.

Disposition: **[**1]** AAMC's motion to dismiss counterclaims and to strike affirmative defenses granted in part and denied in part.

Core Terms

misuse, affirmative defense, trade secret, misappropriation, counterclaims, public policy, questions, copyright infringement, testing, Copyright Act, motion to dismiss, unenforceable, confidentiality, preempted, takers, allegations, adhesion contract, unclean hands defense, exclusive right, unconscionable, infringement, monopoly, asserts, argues, holder, affirmative claim, patent misuse, equitable, copying, courts

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss is appropriate only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. A court must presume all well-pleaded factual allegations in the complaint to be true and draw all reasonable inferences from those allegations in favor of the nonmoving party in applying *Fed. R. Civ. P. 12(b)(6)*. In evaluating a *Rule 12(b)(6)* motion to dismiss, the court is limited to considering facts alleged in the complaint, any documents either attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record. Factual allegations in briefs or memoranda of law may not be considered when deciding a *Rule 12(b)(6)* motion, particularly when the facts they contain contradict those alleged in the complaint.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > Adhesion Contracts

Contracts Law > Defenses > Unconscionability > General Overview

HN2[] **Types of Contracts, Adhesion Contracts**

A contract of adhesion is defined generally as one imposed upon a powerless party, usually a consumer, who has no real choice but to accede to its terms. Even if a contract is one of adhesion, it is enforceable unless it is deemed unconscionable upon judicial scrutiny. The party seeking to establish unconscionability must prove not only that one of the parties lacked a meaningful choice but also that the terms of the contract are unreasonably favorable to the other party. A contract is not unconscionable merely because the parties to it are unequal in bargaining position.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN3[] Misuse of Rights, Copyright & Trademark Misuse Defenses

The doctrine of copyright misuse, which has its historical roots in the unclean hands defense, bars a culpable plaintiff from prevailing on an action for an infringement of the misused copyright.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

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

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN4[] Misuse of Rights, Copyright & Trademark Misuse Defenses

The doctrine of copyright misuse forbids the use of a copyright to secure an exclusive right or limited monopoly not granted by the U.S. Copyright Office and which is contrary to public policy to grant. The copyright misuse defense is analogous to the patent misuse defense. Whereas copyright law seeks to increase the store of human knowledge and arts by rewarding authors with the exclusive rights to their works for a limited time, the granted monopoly power does not extend to property not covered by the copyright. Misuse often exists where the patent or copyright holder has engaged in some form of anticompetitive behavior.

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > ... > Equity > Maxims > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN5[] **Maxims, Clean Hands Principle**

The unclean hands defense closes the doors of a court of equity to a party tainted with inequitableness or bad faith relative to the matter in which she seeks relief and derives from the equitable maxim that one who comes into equity must come with clean hands.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

HN6[] **Pleadings, Amendment of Pleadings**

Ordinarily, absent a formal motion to amend the complaint, a court does not treat the contents of an opposition to a motion to dismiss as an amendment to a complaint.

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN7[] **Unfair Competition, Federal Unfair Competition Law**

In trademark law, the mark holder usually does not have the ability to destroy competition. The holder can only keep competitors from using the mark, and, in most circumstances, cannot keep them from selling a directly competing product.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN8[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

The doctrine of unclean hands is recognized only rarely in copyright cases, where the copyright holder's transgression is of serious proportions and relates directly to the subject matter of the infringement action.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN9[] Misuse of Rights, Copyright & Trademark Misuse Defenses

The absence of evidence of an antitrust violation requires a party alleging copyright misuse to show that there has been an illegal extension of monopoly or other violation of the public policy underlying copyright law.

Copyright Law > ... > Elements > Copying by Defendants > Access

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

HN10[] Copying by Defendants, Access

Although dissemination of creative works is a goal of the Copyright Act (the Act), *17 U.S.C.S. § 101 et seq.*, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors. Nothing in the Act prevents an author from hoarding all of his works during the term of the copyright. A copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.

Copyright Law > Constitutional Copyright Protections > First Amendment Considerations

Copyright Law > Constitutional Copyright Protections > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Copyright Law > ... > Ownership Rights > Reproductions > General Overview

Copyright Law > ... > Protected Subject Matter > Limited Protection for Ideas > General Overview

HN11[] Constitutional Copyright Protections, First Amendment Considerations

The *First Amendment* does not require that copyrighted works be published or made available to particular persons. The Copyright Act, *17 U.S.C.S. § 101 et seq.*, gives a copyright holder the exclusive right to determine whether to reproduce or distribute her work. *17 U.S.C.S. § 106*. Copyright law contains built-in *First Amendment* accommodations because copyright law distinguishes between ideas and expression, and protects only expression.

Copyright Law > ... > Elements > Copying by Defendants > Access

HN12[] Copying by Defendants, Access

See *37 C.F.R. § 202.20(b)(4)*.

Copyright Law > ... > Elements > Copying by Defendants > Access

HN13[] Copying by Defendants, Access

See *Cal. Educ. Code § 99162*.

Copyright Law > ... > Elements > Copying by Defendants > Access

HN14[] Copying by Defendants, Access

Arizona's truth in testing law, *Ariz. Rev. Stat. § 15-747(A)*, exempts from its scope any nationally standardized test that is copyrighted and would be deprived of value if the questions or answers become known to pupils before the test. *Ariz. Rev. Stat. § 15-747(B)* prohibits any other activities that would violate the copyright protection afforded by federal law to the copyright holders of the tests.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN15[] Defenses, Demurrers & Objections, Motions to Strike

Fed. R. Civ. P. 12(f) provides that the court may, upon motion of a party or sua sponte, strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from any pleading. Courts disfavor motions to strike. However, such motions should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Trade Secrets Law > Federal Versus State Law > Federal Preemption

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

HN16[] Federal & State Law Interrelationships, Federal Preemption

Preemption under the Copyright Act, *17 U.S.C.S. § 101 et seq.*, has both subject matter and equivalency requirements; to be preempted, state law must not only relate to the type of work protected by copyright law, but it must be equivalent to any of the exclusive rights protected by the Copyright Act. *17 U.S.C.S. § 301(b)(1)*, *(3)*.

Copyright Law > ... > Civil Infringement Actions > Elements > Copying by Defendants

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

HN17[] Elements, Copying by Defendants

The elements of a copyright infringement claim are: (1) ownership of a valid copyright by the plaintiff and (2) copying of the original elements of the copyrighted work by the defendant.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Education Law > Academic Instruction > Standard Achievement Tests

Trade Secrets Law > Misappropriation Actions > General Overview

HN18[] Intellectual Property, Misuse of Rights

See *D.C. Code Ann. § 36-401*.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Acquisition

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Trade Secrets Law > Breach of Confidence > General Overview

HN19[] Copyright Infringement Actions, Civil Infringement Actions

A trade secret misappropriation claim, unlike a copyright infringement claim, requires a showing of improper acquisition of secret material or a breach of confidentiality.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Economic Value

Trade Secrets Law > Protection of Secrecy > Reasonable Measures > General Overview

HN20[] Intellectual Property, Misuse of Rights

See *D.C. Code Ann. § 36-401(4)*.

Business & Corporate Compliance > ... > Contracts Law > Contract Formation > Execution & Delivery

Contracts Law > Statute of Frauds > General Overview

HN21[] Contract Formation, Execution & Delivery

See *D.C. Code Ann. § 28-3502*.

Counsel: For ASSOCIATION OF AMERICAN MEDICAL COLLEGES, Plaintiff: Robert A. Burgoyne, FULBRIGHT & JAWORSKI LLP, Washington, DC.

For PRINCETON REVIEW, INC., Defendant: Jay Ward Brown, LEVINE SULLIVAN KOCH & SCHULZ, LLP, Washington, DC. Roger Lloyd Zissu, FROSS ZELNICK LEHRMAN & ZISSU, P.C., New York, NY.

For PRINCETON REVIEW, INC., Counter Claimant.

For ASSOCIATION OF AMERICAN MEDICAL COLLEGES, Counter Defendant: Caroline M. Mew, FULBRIGHT & JAWORSKI LLP, Washington, DC.

Judges: Henry H. Kennedy, Jr., United States District Judge.

Opinion by: Henry H. Kennedy, Jr.

Opinion

[*13] MEMORANDUM OPINION AND ORDER

Charging The Princeton Review, Inc. ("Princeton Review") with copyright infringement, misappropriation of trade secrets and fraud, the Association of American Medical Colleges ("AAMC"), brings this action alleging that Princeton Review unlawfully compromised the confidentiality and security of AAMC's Medical College Admission Test ("MCAT"). This action is brought under the Copyright Act, *17 U.S.C. § 101 et seq.* **[**2]** Princeton Review asserts two counterclaims, alleging that restrictions AAMC seeks to impose on (1) MCAT test takers and (2) purchasers of released MCAT questions are unenforceable because they constitute contracts of adhesion, violate the *First Amendment* and public policy, and because AAMC misused its copyright. Princeton Review also raises several affirmative defenses.

Before the court is AAMC's motion to dismiss Princeton Review's counterclaims and to strike five of Princeton Review's affirmative defenses [# 10]. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that the motion must be granted in part and denied in part.

I. BACKGROUND INFORMATION

AAMC is a nonprofit education association comprised of medical schools, teaching hospitals, faculty, medical students and residents. AAMC develops, administers, and owns all rights in and to the MCAT, a standardized test taken by applicants to medical and other health professions schools in the United States. Medical school admissions committees use the standardized MCAT score to compare the qualifications of medical school applicants. These **[**3]** committees generally consider the score in combination with other information, such as undergraduate records, references, and personal interviews to make admissions decisions.

AAMC administers the MCAT in April and August each year at test centers throughout the United States. Designed to assess the mastery of certain skills and concepts for the practice of medicine, the **[*14]** MCAT covers basic concepts in biology, chemistry, organic chemistry, and physics; facility with problem solving and critical thinking; and writing skills. The MCAT contains 221 questions in four sections: Verbal Reasoning, Physical Science, Biological Science, and a Writing Sample. With the exception of the Writing Sample, the sections consist of multiple choice questions. According to AAMC, it costs $ 250,000 to develop each MCAT test form.

AAMC registers its MCAT test forms and questions (including the answer choices) with the Register of Copyrights pursuant to the "secure test" regulations issued by the U.S. Copyright Office. *37 C.F.R. § 202.20*. Under the Copyright Act, AAMC has certain exclusive rights with respect to the test forms and the test questions, including the exclusive **[**4]** right to copy, distribute, display, publish and prepare derivative works. *17 U.S.C. § 106*.

AAMC endeavors to protect the secure nature of the MCAT test forms and questions by imposing certain restrictions ("MCAT Prohibitions"). Before administering the MCAT, exam proctors tell test takers that they are not allowed to "duplicate, record, or memorize any part of the MCAT." Compl. P 20. AAMC also requires test takers to write out in longhand and certify by signature on their answer form that they "agree to the conditions set forth in the MCAT Announcement." *Id.* P 21. The MCAT Announcement is a booklet that contains the policies and procedures for taking the MCAT. It contains the following language under the heading "Test Center Regulations and Procedures":

> The MCAT is confidential and contains copyrighted material. All test materials, including test books and answer documents, are the property of the MCAT Program Office and AAMC and must be returned to the test supervisor after each administration. No portion of such materials may be retained by examinees. Pages or covers of test books are not to be torn out of or separated from the test books in **[**5]** any way. Additionally, **test takers are not permitted to duplicate or record (by copying, photographing, memorizing, or any other means) any part of the MCAT.**

Ex. A to PL's Reply at 10 (emphasis in original). At the time of testing, test takers are required to sign a statement agreeing not to "disclose -- in whole or in part -- any exam questions or answers to anyone during or after the exam." *Id.* at 5. The "Who May Register" section of the MCAT Announcement sets forth AAMC's policy that only individuals who are preparing to apply to a health professions school should take the MCAT, absent special permission from AAMC. *Id.* An individual who wants to take the MCAT for reasons other than applying to a health profession school must send a written request to AAMC stating her reason(s) for wanting to take the test. AAMC reviews these requests on a case-by-case basis.

AAMC also sells MCAT practice materials to the public, including copies of previous actual test questions that have been "retired" and are no longer used ("MCAT Released Questions"). Compl. P 50.

Princeton Review is a private corporation that provides test preparation courses and tutoring for post-secondary **[**6]** and graduate admissions tests, including the MCAT. AAMC alleges that Princeton Review arranged to have its employees and/or agents take the MCAT, specifically the April and August 2002 examinations, in order to memorize test questions rather than for the purpose of preparing to enroll in a health professions school. AAMC also alleges that Princeton Review assembled, copied and distributed "tap reports" to its instructors for use in Princeton Review's **[*15]** MCAT preparation classes. Compl. P 33. A "tap report" is a detailed report that allegedly reconstructs the content of the MCAT's questions and answers by compiling the reports of those who memorized sections of the MCAT.

In defense of this action, Princeton Review asserts two counterclaims and nineteen affirmative defenses. In its first counterclaim, Princeton Review claims that the MCAT Prohibitions are unenforceable as to MCAT test takers because they are contracts of adhesion, constitute misuse of copyright, violate public policy and are contrary to the *First Amendment*. In its second counterclaim, Princeton Review claims that the MCAT Prohibitions are unenforceable as to purchasers of MCAT Released Questions **[**7]** for the same reasons.

II. ANALYSIS

AAMC moves to dismiss defendant's counterclaims for failure to state a claim under *FED. R. CIV. P. 12(b)(6)*. AAMC also moves to strike Princeton Review's fifth, seventh, eighth, twelfth, and fourteenth affirmative defenses pursuant to *FED. R. CIV. P. 12(f)*. The affirmative defenses at issue are: (1) that Princeton Review's conduct is protected by the *First Amendment* and principles underlying truth in testing laws; (2) that *Section 301(a) of the Copyright Act*, *17 U.S.C. § 301(a)* preempts AAMC's misappropriation of trade secrets claim; (3) that AAMC's misappropriation of trade secrets claim is barred because it has misused its copyrights; (4) that AAMC's fraud claim is barred because the MCAT Prohibitions are unenforceable contracts of adhesion; and (5) that AAMC's fraud claim is barred by the statute of frauds.

A. Standard for Motion to Dismiss

HN1[] A motion to dismiss is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with **[**8]** the allegations." *Martin v. Ezeagu, 816 F. Supp. 20, 23 (D.D.C. 1993)* (internal quotations omitted); *see* *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)* (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). The court must presume all well-pleaded factual allegations in the complaint to be true and draw all reasonable inferences from those allegations in favor of the non-moving party in applying *Rule 12(b)(6)*. *See* *Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994)*; *Schuler v. United States, 199 U.S. App. D.C. 23, 617 F.2d 605, 608 (D.C. Cir. 1979)* (stating that the court must give the plaintiff "the benefit of all inferences that can be derived from the facts alleged"). In evaluating a *Rule 12(b)(6)* motion to dismiss, the court is limited to considering facts alleged in the complaint, any documents either attached to or incorporated in the complaint, **[**9]** matters of which the court may take judicial notice, *EEOC v. St. Francis Xavier Parochial School, 326 U.S. App. D.C. 67, 117 F.3d 621, 624 (D.C. Cir. 1997)*, and matters of public record, *Marshall County Health Care Authority v. Shalala, 300 U.S. App. D.C. 263, 988 F.2d 1221, 1226 n.6 (D.C. Cir. 1993)*. Factual allegations in briefs or memoranda of law may not be considered when deciding a *Rule 12(b)(6)* motion, particularly when the facts they contain contradict those alleged in the complaint. *Henthorn v. Dep't of Navy, 308 U.S. App. D.C. 36, 29 F.3d 682, 688 (D.C. Cir. 1994)*. In this case, because AAMC seeks to dismiss Princeton Review's counterclaims, the court will treat Princeton Review's Answer and the factual allegations therein the same way it would treat a plaintiff's complaint in the usual motion to dismiss scenario.

B. Counterclaims

AAMC argues that Princeton Review's counterclaims should be dismissed because **[*16]** they fail to state a claim upon which relief can be granted. [1] Both counterclaims will be addressed together because the legal issues presented by AAMC's motion overlap.

[10] 1. Unenforceable Contracts of Adhesion**

Princeton Review alleges that any agreement to the MCAT Prohibitions by test takers, or purchasers of MCAT Released Questions, is not voluntarily given, is unconscionable, and therefore is an unenforceable contract of adhesion.

HN2[] A contract of adhesion is defined generally as one "imposed upon a powerless party, usually a consumer, who has no real choice but to accede to its terms." *Chinnery v. Frank E. Basil, Inc. , 1988 U.S. Dist. LEXIS 19438, 1988 WL 4803, at *1 n.2 (D.D.C. Jan. 13, 1988)*. Even if a contract is one of adhesion, it is enforceable unless it is deemed unconscionable upon judicial scrutiny. *See* *Smith, Bucklin & Assocs., Inc. v. Sonntag, 317 U.S. App. D.C. 364, 83 F.3d 476, 480 (D.C. Cir. 1996)*. The party seeking to establish unconscionability must prove "not only that one of the parties lacked a meaningful choice but also that the terms of the contract are unreasonably favorable to the other party." *Id.* (quoting *Riggs Nat'l Bank of Wash., D.C. v. Dist. of Columbia, 581 A.2d 1229, 1251 (D.C. 1990))*. A contract is "not unconscionable merely because the parties to **[**11]** it are unequal in bargaining position. . . ." *RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d. (1981); see also* *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)* ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.").

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[1] Relying on *North Central F.S., Inc. v. Brown, 951 F. Supp. 1383, 1412 n.22 (N.D. Iowa 1996)*, and *EEOC v. Mike Fink Corp.*, 1998 WL 34078445, at *6 (M.D. Term. July 17, 1998), Princeton Review argues that because its counterclaims seek a declaration of rights that are the "mirror image" of the relief AAMC seeks, there is no basis for dismissal of its counterclaims on the face of the pleading. Def.'s Opp'n at 11. Princeton Review's argument is without merit and its reliance on *North Central, 951 F. Supp. at 1412 n.22*, and *Mike Fink Corp.*, 1998 WL 34078445, at *6, is misplaced.

AAMC argues that even if the MCAT Prohibitions are contracts of adhesion, they are not unconscionable. AAMC acknowledges that MCAT test takers may not have a choice as to whether or not they will agree to the MCAT Prohibitions if they desire to sit for the exam. AAMC contends, however, that the MCAT Prohibitions do not unreasonably favor AAMC because they merely ask test takers to take the test for legitimate reasons and to respect the confidentiality of the secure test questions.

The court finds that Princeton Review adequately states a claim that the MCAT Prohibitions are unenforceable and unconscionable contracts of adhesion. Princeton Review alleges that AAMC coerces test takers into agreeing to the MCAT Prohibitions. Answer P 117(a). On a motion to dismiss, **[**12]** the court must make all inferences in favor of the nonmoving party and assume that the MCAT Prohibitions are contracts of adhesion. Although the next step in the unconscionability analysis requires Princeton Review to establish that "one of the parties lacked a meaningful choice but also that the terms of the contract are unreasonably favorable to the other party," *Smith, Bucklin & Assocs., Inc., 83 F.3d at 480* (citation omitted), Princeton Review is not required to prove its claim in the complaint. The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which she bases her claim. *See* *Conley, 355 U.S. at **[*17]** 47* (stating that a claim need not be detailed but simply provide fair notice of the claim and the grounds on which it rests). AAMC's arguments regarding contracts of adhesion go to the merits of the claim, not whether Princeton Review failed to state a claim. Because Princeton Review adequately pled the basis for this counterclaim, the court denies AAMC's motion to dismiss for failure to state a claim on this ground.

2. Copyright Misuse

Princeton Review also brings its counterclaims on the basis **[**13]** of copyright misuse. AAMC moves to dismiss the counterclaims on the grounds that copyright misuse cannot be the basis of an affirmative claim.

HN3[] The doctrine of copyright misuse, which has its historical roots in the unclean hands defense, [2] "bars a culpable plaintiff from prevailing on an action for an infringement of the misused copyright." *Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 972 (4th Cir. 1990)*; *see* *Practice Mgmt. Info. Corp. v. AMA, 121 F.3d 516, 520 & n.9 (9th Cir. 1997)* (adopting the rule that copyright misuse is a defense to copyright infringement); *DSC Communications Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996)* (same); *Nat'l Cable Television Ass'n, Inc. v. Broad. Music, Inc., 772 F. Supp. 614, 651 (D.D.C. 1991)* (stating that "copyright misuse is an affirmative, equitable defense to infringement that has grown out of the recognized doctrine of patent misuse"). ***HN4***[] The doctrine forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which is contrary to public policy to grant. *See* *Lasercomb, 911 F.2d at 977* **[**14]** . The *Lasercomb* court found the copyright misuse defense analogous to the patent misuse defense, which the Supreme Court originally recognized in *Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492-93, 86 L. Ed. 363, 62 S. Ct. 402, 1942 Dec. Comm'r Pat. 733 (1942)*. [3]*Lasercomb, 911 F.2d at 977*. As the first court to extend the rationale beyond patent misuse to copyrights, the Fourth Circuit explained in *Lasercomb* that whereas "copyright law seeks to increase the store of human knowledge and arts by rewarding . . . authors with the exclusive rights to their works for a limited time. . . . The granted monopoly power does not extend to property not covered by the . . . copyright." *911 F.2d at 976*. Other courts have since affirmed that misuse often exists where the patent or copyright holder has engaged in some form of anti-competitive behavior. *See* *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 204 (3d Cir.*

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[2] ***HN5***[] The unclean hands defense closes the doors of a court of equity to a party tainted with inequitableness or bad faith relative to the matter in which she seeks relief and derives from the equitable maxim that one '"who comes into equity must come with clean hands."' *United States v. Philip Morris Inc., 300 F. Supp. 2d 61, 74 (D.D.C. 2004)* (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993, 1945 Dec. Comm'r Pat. 582 (1945))*.

[3] In this landmark patent infringement action, the Supreme Court held that a patent operates to create and grant to the patentee an exclusive right to make, use and vend the particular device described in and claimed in the patent, but does not grant immunity for a monopoly not within the grant. *Morton Salt, 314 U.S. at 491*. Thus, the court stated that use of a patent to suppress the sale of an unpatented article may preclude the patentee from prevailing on an infringement claim because equity requires that a party have "clean hands." *Id. at 491-92*.

2003) (explaining the history and public policy behind the copyright misuse defense); Nat'l Cable Television, 772 F. Supp. at 652 (stating that patent misuse occurs **[**15]** when a patent holder "uses **[*18]** its right to violate the antitrust laws or otherwise abuses the monopoly power granted it by the patent").

[16]** Princeton Review expressly disavows that it is asserting misuse of copyright as a defense to copyright infringement. *See* Def.'s Opp'n at 13. Instead, Princeton Review argues that it can bring an affirmative claim of copyright misuse, relying on *Electronic Data Systems Corp. v. Computer Associates International, Inc., 802 F. Supp. 1463 (N.D. Tex. 1992)*, in which the court permitted the assertion of copyright misuse both as a defense to copyright infringement, and as an independently actionable claim. *Id. at 1466*.

Electronic Data provides scant support for Princeton Review's position because it is distinguishable from the instant case on in several respects. First, Princeton Review is not asserting misuse of copyright as a defense to copyright infringement, but is disputing the enforceability of the MCAT Prohibitions under D.C. law. Second, it appears that the court in *Electronic Data* permitted an independent copyright misuse claim to proceed because the copyright misuse claim alleged violations of *§ 2 of the Sherman Act. Elec. Data, 802 F. Supp. at 1466* (stating that the court would deny the motion **[**17]** to dismiss the plaintiff's copyright misuse claim because the defendant had "failed to establish that [the plaintiffs] copyright misuse claim . . . does not allege violations of *§ 2 of the Sherman Act*"). Princeton Review, however, does not allege any *Sherman Act* or other antitrust violations. [4] **[**18]** [5]

Courts have generally recognized **[**19]** misuse of copyright as a defense to copyright infringement and not as an affirmative claim. *See Schoolhouse, Inc. v. Anderson, 2000 U.S. Dist. LEXIS 22524, 2000 WL 1640081, at *7 (D. Minn. Nov. 8, 2000)* (stating that "abuse of copyright is generally recognized as an equitable defense to a copyright infringement claim and is rarely recognized as an independently justiciable cause of action"); *Sony Pictures Entm't, Inc. v. Fireworks Entm't Group, Inc., 156 F. Supp. 2d 1148, 1167 n.28 (C.D. Cal. 2001)* (noting that to the extent the defendants asserted misuse of copyright, the defendants had to bring such a claim as an affirmative defense, not as a counterclaim), *vacated pursuant to* ***[*19]*** *settlement*, *2002 WL 32387901 (C.D. Cal. Nov 5, 2002)*; *Warner/Chappel Music, Inc. v. Pilz Compact Disc, Inc., 1999 U.S. Dist. LEXIS 17161, 1999 WL 999332, at *6 n.5 (E.D. Pa. Oct. 26, 1999)* (refusing to allow an affirmative claim of copyright abuse to proceed because there was "no authority in [the Third] Circuit for such a claim, and virtually no authority in any Circuit for such a claim either"). These cases, however, do not discuss **[**20]** the rationale for limiting the doctrine of copyright misuse for use as a defense to infringement. Thus, the court will look to cases involving other types of intellectual property in which courts have confined the doctrine of misuse to a defense.

In *Transitron Electronic Corp. v. Hughes Aircraft Co., 487 F. Supp. 885 (D. Mass. 1980)*, the court held that patent misuse was not an actionable tort because it was developed as "an equitable defense, analogous to the clean hands defense, against an infringement action." *Id. at 893*. "That the doctrine does not create an independent

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[4] The court acknowledges that Princeton Review asserts in its opposition that "AAMC seeks to leverage its membership monopoly as well as its monopoly over the [MCAT] to extend its rights beyond those granted to it pursuant to *Section 106 of the Copyright Act*" and "abuses the monopoly power granted by the copyrights." Def.'s Opp'n at 13, 16. However, neither of Princeton Review's counterclaims asserts a violation of ***antitrust law***. ***HN6***[] "Ordinarily, absent a formal motion to . . . amend the complaint, a court does not treat the contents of an opposition to a motion to dismiss as an amendment to a complaint." *Rohrbaugh v. Inv. Co. Inst., 2002 U.S. Dist. LEXIS 13401, 2002 WL 31100821, at *5 n.10 (D.D.C. July 2, 2002)* (citing *Confederate Mem'l Ass'n v. Hines, 301 U.S. App. D.C. 395, 995 F.2d 295, 299 (D.C. Cir. 1993)*; ***Ali v. Dist. of Columbia, 349 U.S. App. D.C. 327, 278 F.3d 1, 8 (D.C. Cir. 2002))***.

[5] Princeton Review refers the court to *Assessment Technologies of WI, LLC, v. WIREdata, Inc., 350 F.3d 640 (7th Cir. 2003)*, in arguing that a copyright misuse counterclaim is not limited to antitrust violations. *Id. at 647* (stating that the argument for applying misuse of copyright beyond the bounds of antitrust is that an "abuse of process" has occurred). *Assessment Technologies*, however, is not analogous to the present case. First, *Assessment Technologies* is a case "about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted, but were not created or obtained by the copyright owner." *Id. at 641*. The instant lawsuit involves AAMC's MCAT test forms and questions, which *are* copyrighted materials. Second, *Assessment Technologies* addresses copyright misuse as a defense to infringement and does not discuss whether the doctrine could be recognized as an independent claim or counterclaim. *See id. at 647*.

cause of action for the alleged infringer is implicit in the black letter statement of the effect of finding patent misuse: 'Misuse of a patent merely suspends the owner's right to recover for infringement of a patent.'" *Id.* (quoting CHISUM, PATENTS 19-91 (1978)). In the context of trademarks, at least one court has rejected trademark misuse as an affirmative defense. *Juno Online Servs. v. Juno Lighting, Inc., 979 F. Supp. 684, 690 (N.D. Ill. 1997)*. In *Juno*, the court noted that an "affirmative claim for patent misuse has a suspect history to begin with" **[**21]** and further stated:

> The fear expressed in cases such as *Morton Salt* is that the holder of a government monopoly will use the monopoly to the detriment of the public by destroying competition. By contrast, ***HN7***[] in trademark law, the mark holder usually does not have the ability to destroy competition. The holder can only keep competitors from using the mark, and, in most circumstances, cannot keep them from selling a directly competing product. Therefore, there appears to be less of a justification for extending a trademark misuse doctrine than there is in the patent area.

Id. Because the policy reasons underlying the development of the equitable doctrine of copyright misuse are grounded in the unclean hands doctrine, permitting copyright misuse as an independent, affirmative claim would be contrary to the purpose of the doctrine. This court has previously indicated that copyright misuse should be used only in narrow circumstances. ***HN8***[] "Unclean hands is recognized 'only rarely' in copyright cases, where the copyright holder's 'transgression is of serious proportions and relates directly to the subject matter of the infringement action.'" *Nat'l Cable Television, 772 F. Supp. at 652* **[**22]** (quoting *Broad. Music, Inc. v. Hearst/ABC Viacom Entm't, 746 F. Supp. 320, 329 (S.D.N.Y. 1990))* (internal citation omitted).

Furthermore, although an antitrust violation is not a "prerequisite to showing misuse," "failure to show [a] violation of the antitrust laws makes it more difficult" for the court to find copyright misuse. *Nat'l Cable Television, 772 F. Supp. at 652*. ***HN9***[] The absence of an antitrust violation requires plaintiffs to show that there has been an illegal extension of monopoly or other violation of the public policy underlying copyright law. *Id.* Princeton Review's counterclaims do not allege an antitrust violation or an illegal extension of monopoly. Indeed, Princeton Review is not a direct competitor of AAMC, but profits from AAMC's development and administration of the MCAT. Although Princeton Review contends that the MCAT Prohibitions are against public policy because they are contrary to the goals of truth in **[*20]** testing laws and the principles of the *First Amendment*, these public policies are not the public policies underlying copyright law. The purpose of copyright law as set out in the Constitution's Copyright Clause **[**23]** is to "promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ." *U.S. CONST. art. I, § 8, cl. 8*; *see also* *Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 432, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984)* ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). In *Stewart v. Abend, 495 U.S. 207, 109 L. Ed. 2d 184, 110 S. Ct. 1750 (1990)*, the Supreme Court stated:***HN10***[]

> Although dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors.

Id. at 228. The Court further stated that "nothing in the copyright statutes would prevent an author from hoarding **[**24]** all of his works during the term of the copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." *Id. at 228-29.* In light of these pronouncements by the Supreme Court, Princeton Review's argument that the MCAT Prohibitions contravene the Copyright Act is without merit. Accordingly, the court concludes that copyright misuse does not form the basis of an affirmative claim and dismisses Princeton Review's counterclaims for failure to state a claim on this ground.

3. *First Amendment* and Public Policy

Princeton Review further claims that the MCAT Prohibitions are unenforceable because they contravene the *First Amendment* and public policy behind truth in testing laws. AAMC argues that its efforts to protect its tests by imposing the MCAT Prohibitions do not violate the *First Amendment* or public policy. The court agrees with AAMC.

a. *First Amendment*

HN11[] The *First Amendment* does not require that copyrighted **[**25]** works be published or made available to particular persons. *Stewart, 495 U.S. at 228-29*. The Copyright Act gives a copyright holder the exclusive right to determine whether to reproduce or distribute her work. *17 U.S.C. § 106*. [6] Thus, AAMC's imposition of the MCAT Prohibitions does not contravene the Copyright Act. The Supreme Court has stated that "copyright law contains built-in *First Amendment* accommodations" because copyright law distinguishes between ideas **[*21]** and expression, and protects only expression. *Eldred v. Ashcroft, 537 U.S. 186, 219, 154 L. Ed. 2d 683, 123 S. Ct. 769 (2003)*; *see* *Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556, 85 L. Ed. 2d 588, 105 S. Ct. 2218* (stating that "copyright's idea/expression dichotomy strikes a definitional balance between the *First Amendment* and the Copyright Act by permitting free communication of facts while still protecting an author's expression") (internal quotation marks and citation omitted). In addition, the *Eldred* Court stated that the "fair use" defense in copyright **[**26]** law, which permits the public to use expression itself in certain circumstances, further accommodates the *First Amendment*. *Eldred, 537 U.S. at 219*; *see* *17 U.S.C. § 107* ("The fair use of a copyrighted work, including such use by reproduction in copies . . ., for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright."). Therefore, the court does not find that the MCAT Prohibitions violate the *First Amendment* and will grant AAMC's motion to dismiss Princeton Review's counterclaims on this ground.

[27] b. Public Policy**

Princeton Review relies on truth in testing laws from New York, California, and Arizona to argue that the MCAT Prohibitions are unenforceable because they violate public policy. *See* *N.Y. EDUC. LAW § 340 et seq.*; *CAL. EDUC. CODE § 99150 et seq.*; *ARIZ. REV. STAT. § 15-747*. While these laws seek to promote fairness and accuracy in the use of standardized testing, *see, e.g.*, *CAL. EDUC. CODE § 99150*, the court does not find that these public policies render the MCAT Prohibitions unenforceable. In arguing that public policy may serve as grounds for a *First Amendment* claim, Princeton Review misapplies *Warner/Chappel Music*, which holds that a copyright misuse defense may be raised if there is a violation of "the public policy embodied *in the grant of a copyright*." *1999 U.S. Dist. LEXIS 17161, 1999 WL 999332, at *5* (emphasis added). Public policies underlying truth in testing laws are not those embodied in the grant of a copyright, and thus cannot be used to invalidate **[**28]** AAMC's imposition of the MCAT Prohibitions. Furthermore, state truth in testing laws do not -- and cannot -- infringe on rights afforded to copyright holders under federal law. [7] To the extent state law and federally-created rights

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[6] Moreover, under federal regulations, the very definition of a secure a secure test, such as the MCAT, requires restricted access to the test. *37 C.F.R. § 202.20(b)(4)* provides:

> ***HN12***[] A secure test is a nonmarketed test administered under supervision at specified centers on specific dates, all copies of which are accounted for and either destroyed or returned to restricted locked storage following each administration. For these purposes a test is not marketed if copies are not sold but it is distributed and used in such a manner that ownership and control of copies remain with the test sponsor or publisher.

Id. The Library of Congress does not retain a copy of secure tests. *37 C.F.R. § 202.20(c)(2)(vi)*.

[7] Among the specific state statutes Princeton Review cites, California's truth in testing laws expressly state that ***HN13***[] "nothing in this section shall be construed to diminish or authorize the infringement of any rights protected by law relating to copyright." *CAL. EDUC. CODE § 99162*. ***HN14***[] Arizona's truth in testing law exempts from its scope any nationally standardized test that is copyrighted and would be deprived of value if the questions or answers become known to pupils before the test. *ARIZ. REV. STAT. § 15-747(A)*. Arizona law also prohibits "any other activities that would violate the copyright protection afforded by federal law to the copyright holders of the tests." *ARIZ. REV. STAT. § 15-747(B)*.

directly conflicted, state law would be preempted. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 616, 137 L. Ed. 2d 852, 117 S. Ct. 1590 (1997)*; *Waterview Mgmt. Co. v. FDIC, 323 U.S. App. D.C. 82, 105 F.3d 696, 698 (D.C. Cir. 1997)*. The Copyright Act has given AAMC broad rights regarding distribution of its secure tests; therefore the court does not find that the MCAT Prohibitions are unenforceable as contrary to public policies underlying state truth in testing laws. Accordingly, the court will grant AAMC's motion to dismiss Princeton Review's counterclaims on this ground.

[29]**

C. Standard for Motion to Strike

HN15[] *FED. R. CIV. P. 12(f)* provides that the court may, upon motion of a party or *sua* ***[*22]*** *sponte*, strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from any pleading. [8] *See FED. R. CIV. P. 12(f)*. Courts disfavor motions to strike.

Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty., Ltd., 207 U.S. App. D.C. 375, 647 F.2d 200, 201 & n.1 (D.C. Cir. 1981) (citing 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1380, at 783 (1969)). However, such motions "should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid wasting unnecessary time and money litigating the invalid defense." *SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 345 (D.D.C. 1980)*. A court has liberal discretion to strike such filings as it deems appropriate under *Rule 12(f)*. *Pigford v. Veneman, 215 F.R.D. 2, 4 (D.D.C. 2003)* (quoting *Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000)).* **[**30]**

$**D. Affirmative Defenses**

1. Fifth Affirmative Defense: *First Amendment*

AAMC moves to strike Princeton Review's fifth affirmative defense, which asserts that the *First Amendment* protects Princeton Review's conduct. For the reasons stated above in Section II.B.3.a, Princeton Review cannot assert *First Amendment* protection for accessing and communicating information about AAMC's copyrighted and secure tests. *See also Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1187-88 (5th Cir. 1979)* (stating that "the *first amendment* is not a license to trammel on legally recognized rights in intellectual property"); *Chicago Sch. Reform Bd. of Trustees v. Substance, Inc., 79 F. Supp. 2d 919, 929 (N.D. Ill. 2000)* **[**31]** (finding no set of circumstances that would afford the defendants *First Amendment* protection to publish copyrighted tests). Therefore, the court will strike Princeton Review's fifth affirmative defense.

2. Seventh Affirmative Defense: Preemption by Copyright Act

AAMC moves to strike Princeton Review's seventh affirmative defense, which asserts that *section 301(a) of the Copyright Act*, *17 U.S.C. § 301(a)*, preempts AAMC's cause of action for misappropriation of trade secrets. *Section 301(a)* provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by *section 106* . . . are governed exclusively by this title." *Id.* ***HN16***[] Preemption under the Copyright Act has both subject matter and equivalency requirements; to be preempted, state law must not only relate to the type of work protected by copyright law, but it must be equivalent to any of the exclusive rights protected by the Copyright Act. *17 U.S.C. § 301(b)(1)*,*(3)* **[**32]** . The D.C. Circuit has held that:

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[8] A "pleading" includes a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, or third-party answer. *FED. R. CIV. P. 7(a)*.

> If an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display in order to constitute a state created cause of action, there is no preemption, provided that the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim.

Sturdza v. United Arab Emirates, 350 U.S. App. D.C. 154, 281 F.3d 1287, 1304 (D.C. Cir. 2002) (citing *Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 456 (6th Cir. 2001))*.

The court must examine and compare the elements of a copyright infringement **[*23]** claim and a trade secret misappropriation claim to determine whether the misappropriation claim contains an extra element. ***HN17***[] The elements of a copyright infringement claim are: (1) ownership of a valid copyright by the plaintiff and (2) copying of the original elements of the copyrighted work by the defendant. *Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991)*. Under D.C. law, ***HN18***[] misappropriation of a trade secret [9] is:

> (A) Acquisition of a trade secret **[**33]** of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (B) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (i) Used improper means to acquire knowledge of the trade secret; or
> (ii) At the time of disclosure or use, knew or had reason to know that the trade secret was:
> (I) Derived from or through a person who had utilized improper means to acquire it;
> (II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;
> (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (iii) Before a material change in his or her position, knew or had reason to know that the information was a trade secret and knowledge of the trade secret had been acquired by accident or mistake.

D.C. Code § 36-401. ***HN19***[] A trade secret misappropriation claim, unlike a copyright infringement claim, requires a showing of improper acquisition of secret material or a breach of confidentiality. *See id.; Park v. Arnott, 1992 U.S. Dist. LEXIS 9903, 1992 WL 184521, at *3 (D.D.C. July 14, 1992)* **[**34]** ; *Westech Gear Corp. v. Dep't of Navy*, 1988 WL 170558, at *2 (D.D.C. May 9, 1988). In *Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655 (4th Cir. 1993),* the Fourth Circuit compared the elements of a trade secret misappropriation claim and copyright infringement claim and held that because the misappropriation claim required a breach of trust or confidence, *§ 301 of the Copyright Act* did not preempt the claim. *Id. at 660*. Similarly, other courts have held that trade secret misappropriation claims based on breaches of confidential relationships are not preempted because the breach of confidentiality is an extra element. *See Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197, 218 (3d Cir. 2002)* (stating that a trade secrets misappropriation claim based on a breach of confidentiality contains an extra element that avoids preemption); *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1165 (1st Cir. 1994)* (stating that "[a] trade secrets claim that requires proof of a breach of a duty of confidentiality . . . [is] not preempted because **[**35]** participation in the breach of a duty of confidentiality -- an element that forms no part of a copyright infringement claim-represents unfair competitive conduct qualitatively different from mere unauthorized copying"); *Computer **[*24]** Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 717 (2d Cir. 1992)* (holding that unfair competition claims based on breaches of confidentiality or trade secrets satisfy the extra element test and are not preempted); *Warrington Assocs., Inc. v. Real-Time Eng'g Sys., Inc., 522 F. Supp. 367, 369 (N.D. Ill. 1981)* (holding that the Copyright Act did not preempt common law trade secret misappropriation claims based on a breach of trust or confidentiality). However, misappropriation claims based solely on the copying

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[9] ***HN20***[] A trade secret is information that "(A) Derives actual or potential independent economic value, from not being generally known to, and not being readily ascertainable by, proper means by another who can obtain economic value from its disclosure or use; and (B) Is the subject of reasonable efforts to maintain its secrecy." *D.C. Code § 36-401(4)*; *see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995)* ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.").

of copyrighted work are preempted. *See Computer Assocs., 982 F.2d at 717*; *Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 788-89 (5th Cir. 1999)*.

[36]** In the instant action, AAMC alleges that Princeton Review acquired and disclosed its trade secrets, i.e., the contents of the secure MCAT test forms, through improper means. AAMC claims that Princeton Review's employees and agents falsely certified that they would not duplicate or record any portion of the MCAT. The court finds that the MCAT Prohibitions that AAMC imposed, if they are not found to be contracts of adhesion, would impose a duty on Princeton Review to maintain the confidentiality of the MCAT questions, and breach of the MCAT Prohibitions would be an improper acquisition. Thus, this extra element would preclude the trade secrets misappropriation claim from preemption by the Copyright Act.

Princeton Review characterizes the "extra element" in AAMC's trade secrets misappropriation claim as secrecy, and contends that because the MCAT questions are not kept secret, the misappropriation claim merely duplicates the copyright infringement claim. Princeton Review claims that the MCAT test forms are not "secure" trade secrets because AAMC has widely disseminated and disclosed its MCAT questions to test takers and students. The question of whether registration of the MCAT test **[**37]** forms under the secure test regulations is sufficient to establish the secrecy required in a trade secrets misappropriation claim goes to the merits of AAMC's claim, and does not address whether the Copyright Act would preempt the misappropriation claim. [10] Accordingly, the court will strike Princeton Review's seventh affirmative defense.

3. Eighth Affirmative Defense: Copyright Misuse

AAMC seeks to strike Princeton Review's eighth affirmative defense, which asserts that AAMC's misappropriation of trade secrets claim is barred by AAMC's copyright misuse in violation of public policy. AAMC argues that Princeton Review has not pled facts that show copyright misuse and that there is no authority for the proposition that copyright misuse is a cognizable defense **[**38]** to a misappropriation of trade secrets claim.

Princeton Review responds that it has sufficiently pled facts to show copyright misuse by AAMC. Princeton Review maintains that AAMC's secure test materials were not in fact trade secrets, and thus AAMC's attempts to prevent the disclosure of the MCAT questions violate public policy underlying truth in testing laws. As discussed above in Section II.B.3.b, public policies underlying truth in testing laws do not make the MCAT Prohibitions unenforceable. Princeton Review also reiterates its argument that AAMC has attempted to extend its monopoly beyond rights afforded under the Copyright Act. As discussed above in Section II.B.2, **[*25]** AAMC's actions do not contravene the Copyright Act. Princeton Review has pled no other facts to show copyright misuse by AAMC. As a result, the court concludes that Princeton Review has failed to plead facts sufficient to support this affirmative defense.

Furthermore, while courts have recognized copyright misuse as an equitable defense to copyright infringement claims, *see, e.g., Lasercomb, 911 F.2d at 977*, the court could find no legal authority that has applied copyright misuse or an unclean **[**39]** hands defense to a trade secrets misappropriation claim. Courts that have considered the issue have found that an unclean hands defense does not bar a trade secrets misappropriation claim. *See Alcatel USA, 166 F.3d at 797* (holding that under the circumstances, the unclean hands defense did not bar injunctive relief based on trade secrets misappropriation); *Telex Corp. v. IBM, 510 F.2d 894, 930 (10th Cir. 1975)* (holding that where there were no antitrust violations, an unclean hands defense did not apply to bar a trade secrets misappropriation claim); *Wyeth v. Natural Biologics, Inc., 2003 U.S. Dist. LEXIS 17713, 2003 WL 22282371, at *24 (D. Minn. Oct. 2, 2003)* (concluding that the equitable unclean hands defense did not apply to a trade secrets misappropriation claim). *Cf. Data Gen., 36 F.3d at 1170* (stating that the case did not require the court to determine whether Massachusetts law recognized an unclean hands defense to a trade secrets misappropriation claim); *Nalco Chem. Co. v. Hydro Techs., Inc., 149 F.R.D. 686, 695 (E.D. Wis. 1993)* (permitting discovery related to an unclean hands defense **[**40]** in a trade secrets misappropriation case). Therefore, because there appears to be no legal

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[10] Princeton Review also raises its argument regarding truth in testing laws in connection with this affirmative defense. Because the court found this argument to be without merit in Section II.B.S.b, the court will not consider the argument here.

authority to support the application of copyright misuse as an affirmative defense to a trade secrets misappropriation claim, and because Princeton Review has not pled sufficient facts to establish copyright misuse, the court will strike the eighth affirmative defense.

4. Twelfth Affirmative Defense: Contracts of Adhesion

_ AAMC moves to strike Princeton Review's twelfth affirmative defense, which asserts that the MCAT Prohibitions are unenforceable contracts of adhesion. As discussed above in Section II.B.1, Princeton Review has pled facts sufficient to state a claim that the MCAT Prohibitions are contracts of adhesion. Although AAMC argues that the MCAT Prohibitions are not unconscionable, this argument goes to the merits of the affirmative defense and at this stage of the proceedings, does not establish that the affirmative defense is "insufficient" under *fed. R. CIV. P. 12(f)*. Accordingly, the court will deny AAMC's motion to strike the twelfth affirmative defense.

5. Fourteenth Affirmative Defense: Statute of Frauds

Finally, AAMC **[**41]** moves to strike Princeton Review's fourteenth affirmative defense, which claims that AAMC's fraud claim is barred by the statute of frauds. [11] AAMC argues that Princeton Review cannot assert and pursue an affirmative defense that is only viable to a breach of contract allegation when AAMC has pled a fraud -- not breach of contract-claim. A **[*26]** statute of frauds defense is proper only when a plaintiff has alleged a breach of contract claim. *See D.C. Code Ann. § 28-3502*. Princeton Review argues that its statute of frauds defense should not be stricken because AAMC's fraud claim is "more accurately" characterized as a breach of contract claim. Def.'s Opp'n at 30. The court disagrees. Princeton Review cites no legal authority to support its argument that the court should consider AAMC's fraud claim as a breach of contract claim. Accordingly, the court will strike Princeton Review's fourteenth affirmative defense.

[**42] III. CONCLUSION

For the foregoing reasons, AAMC's motion to dismiss counterclaims and to strike affirmative defenses must be granted in part and denied in part. Accordingly, it is this 22nd day of June, 2004, hereby:

ORDERED, that AAMC's motion to dismiss counterclaims and to strike affirmative defenses is **GRANTED** in part and **DENIED** in part. Princeton Review's counterclaims are **DISMISSED** to the extent that they are based on copyright misuse and violations of the *First Amendment* and public policy. Princeton Review's fifth, seventh, eighth, and fourteenth affirmative defenses are **STRICKEN.** AAMC's motion is denied in all other respects.

Henry H. Kennedy, Jr.

United States District Judge Assigned to: Judge Henry H. Kennedy

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[11] *D.C. Code § 28-3502* provides, in relevant part:

> ***HN21***[] An action may not be brought . . . upon an agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action is brought, or a memorandum or note thereof, is in writing, which need not state the consideration and signed by the party to be charged therewith or a person authorized by him.

Id.

Green Country Food Mkt., Inc. v. Bottling Group, LLC

United States Court of Appeals for the Tenth Circuit

June 22, 2004, Filed

No. 02-5076

Reporter

371 F.3d 1275 *; 2004 U.S. App. LEXIS 12297 **; 2004-1 Trade Cas. (CCH) P74,454; 58 Fed. R. Serv. 3d (Callaghan) 993

GREEN COUNTRY FOOD MARKET, INC., d/b/a Collinsville IGA; GREEN COUNTRY FOOD MARKET NO. 3, INC., d/b/a Harvest Fine Foods No. 3; GREEN COUNTRY FOOD MARKET NO. 4, INC., d/b/a Harvest Find Foods No. 4; GREEN COUNTRY FOOD MARKET NO. 5, INC., d/b/a Harvest Fine Foods No. 5; GREEN COUNTRY FOOD MARKET NO. 6, INC., d/b/a Cushing IGA; BRISSA, INC., d/b/a Foodworld IGA; PLAZA REDBUD INC., d/b/a Plaza Redbud Supermarket; and NET-MOR FOOD OUTLET, INC., d/b/a Net-mor Food Outlet, Plaintiffs-Appellants, v. BOTTLING GROUP, LLC and BOTTLING GROUP HOLDINGS, INC., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Oklahoma. (D.C. No. 01-CV-0411-E).

Disposition: AFFIRMED.

Core Terms

products, branded, cluster, distributed, Holdings, soft drink, monopolization, grocery store, beverage, relevant market, district court, pleadings, summary judgment, monopoly power, interchangeability, customers, consumer, prices, manufacturer, monopoly, package, entity

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN1[] **Standards of Review, De Novo Review**

Appellate courts review a grant of summary judgment de novo, applying the same standard used by the district court.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN2[] **Discovery, Methods of Discovery**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN3[] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, courts construe the facts and inferences therefrom in the light most favorable to the non-moving party.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] **Regulated Practices, Private Actions**

Summary judgment in antitrust cases should be used sparingly because motive and intent play leading roles in the analysis. However, the usual rules governing summary judgment still apply in antitrust cases.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] **Complaints, Requirements for Complaint**

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. The statement must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN6[] **Pleadings, Rule Application & Interpretation**

A plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint a theory on which the plaintiff could recover, provided that a late shift in the thrust of the case will not prejudice the other party in maintaining its defense. The liberalized pleading rules, however, do not permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7[] **Pleadings, Rule Application & Interpretation**

A fundamental statutory citation is not a mere fact and, if incorrect, may topple the structure of the complaint, particularly where the citation appears to represent the legal theory upon which the plaintiff relies.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN8[] **Monopolies & Monopolization, Attempts to Monopolize**

See *Okla. Stat. tit. 79, § 203(A)-(C)*.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > Remedies > Damages > Monetary Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] **Private Actions, State Regulation**

Okla. Stat. tit. 79, § 205(A) provides for injunctive relief and monetary damages to any person injured by a violation of the Oklahoma Antitrust Reform Act, *Okla. Stat. tit. 79, § 201 et seq.*

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN10[] **Standards of Review, Abuse of Discretion**

Appellate courts review a district court's denial of a motion to treat a complaint as amended for abuse of discretion.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Conforming Pleadings to Evidence

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN11[] **Amendment of Pleadings, Conforming Pleadings to Evidence**

See *Fed. R. Civ. P. 15(b)*.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Conforming Pleadings to Evidence

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN12[] **Amendment of Pleadings, Conforming Pleadings to Evidence**

Fed. R. Civ. P. 15(b) contains two mechanisms for amending the complaint to conform to the evidence. First, a complaint may be impliedly amended under *Fed. R. Civ. P. 15(b)* if an issue has been tried with the express or implied consent of the parties and not over objection. A party impliedly consents to the trial of an issue not contained within the pleadings either by introducing evidence on the new issue or by failing to object when the opposing party introduces such evidence. However, implied consent cannot be based on the introduction of evidence that is relevant to an issue already in the case when there is no indication that the party presenting the evidence intended to raise a new issue.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Evidence > ... > Procedural Matters > Objections & Offers of Proof > Objections

HN13[] **Pleadings, Amendment of Pleadings**

Upon objection by the opposing party, the party wishing to amend the pleadings must employ the second mechanism of *Fed. R. Civ. P. 15(b)*. Pursuant to that mechanism, the pleadings may be amended if the party files a motion to amend the complaint and the objecting party fails to satisfy the court that it will be prejudiced by the amendment. *Fed. R. Civ. P. 15(b)*. The party must expressly move under *Fed. R. Civ. P. 15(b)* for such an amendment. A court may not sua sponte invoke the second portion of *Fed. R. Civ. P. 15(b)*. Accordingly, when proper objections have been made but no *Fed. R. Civ. P. 15(b)* motion has been filed, the lack of prejudice to a party does not provide a basis for an amendment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN14[] **Monopolies & Monopolization, Attempts to Monopolize**

The Oklahoma Antitrust Reform Act, *Okla. Stat. tit. 79, § 201 et seq.*, is construed in accordance with federal ***antitrust law***. *Okla. Stat. tit. 79, § 212*. *Okla. Stat. tit. 79, §§ 203(B)* and *203(C)* of the Oklahoma Antitrust Reform Act, *Okla. Stat. tit. 79, § 201 et seq.*, both require that the plaintiff prove a relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > State Regulation

HN15[] **Conspiracy to Monopolize, State Regulation**

See *Okla. Stat. tit. 79, § 203(B)*.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] Sherman Act, Claims

To establish liability under *Okla. Stat. tit. 79, § 203(B)*, a plaintiff must first define the relevant market. *Okla. Stat. tit. 79, § 203(D)(1)(a)*. Without a definition of that market there is no way to measure a defendant's ability to lessen or destroy competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN17[] Monopolies & Monopolization, Attempts to Monopolize

Under *Okla. Stat. tit. 79, § 203(C)*, it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition. *Okla. Stat. tit. 79, § 203(C)*. Pursuant to the statute, an "essential facility" is a facility which, inter alia, is controlled by an entity that possesses monopoly power. *Okla. Stat. tit. 79, § 203(D)(3)(a)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN18[] Monopolies & Monopolization, Attempts to Monopolize

"Monopoly power" is the power to control market prices or exclude competition. *Okla. Stat. tit. 79, § 203(D)(2)*. To prove monopoly power, the plaintiff must first define the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN19[] Regulated Practices, Market Definition

Both *Okla. Stat. tit. 79, § 203(B)* and *Okla. Stat. tit. 79, § 203(C)* require proof of a relevant market. The relevant market inquiry has two components: geographic market and product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN20[] Regulated Practices, Market Definition

A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered. The interchangeability of products is measured by, and is substantially synonymous with, cross-elasticity. A market is "cross-elastic" if rising prices for one product causes consumers to switch to the other product. Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > Federal Circuit Court

HN21[] **Regulated Practices, Market Definition**

The boundaries of a submarket within a larger product market are defined by such factors as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and sensitivity to price changes and specialized vendors. The same proof which establishes the existence of a relevant product market also shows (or fails to show) the existence of a product submarket.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN22[] **Regulated Practices, Market Definition**

In general, a manufacturer's own products do not themselves comprise a relevant product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN23[] **Regulated Practices, Market Definition**

Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Monopolies & Monopolization, Actual Monopolization**

A company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN25[] **Regulated Practices, Market Definition**

Products of a single manufacturer may in rare circumstances constitute a relevant product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN26[] Regulated Practices, Market Definition

The United States Supreme Court has acknowledged in dicta that the soft drink industry is a prototypical example of an industry in which products are so interchangeable that control over one brand cannot be an illegal monopoly.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN27[] Regulated Practices, Market Definition

A "cluster market" exists where a seller provides a full line of products or services that create a separate product market consisting of that "cluster" of products or services.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN28[] Regulated Practices, Market Definition

A cluster market exists only when the "cluster" is itself an object of consumer demand. In other words, the cluster approach is only appropriate where the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN29[] Relevant Market, Product Market Definition

The fact that an entity distributes a number of different products does not of itself give it monopoly power in a cluster market; it merely defines the product(s)/service(s) offered by the distributor as a package and then limits the relevant product market to those entities that can offer a competitive package.

Counsel: Keith A. Ward, (Nancy C. Curtis with him on the briefs) Richardson, Stoops, Richardson & Ward, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Jon E. Brightmire, (James P. McCann and R. Charles Wilkin III, with him on the brief) Doerner, Saunders, Daniel & Anderson, L.L.P., Tulsa, Oklahoma, for Defendants-Appellees.

Judges: Before EBEL, BALDOCK, and KELLY, Circuit Judges.

Opinion by: EBEL

Opinion

[*1277] EBEL, Circuit Judge.

Plaintiffs, retail grocery stores operating in the Tulsa, Oklahoma area, brought this diversity action under the *Oklahoma Antitrust Reform Act* against their local distributor of Pepsi and affiliated beverage products and its holding company ("Bottling Group" and "Holdings"). Plaintiffs alleged that Bottling Group unlawfully discontinued sales to Plaintiffs in response to a price discrimination lawsuit Plaintiffs had previously brought against Bottling Group's predecessor-in-interest. The district court granted summary judgment in favor of Bottling Group and Holdings. On appeal, Plaintiffs primarily challenge the district court's definition of the relevant **[**2]** product market. We exercise jurisdiction pursuant to *28 U.S.C. § 1291* and AFFIRM.

BACKGROUND

Plaintiffs are corporations that operate grocery stores, each owned in whole or in part by either Steven Davis or Brian Honel. Plaintiff Brissa, Inc. (operated by Mr. Honel) and Plaintiff Plaza Redbud Inc. (operated by Mr. Davis) had purchased Pepsi and affiliated beverage products from Beverage Products Corporation ("BPC"), the exclusive distributor of these products in the Tulsa area. By 1997, Mr. Honel and Mr. Davis had recognized that they were often unable to sell their Pepsi products at prices competitive with other **[*1278]** area grocery stores. Mr. Honel and Mr. Davis compared their invoices from BPC and discovered that BPC had been charging them different wholesale prices for the beverage products it distributed. On January 5, 1999, Plaintiffs Brissa and Plaza Redbud sued BPC for price discrimination under Oklahoma antitrust laws.

On February 8, BPC transferred all assets, liabilities, and stock to Bottling Group Holdings, Inc. ("Holdings"), which the same day transferred the same assets, liabilities, and stock to Bottling Group, LLC ("Bottling Group"). Bottling **[**3]** Group is majority owned by Holdings, and Holdings is indirectly wholly owned by The Pepsi Bottling Group, Inc.

On February 11, Bottling Group discontinued sales to Plaintiffs Brissa and Plaza Redbud because of a "distinct decrease in the level of trust" between Bottling Group and each grocery store stemming from the pending price discrimination lawsuit. Bottling Group has also refused to distribute its products to other Plaintiff grocery stores that Mr. Honel and Mr. Davis have acquired. Plaintiffs therefore have no access, other than retail purchase, to the 155 Pepsi and affiliated beverage products distributed by Bottling Group.

Plaintiffs filed this lawsuit against both Bottling Group and Holdings under *§§ 203 and 205* of the Oklahoma Antitrust Reform Act, *Okla. Stat. tit. 79, § 201 et seq*. The complaint alleged monopolization, attempt to monopolize, and conspiracy to monopolize under *§ 203(B)* and denial of access to an essential facility under *§ 203(C)*, and requested injunctive relief and monetary damages under *§ 205*. All allegations were predicated on Bottling Group's refusal to deal with Plaintiffs following Plaintiffs' initiation of the **[**4]** price discrimination lawsuit against BPC.

The district court denied Plaintiffs' request for a preliminary injunction and granted summary judgment in favor of Bottling Group and Holdings. The district court held that Plaintiffs had not pled a claim under *§ 203(A) of the Oklahoma Antitrust Reform Act*, which prohibits unilateral acts in restraint of trade, and that their claims under *§§ 203(B) and 203(C)* of the Act failed because Plaintiffs had not proven that the beverage products distributed by Bottling Group comprised a relevant product market.

Plaintiffs timely filed this appeal. Plaintiffs argue that the complaint stated a claim under *§ 203(A)* and, in the alternative, that the complaint should have been treated by the district court as constructively amended, under *Federal Rule of Civil Procedure 15(b)*, to include a *§ 203(A)* claim. Plaintiffs also argue that the district court erred in requiring Plaintiffs to offer proof of a relevant product market and, in the alternative, in rejecting Plaintiffs' narrow definition of the relevant product market.

DISCUSSION

HN1[] We review a grant of summary judgment *de novo,* applying the same **[**5]** standard used by the district court. *State of Utah v. Babbitt, 53 F.3d 1145, 1148 (10th Cir. 1995)*. ***HN2***[] Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. ***HN3***[] We construe the facts and inferences therefrom in the light most favorable to the non-moving party. *Babbitt, 53 F.3d at 1148*. [1]

[6] [*1279] A. Whether Plaintiffs Properly Pled a *§ 203(A)* Claim**

1. The complaint

HN5[] A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. The statement must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*.

HN6[] A plaintiff should not be prevented from pursuing a claim simply because of a failure to set forth in the complaint a theory on which the plaintiff could recover, provided that a late shift in the thrust of the case will not prejudice the other party in maintaining its defense. *Evans v. McDonald's Corp., 936 F.2d 1087, 1090-91 (10th Cir. 1991)*. The liberalized pleading rules, however, do not permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case. *Id. at 1091*. This practice, if tolerated, "would waste the parties' resources, as well as judicial resources, on discovery aimed at ultimately unavailing legal theories and **[**7]** would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances." *Id.* (affirming district court's determination precluding plaintiff from litigating new legal theory raised for first time in response to defendant's motion for summary judgment).

In Dunn v. Ewell (In re Santa Fe Downs), the complaint cited one section of the *Bankruptcy Act* but the plaintiffs attempted to introduce evidence pertaining to a second section. *611 F.2d 815, 816 (10th Cir. 1980)*. We held that the plaintiffs had not properly stated a claim under that second section. See id. We noted that "we cannot say that the incorrect statutory citation was an unimportant detail implicitly corrected by the facts alleged in the complaint." *Id.* ***HN7***[] "[A] fundamental statutory citation is not a mere fact and, if incorrect, may topple the structure of the complaint, particularly where the citation appears to represent the legal theory upon which the plaintiff relies." *Id.*

In this case, Plaintiffs did not mention *§ 203(A)* in their complaint but referred only to *§§ 203(B), 203(C), and 205*. [2] Plaintiffs' allegations focused exclusively on alleged monopolization **[**8]** under *§ 203(B)* and denial of access to

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[1] ***HN4***[] Summary judgment in antitrust cases should be used sparingly because motive and intent play leading roles in the analysis. *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 882 (10th Cir. 1997)*; ***Dreiling v. Peugeot Motors of Am., Inc., 850 F.2d 1373, 1379 (10th Cir. 1988)***. However, the usual rules governing summary judgment still apply in antitrust cases. *Sports Racing, 131 F.3d at 882*.

[2] *Section 203 of the Oklahoma Antitrust Reform Act* provides in relevant part:

> ***HN8***[] A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.
>
> B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.
>
> C. Without limiting any other section of Title 79 of the Oklahoma Statutes or applicable sections of Title 17 of the Oklahoma Statutes, it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition. An injured competitor or customer may bring an action under Section 5 of this act to enforce the provisions of this section only when such injured competitor or customer does not have a remedy before the Corporation Commission.

Okla. Stat. tit. 79, § 203(A)-(C). ***HN9***[] *Section 205* provides for injunctive relief and monetary damages to any person injured by a violation of the Act. Id. *§ 205(A)*.

an essential facility under *§ 203(C)*. Plaintiffs failed to mention **[*1280]** *§ 203(A)*, which prohibits unilateral acts in restraint of trade, either in form or in substance.

[9]** As in Dunn, we cannot say that this omission was "an unimportant detail." See *611 F.2d at 816*. The complaint did not place Defendants Bottling Group and Holdings on notice of the need to defend against a *§ 203(A)* claim, as was demonstrated by Defendants' failure to offer any defense to a *§ 203(A)* claim in their initial motion for summary judgment. Plaintiffs' citation to *§ 203(A)* in their response to Defendants' motion did not cure that error. See *Evans, 936 F.2d at 1091*. A claim for unilateral acts in restraint of trade is sufficiently distinguishable from either a monopolization or an essential facilities claim that Plaintiffs should have mentioned the claim in the complaint. Accordingly, the district court did not err in holding that Plaintiffs had not pled a *§ 203(A)* claim in their complaint.

2. *Rule 15(b)*

HN10[] We review a district court's denial of a motion to treat the complaint as amended for abuse of discretion. *Koch v. Koch Indus., Inc., 203 F.3d 1202, 1216 (10th Cir. 2000)*. *Federal Rule of Civil Procedure 15(b)* provides:

> ***HN11***[] When issues not raised by the pleadings are **[**10]** tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15(b). *Rule 15(b)* is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel[.]" Wright et al., Federal Practice and Procedure **[**11]** , § 1491, at 5 (2d ed. 1990) (quoted with approval in *Brandon v. Holt, 469 U.S. 464, 471 n.19, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985))*.

Rule 15(b) ***HN12***[] contains two mechanisms for amending the complaint to conform to the evidence. First, a complaint may be impliedly amended under *Rule 15(b)* "if an issue has been tried with the express or implied consent of the parties and not over objection." *Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 456 (10th Cir. 1982)*. A party impliedly consents to the trial of an issue not contained within the pleadings either by introducing evidence on the new issue or by failing to object when the opposing party introduces such evidence. *Koch, 203 F.3d at 1217*. However, implied consent cannot be based on the introduction of evidence that is relevant to an issue already in the case when there is no indication that the party presenting the evidence intended to raise a new issue. *Moncrief v. Williston Basin Interstate Pipeline Co., 174 F.3d 1150, 1162 (10th Cir. 1999)*.

This mechanism for implying an amendment is not available if the opposing party objects to evidence pertaining to a new claim. *Dunn, 611 F.2d at 817.* **[**12]** Instead, ***HN13***[] upon objection by the opposing party, the party wishing to amend the pleadings must employ the second mechanism of **[*1281]** *Rule 15(b)*. Pursuant to that mechanism, the pleadings may be amended if the party files a motion to amend the complaint and the objecting party fails to satisfy the court that it will be prejudiced by the amendment. *Fed. R. Civ. P. 15(b)*. The party must expressly move under *Rule 15(b)* for such an amendment. *Moncrief, 174 F.3d at 1163 n.7* ("A court may not sua sponte invoke the second portion of *Rule 15(b)*."). Accordingly, when proper objections have been made but no *Rule 15(b)* motion has been filed, the lack of prejudice to a party does not provide a basis for an amendment. *Dunn, 611 F.2d at 817*.

In the instant case, Plaintiffs referenced *§ 203(A)* only three times in their motions below or in response to Bottling Group and Holdings' motion for summary judgment. Each reference involved a mere citation to or quotation of *§ 203(A)* and was unaccompanied by any evidence that differed from the evidence offered in support of their *§§*

203(B) and 203(C) claims. Significantly, Bottling Group **[**13]** and Holdings objected to Plaintiffs' attempt to raise a § 203(A) claim on the ground that the claim was not pled in the complaint. In light of this objection, the first mechanism of Rule 15(b) is inapplicable. See Dunn, 611 F.2d at 817. Because a court can invoke the second mechanism of Rule 15(b) only in response to a Rule 15(b) motion and because Plaintiffs filed no such motion, the second mechanism of Rule 15(b) is likewise inapplicable. See Moncrief, 174 F.3d at 1163 n.7.

Accordingly, the district court did not abuse its discretion in refusing to treat Plaintiffs' complaint as amended under Rule 15(b) to include a § 203(A) claim.

B. The Relevant Product Market

HN14[] The Oklahoma Antitrust Reform Act is construed in accordance with federal ***antitrust law***. Okla. Stat. tit. 79, § 212; see also Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, 587 P.2d 1360, 1362 (Okla. 1978). Sections 203(B) and 203(C) of the Oklahoma Antitrust Reform Act both require that the plaintiff prove a relevant market.

HN15[] Under § 203(B), "it is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize **[**14]** any part of trade or commerce in a relevant market within this state." Okla. Stat. tit. 79, § 203(B). Accordingly, ***HN16***[] to establish liability under § 203(B), a plaintiff must first define the relevant market. Id. § 203(D)(1)(a); see also Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition."); Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993) (to establish § 2 Sherman Act violation for monopolization or attempted monopolization, plaintiff must define relevant market).

HN17[] Under § 203(C), "it is unlawful for any person in control of an essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition." Okla. Stat. tit. 79, § 203(C). Pursuant to the statute, an "essential facility" is a facility which, inter alia, "is controlled by an entity that possesses **[**15]** monopoly power." Id. § 203(D)(3)(a). ***HN18***[] "Monopoly power" is "the power to control market prices or exclude competition." Id. § (D)(2); see also United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). To prove monopoly power, the plaintiff must first define the relevant market. See Walker Process Equip., 382 U.S. at 177.

Accordingly, ***HN19***[] both § 203(B) and § 203(C) require proof of a relevant market. The **[*1282]** relevant market inquiry has two components: geographic market and product market. Telecor Communications, Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1130 (10th Cir. 2002). Only the latter is an issue in this appeal.

The Supreme Court articulated the standard for defining the relevant product market in United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 404. ***HN20***[] A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." Id.; Teleco, 587 P.2d at 1364. The interchangeability of products is measured by, and is substantially synonymous **[**16]** with, cross-elasticity. Telecor, 305 F.3d at 1131. A market is "cross-elastic" if rising prices for one product causes consumers to switch to the other product. Id.; see also du Pont, 351 U.S. at 393 ("Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.").

The Supreme Court has also recognized the existence of submarkets within a larger product market. Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). ***HN21***[] The boundaries of such a submarket are defined by such factors as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, and sensitivity to price changes and specialized vendors. Id. "The same proof which establishes the existence of a relevant product market also shows (or…fails to show) the existence of a product submarket." 1 ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 521 (4th ed. 1997) **[**17]** (quoting H.J., Inc. v. Int'l Tel. &

Tel. Corp., 867 F.2d 1531, 1540 (8th Cir. 1989)). Thus, the general standard articulated in du Pont, in conjunction with the specific factors announced in Brown Shoe, provides the applicable standard for defining the relevant product market.

1. Products of a single manufacturer or brand

HN22[] In general, a manufacturer's own products do not themselves comprise a relevant product market. 1 ABA Section of ***Antitrust Law***, supra, 527-28. As the Supreme Court stated in du Pont:

> ***HN23***[] Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market.

351 U.S. at 394. Similarly, we have said that ***HN24***[] "a company does not violate the *Sherman Act* by virtue of the natural monopoly it holds over its own product." *TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)* (holding that TNT is not relevant product market for purposes of Sherman **[**18]** Act). Even where brand loyalty is intense, courts reject the argument that a single branded product constitutes a relevant market. *Disenos Artisticos E. Industriales, S.A. v. Work, 714 F. Supp. 46, 47-48 (E.D.N.Y. 1989)* (defining relevant product market as market for high quality decorative giftware, despite "intense brand loyalty" among some customers for certain brand of porcelain figurine); see also *Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988)* (Although "virtually every seller of a branded product has *some* customers who especially prefer its product," that fact alone does not show market power (emphasis in original).).

[*1283] Nonetheless, ***HN25***[] products of a single manufacturer may in rare circumstances constitute a relevant product market. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-82, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*. In Eastman Kodak Co. v. Image Technical Services, Inc., the Supreme Court held that the relevant product market must be defined in terms of the choices of products and services available to Kodak equipment owners. *Id.* Because Kodak equipment owners were locked **[**19]** into Kodak parts and services, Kodak parts and services were not interchangeable with the parts and services of other manufacturers. See *id. at 482*. Accordingly, only those companies that serviced Kodak machines comprised the relevant product market. *Id.* [3]

HN26[] The Supreme Court has acknowledged in dicta that the soft drink industry is a prototypical example of an industry in which products are so interchangeable that control over one brand cannot be an illegal monopoly. The Court said that "this power that…soft-drink manufacturers **[**20]** have over their trademarked products is not the power that makes an illegal monopoly." du *Pont, 351 U.S. at 393*. "There are certain differences in the formulae for soft drinks but one can hardly say that each one is an illegal monopoly." *Id.*; see also *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 696 F. Supp. 97, 131 (D. Del. 1988)* ("There can be no serious dispute that Coca-Cola products are in competition with many other soft drinks."); *Barq's Inc. v. Barq's Beverages, Inc., 677 F. Supp. 449, 455 (E.D. La. 1987)* ("Based upon the theory of interchangeability, which allows for closely related product substitutes to be considered in the relevant market, the appropriate unit here is all soft drinks. Barq's root beer is merely one soft drink in a market of competing soft drinks.").

Accordingly, Pepsi branded beverage products cannot alone comprise a relevant product market. Plaintiffs attempt to avoid this conclusion by offering evidence that consumers are "brand loyal" to Pepsi branded products. Mr. Davis, one of the grocery store owners in this case, testified that in his experience, people are brand loyal to Pepsi **[**21]** because instead of substituting Coke if they do not find Pepsi on the grocery store shelves they look

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[3] See also *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 111-12, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* (holding that distinct market exists for NCAA college football broadcasts); *Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 249-52, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959)* (holding that relevant market was properly defined as promotion of championship boxing contests, not all professional boxing events).

elsewhere for Pepsi. Brand loyalty of consumers to particular soft drinks is an insufficient basis for concluding that Pepsi constitutes a relevant product market. Plaintiffs have offered no other evidence to show that Pepsi products are not reasonably interchangeable with Coke products or other branded soft drinks.

Nor have Plaintiffs offered any evidence pertaining to the specific factors listed by the Supreme Court in Brown Shoe, such as evidence that Pepsi prices are insensitive to price changes in other branded soft drinks. See *370 U.S. at 325*. In short, Plaintiffs have offered no evidence - other than their own testimony pertaining to brand loyalty - to prove that Pepsi branded products constitute a market distinct from other soft drink products.

2. Cluster markets

Courts also recognize the existence of "cluster markets." ***HN27***[] A "cluster market" exists where a seller provides a full line of products or services that create a separate product market consisting of **[*1284]** that "cluster" of products or services. See *United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 360-61, 26 L. Ed. 2d 658, 90 S. Ct. 2035 (1970)* **[**22]** (holding that products and services offered by full-service banks constituted cluster market); *United States v. Grinnell Corp., 384 U.S. 563, 572-73, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)* (holding that central station protective services including automated burglar alarms, automated fire alarms, sprinkler services, and watch signal services constituted cluster market); *United States v. Phila. Nat'l Bank, 374 U.S. 321, 356-57, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)* (holding that products and services offered by commercial banks constituted cluster market).

HN28[] A cluster market exists only when the "cluster" is *itself* an object of consumer demand. See *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1221 (10th Cir. 1986)* (rejecting cluster market approach where cluster was not itself the object of consumer demand). In other words, the cluster approach is only appropriate where "'the product package is significantly different from, and appeals to buyers on a different basis from, the individual products considered separately.'" *Id.* (quoting *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011, 1016-17 (9th Cir. 1983)).* **[**23]**

Plaintiffs argue that even if Pepsi products themselves cannot constitute a relevant product market, Bottling Group distributes a full line of beverage products that together constitute a cluster market over which Bottling Group has monopoly power. Specifically, Plaintiffs point out that Bottling Group distributes approximately 60 Pepsi branded products, approximately 25-30 Dr. Pepper branded products, and other branded apple juices, teas, sport drinks, and water products. In total, Bottling Group distributes approximately 155 branded beverage products.

There are two problems with Plaintiffs' argument. First, Plaintiffs have presented no evidence that the 155 different products distributed by Bottling Group together constitute a cluster that is *itself* the object of consumer demand, as our precedent requires. See *Westman, 796 F.2d at 1221*. Plaintiffs offer no evidence establishing that the package of grocery products distributed by Bottling Group appeals to grocery stores on a different level than Pepsi, Dr. Pepper, Slice, etc. considered separately. They have not offered evidence, for example, that Plaintiffs' customers enter the store with the intent to purchase **[**24]** both Pepsi and Dr. Pepper together and the absence of one of those products would cause the customer to go to another store to purchase both. Nor have they introduced evidence that grocery stores significantly benefit from purchasing Dr. Pepper products and Pepsi products as a package rather than individually.

Second, Plaintiffs do not argue that Bottling Group has monopoly power even if the product market is defined as a cluster market. If a cluster market exists, then presumably that market would include all distributors who provide a similar cluster of soft drink or other beverage products and affiliated services to grocery stores for retail sale in the relevant geographic market. Plaintiffs have come forward with no evidence demonstrating that Bottling Group has monopoly power even in this more narrowly defined product market. [4] Plaintiffs appear to misunderstand the

[4] Plaintiffs did offer evidence of the market share of the individual products distributed by Bottling Group; however, evidence of the market share of the products *as a product cluster* is not provided.

significance of a cluster market - *HN29*[] the fact that an entity distributes a number of different products does not of itself give it monopoly power in a "cluster market"; it merely defines the product(s)/service(s) offered by **[*1285]** the distributor as a package and then limits the relevant product market to those entities that **[**25]** can offer a competitive package.

Accordingly, the district court did not err in holding that the products exclusively distributed by Bottling Group in the Tulsa area cannot, as a matter of law, constitute a relevant product market. [5]

CONCLUSION

We hold that Plaintiffs failed to **[**26]** plead a claim under *§ 203(A) of the Oklahoma Antitrust Reform Act, and* that their claims under *§§ 203(B) and 203(C)* of the Act require proof of a relevant product market. We further hold that Plaintiffs have failed to establish a genuine dispute that the products distributed by Bottling Group alone constitute a relevant product market. Accordingly, the district court's grant of summary judgment in favor of Bottling Group and Holdings is AFFIRMED.

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[5] Plaintiffs may have argued below that Bottling Group had monopoly power in a product market more broadly defined as the market for all soft drink and other beverage products distributed to retail grocers. By failing to re-assert this argument on appeal, however, Plaintiffs have waived it, and, in any event, the record does not support such a theory.

United States v. Northern Trust Co.

United States Court of Appeals for the Seventh Circuit

June 8, 2004, Argued ; June 22, 2004, Decided

Nos. 04-1148 & 04-1150

Reporter

372 F.3d 886 *; 2004 U.S. App. LEXIS 12242 **; 2006-1 U.S. Tax Cas. (CCH) P50,141; 93 A.F.T.R.2d (RIA) 2004-2789; 32 Employee Benefits Cas. (BNA) 2944

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. NORTHERN TRUST COMPANY, as trustee of the Caterpillar Incorporated Master Trust and the Inland Steel Industries Pension Trust, Defendant-Appellee.

Subsequent History: Motion granted by *United States v. N. Trust Co., 2005 U.S. Dist. LEXIS 23497 (N.D. Ill., Oct. 11, 2005)*

Prior History: [1]** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 98 C 7272 & 98 C 8217. James B. Moran, Judge.

United States v. Northern Trust Co., 210 F. Supp. 2d 955, 2001 U.S. Dist. LEXIS 18030 (N.D. Ill., 2001)

Disposition: Reversed and remanded.

Core Terms

misrepresentation, shares, shareholder, refunds, pension fund, pension trust, district court, state of mind, mutual

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Tax Law > ... > Tax Credits & Liabilities > Credits, Overassessments & Refunds > General Overview

Tax Law > Federal Tax Administration & Procedures > General Overview

Tax Law > Federal Tax Administration & Procedures > Tax Credits & Liabilities > General Overview

HN1[] **Statute of Limitations, Time Limitations**

26 U.S.C.S. § 6532(b) gives the United States only two years to commence proceedings to recover erroneously paid refunds, except that such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The statute of limitations is an affirmative defense. *Fed. R. Civ. P. 8(c)*.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A complaint states a claim on which relief may be granted whether or not some defense is potentially available.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] **Motions to Dismiss, Failure to State Claim**

Complaints need not anticipate and attempt to plead around defenses.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5[] **Motions to Dismiss, Failure to State Claim**

With respect to elements of a plaintiff's claim, complaints need not plead facts or legal theories.

Tax Law > ... > Tax Credits & Liabilities > Credits, Overassessments & Refunds > General Overview

HN6[] **Tax Credits & Liabilities, Credits, Overassessments & Refunds**

"Misrepresentation" differs from "fraud" for purposes of *26 U.S.C.S. § 6532(b)*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN7[] **Pleadings, Heightened Pleading Requirements**

Under *Fed. R. Civ. P. 9(b)*, malice, intent, knowledge, and other condition of mind may be averred generally.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN8[] **Standards of Review, Questions of Fact & Law**

Case-specific details that serve as minor premises in a legal syllogism and thus determine the outcome are what the courts normally understand by "facts" (or "adjudicative facts") in the judicial process.

Civil Procedure > Trials > Bench Trials

Labor & Employment Law > Discrimination > Actionable Discrimination

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9[] **Trials, Bench Trials**

"Discrimination" is a matter of fact for purposes of *Fed. R. Civ. P. 52* and appellate review.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN10[] **Standards of Review, Questions of Fact & Law**

A person's status as a "seaman" is an issue of fact.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN11[] **Regulated Practices, Market Definition**

The definition of a "market" in ***antitrust law*** is an issue of fact.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > Intentional Torts > Defamation > General Overview

HN12[] **Defenses, Fair Comment & Opinion**

Statements that imply propositions that can be true or false are statements of "fact" rather than "opinion" in tort law.

Business & Corporate Compliance > ... > Enforcement > Duties & Liabilities of Parties > Forgery, Fraud & Mistake

Governments > Legislation > Statute of Limitations > Time Limitations

Tax Law > ... > Tax Credits & Liabilities > Credits, Overassessments & Refunds > General Overview

HN13[] **Duties & Liabilities of Parties, Forgery, Fraud & Mistake**

Because "misrepresentation" appears in the same sentence as the word "fraud" in 26 U.S.C.S. § 6532(b), it must mean some less culpable state of mind.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellant: Charles Bricken, DEPARTMENT OF JUSTICE, Washington, DC USA; Thomas P. Walsh, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL USA.

For NORTHERN TRUST COMPANY, as Trustee of the Caterpillar Incorporated Master Trust, Defendant - Appellee: Jeffrey E. Stone, MCDERMOTT, WILL & EMERY, Chicago, IL USA.

Judges: Before EASTERBROOK, KANNE, and DIANE P. WOOD, Circuit Judges.

Opinion by: EASTERBROOK

Opinion

[*887] EASTERBROOK, *Circuit Judge*. Closed-end mutual funds pay federal income tax on income and capital gains, then notify their investors, to which the tax burden passes through. A shareholder that is tax exempt (such as a pension trust or a university endowment) can claim a refund of the taxes that the mutual fund paid on account of its proportionate investment. Taxable investors get income coupled with a credit for tax the mutual fund has paid. Two pension trusts (for employees of Inland Steel and Caterpillar) were shareholders of record in Quest for Value Dual Purpose Fund, a closed-end mutual fund. Quest reported to Northern Trust Co., as trustee of these pension trusts, the gains **[**2]** and taxes attributable to these shares. Northern Trust then filed tax returns and claimed refunds on behalf of the pension funds. During 1991 through 1995, the tax years at issue in this litigation, Northern Trust received more than $ 6 million in refunds for the benefit of these pension plans.

The United States wants the money back. It contends that, with the permission of the two pension funds, Northern Trust "lent" the Quest shares to "borrowers" that held all economic incidents of ownership--the right to any dividends on the shares, the right to vote the shares, even the entitlement to sell them and keep the profits. If a borrower elected to return the shares at the end of the term, it retained any capital gain or loss. For this set of rights, it paid the pension funds 102% of the market price of the Quest shares on the date the "loans" were made. As the United States sees things, these transactions were sales carrying a misleading label designed to allow the pension funds to reap tax benefits on shares that they no longer owned--while the "borrowers," though taxable entitles, avoided the economic incidence of taxes on the mutual fund's undistributed income and capital gains.

[3]** These suits (one for each pension fund) were filed late in 1998, less than two years from the date the refund of 1995 taxes had been paid, but more than two after the refunds for the other tax years had been disbursed. Section 6532(b) of the Internal Revenue Code, 26 U.S.C. § 6532(b), ***HN1***[] gives the United States only two years to commence proceedings to recover erroneously paid refunds, "except that such suit may be brought at any time within 5 years from the making of the refund if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact." The complaint alleged that the five-year period applies because Northern Trust misrepresented that the two pension trusts were Quest's "shareholders" and thus eligible for refunds. On Northern Trust's motion under Fed. R. Civ. P. 12(b)(6), the district court dismissed the complaint (with respect to tax years 1991 through 1994) for failure to state a claim on which relief may be granted. 93 F. Supp. 2d 903 (N.D. Ill. 2000). As the court saw things, status as a shareholder is a mixed question of law and fact, **[**4]** and thus not a "fact" as § 6532(b) uses that term; and a "misrepresentation" occurs only if the taxpayer acts with a deceptive state of mind, which the complaint did not allege. Four years later the parties settled the United States' claim with respect to the 1995 tax year--Northern Trust eventually paid 100 [cent] on the dollar--and the district **[*888]** court entered a final judgment, from which the United States appealed.

Dismissal under Rule 12(b)(6) was irregular, for ***HN2***[] the statute of limitations is an affirmative defense. See Fed. R. Civ. P. 8(c). ***HN3***[] A complaint states a claim on which relief may be granted whether or not some defense is potentially available. This is why ***HN4***[] complaints need not anticipate and attempt to plead around defenses. See, e.g., *Gomez v. Toledo, 446 U.S. 635, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980)*; *United States Gypsum Co. v. Indiana Gas Co., 350 F.3d 623 (7th Cir. 2003)*. So it is irrelevant that the complaint did not plead that Northern Trust set out to deceive the Internal Revenue Service, or was negligent (or grossly negligent) in applying for refunds. Resolving defenses comes after the complaint stage. **[**5]** Even ***HN5***[] with respect to elements of the plaintiff's claim, complaints need not plead facts or legal theories. See, e.g., *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)*; *Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992)*.

HN6[] "Misrepresentation" differs from "fraud;" otherwise *§ 6532(b)* would be redundant. Understandably, therefore, Northern Trust does not contend that the United States had to plead with particularity under *Fed. R. Civ. P. 9(b)*. Yet if the normal approach of *Rule 8(a)* applies, this complaint is unimpeachable. Indeed, it goes beyond what is necessary, for the complaint *does* anticipate the limitations defense and meet it with a claim that Northern Trust made a "misrepresentation of a material fact." What more could be required? If, as the district court believed, the word "misrepresentation" connotes a culpable state of mind, then the complaint *pleads* that state of mind by using the word "misrepresentation," for ***HN7***[] under *Rule 9(b)* "malice, intent, knowledge, and other condition of mind . . . may be averred generally." And if, as the United States contends, negligent **[**6]** errors may be called "misrepresentations," again the complaint is sufficient. Instead of jettisoning the complaint, the district judge should have invited the parties to file motions for summary judgment or held a bench trial; then we would know what state of mind the persons who prepared these tax returns had, and we could determine whether that was enough under the statute. Precipitate dismissal of the complaint has prolonged this litigation needlessly.

There remains a possibility that this complaint contained too much rather than too little--that the United States has pleaded itself out of court by alleging things that, if true, devastate its claim. The complaint alleges that the "misrepresentation" was Northern Trust's statement that the pension funds were "shareholders" in Quest. The district court saw this as conclusive in defendant's favor, for status as a "shareholder" is not a "fact" but a legal characterization of facts. This is a subject we can address now, and we disagree with the district court's view that only the most concrete statements about the world are "facts" for purposes of *§ 6532(b)*. The word "fact" is a staple of the legal system, and no one suggests that **[**7]** it has a special meaning in the Internal Revenue Code. There is no linguistic problem in saying that a characterization ("shareholder") derived from combining an undisclosed view of the law with undisclosed details about the terms of the "loan" is itself a "fact" (or a mixed question of law and fact, which is treated as a fact for many purposes). "Facts" are not limited to those things that can be described by Newton's three laws of motion. Those ***HN8***[] case-specific details that serve as minor premises in the legal syllogism and thus determine the outcome are what we normally **[*889]** understand by "facts" (or "adjudicative facts") in the judicial process.

Consider some parallels. Is "discrimination" under Title VII a "fact"? Ascertaining the existence of "discrimination" requires the application of legal rules to events in the workplace (was someone of a different race promoted under similar circumstances?, and so on). The Supreme Court nonetheless held in *Pullman-Standard v. Swint, 456 U.S. 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982)*, that ***HN9***[] "discrimination" is a matter of fact for purposes of *Fed. R. Civ. P. 52* and appellate review. We know from *Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 89 L. Ed. 2d 739, 106 S. Ct. 1527 (1986),* **[**8]** that ***HN10***[] a person's status as a "seaman" is an issue of fact, and from *National Collegiate Athletic Association v. University of Oklahoma, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*, that ***HN11***[] the definition of a "market" in ***antitrust law*** is an issue of fact. Why should the identification of a "shareholder" differ? All of these are characterizations arrived at by applying legal rules to events that may or may not be in dispute. If the district court articulates the wrong legal rule, it makes an error of law on the way to its finding of fact, but this does not render the characterization itself a proposition of "law."

One could see the same thing through the lens of defamation law. Suppose someone points a finger and shouts: "That man is a shareholder of Quest!" The statement could be defamatory if it implied disreputable conduct--if, for example, the person were a judge who had just rendered a decision in favor of Quest rather than recusing himself. ***HN12***[] Statements that imply propositions that can be true or false are statements of "fact" rather than "opinion" in tort law. See, e.g., *Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988)* (discussing this doctrine). The proposition "the Inland **[**9]** Steel Industries Pension Trust is a shareholder of Quest" implies things that can be true or false--

at a minimum, that the pension fund owned shares (as opposed to bonds or warrants) during the taxable year in question, and that it was the beneficial rather than bare legal owner of the shares (in other words, that it did not hold them as trustee, let alone as bailee, pledgee, or custodian). The United States contends, however, that the pension fund did *not* enjoy beneficial ownership in these shares. That may be true or false; and if the pension fund transferred beneficial ownership of the shares, then the statement that it remained a "shareholder" is a misrepresentation of fact. It is no different from the assertion "the Inland Steel Industries Pension Trust owns 100,000 shares of Quest" when as a result of sales and other transfers to third parties it owned only 10,000. That misstatement, which would increase the tax refund by an order of magnitude, would be one of fact.

Nothing else in the complaint had any potential to scuttle the claim. Thus we must remand. We have learned enough about *§ 6532(b)* to say that, when ruling on motions for summary judgment or holding a bench trial, **[**10]** the district court should not treat the word "misrepresentation" as limited to intentional deception. Only one appellate opinion to date has discussed that word's meaning. *Lane v. United States, 286 F.3d 723 (4th Cir. 2002)*--which considers and disapproves the district court's opinion in this litigation--holds that ***HN13***[] because "misrepresentation" appears in the same sentence as the word "fraud," it must mean some less culpable state of mind. The fourth circuit thought that gross negligence would do; we need not decide whether even that much is essential. One way to understand *§ 6532(b)* as a whole might be that, when the return discloses enough that all the IRS has to do is check the calculations and apply the law, then the period of limitations is two years; but if the IRS must independently discover **[*890]** facts that contradict the return, then it has an extra three years to do the legwork. Then if Northern Trust had represented that "the Inland Steel Industries Pension Trust owns 100,000 shares of Quest" when it owned only 10,000, that statement would be a "misrepresentation" even if it was just a typographical error (the addition of an extra zero). The only way to identify **[**11]** such an error would be to ask the pension fund or Quest for original records, a step that may not occur even in an audit (itself a rare event). Many dictionaries define "misrepresentation" to include both intentional and inadvertent misstatements. Whether that is the best way to treat this word in this statutory context is a question that need not yet be answered, for the United States tells us that it is prepared to demonstrate that Northern Trust committed gross negligence, or worse. Only if it comes up short will it be necessary to pin down the word's meaning.

REVERSED AND REMANDED

Benson v. State

Circuit Court of Maryland, Baltimore City

June 23, 2004, Decided

Civil No. 24-C-01-005799, Civil No. 24-C-03-004273

Reporter

2004 Md. Cir. Ct. LEXIS 27 *; 2004 WL 5190063

SANDRA BENSON, On behalf of herself & all others similarly situated, Plaintiff, v. The STATE OF MARYLAND, et. al., Defendants, MARY ANN DEAN, On behalf of herself & all others similarly situated, Plaintiff, v. The STATE OF MARYLAND, et. al., Defendants,

Notice: CONSULT LOCAL RULES REGARDING CITATION AND PRECEDENTIAL VALUE OF UNPUBLISHED OPINIONS.

Core Terms

inmates, Plaintiffs', telephone, Prison, claimant, damages, motion to dismiss, unjust enrichment, antitrust, contracts, notice, filed rate doctrine, phone, class action, tort claim, charges, rates, civil conspiracy, anti trust law, Premium, consumer protection, telephone system, cause of action, sovereign immunity, Consolidated, recipients, courts, tariff, delegation, immune

LexisNexis® Headnotes

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN1[] **State & Territorial Governments, Claims By & Against**

Md. Code Ann., State Gov't § 12-207(a)(1)-(5) outlines the form in which a claim against the State may be raised: (1) contain a concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort; (2) demand specific damages; (3) state the name and address of each party; (4) state the name, address, and telephone number of counsel for the claimant, if any; and (5) be signed by the claimant, or the legal representative or counsel for claimant.

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN2[] **State & Territorial Governments, Claims By & Against**

Maryland Courts have recognized that, substantial compliance with the requirements of the Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-207(a)(1)-(5), is sufficient to satisfy the condition precedent to the State's waiver of sovereign immunity. Additionally, the Court of Special Appeals has acknowledged that while Maryland had never, addressed the issue of substantial compliance in the context of a deviation from the required form or content of a notice. There is a great deal of support, however, in the decisions of other states for the proposition that, where compliance with a statutory requirement is technically defective, but nevertheless accomplishes the purposes of the statute itself, the actions taken may be held sufficient.

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN3[] **State & Territorial Governments, Claims By & Against**

The purpose of Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-207(a)(1)-(5), is to provide the relevant agency with notice of a claim. The notice must inform the agency of the circumstances of the incident so that it may investigate, determine its possible liability, negotiate a settlement, or prepare a defense. If the notification facilitates the fulfillment of those statutory objectives, the plaintiffs have substantially complied.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Torts > ... > Liability > Federal Tort Claims Act > Elements

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN4[] **Reviewability, Exhaustion of Remedies**

See *28 U.S.C.S. § 2675(a)*.

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN5[] **State Tort Claims Acts, Procedural Matters**

See Md. Code Ann., State Gov't § 12-206(b).

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN6[] **State Tort Claims Acts, Procedural Matters**

The Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-207(d), states that a claim is denied finally: (1) if, by certified mail, return receipt requested, under a postmark of the United States Postal Service, the Treasurer or designee sends the claimant, or the legal representative or counsel for the claimant written notice of denial; or (2) if the Treasurer or designee fails to give notice of a final decision within 6 months after the filing of the claim.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Torts > ... > Liability > Federal Tort Claims Act > Elements

Torts > ... > Liability > Federal Tort Claims Act > Procedural Matters

HN7[] Reviewability, Exhaustion of Remedies

The Federal Tort Claims Act, 28 U.S.C.S. § 2675, case law clearly demonstrates that a plaintiff pursuing a class action under it or an analogous tort claims act, such as Maryland's, must be able to (1) name each individual claimant, so that settlement negotiations may be facilitated; and (2) provide evidence that each member of the class has exhausted his or her administrative remedies, or (3) when filing the administrative claim provide evidence of the authority either of plaintiff, or plaintiff's counsel, to present claims on behalf of each individual class member.

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Remedies

HN8[] State & Territorial Governments, Claims By & Against

Md. Code Ann., Cts. & Jud. Proc. § 5-522(a)(1) states that Maryland's immunity is not waived under the Maryland Tort Claims (MTCA)Act, Md. Code Ann., State Gov't § 12-104, for punitive damages. Thus, punitive damages may not be awarded against the State-pursuant to the MTCA.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

HN9[] Exhaustion of Remedies, Administrative Remedies

The Maryland Tort Claims Act (MTCA), Md. Code Ann., State Gov't § 12-206(b)(2), states that a claimant may not institute a court action under the MTCA until the Treasurer or designee denies the claim finally. A final denial, as spelled out in Md. Code Ann., State Gov't § 12-107(d), occurs either when (1) claimant receives written notice of denial; or (2) the Treasurer or designee fails to give notice of the final decision within six months of the filing.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Administrative Remedies

HN10[] Reviewability, Exhaustion of Remedies

Maryland case law decrees that a trial court dismisses the action when a plaintiff has made the appropriate claim with the an agency but filed a court action before the claim was denied or the six-month period for agency consideration has run.

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Liability > State Tort Claims Acts > Procedural Matters

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] State & Territorial Governments, Claims By & Against

The Maryland Tort Claims Act, Md. Code Ann., State Gov't § 12-206(b), requires that notice is to be filed within one year after the occurrence of the injury that is the basis of the claim and suit is to be filed within three years after the cause of action arose. Md. Code Ann., *State Government § 12-106(b)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > Public Entity Liability > Immunities > Sovereign Immunity

Governments > State & Territorial Governments > Claims By & Against

HN12[] Deceptive & Unfair Trade Practices, State Regulation

The doctrine of sovereign immunity bars individuals from bringing actions against the State, thus protecting it from interference with governmental functions and preserving its control over its agencies and funds. The doctrine is applicable to the State's agencies and instrumentalities, unless the legislature has waived governmental immunity explicitly or by implication. Maryland Code, Title 13 of the Commercial Law Act, entitled the Consumer Protection Act, Md. Code Ann., *Com. Law § 13-301 et seq.*, grants no waiver of the State's sovereign immunity. Furthermore, there is no Maryland case in which a consumer protection claim was tolerated against the State where the Plaintiff had failed to persuade the court that such a claim should be allowed therein.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN13[] Civil Conspiracy, Elements

Maryland Court's have defined civil conspiracy as a tort in which, a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff.

Constitutional Law > Separation of Powers

HN14[] Constitutional Law, Separation of Powers

Md. Const. Decl. Rights art. 8 provides: That the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Administrative Law > Separation of Powers > Legislative Controls > Scope of Delegated Authority

Constitutional Law > Separation of Powers

HN15[] Legislative Controls, Scope of Delegated Authority

Although the statutory language in *Md. Const. Decl. Rights art. 8* concerning the separation of powers seems strict and absolute, the Maryland Court of Appeals have, on a number of occasions, stressed that Article Eight of the

Maryland Declaration of Rights does not impose a complete separation between the branches of government, and that one may constitutionally delegate legislative power to the executive branch where the legislature provides sufficient safeguards in order to guide the executive branch in the administration of the statute.

Civil Rights Law > Protection of Rights > Prisoner Rights > Welfare

Governments > State & Territorial Governments > Finance

HN16[] Prisoner Rights, Welfare

See Md. Code Ann., *Corr. Servs. § 10-503(a)(2)(i)*.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

Governments > State & Territorial Governments > Finance

HN17[] Rule Application & Interpretation, Validity

A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act. A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts. There is no set rule when determining whether an Act is primarily a regulatory measure or a revenue measure. In general, it may be said that when it appears from the Act itself that revenue is its main objective, and the amount of the tax supports that theory, the enactment is a revenue measure. The Brennan court also establishes that, in a regulatory Act formed under the guise of a revenue-raising Act, when the amount charged is left to the discretion of an administrative official, it is not a valid exercise of the State's police power. That is, the state cannot use its taxing power to validate a measure that would be void under its power to regulate.

Civil Rights Law > Protection of Rights > Prisoner Rights > Welfare

Governments > State & Territorial Governments > Finance

HN18[] Prisoner Rights, Welfare

See Md. Code Ann., *Corr. Servs. § 10-503(a)(2)(i)(1)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN19[] Types of Contracts, Quasi Contracts

The elements of the tort of unjust enrichment are as follows: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

Contracts Law > Defenses > Volunteers

HN20[] Defenses, Volunteers

The voluntary payments rule establishes that, absent a special statutory remedy, an action to reclaim money voluntarily paid will not lie even where the charge is alleged to be illegal. The prerequisites of the voluntary payment rule are that: (1) payment must be voluntary; and (2) it must be made with knowledge of all the facts.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > State & Territorial Governments > Finance

HN21[] Congressional Duties & Powers, Spending & Taxation

Md. Const. Decl. Rights art. 14 states: that no aid, charge, tax, burden or fees ought to be rated or levied, under any pretense, without the consent of the Maryland Legislature.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN22[] Deceptive & Unfair Trade Practices, State Regulation

See Md. Code Ann., Com. Law § 11-201(f).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN23[] Deceptive & Unfair Trade Practices, State Regulation

See Md. Code Ann., Com. Law § 11-202(a)(1).

Antitrust & Trade Law > General Overview

Governments > Federal Government > Claims By & Against

HN24[] Antitrust & Trade Law

The United States District Court for the District of Columbia held that federal officials and federal entities were immune from being sued under federal antitrust laws. The Court has explained therein that antitrust laws were not intended to restrain governmental action.

Antitrust & Trade Law > General Overview

Governments > State & Territorial Governments > Claims By & Against

HN25[] Antitrust & Trade Law

Maryland antitrust laws were created to compliment the federal antitrust laws, and federal courts have held that state actions, including the actions of its agencies, are exempt from federal antitrust suits under the state action doctrine. Federal courts have also held that antitrust laws forbid only those trade restraints and monopolizations that are created, or attempted, by the acts of individuals or combinations of individuals or corporations. In addition, states and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. Accordingly, federal jurisdictions have ruled that valid governmental actions do not violate ***antitrust law***. Thus, analyzing federal ***antitrust law***, one would conclude that the State of Maryland is immune from liability. Hence, the State is also immune from its own antitrust laws which are complementary to the federal laws. A Maryland trial court must conclude that the State cannot be a person within the meaning of the Maryland Antitrust Act and need not be exempted by any section of the Act since it withstands the authority of the Act.

Antitrust & Trade Law > Regulated Practices

Governments > State & Territorial Governments > Claims By & Against

HN26[] **Antitrust & Trade Law, Regulated Practices**

Although the actions of the State may not be found to be unlawful pursuant to the Maryland Antitrust Act, Md. Code Ann., *Com. Law § 11-202 et seq.*, state actions that threaten to restrict trade or cause monopolization must be valid actions. Valid state actions, for the purposes of antitrust immunity, must be clearly articulated and affirmatively expressed as state policy, and be actively supervised by the State itself.

Governments > State & Territorial Governments > Finance

HN27[] **State & Territorial Governments, Finance**

See *Md. Const. art. III, § 32*.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Money Had & Received

HN28[] **Breach of Contract Actions, Money Had & Received**

Money Had and Received is merely a particularized restitution action or a form of quasi-contractual action derived from the theory of unjust enrichment. The count is commonly said to be equally remedial with a bill in equity, and, in general terms, lies whenever the defendant has obtained possession of money which, in equity and good conscience, he ought not to be allowed to retain.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN29[] **Procedural Due Process, Scope of Protection**

See *Md. Const. Decl. Rights art. 24*.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN30[] Civil Conspiracy, Elements

Under Maryland law, one can establish a cause of action for a civil conspiracy where: (1) a confederation of two or more persons by agreement or understanding; (2) engage in some unlawful or tortious act done in furtherance of the conspiracy or engage in an unlawful and tortious means to accomplish an act not in itself illegal; with (3) actual legal damage resulting to the plaintiff.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN31[] Sherman Act, Claims

Conspiracy has been defined in the anticompetitive or monopolistic context as follows: To maintain a cause of action under the Sherman Act, *15 U.S.C.S. § 1*, a party must set forth the following allegations: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relative product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal and (4) that the Plaintiff was injured as a proximate result of that conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN32[] Civil Conspiracy, Elements

Maryland Courts have consistently held that conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff. No action in tort lies for conspiracy to do something unless the acts actually done, if done by one person, would constitute a tort.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN33[] Regulated Practices, Price Fixing & Restraints of Trade

The field-rate doctrine, which is based on both historical antipathy to rate setting by courts, deemed a task they are inherently unsuited to perform competently, and on a policy of forbidding price discrimination by public utilities and common carriers, forbids a court to revise a public utility's or common carrier's filed tariff, which is to say the terms of sale that the carrier has filed with the agency that regulates the carrier's service.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN34[] Regulated Practices, Price Fixing & Restraints of Trade

It is permissible for a customer or a competitor to challenge a tariff before the appropriate state agency and, if they are disappointed with the response of the agency, they can seek judicial review, *47 U.S.C.S. §§ 204(a)(2)(C)* and *402*. But, the customer or competitor cannot ask the court in a suit such as a civil rights or antitrust suit, to invalidate or modify a tariff or seek damages based upon the difference between the actual tariff and some lawful, hypothetical tariff.

Judges: [*1] Thomas E. Noel, Judge.

Opinion by: Thomas E. Noel

Opinion

MEMORANDUM AND ORDER

Plaintiffs Sandra Benson and Mary Ann Dean, both individually and on behalf of persons similarly situated, bring these class actions against the State of Maryland, Office of the State Treasurer, Office of the Comptroller of the Treasury, and the State Department of Public Safety and Correctional Services[1]. Both Ms. Benson and Ms. Dean, the relatives of Maryland inmates, allege that they have been required to pay excessive charges for collect calls received from their inmate relatives, due to an illegal scheme carried out by the Defendants.

I. Facts

The facts of this case are undisputed. In 1989, Maryland personnel, after a competitive **[*2]** bidding process, contracted exclusively with Verizon Communications, Inc. (operating as Bell Atlantic at the time) and AT&T[2] to provide pay phones and telephone carrier services in its prisons[3]. In Maryland, inmates of penal institutions are allowed to make only outgoing collect telephone calls if they wish to speak to persons outside of their confines[4]. Those family members or friends of the inmates, who choose to accept the collect calls are charged at a greater rate than the rates charged to the general public.

Under the conditions of the contract between Maryland and AT&T, the State receives as much as 42% of the amount charged for outgoing long distance telephone calls and 20% of the amount Verizon charges for outgoing local calls from the prisons. The carrier, however, does not reduce its profits to accommodate the State's percentage. Recipients of inmate calls are charged a rate that consists of the State's percentage in addition to the fee it charges for the actual service.[5]

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[1] Plaintiff's original pleadings also named Richard N. Dixon, former Maryland State Treasurer, and William Donald Schaefer, Comptroller of the Treasury as Defendants. This court, held an initial motions hearing on August 28, 2002, at which time defendants were reduced to the State of Maryland, Office of the State Treasurer, Office of the Comptroller of the Treasury and the State Department of Public Safety and Correctional Services. Herein, "State" and/or "Maryland" will refer to some and/or all Defendants.

[2] According to Plaintiff's Exhibit 1 for Motion for Partial Summary Judgment, (e.g. Defendant's Answers to Plaintiff's Interrogatories), there is one contract for all state agencies. Verizon carries all local calls and AT&T carries each long distance call.

[3] This contract was extended for six months in June of 2002 according to Plaintiff's Exhibit 1 for her third amended complaint (e.g. statements made by a Prince George's County Delegate in the November 28, 2001, Daily Record article entitled "Try that number again: Suit challenges prison phone rates.")

[4] In a collect call situation the caller, through a "live" or "automated" operator, places a call to the recipient. The operator communicates **[*3]** to the recipient that a collect call has been placed to them by the caller. The recipient is asked whether or not they will accept the charges for the call, as they will be responsible for the charges.

[5] Maryland, reportedly, is projected to receive as much as $6,600,000.00 annually in revenue from these contracts. This revenue is paid by Verizon Communications, Inc. and AT&T to the State in monthly installments. The State deposits these monies into their Inmate Welfare Fund. Plaintiff's Exhibit 1 (Defendant's Answer to Plaintiff's Interrogatories) explains that the funds in the Inmate Welfare Fund are spent for education, medical care support, life skills programming, commissary operations, religious services, some inmate **[*4]** wages and inmate litigation. Defendant provided the Inmate Welfare Fund's fiscal year 2000 expenditure break down which accounted for $5,046,000.

The State Office of Legislative Audits has confirmed that long distance collect calls received from Maryland's inmates costs the recipient $3.45 for the first minute and $.45 for each additional minute, while each local call was billed at a flat rate of $.85. Ms. Benson, has produced telephone bills from an eight-day period in February of 2001, in which 46 collect phone calls were made to her from a Maryland prison, for which she was charged $344.35.

The instant class actions seek legal and equitable remedies for the above-mentioned charges for collect calls made from Maryland inmates to members of their families and friends. Plaintiffs allege that the State of Maryland entered into exclusive contracts with the aforementioned telephone companies and that, stemming from these contracts, family and friends of inmates were charged excessive rates for collect calls. Inmates are only allowed to make collect calls through this arrangement and the telephone companies reaped a substantial percentage of the telephone charges to the State of Maryland. **[*5]**

As for the *Benson* action, it was originally filed by Sandra Benson, who was the parent of a Maryland inmate. Ms. Benson alleged that she was required to pay excessive charges for collect calls placed to her by her son who was an inmate at a correctional facility in the State of Maryland. Sandra Benson is now deceased, and Crystal Benson, the personal Representative of Sandra Benson's Estate, is the substituted Plaintiff in *Benson's* Fifth Amended Complaint. The parallel *Dean* case has been recently filed and seeks the same relief as the *Benson* case.

Numerous Motions to Dismiss, a Motion for Summary Judgment, and various oppositions to said motions, have been previously filed in the *Benson* case. However, the current *Benson* and *Dean* Complaints include new causes of action and have been organized differently than the previously filed complaints. Hence, Defendants have filed the instant consolidated motion to dismiss to address the new and amended complaints. In addition, by stipulation of the parties, all served and produced discovery in the *Benson* case has been fully adopted in the *Dean* case.

II. Discussion

Plaintiffs' Benson and Dean, in their respective complaints, have challenged the legality **[*6]** of the Maryland inmate telephone system on nine (9) grounds including:

(1) *Article Eight (8) of the Maryland Declaration of Rights*, Separation of Powers;
(2) Unjust Enrichment;

(3) *Article Fourteen (14) of the Maryland Declaration of Rights*, Unauthorized Tax;
(4) Maryland Antitrust Act;
(5) Maryland Consumer Protection Act;

(6) *Article III, section 32 of the Maryland Constitution*, Unlawful Appropriation;
(7) Money Had and Received;

(8) *Article 24 of the Maryland Declaration of Rights*, Unlawful Taking; and
(9) Civil Conspiracy.

Defendants, in their Consolidated Motions to Dismiss, argue that the complaints should be dismissed due to their failure to state a claim upon which relief may be granted as to each of the nine (9) counts. Furthermore, Defendants contend that, in some respects, the Plaintiffs' claims are barred by the provisions of the Maryland Tort Claims Act.

A. Maryland Tort Claims Act

Plaintiffs, Sandra Benson and Mary Ann Dean have initiated this action under Maryland Code, Title 12, Subtitle 1 of the State Government Article, entitled the "Maryland Tort Claims Act" (hereinafter "MTCA"), on behalf of themselves and the proposed class. The MTCA was created to ensure that parties injured by the State could seek redress despite sovereign immunity. Maryland Code, *§12-207(a)(1)-(5)* of the State Government Article ***HN1***[] outlines the form in which a claim against the **[*7]** State may be raised:

(1) contain a concise statement of facts that sets forth the nature of the claim, including the date and place of the alleged tort;
(2) demand specific damages;
(3) state the name and address of each party;
(4) state the name, address, and telephone number of counsel for the claimant, if any; and
(5) be signed by the claimant, or the legal representative or counsel for claimant.

On October 25, 2001, Plaintiff Benson sent a letter, via certified mail, return-receipt requested, to the Office of the State Treasurer for Maryland pursuant to *§12-207(a)* of the Article[6]. On May 28, 2002, Plaintiff Dean's counsel, Marshall N. Perkins, Esquire, sent a letter, via certified mail, return-receipt requested, to the Office of the State Treasurer for Maryland pursuant to *§12-207(a)* of the Article. The Treasurer, or his designee, as directed by Title 12 of the Article, is to consider such claims and settle or deny them[7]. Defendant challenges the sufficiency of Plaintiffs' claims alleging failure to meet the requirements of the MTCA.

As to the allegation of failure to specify damages sought, Defendant is correct **[*8]** to the extent that Plaintiffs have not claimed a specific dollar amount[8]. Nevertheless, ***HN2***[] Maryland Courts have recognized that, "substantial compliance with the requirements of the MTCA is sufficient to satisfy the condition precedent to the State's waiver of sovereign immunity." *Simpson v. Moore, 323 Md. 215, 225, 592 A.2d 1090 (1991)*. Additionally, the Court of Special Appeals acknowledged that while Maryland had never, "addressed the issue of substantial compliance in the context of a deviation from the required form or content of a notice[9]. . . [t]here is a great deal of support, however, in the decisions of other states for the proposition that, where compliance with a statutory requirement is technically defective, but nevertheless accomplishes the purposes of the statute itself, the actions taken may be held sufficient . . ." *Conaway v. State, 90 Md. App. 234, 243, 600 A.2d 1133 (1992)*.

Conaway, was a case in which a prisoner injured in the Maryland Division **[*9]** of Correction, filed negligence claims against the State pursuant to the MTCA. The State denied Conaway's claim on the grounds that the notice provided was defective. Conaway filed his Complaint after the time period allowed in the MTCA had expired and failed to demand specific damages. The Court following the rule set forth in *Gardner v. State, 77 Md. App. 237, 247, 549 A.2d 1171 (1988)* which held that Maryland courts are to look to the Federal Tort Claims Act (hereinafter FTCA) in interpreting the MTCA. The aforementioned court found resolution in the claimant's failure by contrasting the two acts. The *Conaway* Court reasoned that, although both acts "require a specific demand for damages, the FTCA also states that, once the agency denies the claim, the claimant may not file a lawsuit for a greater amount of damages than was claimed before the agency . . .". This provision provides the agency with a certain degree of precision in investigating the claim, in that it will know the magnitude of the government's potential liability at all times. The MTCA provides no such limitation on the claimant's eventual action for damages; thus, the specific demand for damages, so critical in federal cases, is of far less relevance in Maryland. The Court **[*10]** reversed the decision to dismiss Conaway's claim because it found he had substantially complied with the notice provision of the MTCA.

In the case at bar, Plaintiffs claim actual damages equal to the amount that Maryland received from the communication carriers. ***HN3***[] The statute's purpose is to provide the relevant agency with notice of a claim. The notice must inform the agency of the circumstances of the incident so that it may investigate, determine its possible

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[6] Plaintiff supplemented her claim with the Treasurer on November 29, 2001 and December 17, 2001.

[7] *§12-107(c)* & *(d)* discuss settlements and final denials respectively.

[8] Plaintiff prays for (1) permanent injunctive relief to enjoin Defendants from charging, invoicing and collecting on the calls, (2) an award of attorney's fees, (3) compensatory and punitive damages, (4) litigation costs, pre- and post-judgment interest, and (5) any other relief the court deems required.

[9] The "notice" alluded to is the claim itself.

liability, negotiate a settlement, or prepare a defense. If the notification facilitates the fulfillment of these statutory objectives, the Plaintiffs have substantially complied. This court finds that Plaintiffs substantially complied by alleging damages that were sufficient for the Treasurer or his designee to begin an investigation into the matter.

In adherence with the rulings of the guiding federal authority this court must, *sua sponte*, deny Plaintiff's class certification as to the MTCA claims. The issue of whether a class action may be filed pursuant to the MTCA is an issue of first impression. Hence, this court will follow Gardner rule by looking to the FTCA for direction. As such, the court reviewed several federal cases **[*11]** which addressed class certifications in cases brought under the FTCA. The majority of these cases held that each individual member of a purported class, prior to certification of an action brought pursuant to the FTCA, 28 USCA § 2675, must satisfy the jurisdictional prerequisites found in the Act. The full text of 28 U.S.C.A. § 2675(a) reads as follows:

> §2675. Disposition by federal agency as prerequisite; evidence
>
> **HN4**[] (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the **claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section**. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal **[*12]** Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

The MTCA's prerequisites are the equivalent of those found in the FTCA. Maryland Code, §12-106(b) of the State Government Article, sets forth the following analogous prerequisites:

> **HN5**[] (b) *Claim and denial required*. — A claimant may not institute an action under this subtitle unless:
> (1) the claimant submits a written claim to the Treasurer or a designee of the Treasurer within 1 year after the injury to person or property that is the basis of the claim;
> (2) the Treasurer or designee denies the claim finally[10]; and
> (3) the action is filed within 3 years after the cause of action arises.

This court's review of federal case law begins with Kantor v. Kahn, 463 F. Supp. 1160 (S.D.N.Y. 1979), in which a class action was brought by plaintiffs to recover damages under the FTCA on behalf of 40,000 consumers alleging **[*13]** that the Civil Aeronautics Board (hereinafter "CAB") failed to regulate a chartered tour group. The Court found an absence of subject matter jurisdiction because the named plaintiffs bore the burden to supply the CAB with the names of the individual claimants in order for the agency to facilitate settlement negotiations. The plaintiffs also failed to state their authority or the authority of their attorney to act as representative on behalf of the class. The Court stated that a class action could be maintained under the Act if each class member filed an individual claim with the agency or if each individual claimant was named with an assertion that would establish the authority of the named claimant to represent claims on behalf of the class members. The court also determined that plaintiffs failed to meet the sum certain requirement because their demand for a lump sum payment did not indicate that each class member suffered the same damages.

Similarly, in Harrigan v. United States, 63 F.R.D. 402 (D. C. Pa. 1974), the Court dismissed an attempted class action instituted by plaintiff, a paralyzed veteran, seeking to represent a class of paralyzed veterans who had undergone urological surgery, on the basis of misleading information. The surgeries **[*14]** were performed in

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[10] §12-107(d) **HN6**[] states that a claim is denied finally: (1) if, by certified mail, return receipt requested, under a postmark of the United States Postal Service, the Treasurer or designee sends the claimant, or the legal representative or counsel for the claimant written notice of denial; or (2) if the Treasurer or designee fails to give notice of a final decision within 6 months after the filing of the claim.

government hospitals and several of the veterans sustained injuries. The Court held that the class action failed to comply with the jurisdictional requirements of the FTCA. Although the purported class filed an administrative claim, the Court did not have jurisdiction over the unnamed members of the purported class who had not filed an administrative claim. The Court reasoned that to allow waivers of the administrative claim prerequisites for unnamed plaintiffs would constitute a prohibited expansion of the jurisdiction of the federal courts. Therefore, the class had to be limited to only those members who had filed administrative claims. After this reduction the class action could no longer be maintained.

Finally, in this discourse, we have *Caidin v. United States, 564 F.2d. 284 (9th Cir. Cal 1977)*, in which a shareholder of a bank brought an action on behalf of himself and all persons similarly situated seeking damages from the federal government as a result of the failure of the national bank. The Court held that the administrative claim filed on behalf of the shareholders as a class was insufficient to fulfill the jurisdictional prerequisites of the FTCA because plaintiff had no express authority to represent the purported **[*15]** class. The Court explained that since it was the objective of the administrative claim requirements to facilitate settlement of cases, it was necessary to require that the existence of such authority be asserted contemporaneously with the filing of the claim by one who files on behalf of a class of claimants. Furthermore, evidence of authority need be presented in regard to each individual claimant who has not filed on his or her own behalf. The Court also found that the Plaintiffs individual claim failed because the only sum requested was for the class as a whole. *Cf. Luria v. Civil Aeronautics Board, 473 F.Supp. 242 (S.D.N.Y. 1919)*; *Pennsylvania by Sheppard v. National Assoc. Of Flood Insurers, 520 F.2d 11 (CA3 1975)*; *Lunsford v. United States, 418 F.Supp. 1045 (D. S.D. 1976)*; *Founding Church of Scientology, Inc. v. Director, Federal Bureau of Investigation, 459 F. Supp. 748 (D.D.C. 1978)*.

The FTCA ***HN7***[] case law clearly demonstrates that a plaintiff pursuing a class action under it or an analogous tort claims act, such as Maryland's, must be able to (1) name each individual claimant, so that settlement negotiations may be facilitated; and (2) provide evidence that each member of the class has exhausted his or her administrative remedies, or (3) when filing the administrative claim provide evidence of the authority either of plaintiff, or plaintiff's counsel, to present claims on behalf of each individual class member.

In these two (2) cases at issue, Plaintiffs have failed each of these enumerated requirements. **[*16]** Plaintiffs Benson and Dean, first and foremost, have failed to name any other similarly situated persons on whose behalf they are acting and any alleged damages suffered by said class members. As previously stated the objective of the MTCA's filing requirement is to afford the State the opportunity to investigate the claims to determine its possible liabilities, and negotiate settlements or prepare defenses. Without the names of these other individuals that Plaintiffs desire to represent and the alleged damages suffered by those class members, the Treasurer is unable to investigate the implicit additional claims. The Treasurer is also incapable of determining the State's possible liability to these unnamed persons, and therefore can neither negotiate settlements, nor prepare defenses to claims of unknown people, which are at this point, only insinuated by Plaintiffs.

In addition, Plaintiffs have offered nothing to suggest that each individual member of the proposed classes have exhausted his or her administrative remedies. The MTCA dictates that no tort claim against the State may be brought into court until there has been a final denial of the claim by the Treasurer. Therefore, Plaintiffs **[*17]** must be able to demonstrate that each of the persons they wish to represent has fried a claim with the Treasurer which has been finally denied, as defined in the MTCA. Finally, Plaintiffs must provide some evidence of their authority to represent the class, but they have offered none. For all of the preceding reasons, Plaintiffs' class action certifications must be denied.

Plaintiffs' prayers for punitive damages also must be denied. Maryland Code, *§5-522(a)(1) of Courts and Judicial Proceedings Article* ***HN8***[] states that Maryland's immunity "is not waived under *§12-104 of the State Government Article*," for punitive damages. Thus, punitive damages may not be awarded against the State-pursuant to the MTCA.

Defendants, in their Consolidated Motion to Dismiss, raise a material argument against Plaintiff Benson's MTCA action. Plaintiff Benson has not illustrated that her Complaint complies with the Tort Claims Act for the reason that there is no allegation that the Treasurer has finally denied the claim. Maryland Code, *§12-106(b)(2) of the State*

Government Article HN9[] states that a claimant may not institute a court action under the MTCA until "the Treasurer or designee denies the claim finally."

A final denial, as spelled out in §12-107(d) of the Article, occurs either when (1) claimant receives written notice of denial, or (2) **[*18]** the Treasurer or designee fails to give notice of the final decision within six months of the filing. Plaintiff Benson, in this case, filed her claim with the Treasurer on October 25, 2001 and subsequently filed suit in the Circuit Court for Baltimore City on November 26, 2001. Plaintiff Benson has not evidenced nor alleged that her claim was finally denied, before she filed suit. This court concludes that Plaintiff Benson's suit, brought only one month after filing her claim with the Treasurer, is premature. Plaintiff's actions preempted the objectives of the MTCA notice requirements from being fulfilled. The filing with the court disrupted the Treasurer's capacity to investigate the matter, determine any State liability, and negotiate a settlement or prepare a defense to the claim. Thus, there can be no finding of substantial compliance here.

Plaintiff Benson's premature filing with the court after only one month is closer to an outright failure than it is to substantial compliance. Moreover, HN10[] Maryland case law decrees that this court "dismiss the action" when a plaintiff has made the appropriate claim with the an agency "but filed a court action before the claim was denied or the **[*19]** six-month period for agency consideration has run". Gardner v. State, 77 Md. App. 237, 248, 549 A.2d 1171 (1988).

Although, §12-102 of the Article states," [t]his subtitle shall be construed broadly, to ensure that injured parties have a remedy," Plaintiff Benson's claim against Maryland is barred by her failure to comply with §12-106(b) of the State Government Article. *See* Williams v. Maryland Department of Human Resources, 136 Md. App. 153, 176, 764 A.2d 351 (2000). The statute commands that the Treasurer be given six months free of litigation to consider and attempt to resolve the matter. Ultimately, Plaintiff's premature court action constitutes a jurisdictional defect that leaves this court with no subject matter jurisdiction over any of Plaintiff's tort claims under the MTCA.

In addition, Plaintiff Dean's MTCA Notice and Complaint were also not timely filed. The MTCA HN11[] requires that notice is to be filed within one (1) year after the occurrence of the injury that is the basis of the claim and suit is to be filed within three (3) years after the cause of action arose. Md. Code Ann., State Government § 12-106(b) (1985). In the Dean case, notice was filed on May 28, 2002 and suit was filed on June 11, 2003. Plaintiff Dean was on notice of her alleged injuries as early as January 1, 1999.[11] Therefore, Plaintiff Dean's claim was not filed with this court within three (3) years after the cause of action arose.

Hence, Defendant's motion to dismiss Plaintiff Benson's claims for failure to comply with the MTCA is granted in part. Plaintiff Benson's failure to attain a final denial from the Treasurer or his designee as mandated in the MTCA will preclude her tort claims. However, those claims that could have been brought independent of the MTCA shall survive for further consideration.

In addition, Defendant's motion to dismiss Plaintiff Dean's Complaint is granted in full. In addition to Plaintiff Dean's failure to timely file a MTCA notice and Complaint, Plaintiff Dean has failed to state any claim in her Complaint that alleges any fact to support the contention that she has suffered any injury. Although Plaintiff Dean's phone records are attached as exhibits to Plaintiff Benson's First Amended Class Action Complaint, nowhere in Dean's Complaint does she allege that she accepted and paid for any collect calls from any Maryland inmate nor has she supplied phone records as exhibits to her Class Action Complaint. The only specific allegations in her Complaint relate to Plaintiff Benson. Plaintiff Dean's Complaint **[*21]** only contains general allegations that she was the victim of a scheme perpetrated by the State to raise revenue from recipients of collect calls from Maryland inmates. Therefore, Plaintiff Dean's Complaint is dismissed in its entirety.

The court must now determine which, if any, of Plaintiff Benson's claims are dismissed by her MTCA failures. First, the court considers Plaintiff Benson's antitrust claim, to determine if it is precluded by her MTCA failure. This court

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[11] Plaintiff Dean was **[*20]** receiving phone bill for collect calls to a Maryland inmate as early as January 1, 1999.

finds that Plaintiff's Antitrust claim is not dismissed as it is not raised subject to the MTCA; moreover, this court believes there are significant issues raised by the claim that justify substantial consideration.

Second, the court considers Plaintiff Benson's Declaration of Rights claims to determine if they are precluded. The court finds that Plaintiff's *Article 8* and *Article 14* claims are dismissed. These claims, specific to this action, are state constitutional fort claims in the opinion of this court. Plaintiff's *Article 8* and *Article 14* claims allege a violation of her constitutional rights brought about by the exclusive State contracts that result in high phone charges for the collect calls she has accepted from an inmate. Any alleged violation of a constitutional **[*22]** right involves a violation of a duty imposed by law.

A tort, as defined in Black's Law Dictionary, is a violation of a duty owed to the plaintiff, as long as the duty is imposed by law rather than by agreement or contract. Thus, under such a broad definition of torts all violations of constitutional rights that result in harm to plaintiffs are encompassed. Furthermore, the MTCA's waiver of sovereign immunity is not limited to a specific short list of tort actions; it applies to "tort actions generally." *See Simpson v. Moore, 323 Md. 215, 219, 592 A.2d 1090 (1991)*. Plaintiff's Declaration of Rights claims are torts encompassed by the MTCA and Plaintiff may not sue the State because of her prerequisite failures.

In addition, Plaintiffs' claims of Unjust enrichment, violations *Art. III, section 32*, (Unlawful Appropriations), Money Had and Received and violations of *Art. 24 of Maryland Declaration of Rights* (Unlawful Taking) are also dismissed pursuant to the MTCA due to the fact that they are torts as defined *supra*.

Next, the court considers Plaintiff Benson's Consumer Protection Act (hereinafter CPA) to determine if it shall survive her MTCA failure. ***HN12***[] "[T]he doctrine of sovereign immunity bars individuals from bringing actions against the State, thus protecting it from interference with governmental functions **[*23]** and preserving its control over its agencies and funds." *Katz v. Washington Sub. San. Comm'n. 284 Md. 503, 507, 397 A.2d 1027 (1979)*, The doctrine is applicable to the State's agencies and instrumentalities, unless the legislature has waived governmental immunity explicitly or by implication. *Godwin v. County Comm'rs, 256 Md. 326, 334, 260 A.2d 295 (1970)*. Maryland Code, Title 13 of the Commercial Law Act, entitled the Consumer Protection Act grants no waiver of the State's sovereign immunity. Furthermore, there is no Maryland case in which a consumer protection claim was tolerated against the State where the Plaintiff had failed to persuade the court that such a claim should be allowed therein. Accordingly, Plaintiff's CPA claim is dismissed.

Finally, Plaintiff Benson's claim of civil conspiracy is also dismissed pursuant to the MTCA. ***HN13***[] Maryland Court's have defined civil conspiracy as a tort in which, "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means employed must result in damages to the plaintiff." *Green v. Washington Sub. San. Comm'n., 259 Md. 206, 269 A.2d 815 (1970)*. The tort of civil conspiracy may not be maintained due to Plaintiff Benson's previously explained MTCA deficiencies: (1) failure to prove receipt **[*24]** of written notice of a final denial and (2) if no final denial, failure to wait until six months after filing with the Treasurer to file a complaint with the court.

Nevertheless, this Court will address each count of Plaintiff Benson's Complaint independent of its analysis pursuant to the Maryland Tort Claims Act. This analysis will encompass each count regardless of its viability under the Maryland Tort Claims Act and will provide a ruling as to the dismissal of each count based upon their merits independent of the Maryland Tort Claims Act analysis.[12]

B. Article Eight of the Maryland Declaration of Rights

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[12] As mentioned *supra*, this Court has already dismissed a number of Plaintiff Benson's counts in her Fifth Amended Complaint, as well as, Plaintiff Dean's initial Complaint in its entirety.

> Article 8 of the Maryland Declaration of Rights HN14[] provides: "That the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

HN15[] Although this statutory language concerning the separation of powers seems strict and absolute, the Maryland Court of Appeals have, on a number of occasions, **[*25]** stressed that Article Eight of the Maryland Declaration of Rights does not impose " a complete separation between the branches of government," and that one may constitutionally delegate legislative power to the executive branch where the legislature provides sufficient safeguards in order to guide the executive branch in the administration of the statute. Judy v. Schaefer, 331 Md. 239, 261, 627 A.2d 1039, 1050 (1993).

In the case at issue, the Maryland State Legislature has generally approved the Department of Corrections' collection of telephone commissions for the benefit of the Inmate Welfare Fund (IWF) through enaction of the legislation which authorizes the creation of the IWF. Section 10-503(a)(2)(i) of the Correctional Services Article, Md. Ann. Code (1999) provides that:

> HN16[] "Each fund consists of (1) profits received from the sale of goods through the commissary operation and telephone and vending machine commissions; and (2) subject to subparagraph (ii) of this paragraph, money received from other sources."

The Issue is whether this general approval, short of an approval of a particular dollar amount by the Maryland State Legislature, is enough approval to give the executive the power to charge families and friends of Maryland State inmates the amount specified in the Prison Telephone Premium. The **[*26]** case, Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 24 A.2d 911 (1942) points out an important distinction that this court must consider before determining its ruling on this particular issue.

Maryland Theatrical involved a statute that permitted the Baltimore Police Commissioner to charge a fee for permits required by businesses that arranged dances. The permit fee was not fixed by statute and could range from $5 to $100 at the discretion of the Police Commissioner. The Police Commissioner was utilizing this statute to regulate the activities of certain organizations by imposing the maximum fee upon them.[13] The court made an important distinction in this case between fees for regulatory purposes and fees for revenue purposes. This distinction was important to the court because different rules apply to each. The court stated:

> HN17[] "A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act. A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts." Id. at 381.

The court stated that there was no set rule when determining whether an Act is primarily a regulatory measure or a revenue measure. *Id*. "In general, it may be said that when it appears from the Act itself that revenue is its main objective, and the amount of the tax supports that theory, the enactment is a revenue measure." Id. The *Brennan* court also established that, in a regulatory Act formed under the guise of a revenue-raising Act, when the amount charged is left to the discretion of an administrative official, it is not a valid exercise of the State's police power. Id. at 385. That is, the state cannot use its taxing power to validate a measure that would be void under its power to regulate. *Id*.

As mentioned *supra*, Brennan was a case involving an Act that permitted the Baltimore City Police Commissioner to issue permits and determine fees ranging from $5 to $100 for dances within the city. And as mentioned previously, although the purpose stated in the Act was "to provide additional revenue for the Special Fund of the Board of Police Commissioners for the City of Baltimore", the Baltimore City Commissioner used it as a regulatory tool to

[13] The Commissioner was utilizing the $100 fee to curtail dances where women charged men a certain **[*27]** amount of money per dance to dance with them.

ensure **[*28]** that the fee was prohibitive for certain events, namely, events where men would pay women to dance with them for a fee. The Police Commissioner would set the permit fee at its highest rate ($100) in order to discourage these types of undesirable dances or soirees.

The present case is easily distinguished from *Brennan* because the Prison Telephone Premium is in no way a regulatory measure. The purpose of the instant legislation is to raise revenue for the Inmate Welfare Fund. Furthermore, and as pointed out by Defendants in their Consolidated Motion to Dismiss, the present case is also distinguishable from *Brennan* because the revenue raised in the instant case does not come from an arbitrarily set fee or tax but from a negotiated and competitively bid contract with a number of telephone service providers already established in the community and the legislature authorized the Department of Corrections to enter into these contracts. Therefore, as stated *supra*, the instant measure is one of revenue-raising and not of a regulatory nature. Hence, the amount of the Prison Telephone Premium is not review able by this court.

Defendants have cited a number of cases including: *Christ v. Maryland Department of Natural Resources, 335 Md. 427, 644 A.2d 34 (1994)*(regulation banning **[*29]** the use of personal water craft by persons under 14); *Department of Transportation v. Armacost, 311 Md. 64, 532 A.2d 1056 (1987)* (regulatory measure ensuring clean air though the Vehicle Emission Inspection Program); and *Lussier v. Maryland Racing Commission, 343 Md. 681, 684 A.2d 804 (1996)* (regulatory measure to govern racing and betting on racing in the state) which, although they deal with regulatory measures and not revenue-raising measures, have showed a trend towards a greater flexibility in the delegation of authority to regulatory agencies. Although inapplicable to the instant case, they illustrate the limits that Maryland Courts have set as they pertain to the delegation of legislative authority to an administrative agency.

As mentioned *supra*, Maryland Courts have taken a more flexible approach concerning the separation of powers doctrine in this context. *Metropolitan Life Ins. Co. v. Insurance Comm. Of Md., 58 Md. App. 457, 472, 473 A.2d 933, 941*, *cert. denied*, *300 Md. 795, 481 A.2d 239 (1984)*. In *Lussier*, there was a broad legislative delegation to the Maryland Racing Commission of the authority to "adopt regulations...to govern racing and betting on racing in the State," imposing civil penalties of up to five-thousand dollars ($5000.00). The court held this broad legislative delegation was proper in the context of separation of powers.

Similarly, in the instant case, the legislature has acknowledged and approved the Department's collection **[*30]** of telephone commissions for the benefit of the Inmate Welfare Fund (IWF) by enacting *§ 10-503(a)(2)(i)(1) of the Correctional Services Article*, Md. Ann. Code (1999)("CS").[14] Both in *Lussier* and the instant case, the legislature has provided no express guidelines as to the actual amount of the commission, but, as the *Lussier* case illustrates, express guidelines are not required.

Furthermore, the instant case can be distinguished from the cited aforementioned cases in that it does not address the exercise by an agency of regulatory power delegated by the legislature Instead, this case involves the collateral and indirect consequences of contracts between the Department and the telephone companies in order to provide a discretionary service to Maryland inmates.

For these reasons, Plaintiffs have failed to state a claim upon which relief may be granted under *Article 8 of the Declaration of Rights.* That is, assuming the truth of the well-pleaded facts in this case and, in addition, the inferences drawn from them in considering a motion to dismiss for failure to state a claim under *Maryland Rule 2-322(b)(2)*, Plaintiff Benson's claim as to this **[*31]** count is dismissed.[15] Furthermore, and as previously mentioned, Plaintiff's claim under *Article Eight of the Maryland Declaration of Rights* is dismissed pursuant to the MTCA.

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[14] This section provides: ***HN18***[] "Each fund consists of...profits derived from the sale of goods through the commissary operation and telephone and vending machine commissions...".

[15] As mentioned *supra*, this count is also dismissed pursuant to the Maryland Tort Claims Act.

C. Unjust Enrichment

HN19[] The elements of the tort of unjust enrichment are as follows:

> (1) a benefit conferred upon the defendant by the plaintiff;
>
> (2) knowledge by the defendant of the benefit; and
>
> (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *County Comm'rs of Caroline County v. Roland Dashiell & Sons, Inc., 358 Md. 83, 95 n. 7, 747 A.2d 600, 609 n. 7 (2000)*.

As to the instant case, the benefit conferred to the Defendant by the Plaintiffs is the amount of the Prison Telephone Premium and the State had knowledge of the benefit conferred. The question remains whether the acceptance or retention by the defendant of the benefit under such circumstances would make it inequitable for the defendant to retain the benefit without payment of its value.

Plaintiffs argue that the retention of the benefit is inequitable for reasons including the fact that the State executive's collecting and retention of those funds is an impermissible **[*32]** delegation of legislative authority. As this court has ruled *supra*, that contention is ill-founded and there is no impermissible delegation of legislative authority in this case. Furthermore, and as mentioned *supra*, Plaintiffs' reliance on *Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 24 A.2d 911 (1942)* is misplaced.

In addition, the Restatement (Second) of Restitution (Tent. Draft No. 1, 1983), § 1, cmt. C, at 10, sets forth three characteristic circumstances of situations that could support a right to restitution to avoid unjust enrichment which include: (1) a voluntary transaction, not fully effective; (2) wrongdoing against the claimant's interest; and (3) mistake.

Defendants argue that, Plaintiffs' complaints do not make out a claim for unjust enrichment that meets this above-mentioned test in addition to the previous test cited. They claim that the instant situation is no different than a situation where an everyday consumer thinks that the asking price is too high but, nonetheless, pays that price. They claim that the families and friends of Maryland inmates have simply made use of an optional service, despite its high price. Despite Plaintiff's argument recognizing the flexible nature of the unjust enrichment cause of action, Plaintiff Benson's Complaint **[*33]** does not allege facts that establish a claim of unjust enrichment pursuant to the tests mentioned *supra*.

Also, Defendants argue that Plaintiffs' claims of unjust enrichment should be dismissed due to the application of two common law defenses, namely, the voluntary payments rule and the change of position defense. ***HN20***[] The voluntary payments rule establishes that, absent a special statutory remedy, an action to reclaim money voluntarily paid will not lie even where the charge is alleged to be illegal. *Washington Suburban Sanitary Comm'n v. C.I. Mitchell & Best Co., 303 Md. 544, 572, 495 A.2d 30 (1985)*. The prerequisites of the voluntary payment rule are that: (1) payment must be voluntary and (2) it must be made with knowledge of all the facts. *Halle Development, Inc. v. Anne Arundel Co., 371 Md. 312, 322-23 n. 16, 808 A.2d 1280, 1286 n. 16 (2002)*.

The Plaintiffs, in this case, allege that they were being charged an unlawful premium on telephone calls between themselves and Maryland inmates but yet they voluntarily paid the charges despite their beliefs that the charged were illegally imposed. Although this seems to be sufficient to satisfy the voluntary payments rule, the doctrine does not apply when "the right to recover....is provided for by statute." *Dua v. Comcast Cable of Maryland, Inc., 370 Md. 604, 646, 805 A.2d 1061, 1085*. And, as discussed *supra*, the MTCA specifically provides a remedy to Plaintiffs.

In addition, Plaintiffs argue that Defendants have failed **[*34]** to establish that a voluntary payment was made with full-knowledge of all the facts. This court finds that there is no evidence that Plaintiffs or any member of the proposed class had full knowledge of the Prison Telephone Premium billed by non-parties. Therefore, this Court rejects Defendants "voluntary payment" defense for the two reasons previously mentioned.

The change of position defense bars an action for restitution for unjust enrichment and is explained by professor Dan. B. Dobbs as follows:

> "When the benefit [conferral of which on the defendant is alleged to have amounted to unjust enrichment] is consumed or expended in ways that (a) do not increase assets or educe liabilities and (b) the expenditure or consumption is one that the recipient would not have indulged except for the mistake, a strong equity appears in favor of the recipient and the defense may be effective to bar restitution". Dan B. Dobbs, *Handbook of the Law of Remedies* (2d ed. 1993), at 450.

Defendants contend that this defense applies to the instant case because the money paid to the State by the Plaintiffs was used to pay for inmate welfare services. Furthermore, Defendants claim that, if the State had suspected that the source of these funds was illegal, they **[*35]** may not have gone forward with imposing the prison telephone premium.

This court is unimpressed by this argument. There is no showing as to any "change in circumstances" by Defendants and Defendants have presented no evidence that would tend to show that the State has done something that it would have otherwise not done. Hence, this court rejects Defendants "change in position" defense.

Nevertheless, Plaintiff Benson's claim of unjust enrichment is dismissed due to the fact that the Complaint fails to state a claim upon which relief may be granted and, as mentioned *supra*, pursuant to the Maryland Tort Claims Act.

D. ***Article 14 of the Maryland Declaration of Rights***

Article 14 of the Maryland Declaration of Rights ***HN21***[] states: "[t]hat no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature."

In their Consolidated Motion to Dismiss, Defendants raise a number of arguments to support their contention that Plaintiffs fail to state a claim upon which relief may be granted pursuant to *Maryland Rule 2-322(b)(2)*. First, Defendants argue that the State has the power to enter into contracts to provide and charge for amenities which include outgoing telephone service. Defendants claim that the aforementioned power to enter into these contracts is provided by the **[*36]** legislation creating DPSCS and empowering it to operate state prisons, namely Md. Code Ann., *Corr. Serv, § 2-101 et seq*.. Second, Defendants contend that the inmate telephone surcharge is not a fee or tax within the meaning of *Article 14 of the Maryland Declaration of Rights.* Defendants argue that it is a voluntarily incurred charge for a service provided to inmates and their family and friends, which the recipients of these calls may decline.

Third, Defendants claim that the Maryland Legislature has consented to and sanctioned the inmate telephone system. Defendant support this argument by citing Md. Code Ann., *Corr. Serv, § 10-501 et seq*, which provides generally for inmate welfare funds consisting in part of "profits derived from the sale of goods through the commissary operation and telephone and vending machine commissions."

Fourth, Defendants argue that the purported problem with the inmate telephone system was presented to the General Assembly during the 2002 session. House Bill 839 would have barred the state from receiving commissions on inmate telephone calls but was reported unfavorably by the House Commerce and Governmental Matters Committee and no further legislative action was taken on the matter. Hence, the inmate telephone system as been recently examined **[*37]** in the legislative arena and the legislature, through their inaction, has, in essence, approved the subject telephone system. Furthermore, this legislative inaction lends credence to Defendants' argument that Plaintiffs' Article 14 argument is without merit.

In opposition to Defendants' Consolidated Motion to Dismiss, Plaintiffs claim that the Prison Telephone Premium is invalid under *Article 14 of the Maryland Declaration of Rights* because it is an aid, burthen, fee or other charge imposed administratively "without the consent of the Legislature". Furthermore, Plaintiffs argue that the PTP is not voluntarily incurred because it is a hidden, coerced kickback and is not a user fee because the amount collected by the State does not go to pay for the telephone system or service.

First, Plaintiffs allege that Defendants contention that "the power to enter into contracts to provide and charge for amenities such as outgoing telephone service to inmates must be considered inherent in the very legislation creating the Department....and empowering it to operate the States prisons," contains a false premise. Plaintiffs argue that the PTP is not a charge for an amenity such as outgoing telephone service but, in actuality, is general revenue money, and purely for **[*38]** profit and extorted from third parties. They claim that *Section 2-101 et seq. of the Correctional Services Article* is generic enabling legislation that is painted in the broadest of strokes and authorizes virtually nothing specific. It is Plaintiffs' contention that, if this general enabling legislation were sufficient to justify a general revenue measure; then *article 14 of the Maryland Declaration of Rights* would become a dead letter since every administrative agency is born from similar generic legislation.

Second, Plaintiffs cite *Eastern Diversified Properties, Inc. v. Montgomery County, 319 Md. 45, 570 A.2d 850 (1990)* to illustrate that the PTP is an aid, burthen or charge prohibited by *Article 14 of the Maryland Declaration of Rights*, The issue in *Eastern Diversified* was whether "a 'development impact fee' imposed by ch. 49A of the Montgomery County Code (1984) for road construction, was a valid regulatory fee under the County's home rule power or is a tax which the County is without authority to impose." *Id. at 46, 570 A.2d at 851*. Hence, this case addressed the question of whether a revenue measure was a tax or a fee and, therefore, subject to consent of the Maryland General Assembly pursuant to *Article 14 of the Maryland Declaration of Rights.* *Id*.

Per the reasoning of *Eastern Diversified*, Plaintiffs claim that, in this case: (1) raising revenue is the sole objective of the Prison Telephone Premium; (2) the amount of raised revenue supports that inference; (3) the State "involuntarily **[*39]** exacts" money via the PTP; (4) recipients of collect calls have no choice but to pay the charge; and (5) the PTP funds are treated and applied as general revenue funds.

Plaintiffs also make a lengthy historical argument to make the point that the framers of *Article 14* were aware of the perceived dangers of allowing executive officials to generate revenue via administrative action.

After careful consideration of the pleadings and the applicable law, it is this court's decision that Plaintiffs fail to state a claim upon which relief may be granted, reasoning that, although the Prison Telephone Premium is a fee as contemplated by *Article 14 of the Maryland Declaration of Rights*, the Maryland legislature has consented to said fee via *§ 10-501 et seq*. of the Correctional Services Article. Furthermore, and although not a legal justification for dismissal, the General assembly has given "approval by silence" of the PTP by failing to take action in 2002 when presented with House Bill 839. Additionally, and as mentioned *supra*, Plaintiffs' claim regarding Defendants' violation of *Article 14 of the Maryland Declaration of Right* is dismissed for Plaintiffs' failures under the Maryland Tort Claims Act.

E. Maryland Antitrust Act

Although this court believes that Plaintiff's antitrust claims are likewise barred by sovereign immunity, Plaintiff's **[*40]** arguments warrant discussion. Plaintiffs' antitrust claims raise three significant issues: (1) whether the State of Maryland is a "person" within the meaning of Maryland Code, *§11-201(f) of the Commercial Law Article*; (2) whether the State of Maryland is exempted by *§11-203* of the Article; and (3) whether the actions of the State, complained of herein, are unlawful pursuant to *§11-204* of the Article.

Maryland Code, *§11-201(f) of the Commercial Law Article* states in full:

> ***HN22***[] Person. — "Person" includes an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

This definition leaves room for two very distinct, yet valid points of view. First, that the State is a "person" in accordance with several State and Federal cases that have held such, when interpreting statutes with similar broad definitions. *See* City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 394-95, 98 S.Ct. 1123, 55 L. Ed. 2d 364, (1978). And alternatively, that the legislature would have included some term explicitly identifying the State, when constructing such a definition in an act that waives the State's sovereign immunity from liability. This court finds no declaration as to whether Maryland is a "person" under the Maryland Antitrust Act, within the wording of the statute nor in any State case law. However, **[*41]** the legislature did provide a key to understanding the antitrust subtitle within the statute itself. Maryland Code, §11-202(a)(1) & (2) of the Article, entitled "Purpose, interpretation, and construction," states in part:

> **HN23**[] (1) The General Assembly of Maryland declares that the purpose of this subtitle is to complement the body of federal law governing restraints of trade, unfair competition, and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest intrastate competition.
> (2) It is the intent of the General Assembly that, in construing this subtitle, the courts be guided by the interpretation given by the federal courts to the various federal statues dealing with the same or similar matters . . .

Accordingly, this court looks to federal holdings for direction. In Sea-Land Service, Inc. v. The Alaska Railroad, 212 U.S. App. D.C. 197, 659 F.2d 243, (D.C. Cir. 1981), **HN24**[] the United States District Court for the District of Columbia held that federal officials and federal entities were immune from being sued under federal antitrust laws. The Court explained therein that antitrust laws were not intended to restrain governmental action.

The plaintiffs in *Sea-Land* were two shipping companies that brought suit against two private corporations, and three federal **[*42]** agencies and their chief officers. The plaintiffs alleged that the federal government was giving preferential rates to their competitors. The Court dismissed the case ruling that a restraint on trade or a monopolization resulting from a valid governmental action did not violate federal ***antitrust law***. The Court further ruled that the case was at its root a complaint about rates that was best left to the governing agency, the Interstate Commerce Commission, which held primary jurisdiction. This court is in agreement with the reasoning used by the Sea-Land Court and its ruling.

The United States government and its agencies may not be sued without their consent under the doctrine of sovereign immunity, just as the Maryland and its agencies may not be sued in state court without their consent under the doctrine. Plaintiff contends that the state antitrust laws constitute legislative consent to sue Maryland for violations of those laws. However, even the most liberal reading of §11-201(f) of the Commercial Law Article will not conclusively lead one to believe that the legislature has waived the State's sovereign immunity to antitrust suits.

Furthermore, Plaintiff has not drawn the court's attention to any case where the **[*43]** State has been subject to suit under the Maryland Antitrust Act, and this court can find none. **HN25**[] Our antitrust laws were created to compliment the federal antitrust laws, and federal courts have held that state actions, including the actions of its agencies, are exempt from federal antitrust suits under the state action doctrine. *See* Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L. Ed. 315 (1943). Federal courts have also held that antitrust laws forbid only "those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.'" Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, 135-136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1962) *citing* Standard Oil v. United States, 221 U.S. 1, 51-52, 31 S. Ct. 502, 55 L. Ed. 619 (1910). In addition, "[s]tales and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government." Arsberry v. Illinois, 244 F.3d 558, 2001 U.S. App. LEXIS 4044, 2001-1 Trade Cas. (CCH) P73,205.

Accordingly, federal jurisdictions have ruled that valid governmental actions do not violate ***antitrust law***. Thus, analyzing federal ***antitrust law***, one would conclude that the State of Maryland is immune from liability. Hence, the State is also immune from its own antitrust laws which are complementary to the federal laws. *See* Baltimore Scrap Corp. v. David J. Joseph Co., 81 F. Supp. 2d 602 (D. Md. 2000) (Defendants immune from federal antitrust liability, were likewise immune from liability under Maryland's antitrust statute based on **[*44]** case law and §11-202 of the Commercial Law Article). This court must conclude that the State cannot be a "person" within the meaning of the

Maryland Antitrust Act and need not be exempted by any section of the Act since it withstands the authority of the Act.

HN26[] Although the actions of the State may not be found to be unlawful pursuant to the Act, state actions that threaten to restrict trade or cause monopolization must be valid actions. Valid state actions, for the purposes of antitrust immunity, must be (1) clearly articulated and affirmatively expressed as state policy, and (2) be actively supervised by the State itself. *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1979)*. The challenged state actions herein are Maryland's contracting with phone utility companies to provide outgoing collect call services from its prisons, and the State's collection of a percentage of the charges paid by recipients of collect calls made from its prisons, which result in the recipients of these calls being charged a higher rate than recipients of collect calls not made from prisons.

However, Maryland may enter into an exclusive licensing contract with a party without offending federal or state antitrust laws. *Murdock v. City of Jacksonville, 361 F. Supp. 1083, 1973 U.S. Dist. LEXIS 12943, 1973-2 Trade Cas. (CCH) P74842 (M.D. Fla. 1973)*. Furthermore, Maryland Code, *§2-103 of the Correctional Services Article*, gives the Secretary of the Department of **[*45]** Public Safety and Correctional Services (hereinafter Department), the power to "establish guidelines and procedures to promote the orderly and efficient administration of the Department."

The Secretary, in turn, appoints a Commissioner to run the Division of Corrections. This Commissioner may "adopt regulations for the operation and maintenance of the units in the Division," under *§3-205* of the Article and the "Division controls the financial affairs of each unit in the Division," pursuant to *§3-220* of the Article. Additionally, *COMAR §§ 21.02.01.04H* authorizes the Department to award specific types of procurement contracts, and for those procurement contracts not specified therein, *COMAR §§ 21.02.01.05A(1)* provides that, "the Board [of Public Works] shall review and approve the award of those procurement contracts not delegated under this chapter, before execution"[16].

In sum, the collect call phone system rises out of Maryland's power to contract and its sovereign power to operate its penal institutions. Moreover the legislature created the Department to forward the policy found in *§2-103 of the Correctional Services Article*, i.e. the orderly **[*46]** and efficient administration of the Department[17]. The challenged contracts are actively supervised by the State through the Board of Public works under *COMAR §§ 21.02.01.06*. Thus, the court can find no invalid governmental action here, as the Department is acting in a subject matter area in which it is authorized to act Consequently, this court can find no antitrust claim.

As the District Court for the District of Columbia stated in *Sea-Land*, and as courts have found in antitrust challenges to exclusive prison telephone service arrangements across the country, the core of this Plaintiffs complaint would be best left to the proper regulatory agency. In order for this court to find for the Plaintiff and grant injunctive relief there would have to be a judicial finding that the telephone rates are unjust and unreasonable. If there is no finding that the rates are unjust and unreasonable, there can be no finding of the alleged injury that is the crux of Plaintiff, i.e. excessive billing. If the Plaintiff has no injury, she has no standing, and so on.

However, rate fixing is not a function of the court. The Maryland **[*47]** legislature created the Public Service Commission (hereinafter PSC) to regulate public service companies such as Verizon Communications, Inc. and AT&T, that conduct business in this state. By law the PSC is the State entity that must insure that the rates are "just and reasonable"[18], and, by law, the utility companies must submit a "tariff schedule" detailing their rates and charges to consumers, to the PSC[19]. The PSC is the only government actor equipped and designated to find a

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[16] Additionally, *COMAR §§ 21.02.01.06* commands that procurement contracts for services and supplies with terms that extend beyond one fiscal year are subject to review and approval procedures outlined in the chapter.

[17] The Department in this instance meaning all of its subdivisions including the Division of Corrections.

[18] *See, §4-201 of the Public Utilities Companies Article.*

billing rate as "excessive". For this reason, this court is not the proper body for determining the excessiveness of phone rates and the phone rates are the heart of this issue. Therefore, Plaintiff Benson's claim alleging violation of the Maryland Antitrust Act is dismissed.

F. Maryland Consumer Protection Act

Count Five (5) of Plaintiff Benson's Complaint alleges that the named defendants instituted and implemented the Prison Telephone Premium which constitutes "unfair" trade practices (PTP) in violation of the Maryland Consumer Protection Act, *CL § 13-301 et seq*.. The Maryland courts have established three-pronged definition of an "unfair trade practice. An "unfair" trade practice is one that: (1) causes **[*48]** significant harm; (2) provides no countervailing benefit to consumers or the marketplace; and (3) consumers cannot reasonably avoid. *Legg v. Castruccio, 100 Md. App. 748, 771, 642 A.2d 906 (1994)*.

Plaintiffs argue that "the injury suffered is substantial; is not outweighed by any countervailing societal interest; and is not an injury that an unsophisticated consumer could have avoided because of the State's monopolistic practices". Defendants contend that the telephone system for Maryland inmates does not fit the definition of an "unfair" trade practice because the inmates can avoid making the phone calls and their friends and family members can decline to accept the calls in non-emergency situations. In addition, Defendants contend that the inmate telephone system also provides countervailing benefits in the form of proceeds used for the inmates benefit.[20] Finally, Defendants contend that the system does not cause significant harm because: (1) the Plaintiffs have provided no evidence to show that the prices charged to inmates families for collect calls would be substantially lower if the State did not receive its commission; and (2) the families and friends of inmates could simply refuse to accept the calls from Maryland inmates.

After careful consideration of the above-mentioned arguments, it is the determination of this court that, taking into consideration the pleadings submitted by both sides and all inferences drawn from said pleadings, that Plaintiffs have failed to state a claim upon which relief may be granted. Plaintiffs have failed to state a claim sufficiently alleging that the inmate telephone system causes any significant harm to friends and families of Maryland inmates who accept collect calls from said inmates. Furthermore, the commissions derived from the PTP are utilized to provide valuable services to Maryland inmates which indirectly provides countervailing benefits to the friends and family members of the Maryland Inmates. Finally, friends and family members of Maryland inmates can reasonably avoid the instant charges by simply not accepting these non-emergency phone calls from the inmates.

The Plaintiffs CPA count should also be dismissed because: (1) the State's retention of commissions from the inmate telephone system is not a direct sale of consumer goods and, hence, is not subject to the Maryland **[*50]** Consumer Protection Act[21]; (2) the Plaintiffs have failed to establish any actual loss which is an essential element under the Maryland Consumer Protection Act[22]; (3) alleged monopolistic overpricing is not an unfair or deceptive trade practice as defined by the Maryland Consumer protection Act[23]; and (4) as mentioned *supra*, the instant

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[19] *See, §4-202 of the Public Utilities Companies Article.*

[20] The Inmate Welfare **[*49]** Fund (IWF) is used to fund recreational and educational activities for Maryland inmates.

[21] *See Morris v. Osmose Wood Preserving, 340 Md. 519, 541, 667 A.2d 624, 635 (1995)*.

[22] *CitaraManis v. Hallowell, 328 Md. 142, 151-53, 613 A.2d 964 (1992)*; *DeReggi Constr. Co. v. Mate, 130 Md. App. 648, 665, 747 A.2d 743 (2000)*. Plaintiffs, in the instant matter, simply speculate as to what rates should apply to the inmate telephone system and it is certainly not the role of this court to determine what a fair and reasonable charge would be for this inmate telephone system.

[23] *Davidson v. Microsoft Corp., 143 Md. App. 43, 57, 792 A.2d 336*, *cert. denied*, ***369 Md. 571, 801 A.2d 1032 (2002)*** (computer software pricing); *Miller v. Pacific Shore Funding, 224 F.Supp.2d 977 (D. Md. 2002)* (loan processing charges).

Consumer Protection Act claim is barred by the doctrine of sovereign immunity. Therefore, Plaintiffs' CPA claim is dismissed.

G. *Section 32 of Article III of the Maryland Constitution* (Unlawful Appropriation)

Section 32 of Article III of the Maryland Constitution states that:

> ***HN27***[] "No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with any appropriation by law; and every such law shall distinctly specify the sum appropriated, and the object, to which it shall be applied; provided, that nothing herein contained, shall prevent the General Assembly from placing a contingent fund at the disposal **[*51]** of the Executive, who shall report to the General Assembly, at each Session, the amount expended, and the purposes to which it was applied. An accurate statement of the receipts and expenditures of the public money, shall be attached to, and published with the Laws, after each regular Session of the General Assembly ".

In their Consolidated Motion to Dismiss, Defendants contend that Plaintiffs' allegation that the use of commission money from the inmate telephone system violates *Section 32 of Article III of the Maryland Constitution* fails to state a claim upon which relief may be granted. Defendants claim that CS *§§10-501 to 10-504* authorize the use of telephone commissions for inmate welfare funds. Defendants further contend that, and as evidenced by Defendant's Exhibit 2 (Selected pages from the FY 2003 State Operating Budget), all inmate welfare fund receipts are specially accounted in each institution's annual appropriation. Therefore, defendants claim that the annual budget specifies how much is to be appropriated to the special CS *§ 10-503* fund for each institution and is, thus, in compliance with *Article III, Section 32 of the Maryland Constitution.* Additionally, Defendants argue that the Plaintiffs in this matter do not have standing to contest the accounting of inmate welfare funds in the budget.

In opposition, **[*52]** Plaintiffs claim that Defendants, through the introduction of the aforementioned Exhibit 2, are attempting to impermissibly convert a dismissal motion to a motion for summary judgment without affording the Plaintiffs an opportunity for meaningful discovery. *See* *Green v. H & R Block, 355 Md. 488, 502, 735 A.2d 1039, 1047 & n.3 (1999)*. Hence, Plaintiffs pray that this court reject this allegedly improper practice.

This court is impressed with Plaintiffs' contention and, assuming the truth of facts presented and the inferences drawn from them in considering a motion to dismiss for failure to state a claim under *Maryland Rule 2-322(b)(2)*, this court declines to dismiss Plaintiffs' claim alleging a violation of *Article III, Section 32 of the Maryland Constitution* for Plaintiffs' failure to state a claim upon which relief may be granted. Although Defendants claim and have presented evidence to establish that they have fully complied with *Article III, Section 32 of the Maryland Constitution*, Plaintiffs have, nonetheless stated a claim upon which relief may be granted. Plaintiffs are correct in their assertion that Defendants, through their introduction of the above-mentioned evidence, are attempting to covert a dismissal motion into a motion for summary judgment without allowing Plaintiffs the benefit of any meaningful discovery. But, nevertheless, Plaintiffs' claim is still dismissed **[*53]** pursuant to the MTCA for Plaintiff Benson's failure to attain a final denial from the Treasurer or his designee.

H. Money Had and Received

HN28[] "Money Had and Received" is merely a particularized restitution action or a form of quasi-contractual action derived from the theory of unjust enrichment *See* Dan B. Dobbs, *Handbook of the Law of Remedies* (2d ed. 1993), at 377. "This count is commonly said to be equally remedial with a bill in equity, and, in general terms, lies whenever the defendant has obtained possession of money which, in equity and good conscience, he ought not to be allowed to retain" *See Poe's Pleading and Practice*, § 117 at 143. Hence, this cause of action is no different than that of unjust enrichment.

Therefore, for the reasons stated *supra* regarding Plaintiff's claim for unjust enrichment, Plaintiffs' claim of Money Had and Received is dismissed for Plaintiffs' failure to state a claim upon which relief may be granted.

I. *Article 24 of the Maryland Declaration of Rights* (Unlawful Taking)

Article 24 of the Maryland Declaration of Rights states:

> ***HN29***[] "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land".

In Plaintiff Benson's Fifth **[*54]** Amended Class Action Complaint, Plaintiffs contend that *Article 24 of the Maryland Declaration of Rights* prohibits the State from taking private property for public use without just compensation and that, regarding the PTP, Defendants' actions have violated these legal protections by retaining the money comprising the PTP. In their Opposition to Defendants' Consolidated Motion to Dismiss, Plaintiffs claim that they have articulated a legally cognizable property interest in the funds seized per the Prison Telephone premium (PTP).

Defendants, in their Consolidated Motion to Dismiss, claim that Plaintiffs' claim fails and, hence, must be dismissed, because plaintiffs have failed to establish that there was an actual government of any cognizable property interest and, without a valid property interest, there can be no unconditional taking. *See* *Phillips v. Washington Legal Foundation, 524 U.S. 156, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998)*(analyzing whether interest on IOLTA accounts was property of clients); *University of Maryland Medical System v. Mallory, 143 Md. App. 327, 354-55, 795 A.2d 107 (2001)*, *cert. denied*, *368 Md. 527, 796 A.2d 696 (2002)* (no property interest injury verdict infringed by statutory damages cap). Defendants also contend that money paid for phone bills cannot be property taken by the State because: (1) Plaintiffs do not pay the State the money; and (2) the money was voluntarily paid and not taken.

Taking into consideration all pleadings **[*55]** and any reasonable inferences drawn from said pleadings, it is the determination of this court that Plaintiffs have failed to state a claim upon which relief may be granted for their claim of unlawful taking in violation of *Article 24 of the Maryland Declaration of Rights.* It is ludicrous for Plaintiffs to claim that Defendants have unlawfully taken Plaintiffs' property by charging Defendants a high price for accepting collect calls from Maryland inmates. *See* *Arsberry v. Illinois, 244 F.3d 558, 565 (7th Cir.)* (Posner, J.), *cert. denied*, *534 U.S. 1062, 122 S. Ct. 661, 151 L. Ed. 2d 576 (2001)* ("And the contention that by charging a high price for phone calls the defendants have taken the plaintiffs' property and must pay just compensation is downright absurd."). Therefore, Plaintiffs have failed to establish: (1) a legally cognizable property interest; and (2) any unlawful taking. Thus, and as mentioned *supra*, Plaintiffs' claim for an unlawful taking in violation of *Article 24 of the Maryland Declaration of Rights* is dismissed.

J. Civil Conspiracy

HN30[] Under Maryland law, one can establish a cause of action for a civil conspiracy where: (1) a confederation of two or more persons by agreement or understanding (2) engage in some unlawful or tortious act done in furtherance of the conspiracy or engage in an unlawful and tortious means to accomplish an act not in itself illegal, with (3) actual **[*56]** legal damage resulting to the plaintiff. *See* SANDLER & ARCHIBALD, PLEADING CAUSES OF ACTION IN MARYLAND 333 (2nd ed. 1998).

Additionally, ***HN31***[] conspiracy has been defined in the anticompetitive or monopolistic context as follows:

> "To maintain a cause of action under *§ 1* of the Sherman Act, a party must set forth the following allegations: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relative product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal and (4) that the Plaintiff was injured as a proximate result of that conspiracy." *Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81 (3rd Cir. 1977)*, *cert. denied*, *436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978)*; *Defino v. Civic Center*

> *Corp.., 718 S.W.2d 505, 510 (Mo. Ct. App. 1986)*; *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8, 107 S.Ct. 720, 726 n.8, 93 L.Ed.2d 667 (1987)*.

Furthermore, ***HN32***[] Maryland Courts have consistently held that "'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff". *Alexander v. Evander, 336 Md. 635, 645 n. 8, 650 A.2d 260, 265 n. 8 (1994)*. "No action in tort lies for conspiracy to do something unless the acts actually done, if done by one person, would constitute a tort". *Alleco v. Weinberg Foundation, 340 Md. 176, 190, 665 A.2d 1038 (1995)*; *Kimball v. Harman, 34 Md. 407, 409 (1871)*; *Miller v. Preston, 174 Md. 302, 312, 199 A. 471 (1938)*.

Defendants rely upon the aforementioned authority and claim that there is no such tort as civil conspiracy in Maryland. **[*57]** Defendants further contend that Plaintiffs' instant claim of civil conspiracy fails under the MTCA because the State has not waived its immunity for said acts. *Baltimore Police Dept. v. Cherkes, 140 Md. App. 282, 314 n. 7, 780 A.2d 410 (2001)*. Plaintiffs argue that, although a plaintiff may not be able to independently recover damages on a conspiracy claim alone, civil conspiracy is still a viable cause of action.

Plaintiffs' instant cause of action for civil conspiracy is dismissed. As mentioned *supra*, all of Plaintiffs' other tort causes of action have been dismissed, and, therefore, this claim of civil conspiracy cannot be held as a separate cause of action. Furthermore, as raise by Defendants and mentioned *supra*, this count of civil conspiracy fails under the MTCA because of Plaintiffs' failure to provide adequate notice under the MTCA.

K. Filed Rate Doctrine

HN33[] "The field-rate doctrine, which is based on both historical antipathy

> to rate setting by courts, deemed a task they are inherently unsuited to perform competently, and on a policy of forbidding price discrimination by public utilities and common carriers, forbids a court to revise a public utility's or common carrier's filed tariff, which is to say the terms of sale that the carrier has filed with **[*58]** the agency that regulates the carrier's service." *AT&T Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998)*; *Maislain Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990)*; *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577-78, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)*; *Cahnmann v. Sprint Corp., 133 F.3d 484, 487 (7th Cir. 1998)*; *Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d. Cir. 1994)*.

HN34[] It is permissible for a customer or a competitor to challenge a tariff before the appropriate state agency and, if they are disappointed with the response of the agency, they can seek judicial review, *47 U.S.C. §§ 204(a)(2)(C)*, *402*. But, the customer or competitor cannot ask the court in a suit such as a civil rights or antitrust suit, to invalidate or modify a tariff or seek damages based upon the difference between the actual tariff and some lawful, hypothetical tariff. *Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001)*. A requirement for this court to determine a lawful tariff would not be proper because it is not the role of this court to set rates. *Arsberry, 244 F.3d at 562*; *Wegoland Ltd., 27 F.3d at 19-21*.

Defendants contend that Plaintiffs claims are barred by the filed rate doctrine. They point out that the Plaintiffs have not filed suit directly against the telephone companies involved in the PTP but have actually filed suit against the state for the undifferentiated and unspecified portion of their phone bills which the state receives. In this context, Defendants claim that the filed rate doctrine still applies in that all of Plaintiffs' claims are based on the notion that the higher rates charged to Maryland inmates are provided for in filed tariffs, **[*59]** *Md. Public Utilities Companies Code Ann. § 4-202* (1998, 2002 Supp.). Defendants claim that Plaintiffs are asking this court to engage in rate-making which is not a function of this court.

In response, Plaintiffs argue that the federal filed rate doctrine has been expressedly repealed and is a defense to nothing. *Ting v. AT&T, 319 F.3d 1126, 1139-40 (9th Cir. 2003)*. Plaintiffs also contend that Defendants' reliance on the Maryland filed rate doctrine is inapplicable for a number of reasons.

First, Plaintiffs claim that applying this state filed rate doctrine would violate federal law because the federal government has made the policy determination that rates are to be de-tariffed. *Id*. Hence, the Maryland filed rate doctrine is preempted and prohibited by federal law. Second, Plaintiffs contend that Defendants have cited no Maryland authority for the application of the Maryland filed rate doctrine.

Third, Plaintiffs argue that the state filed rate doctrine does not apply in this case because Defendants have filed no tariffs. Plaintiff illustrated that, even Defendants concede in their Consolidated Motion to Dismiss that the PTP "is not paid to the State by the Plaintiffs". Fourth, Defendants contend that Plaintiffs have provided no evidence that an applicable tariff has even been filed. **[*60]**

Fifth, Plaintiffs claim that a state filed rate doctrine has no application in the context of claims alleging violations of the Maryland Constitution. *Maryland Green Party v. Maryland Bd. of Elections, 377 Md. 127, 832 A.2d 214 (2003)*. Sixth, Plaintiffs contend that the state filed rate doctrine must yield to causes of action arising pout of express public policy mandates such as the Maryland Antitrust Act or Maryland Consumer Protection Act. *Kirkwood v. Union Electrical Co., 671 F.2d 1173, 1178-79 (8th Cir. 1982)*, *cert. denied*, *459 U.S. 1170, 103 S. Ct. 814, 74 L. Ed. 2d 1013 (1983)*.

Taking into consideration the arguments made by both parties and any reasonable inferences drawn from said arguments, it is this court's determination that the filed rate doctrine does not apply to the case at issue. First, and as illustrated in the *Ting* case, the federal courts have determined that rates are to be de-tariffed. Therefore, the application of a state filed rate doctrine is preempted and prohibited by federal law. Second, Defendants have cited no Maryland authority for the application of a Maryland filed rate doctrine and, furthermore, this court could not find such authority.

III. Conclusion

For the reasons explained in this opinion, both Plaintiffs Dean and Benson's claims are dismissed in their entirety.

ORDER

It is hereby **ORDERED**, on this 23 day of June, 2004, that Plaintiffs' Benson and Dean's **[*61]** claims are DISMISSED in their entirety.

/s/ Thomas E. Noel

Judge

ORDER

It is hereby **ORDERED**, on this 23 day of June, 2004, that Plaintiffs' Benson and Dean's claims are DISMISSED in their entirety.

/s/ Thomas E. Noel

Judge

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield

United States Court of Appeals for the First Circuit

June 24, 2004, Decided

No. 03-2061

Reporter

373 F.3d 57 *; 2004 U.S. App. LEXIS 12493 **; 2004-1 Trade Cas. (CCH) P74,459

THE STOP & SHOP SUPERMARKET COMPANY; WALGREEN EASTERN COMPANY, INC., Plaintiffs, Appellants, v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND; COORDINATED HEALTH PARTNERS, INC., d/b/a BLUE CHIP; CVS CORPORATION; PHARMACARE MANAGEMENT SERVICES, INC., Defendants, Appellees. C. DANIEL HARON; RONALD BOCHNER; MAXI DRUG, INC., d/b/a BROOKS PHARMACY; PROVIDER HEALTH SERVICES, INC.; UNITED HEALTHCARE CORPORATION. Defendants.

Prior History: **[**1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. [Hon. Ernest C. Torres, U.S. District Judge].

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 239 F. Supp. 2d 180, 2003 U.S. Dist. LEXIS 4111 (D.R.I., 2003)

Disposition: Affirmed.

Core Terms

pharmacies, network, customers, bidding, reimbursed, antitrust, plaintiffs', competitors, district court, benefits, per se violation, rule of reason, subscribers, ancillary, summary judgment, anti trust law, foreclosure, supplier, insurer, retail, prescription drug, negotiations, reciprocal, depending, purchases, prices, admit, join, relevant market, anti-competitive

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[ ] **Standards of Review, De Novo Review**

Rulings on summary judgment and directed verdicts are reviewed de novo. The standard for review of rulings excluding evidence depends on the nature of the underlying issue (fact, law, judgment call).

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[] **Per Se Rule & Rule of Reason, Sherman Act**

Antitrust claims under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, ordinarily require a burdensome multi-part showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits. This is the so-called rule of reason calculus. This calculus is bypassed if the collusive arrangement falls instead within one of several categories (e.g., naked horizontal price fixing) in which liability attaches without need for proof of power, intent or impact. For that reason plaintiffs typically try to bring their claims within per se rubrics. Whether a plaintiff's alleged facts comprise a per se claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN3[] **Practices Governed by Per Se Rule, Boycotts**

The most important per se categories are naked horizontal price-fixing, market allocation, and output restrictions. Sometimes group boycotts are called per se violations, but the label here is only minimally useful since many arrangements that are literally concerted refusals to deal have potential efficiencies and are judged under the rule of reason. Minimum retail price fixing is a rare vertical arrangement still comprising a per se violation--that is why car makers only "suggest" a retail price to dealers.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Bid rigging of a certain kind is a per se violation of the antitrust laws, but this refers to horizontal price fixing whereby two or more suppliers (or occasionally purchasers) secretly fix the price at which they will bid.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The antitrust laws are not meant to police bad management; the market (or the insurance regulator) is expected to do that.

Business & Corporate Law > Joint Ventures > General Overview

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN6[] Business & Corporate Law, Joint Ventures

Joint ventures involving direct competitors not infrequently exclude other competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Restraints that are truly ancillary to a larger efficiency-gaining enterprise are not normally condemned per se without looking at likely consequences.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN8[] Practices Governed by Per Se Rule, Boycotts

To the extent the group boycott label is useful at all to describe a per se violation, it is principally a warning against anticompetitive secondary boycotts--e.g., manufacturers who agree not to supply a store that buys from a discounting manufacturer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Harm does not mean a simple loss of business or even the demise of a competitor but an impairment of the competitive structure of the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN10[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent. But while low numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny.

Counsel: John J. Curtin, Jr. with whom Daniel L. Goldberg, Alicia L. Downey, Bingham McCutchen LLP, William M. Dolan III, Brown Rudnick Berlack Israels LLP, Gregg A. Hand and White & Case LLP were on brief for appellants.

Steven E. Snow with whom Robert K. Taylor, Daniel S. Crocker and Partridge Snow & Hahn LLP were on brief for appellees Blue Cross & Blue Shield of Rhode Island and Coordinated Health Partners, Inc., d/b/a Blue Chip.

Bruce D. Sokler with whom Yee Wah Chin, Noam B. Fischman, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., James A. Ruggieri and Higgins, Cavanagh & Cooney LLP were on brief for appellees CVS Corporation and Pharmacare Management Services, Inc.

Judges: Before Boudin, Chief Judge, Howard, Circuit Judge and Saris,* District Judge.

Opinion by: BOUDIN

Opinion

[*59] BOUDIN, *Chief Judge*. Stop & Shop Supermarket Company ("Stop & Shop") and Walgreen Eastern Co., Inc., ("Walgreen") brought an antitrust suit against a number of defendants primarily based on *section 1 of the Sherman Act,* **[**2]** *15 U.S.C. § 1 (2000)*, lost certain of their claims on summary judgment, and then suffered a directed verdict at the jury trial held on the balance of their claims. They now appeal on several grounds as to certain defendants (the other defendants settled). We begin with a description of background events and proceedings in the district court.

Blue Cross and Blue Shield of Rhode Island ("Blue Cross") is the major health insurer in that state, offering various plans that cover, among other medical expenses, the cost of prescription drugs. Until 1997, Blue Cross managed drug benefits itself and provided a substantially "open" pharmacy system--that is to say, most subscribers could buy drugs at any pharmacy. Blue Cross determined what drugs it would reimburse, set (by negotiation) what would be paid to the pharmacies, and processed subscriber claims.

Beginning in 1997, Blue Cross decided to use a pharmacy benefits manager to administer its prescription drug benefits. Such managers often set up a "closed" network of pharmacies, providing greater insurance coverage to those subscribers who use network pharmacies. In exchange for inclusion in the network, and therefore **[**3]**

* Of the District of Massachusetts, sitting by designation.

increased volume of drug sales, the network pharmacies typically agree to provide drugs at lower prices, resulting in lower costs to the insurer.

In this case, Blue Cross invited bids from managers and received three, one of which Blue Cross disqualified. The second manager was PharmaCare, a subsidiary of CVS, a well known major drug store chain (52 pharmacies in Rhode Island). The third manager, Wellpoint, proposed a closed network limited to pharmacies operated by Stop & Shop (18 pharmacies) and Walgreen (15 pharmacies). After obtaining further bids from Wellpoint and PharmaCare, in December 1997 Blue Cross selected PharmaCare to manage a closed network that initially included the CVS pharmacies and most independent pharmacies in Rhode Island.

During this period, PharmaCare was itself negotiating with yet another benefit manager--Provider Health Services, Inc. ("Provider"). Provider managed a closed network, comprised mainly of Brooks Pharmacies (42 pharmacies in the state), serving another insurer--United Healthcare of New England, Inc. ("United")--doing business in Rhode Island. In February 1998, Provider agreed to allow CVS stores to join the United/Provider network; and in **[**4]** May 1998, PharmaCare allowed Brooks and other Provider pharmacies to join the Blue Cross/PharmaCare closed network.

Ancillary to these arrangements, Brooks and Provider's other pharmacies agreed--obviously for PharmaCare's benefit--not to join other networks competing for Blue Cross' business. PharmaCare in turn agreed not to admit into the Blue Cross/PharmaCare network new drug stores (beyond CVS, the independents, and the pharmacies in the United/Provider network). Blue Cross consented to the enlargement of its closed network and in November 1998 signed a formal three-year contract with PharmaCare.

Not all Blue Cross customers are covered by plans that effectively restrict them to closed network pharmacies. Blue Cross offers multiple plans, and one set allows customers to fill prescriptions at any pharmacy without economic penalty. Blue Cross' counsel estimated in oral argument **[*60]** that perhaps two-thirds of Blue Cross' customers are restricted to its closed network; our own review of the record suggests that the number--which obviously varies over time--may be closer to three-quarters.

Unhappy with losing the opportunity to serve many Blue Cross customers on competitive terms, Stop **[**5]** & Shop brought the present action on June 9, 1999, against Blue Cross, PharmaCare and CVS, charging violations of federal and state antitrust laws; in March 2000, Walgreen joined as co-plaintiff and an amended complaint was filed on May 2, 2000. United Health, Provider, and Brooks were also initially defendants but, they were dropped after agreeing to admit plaintiffs to the United/Provider network.

On motions for summary judgment, the district court wrote a detailed opinion rejecting plaintiffs' claims that any per se violation of the antitrust laws had been plausibly shown. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 239 F. Supp. 2d 180, 195 (D.R.I. 2003)*. It rejected claims that any of the arrangements comprised naked horizontal restraints such as a group boycott. *Id. at 189-91*. However, the court ruled that factual issues precluding summary judgment were raised as to whether any of defendants' conduct was actionable under the rule of reason. *Id. at 193*.

At this time, the district court said that Blue Cross represented about 60 percent of the customers in Rhode Island whose retail drug purchases were reimbursed; **[**6]** and United provided such benefits to about 25 percent. *Stop & Shop, 239 F. Supp. 2d at 183*. These figures were the lynch-pin of the pretrial report by plaintiffs' expert witness, Dr. Bruce Stangle, who stressed the 85 percent figure in concluding that "an out-of-network entrant would be precluded from competing in a substantial portion of the relevant market."

Thereafter the district court considered *in limine* motions filed by Blue Cross. Subject to reconsideration at trial, the court granted a motion to exclude certain evidence as to the bidding process leading to PharmaCare's selection and the related decisions of PharmaCare and Provider to expand their respective closed networks to include each other's present pharmacy members. The court denied, again subject to reconsideration at trial, a motion to exclude key testimony from plaintiffs' expert witness, Dr. Stangle.

Trial began in June 2003. On the sixth day of trial, the district court upheld a defense objection to Dr. Stangle's proposed testimony concerning the proper definition of the relevant market. Plaintiffs tendered a summary of the proposed testimony as an offer of proof and rested. The district **[**7]** court then granted a defense motion for judgment as a matter of law, holding (in an oral ruling from the bench) that absent an adequate market definition, the plaintiffs could not make out a rule of reason claim under the antitrust laws.

The plaintiffs now appeal, arguing that the district court erred in granting partial summary judgment on the per se claims, in excluding several items of evidence including Dr. Stangle's testimony on market definition, and in directing a verdict. ***HN1***[] Rulings on summary judgment and directed verdicts are reviewed *de novo*, *Wolinetz v. Berkshire Life Ins. Co., 361 F.3d 44, 47 (1st Cir. 2004)* (summary judgment); *Ahern v. Scholz, 85 F.3d 774, 793 (1st Cir. 1996)* (directed verdict); the standard for review of rulings excluding evidence depends on the nature of the underlying issue (fact, law, judgment call), *see* *Blake v. Pellegrino, 329 F.3d 43, 46 (1st Cir. 2003)*.

[*61] *Per se claims*. Plaintiffs begin their brief by contesting the district court's summary judgment ruling that no legitimate per se claims were presented. As our prior decisions have explained, ***HN2***[] antitrust claims under *section 1 of the Sherman Act* **[**8]** ordinarily require a burdensome multi-part showing: that the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits. This is the so-called rule of reason calculus. *See, e.g.*, *Eastern Food Servs. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 5 (1st Cir. 2004)*; *Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 59 (1st Cir. 2002)*, *cert. denied*, *537 U.S. 885, 154 L. Ed. 2d 144 (2002)*.

This calculus is bypassed if the collusive arrangement falls instead within one of several categories (*e.g.*, naked horizontal price fixing) in which liability attaches without need for proof of power, intent or impact. *Eastern Food Servs., 357 F.3d at 4* & n.1. For that reason plaintiffs typically try to bring their claims within per se rubrics. Whether a plaintiff's alleged facts comprise a per se claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment. *See, e.g.*, *Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 50-51 (1st Cir. 1998).* **[**9]**

HN3[] The most important per se categories are naked horizontal price-fixing, market allocation, and output restrictions. Sometimes group boycotts are called per se violations, but the label here is only minimally useful since many arrangements that are literally concerted refusals to deal have potential efficiencies and are judged under the rule of reason. *See* *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*. Minimum retail price fixing is a rare vertical arrangement still comprising a per se violation--that is why car makers only "suggest" a retail price to dealers--but this offense is not charged by plaintiffs in this case. [1]

Because the defendants moved for summary judgment, the complaint **[**10]** allegations did not have to be taken as true, *see* *R.W. Intern Corp. v. Welch Food, Inc., 13 F.3d 478, 487 (1st Cir. 1994)*, but the plaintiffs were entitled to the benefit of the doubt: specifically, reasonable inferences were to be drawn in their favor and genuine factual disputes were properly reserved for trial so far as plaintiffs' sworn version of the facts conflicted with the defendants' sworn version. *See* *Fed. R. Civ. P. 56(c)*; *Douglas v. York County, 360 F.3d 286, 290 (1st Cir. 2004)*. However, broadly speaking *what happened* in this case is largely undisputed, although some of the details are obscure.

In a nutshell, the arrangements that concern plaintiffs were two. First, Blue Cross contracted for a closed network for its subscribers that excluded the plaintiffs after a bidding contest that plaintiffs say was flawed and that they should have won. Second, Blue Cross and its pharmacy benefits manager agreed with United and its manager that their respective network pharmacies would be admitted to each other's closed networks; these arrangements included exclusionary restrictions and (plaintiffs suggest) **[**11]** other more sinister collaboration as to price.

[1] The per se categories are discussed with relevant citations in *Eastern Food Servs, 357 F.3d at 4-5 & n.1*, and other of our decisions. On minimum vertical price fixing, see *Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47 (1st Cir. 2001)*.

We start with the creation of Blue Cross' closed network. The alleged unfair **[*62]** bidding aside, this is nothing other than an exclusive dealing arrangement, slightly complicated by the involvement of three or four sets of parties rather than the usual two. Blue Cross, either directly or indirectly, is buying prescription drugs for its subscribers. *See Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 924-25 (1st Cir. 1984)*, *cert. denied*, *471 U.S. 1029, 85 L. Ed. 2d 322 (1985)*. Blue Cross' closed network effectively gives certain drug stores the exclusive right to supply such drugs to most of its customers.

This certainly inconveniences Blue Cross subscribers for whom more outlets are a benefit. But, if Blue Cross is a competent negotiator, the closed network should lower the cost to Blue Cross of supplying drugs to customers (because most suppliers will cut prices in exchange for increased volume, *cf. U.S. Healthcare, 986 F.2d at 591*). Blue Cross might pass the savings on to customers (lower premiums, smaller co-payments, broader coverage) or keep the savings itself and pay its executives **[**12]** more (if competition among health insurers is inadequate and state regulation absent).

Either way, the closed network is simply an exclusive dealing arrangement which is not a per se violation of the antitrust laws. *See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-29, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; *Eastern Food Servs., 357 F.3d at 8*. The arrangement might still be unlawful under the rule of reason depending upon the particular circumstances--that is, depending upon the balance between efficiencies gained and any harm to competition that could be shown, *id. at 5*, but we are concerned for the moment only with whether per se treatment was warranted. It was not.

Nothing is changed by plaintiffs' claim that the bidding was unfair. "***HN4***[] Bid rigging" of a certain kind is a per se violation of the antitrust laws, *e.g.*, *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 777 (7th Cir. 1999)* (Posner, C.J.); but this refers to horizontal price fixing whereby two or more suppliers (or occasionally purchasers) secretly fix the price at which they will bid. *See id.* When Blue Cross, through its benefits manager, **[**13]** gave exclusive rights to CVS and certain other pharmacies, it was not bidding at all; it was inviting bids and making its own decision as to which bid to accept.

Ordinarily, it would be in Blue Cross' interest to accept the lowest cost bid, assuming services were equivalent. Plaintiffs say that Blue Cross manipulated the bidding (*e.g.*, by giving CVS information about Wellpoint's bid), which conceivably could happen if Blue Cross were corrupt or incompetent (an alternative, benign reason would be to press PharmaCare to improve its offer). But ***HN5***[] the antitrust laws are not meant to police bad management; the market (or the insurance regulator) is expected to do that.

This brings us to the first part of the second transaction, namely, the agreements that let the Blue Cross and United pharmacies serve in each other's closed networks. These are undoubtedly horizontal agreements, Blue Cross and United being competitors (as are PharmaCare and Provider), and so draw closer scrutiny. But on their face, they are not exclusionary or otherwise anti-competitive: they allow *more* pharmacies to compete for the same consumer's business (*e.g.*, Brooks can supply Blue Cross customers) and give **[**14]** customers *more* options.

The main anti-competitive threat, to the extent it exists, lies not in admission of new pharmacies but in ancillary provisions that might exclude others by agreement. It appears that the United/Provider network remained free to admit other pharmacies: **[*63]** it did in fact admit the plaintiffs as part of an agreement to settle this lawsuit. But the district court says that the contracts precluded the Blue Cross/PharmaCare network from admitting any *other* new pharmacies (beyond the United/Provider pharmacies), *Stop & Shop, 239 F. Supp. 2d at 184*, so the contracts did for some period restrict Blue Cross/PharmaCare from admitting plaintiffs.

Like the original exclusive dealing contract, this is a possible antitrust violation, but it is not a per se violation. The reason is that the closed pharmacy arrangement is valuable to participating pharmacies in part because it directs volume to them; thus, the United/Provider pharmacies had a direct interest, in exchange for allowing CVS to compete for their captive subscribers, in not only being allowed to compete for Blue Cross' customers but in making sure that yet additional new member pharmacies **[**15]** did not unreasonably dilute this benefit.

This does *not* mean that the ancillary restriction is lawful but only that per se condemnation is not appropriate. ***HN6***[] Joint ventures involving direct competitors not infrequently exclude other competitors. *Cf. N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 296-97, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985)*. Imagine a research and development consortium between a dozen small manufacturers that by agreement excluded any new entrants; the arrangement might enhance competition with larger manufacturers, and yet the original members might be unwilling to commit resources to the venture if *other* competitors--even small ones--were able to enter at will and share in the inventions. *See* XIII Hovenkamp, ***Antitrust Law*** P 2115a (1999).

A further explicit provision of the reciprocal expansions barred the United/Provider pharmacies from participating in other networks competing for Blue Cross' business. *Stop & Shop, 239 F. Supp. 2d at 184*. This, too, is not a per se violation. By admitting the Brooks pharmacies into its own closed network, Blue Cross and PharmaCare were in effect including them **[**16]** in a joint venture. There are sometimes legitimate reasons why one party to a joint venture can insist as the price of entry that a new member limit its existing competitive freedom. XIII Hovenkamp P 2213.

Here, PharmaCare was creating and administering a network for Blue Cross and, in the course of doing so, it would be providing favored access to network pharmacies, bolstering their connection with subscribers, and conceivably giving them information valuable in their servicing of the customers. PharmaCare might legitimately be unwilling to expand the network to include pharmacies who were at the same time preparing to join a new consortium to *replace* PharmaCare as Blue Cross' manager.

Despite plaintiffs' looser description, the restraint does not prevent Brooks pharmacies from joining other networks but only from involving themselves in attempts to supplant PharmaCare with Blue Cross. The restraint might still be unjustified--with efficiency gains outweighed by competitive harm--and so perish after a rule of reason analysis. But ***HN7***[] restraints that are truly ancillary to a larger efficiency-gaining enterprise--here, the expanded closed network--are not normally condemned per se **[**17]** without looking at likely consequences. *Addamax Corp., 152 F.3d at 52*; *see* XIII Hovenkamp P 2213c(1).

If the rhetoric of older group boycott cases were taken at face value, such agreements might appear to fall within a per se ban. *Cf. Associated Press v. United States, 326 U.S. 1, 13-14, 18,* ***[*64]*** *89 L. Ed. 2013, 65 S. Ct. 1416, 1419 (1945).* After all, in two different aspects, the ancillary agreements are promises by one competitor or group of competitors to another not to deal with a third competitor (CVS, through PharmaCare, not to include Stop & Shop and Walgreen in the PharmaCare network; Brooks not to consort with Stop & Shop and Walgreen to compete for the Blue Cross contract). But the rhetoric cannot be taken literally.

After all, every joint venture among competitors that limits membership fits the lay definition of "an agreement not to deal," and at least in recent years the Supreme Court has flatly rejected the per se label for those that have some efficiency achieving benefits. *N.W. Wholesale Stationers, 472 U.S. at 295-98*. ***HN8***[] To the extent the group boycott label is useful at all to describe a per se violation, it is principally a warning **[**18]** against anticompetitive secondary boycotts--*e.g.*, manufacturers who agree not to supply a store that buys from a discounting manufacturer. *Cf. Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465-67, 85 L. Ed. 949, 61 S. Ct. 703, 32 F.T.C. 1856 (1941)*; *U.S. Healthcare, 986 F.2d at 593*.

This brings us finally to the intimations in plaintiffs' brief of more sinister collaboration. In attacking the dismissal of per se claims, the plaintiffs accuse the district court of "ignoring compelling evidence of *per se* illegal, horizontal agreements and their anticompetitive motives and effects," a statement followed by bullet points that cross-reference back to the briefs' statement of facts. Putting aside the bid rigging and ancillary-agreement charges already dealt with above, the pertinent factual charge is as follows:

> After Blue Cross's selection of PharmaCare's bid in late 1997, representatives of CVS and representatives of PharmaCare, engaged in a series of meetings, discussions, and written correspondence with representatives of competing pharmacies Brooks and the independent pharmacy members of Provider. (J.A. 210-217, Stmt. PP 89-113). As a result, these competitors **[**19]** agreed to set identical prescription reimbursement rates, both directly and by an equalizing mechanism that entailed payments by CVS to Brooks and Provider's

> independent pharmacies for each United prescription that CVS filled. (J.A. 216, 218-19, Stmt. PP 108-10, 120; J.A. 1987-89; J.A. 3053-54; J.A. 3081-84; J.A. 3129-32.) The parties likewise discussed identical co-payment levels. (J.A. 2923.)

This description insinuates wrongdoing but without the precision needed to advance the argument. Obviously any arrangement that reciprocally admitted United's pharmacies into the Blue Cross network and Blue Cross' into United's would involve some arrangements as to various payment matters. This would not permit CVS and Brooks to agree in general on prices at which prescription drugs could be sold to the public. But the respective insurers and their benefit managers would be entitled to discuss with newly entering pharmacies reimbursement and co-payment rates; and there would be nothing startling about new-comers expecting the same reimbursement as earlier network members. [2]

[20]** **[*65]** Partial integration of the two networks--each operating at three levels, insurer, benefit manager, and retailer--involves settling on component payments which--at least within each network--may well involve identical payments to all participating pharmacies. It was plaintiffs' job to explain in detail to us just what the arrangements were and *why* they plausibly constituted antitrust violations. In the context of partial integration, simply to refer to "identical principal reimbursement rates," "an equalization mechanism," and "identical co-payment levels" is to substitute innuendo for analysis.

This fatal obscurity has one exception. Immediately after the paragraph quoted above, there is a further paragraph describing a February 1998 meeting between PharmaCare and two Stop & Shop representatives. PharmaCare had recently won the Blue Cross contract, and it was then negotiating with United pharmacies for reciprocal inclusion. Stop & Shop was asking to be included as well. According to a memorandum describing the meeting prepared by a Stop & Shop representative, the PharmaCare president said no.

The memorandum says that the reasons PharmaCare gave for this refusal were that the **[**21]** negotiations to set up the new PharmaCare network had been difficult, that it had required "horse trading" (apparently a reference to the United/Provider negotiations), and that adding a "third" chain (apparently referring to Stop & Shop on top of CVS and Brooks) would make the situation even more complex. The memorandum concluded its recitation by saying:

> [The PharmaCare president] also lectured John and I about our industry not being farsighted [sic] to stick together on pricing issues and that we had only ourselves to blame for the extremely low reimbursement rates in the market.

In their opening brief, plaintiffs describe this last statement as "another reason" for plaintiffs' exclusion from the expanded Blue Cross network. The intimation (by a benefits manager owned by CVS) that the retail pharmacies in general ought to stick together to raise reimbursement rates paid to them by insurers might well interest the Antitrust Division, but plaintiffs have a grievance only if their refusal to adhere was "another reason" for their exclusion. This claim is unsupported by the language of the memorandum or the follow-up depositions of the participants which we have ourselves **[**22]** read.

The trial. The absence of plausible per se claims in no way dooms the plaintiffs' case. The initial core arrangement--the creation of a closed network by Blue Cross and PharmaCare comprising CVS and various independent pharmacies--is a classic exclusive dealing arrangement. To simplify slightly (and without repeating details) Blue Cross, in exchange for better prices, gave its business exclusively to one group of pharmacies, agreeing for three years not to deal with others including Walgreen and Stop & Shop.

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[2] As for the "equalization" payments by CVS to Brooks and Provider's independent pharmacies, Blue Cross/Pharmacare apparently reimburses its pharmacies for certain prescription drugs at lower rates than those at which United/Provider reimburses its pharmacies for the same drugs. To compensate United's pharmacies for agreeing to the lower reimbursement rates, CVS and the other Blue Cross pharmacies agreed to pay United's pharmacies $ .25 for every United subscriber's prescription that they filled. This might or might not be a permissible arrangement, but it is not naked price fixing by competitors.

Such agreements are not universally forbidden by the Sherman Act--indeed, they are quite common--but may, depending on the circumstances, unreasonably restrain trade. XI Hovenkamp, ***Antitrust Law*** PP 1802-07, 1810-1814, 1821 (1998). Because such agreements can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today. *Compare* *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306-307, 313-14, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)*, **[*66]** *with* *Tampa Elec. Co., 365 U.S. at 334*.

Indeed, courts tend to be skeptical of such claims because it is not in the long-term **[**23]** interest of the company that grants the "exclusive deal" to drive out of business competitors of the grantee. Here, Blue Cross would be disserved by making CVS a monopolist, which could then exploit Blue Cross by demanding higher reimbursement. Still, an excluded supplier remains free to offer evidence that, in the individual instance, the anti-competitive consequences of an exclusive contract outweigh the benefits.

This almost always requires a showing of injury to competition; some savings are likely or else the buyer would ordinarily not agree to forego dealing with other suppliers, and in any event an agreement that caused no harm would not be worth condemning. But ***HN9***[] harm does not mean a simple loss of business or even the demise of a competitor but an impairment of the competitive structure of the market. *See* *Brown Shoe Co. v. United States, 370 U.S. 294, 344, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*.

If an exclusive dealing contract cuts off stores like Walgreen from an unduly large portion of the available market for its goods, it and others like it might cease to provide prescription drugs. And if this led or was likely to lead to a shortage of competing drug stores (and new **[**24]** entry was difficult), the few remaining existing competitors might then be able to conspire or otherwise misbehave without being disciplined by competition. Where such foreclosure and negative effects are the result of an agreement, the Sherman Act may condemn the agreement as unreasonable. *Eastern Food Servs., 357 F.3d at 8*; *see* XI Hovenkamp P1802b.

Accordingly, at trial, it was critical to any attack on the exclusive dealing arrangement--and almost any other non-per-se claim one could imagine--that plaintiffs establish a relevant market and harm within it. For the exclusive dealing contract, the first step would be to show the extent of foreclosure resulting from the Blue Cross contract with CVS and others in the PharmaCare network, taking account of other existing foreclosures (*e.g.*, by United/Provider until its settlement with plaintiffs). *Cf.* *Tampa Elec. Co., 365 U.S. at 327-29*; *Eastern Food Servs., 357 F.3d at 8*.

Plaintiffs sought to offer their market definition evidence primarily, as is typical, through an economist, Dr. Stangle. Dr. Stangle's position in his pretrial report was that the relevant market was "the retail **[**25]** sale of health care financed or insurance reimbursed pharmaceutical products" (the product dimension of the market) in Rhode Island (the geographic dimension). Obviously, excluding retail sales that are not financed or reimbursed increases the percentage size of the foreclosed market.

In explaining why he distinguished between reimbursed purchases and all others, Dr. Stangle pointed to the much smaller direct cost to the Blue Cross customer who purchased the same drug from a closed network pharmacy (*e.g.*, CVS) as opposed to a non-network pharmacy (*e.g.*, Walgreen). The defendants protested that this ignored the customer's "true" cost of the CVS drugs which included a share of the insurance premium that the subscriber (or his employer) paid to Blue Cross and also ignored other elements affecting the comparison, such as partial reimbursement for out-of- network purchases.

Pointing to these supposed flaws in Dr. Stangle's market definition, the district court refused to allow the jury to consider it. Then, as already recounted, the plaintiffs made a proffer of the testimony for **[*67]** the record and rested, the defense moved for a directed verdict, and the judge granted the motion and **[**26]** entered judgment for the defendants. The judge said that any remaining evidence in the record supporting the plaintiffs' market definition was too thin to permit the jury to find the proposed market in the absence of expert testimony.

Plainly, for high-cost prescription drugs, whether insurance will cover purchases at a particular pharmacy tends to be crucial to consumer choice, and Dr. Stangle was correct in retorting to the defense that a customer who has paid his insurance premium (or had it paid for him) will--at least for high priced drugs--seek out closed network pharmacies if reimbursement is higher and shun those not within the insurer's closed network. At the point of sale, the customer is interested in what he pays and gets reimbursed, not some imputed (and now sunk) insurance premium cost.

Unfortunately for Dr. Stangle's market definition, the concern in an ordinary exclusive dealing claim by a shut-out supplier is with the available market *for the supplier*. Here, for Walgreen and Stop & Shop, their potential customers are presumptively *all* retail customers for prescription drugs--not just that smaller sub-group who are insured or reimbursed. To say that some sub-group **[**27]** of customers is foreclosed proves nothing by itself about the impact on pharmacies. [3]

This is the same defect we recently addressed in Eastern Food Services. There, as here, a shut-out supplier complained that the foreclosed customers (in *Eastern*, they were students and faculty seeking food services on a university campus) were foreclosed by the university's exclusive dealing contract with another vendor. 357 F.3d at 3-4, 6-7. But the impact of the foreclosure on *the supplier* depended not on the impact on the students and faculty but on how many unforeclosed vending machine customers remained elsewhere. Id. at 6-7.

Walgreen and Stop & Shop sell prescription drugs to lots of customers **[**28]** including those whose purchases are not reimbursed. Conceivably, the latter could be so small a group that foreclosure of a large percentage of reimbursed customers would still be fatal, or there might be some special circumstance that made separate consideration of the sub-group appropriate. But the former possibility would still have to be proved, normally by a proper market definition; and of the latter, there is no hint in this case.

Conceivably, some adjustment to account for the omission of self-paying customers could be devised from existing evidence: plaintiffs say that Blue Cross and United insure 70 percent of Rhode Islanders. But even if a figure representing the entire market could be derived, the number foreclosed by Blue Cross (and formerly by United) remains unknown because a significant portion of Blue Cross' customers have policies that do not effectively restrict them to the closed network. Nor is it our job to build plaintiffs' case for them.

The plaintiffs refer to other record evidence that they say was available to the jury to establish the same reimbursed-drugs product market *without* testimony from Dr. Stangle. The evidence is described in some detail; **[**29]** for example, the Stop & Shop executive in charge of pharmacy **[*68]** products testified to the same large differential in out of pocket costs to reimbursed and unreimbursed customers. But this simply repeats the same mistake in focus without the Ph.D.

It may be worth adding that even a high number would not necessarily establish an antitrust violation. XI Hovenkamp PP 1820b at 147, 1820d. How much of the market must remain open to support decent competition depends on scale economies (retail pharmacies are different than car makers), on ease of re-entry, and on other factors. *Cf. id.* at P 1820d. The still somewhat useful Learned Hand formula for monopoly power has no counterpart in exclusive dealing law. United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945). But reliable numbers are an essential starting point and were not supplied.

HN10[] For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45-46, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (O'Connor, J., concurring); Hovenkamp, *Federal Antitrust Policy* 436-37 & nn. 43-45 (2d ed. 1999) **[**30]** (collecting cases). But while low numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny based on factors just mentioned. There are a few cases to the contrary, Hovenkamp, *Federal Antitrust Policy*, at 437 n. 49, but they cannot be reconciled with Tampa, 365 U.S. at 329, 333; *see also* Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 393-94 (7th Cir. 1984) (Posner, J.); XI Hovenkamp, P 1820b at 147, 1821d.

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[3] One of the defendants suggests that Rhode Island is too large a geographic market because customers shop locally. Reflection will reveal that--whatever the correct market--this argument is a different version of the same mistake of focusing on the customer rather than the supplier.

The plaintiffs also complain that the district court should have permitted them to offer at trial evidence on two other matters: "[first] that Blue Cross manipulated its bidding process and the selection of PharmaCare to manage its closed pharmacy network . . . [and second] evidence showing the mutual, concerted expansion of the defendants' closed pharmacy networks." This evidence, say the plaintiffs, was relevant to their broad rule of reason case even if neither incident was a per se violation.

Plaintiffs devote only three paragraphs (and one long quotation from an old warhorse) to explaining why or how this evidence might be relevant to their "broader challenge to the defendants' **[**31]** course of conduct . . . ." The warhorse is the reminder in *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*, since repeated in other cases, that in assessing a restraint, a broad array of prior history of the restraint, motive, surrounding conditions and the like may be pertinent. Whether evidence was wrongly excluded depends in part on what it was offered to prove. Plaintiffs' brief says that the two excluded incidents were relevant to show "deliberate, concerted action by the defendants" and "that the concerted action unreasonably restrained or tended to restrain trade in the relevant market." The former proposition is admitted (there are explicit agreements); and the latter is simply an abstract description of the Sherman Act's rule of reason and is not a honed antitrust theory for which specific evidence might or might not be relevant.

Chicago Board of Trade is not an endorsement of kitchen-sink antitrust in which anything that might alarm a jury is made admissible. Plaintiffs had, so far as appears, only one substantial and relevant antitrust theory--namely, that Blue Cross had adopted a competitively harmful exclusive dealing **[**32]** arrangement, made more fearsome by its reciprocal expansion and coupled with overbroad ancillary restraints. For this, collaboration was patent--no one **[*69]** denied the existence of the contracts. The allegedly flawed bidding process added nothing to proof of collaboration and had no demonstrated antitrust significance.

In their brief on appeal, plaintiffs suggest that the bid process evidence showed that Blue Cross was determined to exclude plaintiffs for the indefinite future and "would have permitted an inference that the three-year terms of the network agreements were illusory." The only "restraint" within the meaning of the Sherman Act was the *contractual* limitation on Blue Cross' ability to add new pharmacies; any unilateral decision thereafter to exclude plaintiffs would not extend the pertinent "restraint."

The reciprocal expansion incident was arguably more relevant. It did not affect the extent of total foreclosure--United had not previously included plaintiffs; but (merely as an example) some of the ancillary terms seemingly made it harder for the plaintiffs to join either network or start a competing network. Yet the district judge's *in limine* ruling did not exclude **[**33]** proof of the terms--only proof of the details of negotiations, and at trial the district judge apparently reversed the tentative exclusion and allowed in some of the details.

There is yet another problem. As already noted, neither the alleged sham bidding process nor the reciprocal expansion of closed networks was a per se violation although the latter, particularly with its ancillary restraints, had a bearing on any rule of reason attack on the core exclusive dealing arrangement. It is not easy to think of a rule of reason analysis that does not depend on showing adverse effects on competition in a properly defined relevant market. *Cf. Augusta News Co., 269 F.3d at 47*. This predicate failed with Dr. Stangle's testimony.

Some antitrust cases are intrinsically hopeless because (as in *Eastern*) they merely dress up in antitrust garb what is, at best, a business tort or contract violation. By contrast, Blue Cross' adoption of a closed network whose impact was arguably reinforced by its reciprocal expansion coupled with ancillary restraints, might be an unreasonable foreclosure of a properly defined market. However, as plaintiffs omitted the proof, one simply cannot **[**34]** tell.

Whether or not there was an antitrust violation affecting the plaintiffs, some of Blue Cross' customers will doubtless be inconvenienced by restricting their purchases to the closed network. If use of a closed network reduces costs for Blue Cross and *also* reduces or holds down the price of a closed market policy, this may be a legitimate outcome--especially if an open market policy is also an available option. There are few free lunches in the world of commerce.

The possibility always remains that a dominant company may act inefficiently or may unfairly exploit its customers. The usual check for such abuses is competition (here, United is an obvious competitor for Blue Cross) but competition may sometimes be inadequate. In such cases antitrust may not always offer customers much protection, *Aluminum Co. of America, 148 F.2d at 429*; but state regulation--sometimes wisely and sometimes not--is usually free to fill the gap.

Affirmed.

Tex. Commer. Energy v. TXU Energy, Inc.

United States District Court for the Southern District of Texas, Corpus Christi Division

June 24, 2004, Decided ; June 24, 2004, Filed

C.A. NO. C-03-249

Reporter
2004 U.S. Dist. LEXIS 13908 *; 2004-2 Trade Cas. (CCH) P74,497

TEXAS COMMERCIAL ENERGY, Plaintiff, vs. TXU ENERGY, INC., et al., Defendants.

Subsequent History: Affirmed by *Tex. Commer. Energy v. TXU Energy, Inc., 2005 U.S. App. LEXIS 11553 (5th Cir. Tex., June 17, 2005)*

Disposition: Defendants' motions to dismiss granted in part. Other motions ruled upon.

Core Terms

filed rate doctrine, electricity, motion to dismiss, rates, antitrust, Energy, breach of contract claim, alleges, civil conspiracy, disparagement, customers, damages, monopolize, wholesale, antitrust claim, generation, prices, retail, anti trust law, defamation, manipulation, TIE, electric power, saving clause, defamatory, bilateral, protocols, conspiracy, scheduled, competitor

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) authorizes the court to dismiss a claim on the basis of dispositive law. When ruling on a *Rule 12(b)(6)* motion to dismiss, the court must accept the plaintiff's factual allegations as true, and view these allegations in a light most favorable to the plaintiff. In a *Rule 12(b)(6)* motion, the court should not look beyond the pleadings. A 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief. The question before the court in examining a *Rule 12(b)(6)* motion is whether the plaintiff's complaint states any valid claim for relief. Since federal courts simply require "notice pleading," the court construes plaintiff's pleading liberally, and lack of detail does not constitute a sufficient ground to dismiss a complaint under *Rule 12(b)(6)*.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Remedies, Damages**

In order to recover under § 1 of the Sherman Act, 15 U.S.C.S. § 1, a plaintiff must prove (1) the existence of an agreement (2) which unreasonably restrains trade (3) to the damage of the plaintiff. Section one applies only to concerted action; unilateral conduct is excluded from its purview. To prove a conspiracy or concerted action, the plaintiff must prove that the conspirators had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN5[] **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the Sherman Act, 15 U.S.C.S. § 2 denounces three actions: monopolization, attempt to monopolize, and conspiracy to monopolize.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN6[] Actual Monopolization, Monopoly Power

Under § 2 of the Sherman Act, 15 U.S.C.S. § 2, the offense of monopoly consists of two elements: the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Specifically, the monopoly power element concerns the power to control prices or exclude competition.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

HN7[] Attempts to Monopolize, Elements

An attempted monopoly in violation of § 2 of the Sherman Act, 15 U.S.C.S. § 2, consists of three elements: (1) that the defendant engaged in predatory or exclusionary conduct, (2) that the defendant possessed the specific intent to monopolize, and (3) that there was a dangerous probability that the defendant would succeed in his attempt.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN8[] Monopolies & Monopolization, Conspiracy to Monopolize

A conspiracy to monopolize can be established only through proof of (1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN9[] Standing, Clayton Act

Section 4 of the Clayton Act 15 U.S.C.S. § 15, provides a private right of action to enforce the Sherman Act and requires a plaintiff to seek recovery for injury "in his business or property." In order to show standing, the private claimant must demonstrate injury to business and property of a type that antitrust laws were intended to prevent. Pleadings need not explain how the injury occurred; that the claimant sustained injury to business or property is a sufficient allegation.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN10[] Clayton Act, Claims

Private antitrust liability under § 4 of the Clayton Act, 15 U.S.C.S. § 15, requires the showing of (1) a violation of the antitrust laws, (2) that it was the defendant's conduct that actually caused injury to his business or property, and (3) some indication of the amount of damage. The plaintiff need only provide a just and reasonable estimate of the damage based on relevant data.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Remedies > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

HN11[] Regulated Practices, Price Fixing & Restraints of Trade

The filed rate doctrine bars antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services. The doctrine holds that any filed rate -- that is, one approved by the governing regulatory agency -- is per se reasonable and unassailable in judicial proceedings brought by ratepayers. In other words, the filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. Moreover, application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rebates

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN12[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

A utility with a filed tariff is prohibited from offering customers rebates and discounts that are at odds with the filed (and often approved) tariff. With respect to rate discrimination, the filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Governments > Federal Government > Claims By & Against

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Antitrust Issues > Administrative Considerations

HN13[] **Exemptions & Immunities, Filed Rate Doctrine**

Although the filed rate doctrine is commonly used to uphold rates approved by federal agencies such as the Federal Energy Regulatory Commission or the Interstate Commerce Commission, the doctrine was developed as a common law defense to federal antitrust litigation. The rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Local Governments > Administrative Boards

HN14[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

Upon a finding of market power abuse by a participant in the Texas electricity market, the Public Utility Commission of Texas is empowered by the Texas Legislature to remedy the situation by seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Tex. Util. Code Ann. ch. 15, by imposing an administrative penalty as authorized by ch. 15, or by suspending, revoking, or amending a certificate or registration as authorized by *Tex. Util. Code Ann. § 39.356*. *Tex. Util. Code Ann. § 39.157(a)*.

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > Deregulation & Restructuring

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Utility Companies > Ownership & Restructuring

HN15[] **Antitrust Issues, Antitrust Immunity**

See *Tex. Util. Code Ann. § 39.158(b)*.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Governments > Legislation > Interpretation

HN16[] **Exemptions & Immunities, Filed Rate Doctrine**

The primary rule in statutory interpretation is that a court must give effect to legislative intent.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Utility Companies > Rates > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Mergers & Acquisitions Law > Antitrust > Remedies

HN17[] **Antitrust & Trade Law, Exemptions & Immunities**

The filed rate doctrine does not provide immunity from antitrust liability. Instead, the doctrine only acts to bar private antitrust suits seeking damages stemming from rates paid to a regulated utility. Companies that engage in illegal antitrust activities regarding filed rates are still subject to criminal sanctions or equitable relief. Furthermore, the filed rate doctrine does not bar antitrust challenges based on mergers or sales of assets by regulated utilities. Therefore, in accordance with the intent of the Texas Legislature in enacting *Tex. Util. Code Ann. § 39.158(b)*, the filed rate doctrine does not confer immunity from federal or state antitrust laws.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Courts > Common Law

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Governments > Legislation > Interpretation

HN18[] **Federal & State Interrelationships, Federal Common Law**

For a legislature to abrogate a federal common law provision, the legislature must speak directly to the question addressed by the common law.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN19[] **Sherman Act, Defenses**

The filed rate doctrine is a recognized part of federal ***antitrust law*** and the United States Congress is best situated to abrogate the filed rate doctrine. Seeing no amendments to the Sherman Antitrust Act addressing the filed rate doctrine, the United States District Court for the Southern District of Texas, Corpus Christi Division, concludes that the legislative intent of the United States Congress is that the filed rate doctrine is a valid defense to federal antitrust claims.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN20[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

The filed rate doctrine applies to market based rates. Rates are considered filed rates and subject to agency review if the responsible regulatory agency is charged with "ensuring just and reasonable rates." However, if rates are truly left to the market, with no filing requirement or Federal Energy Regulatory Commission supervision at all, the filed rate doctrine would by its terms no longer operate.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Wholesale Rates

HN21[] **Public Enforcement, State Civil Actions**

The Public Utility Commission of Texas (PUCT) is required to ensure safe, reliable, and reasonably priced electricity. *Tex. Util. Code Ann. § 39.101(a)(1)*. PUCT is also required to ensure that Ancillary Services are available at reasonable prices with terms and conditions not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive. *Tex. Util. Code Ann. § 39.004(e)*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Antitrust Issues > Exclusionary Conduct

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN22[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

The "competitor exception" to the filed rate doctrine holds that an anticompetitive practice embodied in a filed tariff may violate the antitrust laws if it impacts upon competitors as opposed to customers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] **Exemptions & Immunities, Filed Rate Doctrine**

Sections 15.01 et seq. of the Texas Free Enterprise and Antitrust Act (TFEAA) are the state law counterparts to federal ***antitrust law***. The Texas legislature mandates that Texas ***antitrust law*** be harmonized with federal ***antitrust law***. *Tex. Bus. & Com. Code Ann. § 15.04*. As a result, there is no need for federal courts to analyze TFEAA claims separately from Sherman Act claims.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN24[] **Business Torts, Fraud & Misrepresentation**

Under Texas law, to recover for fraud, the plaintiff must establish: (1) a material representation; (2) it was false when made; (3) the speaker either knew it was false or asserted it without knowledge of its truth; (4) the speaker intended that it be acted upon; (5) the party acted in reliance; and (6) the party was injured as a result.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Retail Rates

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN25[] **Exemptions & Immunities, Filed Rate Doctrine**

A regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action. Thus, even if a filed rate is obtained through fraud, it remains true that one does not suffer the predicate "injury to business or property" by paying the filed rate.

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

HN26[] **Fraud & Misrepresentation, Negligent Misrepresentation**

To prevail in a negligent misrepresentation action in Texas, the plaintiff must prove: (1) the defendant made a representation in the course of his business, or in a transaction in which he had a pecuniary interest, (2) the defendant supplied false information for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Delivery & Tender

Contracts Law > Breach > Breach of Contract Actions > General Overview

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Breach > General Overview

HN27[] **Standards of Performance, Delivery & Tender**

The elements for breach of contract in Texas are: 1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of the contract by the defendant; and 4) damages to the plaintiff resulting from the breach.

Contracts Law > Breach > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Energy & Utilities Law > Electric Power Industry > General Overview

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

HN28[] **Contracts Law, Breach**

The filed rate doctrine only applies to claims regarding the reasonableness of rates filed by a regulated industry.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Energy & Utilities Law > Electric Power Industry > Electric Power Rates > Filed Rate Doctrine

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

HN29[] **Filed Rate Doctrine, Public Utilities & Telecommunications Carriers**

The court may dismiss a complaint on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law.

Torts > ... > Defamation > Public Figures > Actual Malice

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Elements > General Overview

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

Torts > ... > Contributory Negligence > Limits on Application > Intentional Torts

HN30[] **Public Figures, Actual Malice**

To state a defamation claim in Texas, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement.

Torts > Intentional Torts > Defamation > Procedural Matters

Torts > Intentional Torts > Defamation > General Overview

HN31[] **Defamation, Procedural Matters**

A statement is defamatory if it exposes a person to public contempt or financial injury, or if it impeaches a person's reputation. Whether a statement is capable of a defamatory meaning is initially a question for the court. The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement. A statement may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances. However, when a publication is of ambiguous or doubtful import, the jury must determine its meaning.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Torts > ... > Defamation > Public Figures > Actual Malice

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Public Figures > Limited Purpose Public Figure

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

HN32[] **Burdens of Proof, Prosecution**

Whether or not a statement was published by the defendant while acting with actual malice focuses on the defendant's state of mind at the time of publication. To prove actual malice it must be shown that the defendant made a statement with knowledge that it was false or with reckless disregard of whether it was true or not. For a public figure to establish reckless disregard, the defendant must have entertained serious doubts as to the truth of his publication.

Torts > Business Torts > Trade Libel > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Trade Libel > General Overview

Torts > Business Torts > Trade Libel > Remedies

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Remedies > Damages

HN33[] **Trade Libel, Elements**

The elements of a claim for business disparagement are: (1) publication by the defendant (2) of disparaging words (3) which are false; (4) published with malice; (5) published without privilege; and (6) special damages to the plaintiff. To prove special damages, a plaintiff must provide evidence of direct, pecuniary loss attributable to the false communications of the defendants. A claim for business disparagement is similar to a claim for defamation, but defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interest.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN34[] **Conspiracy, Elements**

Under Texas law, five elements are necessary to establish an actionable claim for civil conspiracy: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. In addition, a plaintiff must plead an underlying tort for its civil conspiracy claim to be actionable.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN35[] **Relief From Judgments, Altering & Amending Judgments**

Fed. R. Civ. P. 15(a) states that leave shall be freely given when justice so requires.

Counsel: **[*1]** For Texas Commercial Energy, A Texas Limited Liability Company, PLAINTIFF: Mikal C Watts, Watts Law Firm LLP, Corpus Christi, TX USA. Gregory Lamar Gowan, Watts Law Firm LLP, Corpus Christi, TX USA. William Robert Anderson, III, Sorell Anderson Et Al, Corpus Christi, TX USA.

For TXU Energy, Inc, TXU Generation Services Company, LP, TXU Portfolio Management Company, LP, FKA TXU Energy Trading Company, LP, TXU Energy Solutions Management Company, FKA TXU Energy Services Company, DEFENDANTS: Richard L. Adams, Maurice Owens, Robert K Wise, Hunton & Williams LLP, Dallas, TX USA. Darrell Lee Barger, Hartline Dacus Et Al, Corpus Christi, TX USA.

For American Electric Power, Inc, Aep Texas Central Company, Aep Texas North Company, American Electric Power Service Corp, Aep Texas Commercial Industrial Retail LP, DEFENDANTS: Steven J Routh, Hogan & Hartson, Washington, DC USA. G Don Schauer, Shauer & Simank PC, Corpus Christi, TX USA. Mary Anne Mason, Hogan & Hartson, Washington, DC USA.

For Reliant Energy Inc, Reliant Resources Inc, Reliant Energy Solutions LLC, Reliant Energy Retail Services LLC, **[*2]** Reliant Energy Solutions LLC, DEFENDANTS: Rufus W Oliver, III, Baker Botts, Houston, TX USA. David Keith Isaak, Baker Botts LLP, Houston, TX USA. Jorge C Rangel, The Rangel Law Firm, Corpus Christi, TX USA.

For Mirant Corporation, Mirant Texas LP, Mirant Wichita Falls LP, Mirant Americas Energy Marketing LP, DEFENDANTS: Eric Brad Terry, Haynes & Boone, LLP, San Antonio, TX USA.

For Automated Power Exchange Inc, DEFENDANT: Osborne J Dykes, III, Fulbright & Jaworski, Houston, TX USA. James F McKibben, Jr, Hermansen McKibben Et Al, Corpus Christi, TX USA. Lance Richard Bremer, Fulbright & Jaworski, Houston, TX USA.

For Electric Reliability Counsel of Texas, DEFENDANT: Judith Reed Blakeway, Strasburger & Price, San Antonio, TX USA. Douglas E Chaves, Chaves Resendez Et Al, Corpus Christi, TX USA. Merritt Maverick Clements, Starsburger & Price, San Antonio, TX USA.

For Texas Genco, LP, DEFENDANT: Daniel K Hedges, Porter & Hedges, Houston, TX USA. John Alexander Irvine, Porter & Hedges, Houston, TX USA. Ralph F Meyer, Royston Rayzor Et Al, Corpus Christi, TX USA.

For Utility Choice, LLC Intervenor PLAINTIFF: Barbara Canales Black, Attorney at Law, Corpus Christi, **[*3]** TX USA. David M Stiles, III, The Chaffin Law Firm, Houston, TX USA. Robert A Chaffin, Attorney at Law, Houston, TX USA. S Reed Morgan, Morgan & Chadick, LLP, Comfort, TX USA.

For Cirro Energy Corporation Intervenor, PLAINTIFF: Barbara Canales Black, Attorney at Law, Corpus Christi, TX USA. David M Stiles, III, The Chaffin Law Firm, Houston, TX USA. Robert A Chaffin, Attorney at Law, Houston, TX USA. S Reed Morgan, Morgan & Chadick LLP, Comfort, TX USA.

For Andrews Distributing, LLP, Individually & as Proposed Class Representative for All Those Similarly Situated Intervenor, Andrews Distributing Company of North Texas Limited, Individually & as Proposed Class Representative for All Those Similarly Situated Intervenor, Water Street, Ltd, Individually & as Proposed Class Representative for All Those Similarly Situated Intervenor, Barry Andrews, Individually & as Proposed Class Representative for All Those Similarly Situated Intervenor, Joe Jernigan, Individually & as Proposed Class Representative for All Those Similarly Situated Intervenor, American Realty Investors AKA Fidinam Investment Consultants, Inc Intervenor, Albert Gonzalez Intervenor, Bea Cisneros Intervenor, Dave **[*4]** Lockyer Intervenor, David Kelley Intervenor, David Schleuter Intervenor, Johnny Hammond Intervenor, Ernest Case Intervenor, Lawrence Balderas Intervenor, Henry lamb, Jr Intervenor, Lynette Smith Intervenor, Lynn Williams Intervenor, Margaret Elizondo Intervenor, Mike Barnes Intervenor, Mike McGuire Intervenor, Pam Spackman Intervenor, Randy Golden Intervenor, Roger Salinas Intervenor, Scott Robsinson Intervenor, Sean Murphy Intervenor, Sergio Villarreal Intervenor, Toni Carr Intervenor, Walter Smith Intervenor, PLAINTIFFS: Michael Maldonado, Attorney at Law, Corpus Christi, TX USA.

FOR TXU Energy, Inc Intervenor, TXU Generation Services Company, LP Intervenor, TXU Portfolio Management Company, LP Intervenor, TXU Energy Solutions Management Company Intevenor, DEFENDANTS: Thomas G. Slater, Jr, HUNTON & WILLIAMS LLP, Richmond, VA, Thomas M. Hughes, HUNTON & WILLIAMS LLP, Washington, D.C., Richard L Adams, Robert K Wise, Maurice Owens, HUNTON & WILLIAMS LLP, Dallas, Texas, USA. Darrell Lee Barger, HARTLINE, DACUS, BARGER, DRYER & KERN LLP, Corpus Christi, Texas.

For American Electric Power, Inc Intervenor, Aep Texan Central Company Intervenor, Aep Texas North Company Intervenor, American Electric Power Service Corp Intervenor, Aep Texas Commercial Industrial Retail LP Intervenor, **[*5]** DEFENDANTS: Steven J Routh, Hogan & Hartson, Washington, DC USA. G Don Schauer, Schauer & Simank. Corpus Christi, TX USA. Mary Anne Mason, Hogan & Hartson, Washington, DC USA.

For Reliant Resources Inc Intervenor, Reliant Energy Electric Solutions LLC Intervenor, Reliant Energy Retail Services LLC Intervenor, Reliant Energy Solutions LLC Intervenor,

DEFENDANTS: Rufus W Oliver, III, David Keith Isaak, Baker Botts, LLP, Houston, TX USA. Jorge C Rangel, The Rangel Law Firm, Corpus Christi, TX USA.

For Automated Power Exchange Inc Intervenor, DEFENDANT:

Osborne J Dykes, III, Lance Richard Bremer, Fulbright & Jaworski, Houston, TX USA. James F McKibben, Jr., Hermansen McKibben Et Al, Corpus Christi, TX USA.

Texas Genco, LP Intervenor, DEFENDANT: Daniel K Hedges, John Alexander Irvine, Porter & Hedges Houston, TX USA.

Ralph F Meyer, Royston Rayvor Et Al, Corpus Christi, TX USA.

For Tractebel Energy Marketing, Inc Intervenor, DEFENDANT: Lawrence J Hand, Jr., Lemie and Kelleher, New Orleans, LA USA.

For Mirant Americana Energy Marketing, LP, INTERESTED PARTY, J Preston Wrotenbery, Oppenheim & Assoc, Houston, TX USA.

For Tractebel Energy Marketing, Inc, DEFENDANT: **[*6]** B Richard Moore, Lawrence H Hand, Jr, Ernest L Edwards, Lemie and Kelleher, New Orleans, LA USA.

Judges: JANIS GRAHAM JACK, UNITED STATES DISTRICT JUDGE.

Opinion by: JANIS GRAHAM JACK

Opinion

ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

On this day came on to be heard: (1) "Defendant Electric Reliability Council of Texas, Inc.'s Motion to Dismiss Second Amended Complaint, or, in the Alternative, to Stay Proceedings," (2) "TXU Defendants' Motion to Dismiss TCE's Second Amended Complaint and Brief in Support," (3) "Texas Genco Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (4) "Defendants TECO EnergySource, Inc. and Frontera Generation L.P.'s Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (5) "American Electric Power Defendants' Motion to Dismiss the Second Amended. Complaint and Memorandum in Support," (6) "Defendant APX's Motion to Dismiss the Second Amended Complaint and Brief in Support," (7) "TIE Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (8) "Reliant Resources Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Supporting Memorandum, **[*7]** " (9) "Defendant Tractebel Energy Marketing, Inc.'s Motion to Dismiss Second Amended Complaint and Memorandum in

Motion to Dismiss Second Amended Complaint and Memorandum in Support," and all corresponding responses and replies. For the reasons stated below, this Court GRANTS these motions in part and DISMISSES Plaintiff's Second Amended Complaint.

I. JURISDICTION

This Court has federal question jurisdiction over this antitrust action pursuant to *28 U.S.C. § 1331*, and supplemental jurisdiction over Plaintiff's state law claims pursuant to *28 U.S.C. § 1367*.

II. FACTS AND PROCEEDINGS

Plaintiff Texas Commercial Energy ("TCE") began selling electric power to retail customers in Texas in January 2002. Initially, TCE entered into bilateral contracts with wholesale providers of electricity to obtain the electric power it sold in the consumer market. However, TCE increasingly: relied on the Balancing Energy Service ("BES") market, a bid-based market for short-term power, to meet its electricity needs. In early 2003, prices in the BES market for electricity increased substantially, and as a result, TCE sustained **[*8]** extensive losses before eventually declaring bankruptcy in March 2003. TCE claims that Defendants contributed to the rise in BES market prices through federal and state antitrust violations, fraud, negligent misrepresentation, breach of contract, defamation, business disparagement, civil conspiracy, and malicious and willful/flagrant conduct.

A. REGULATORY BACKGROUND

The state of Texas operates an independent and self-contained electric production and transmission grid that serves nearly 85 percent of the state. The Federal Energy Regulatory Commission ("FERC") does not regulate Texas' independent electric grid and electric utility companies operating in the Texas electricity market are exempt from the *Federal Power Act*. The. Public Utility Commission of Texas ("PUCT") regulates the Texas electric and transmission grid.

Historically, electric power in Texas was generated and sold by integrated electric utilities that supplied specific geographic areas, and retail rates for electricity were set by the state. But in 1999, the Texas Legislature, with the passage of Senate Bill 7, amended the Public Utility Regulatory Act ("PURA"), and began the deregulation of the Texas electricity **[*9]** market. The law required that rates for electric power in Texas be set by a competitive market, and called for each integrated electric utility to partition itself into three companies: (1) a Power Generation Company ("PGC"), (2) a Transmission and Distribution Provider ("TDSP"), and (3) a Retail Electric Provider ("REP",) . Senate Bill 7 did not require a full divestiture by each electric utility, but each of the three resulting companies was required, to be operated by separate management. The Texas Legislature also granted PUCT jurisdiction over the Texas electricity market.

ERCOT, under a contract with PUCT, is the Independent System Operator ("ISO") of the Texas electricity market, and is charged with insuring (1) system reliability, (2) nondiscriminatory access to transmission and distribution systems, (3) access to market information, and (4) clearance of all market transactions. The ERCOT protocols, which are created and adopted by the ERCOT board, provide the framework for the administration of the Texas electricity market. These protocols divide participants in Texas' wholesale electricity market into three categories: (1) Load Serving Entities ("LSE"), (2) Qualified Scheduling **[*10]** Entities ("QSE"), and (3) Resource Entities ("RE"). LSEs (which include REPs, municipal electric utilities, and co-op electric utilities) sell electricity, REs (which include PGCs) generate electricity, and QSEs serve as intermediaries between LSEs and REs. QSEs are responsible for submitting both (1) schedules of procured energy for LSEs to ERCOT and (2) resource plans for REs to ERCOT. In addition, QSE's must possess either an investment grade credit rating or post collateral with ERCOT in the form of letters of credit or cash equivalents.

Prior to November 2002, the ERCOT protocols required that QSEs submit a "Balance Schedule" demonstrating that the scheduled generation of the REs that a QSE represents is equal to the retail obligations of the LSEs that the QSE represents However, on November 1, 2002, ERCOT implemented the Relaxed Balancing Schedules protocol. This new protocol eased restrictions in the Texas electric market by eliminating the requirement that the scheduled generation of a QSE match its obligations in the retail power market. This revision was designed to increase competition in the market by allowing REPs to also serve their retail load requirements through purchases **[*11]** in the BES market.

The wholesale electricity market in Texas is for both electric power and electric capacity, both of which are available through (1) bilateral agreements among market participants and (2) the BES market. Forward power contracts for future electricity are available only through bilateral agreements, and bilateral agreements are the only source of (1) short-term, one-day to one-month, and (2) long-term, over one-month wholesale purchases. The BES market is a market for same day purchases made in fifteen-minute intervals. Prices in the BES market are capped at $ 1,000.00 per MWh.

In addition, the ERCOT wholesale market is divided into a number of Congestion Zones ("CZ"). The geographic area of each CZ is re-determined each year, and is established according to three factors: (1) transmission capacity, (2) generation capacity, and (3) electricity demand. Each CZ participates in both the bilateral market and the BES market. Both bilateral market prices and BES market prices are separately quoted for each of the CZs. Before 2004, there were four CZs in Texas; a fifth CZ was added in 2004.

Electric capacity, an Ancillary Service, is a critical component of the wholesale **[*12]** market, and each LSE is required to supply reserve capacity, an Ancillary Service Requirement. Ancillary Services are purchased either through (1) bilateral agreements with other market participants, or (2) directly through ERCOT in the Ancillary Services market, a bid-based market. In both the BES market and the Ancillary Services market, ERCOT serves as an intermediary, matching offers and bids. A REP can buy or sell energy on the BES market as the need arises to satisfy its retail obligations. ERCOT also administers a day-ahead capacity market.

Senate Bill 7 requires that PUCT monitor and remedy market power abuses. PUCT, through injunctions, fines, and the revocation of the right to participate in the market, possesses the authority to punish those who abuse their market power. PUCT also created the Market Oversight Division ("MOD") to ensure compliance with the statutory requirements of the amended PUPA. The MOD itself does not possess decision-making power, but reports directly to PUCT. As part of its compliance activities, in June 2002 the MOD required all participants in the Texas electricity market to file an affidavit with PUCT pledging that they would not engage in market **[*13]** manipulation. These affidavits were a direct response to market manipulation that occurred during August 2001 as a result of improper scheduling practices. The MOD also required market participants to return the $ 30,000,000.00 obtained as a result of these improper practices.

B. FACTUAL BACKGROUND

TCE began operating as a REP in the State of Texas on January 1, 2002. As a REP, TCE purchased energy and electric capacity from other market participants, and then sold this energy directly to retail customers. Initially, TCE purchased its supply of energy through a bilateral contract with Bryan Texas Utilities. However, on June 20, 2002, TCE became a certified QSE, and began to both purchase electric power directly from ERCOT in the BES market and self-schedule bilateral purchase agreements for power in the wholesale market.

During January 2003, TCE noted that the percentage of electricity in the ERCOT-controlled electric market supplied by the BES market began to rise. During January and February 2003, TCE regularly observed price spikes in the BES market that were three to five times the price of day-ahead power. Concerned about these observations, TCE met with the MOD, and **[*14]** alleged that both anticompetitive bids and manipulation of scheduled generation drove prices in the BES market to $ 241.15 per MWh on January 25, 2003. [1] On that day, the price for day-ahead power was $ 40.30 per MWh. As a result of these price spikes, TCE paid higher prices in the BES market, and was forced to withdraw credit-based collateral from its bilateral partners to meet its increasing collateral requirements with ERCOT.

TCE claims that these high prices occurred as a result of market manipulation by Defendants, and notes that TXU controlled 75 percent of the BES market on February 24, 2003, 99 percent of the BES market on February 25, 2003, and 85 percent of the BES market on February 26, 2003. On February 24, 2003, TCE contends that

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[1] TCE alleges that prices spiked to $ 241.15 per MWh on January 25, 2003 (SAC P 186), but then later alleges that prices rose to $ 273.64 per MWh at 10:30 a.m. on January 25, 2003. (SAC P 191.)

Defendants implemented a squeeze on the market for short-term and BES energy. **[*15]** The BES market price for the 8:30 a.m. interval initially cleared $ 990.01 per MWh before being recalled from the market. Then at 6:00 p.m., the price for BES energy cleared $ 990.01 per MWh for ten intervals. TCE alleges that on February 25, 2003, Defendants TXU and Reliant, despite possessing excess generation capacity, withheld energy from the market in order to manipulate BES market prices. At 7:00 a.m. on February 25, 2003, the BES market ran out of offers, and the market-clearing price for energy ("MCPE") was again $ 990.00 per MWh. As a result, at 7:30 a.m., ERCOT issued a market advisory and requested additional upbalancing bids in an effort to provide more electricity in the BES market. TCE contends that throughout the day, ERCOT gave several verbal dispatch instructions to Defendant TXU to raise its level of electric power output into the system. TCE alleges that these verbal instructions failed to follow ERCOT protocols requiring ERCOT to identify the specific generation unit of a plant that is to be raised or lowered. TCE also contacted the Thief Operating Officer ("COO") of ERCOT, and requested an explanation for the price spikes in the BES market that morning. ERCOT's **[*16]** COO could not explain the price spikes given that generation and load forecasts were correct, a weather emergency had not been declared, there were no natural gas curtailments, the transmission system suffered from no operational problems, and there were no generation unit outages.

During the week of February 25, 2003, with the rise in BES market prices, TCE was forced to increase its posted collateral with ERCOT from $ 16,200,000.00 to approximately $ 24,000,000.00. In addition, to have complied with ERCOT protocols when the invoice for the last week of February was to come due in March 2003, TCE would have had to increase its collateral with ERCOT from approximately $ 24,000,000.00 to $ 102,000,000.00. On February 25, 2003, TCE began to contact other market participants in attempt to sell all or part of its customer portfolio. TCE obtained Confidentiality Agreements from these contacted market participants, and alleges that several Defendants violated their Confidentiality Agreements by distributing sensitive and proprietary financial information in an effort to defame and disparage TCE.

On March 3, 2003, the MOD issued "Report on February 24-26, 2003 Balancing Energy Price Spikes, **[*17]** " and concluded that market manipulation had increased the price of energy in the BES market by two to three times, at an additional cost to the market of $ 17,000,000.00. During this week, ERCOT agreed to give TCE until March 6, 2003 to post additional collateral. Then on March 4, 2003, ERCOT offered to reduce TCE's credit requirement to roughly $ 59,000,000.00. However, on March 5, 2003, despite ERCOT's agreement to wait until March 6, 2003, ERCOT tendered TCE's Letters of Credit for payment. On March 6, 2003, TCE filed for Chapter 11 bankruptcy and requested a Temporary Restraining Order ("TRO") to prevent ERCOT from drawing upon its Letters of Credit.

On March 7, 2003, TCE and ERCOT agreed to the terms of an injunction during the hearing for the TRO. The agreement provided that TCE transfer customers representing 80 percent of its revenue to other REPs participating in the Texas electricity market. In return, ERCOT agreed to release TCE's Letters of Credit and assist TCE in collecting its accounts receivable. In addition, during a March 10, 2003 meeting with representatives of participants in the Texas electricity market, two additional requirements were incorporated into the agreement: **[*18]** (1) TCE would no: be allowed to purchase more than 10 percent of its energy requirements in the BES market and (2) the largest of TCE's released customers would be placed on Provider of Last Resort ("POLR") rates. [2] TCE alleges that the second additional requirement is a violation of PUCT rules.

In late March 2003, the Chief Executive Officer ("CEO") of ERCOT issued a number of public statements about TCE. TCE alleges that these statements violated ERCOT protocols by releasing 2 POLR rates are indexed to the MCPE of the BES market. Confidential financial and business information. In addition, TCE contends that these statements were false and intentionally misleading.

In a report issued on May 19, 2003, the MOE' reported that "bidders using the APX QSE and Mirant 'acknowledged that their extreme bids did not reflect production costs during the weather event, but claimed that the sporadic windfall revenues were intended to improve the long-term profitability **[*19]** of a plant.'" (Pl.'s Second Amend. Compl. ("SAC") P 292.) On January 27, 2004, the MOD published "Staff Inquiry into Allegations made by Texas

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[2] POLR rats are indexed to the MCPE of the BES market.

Commercial Energy regarding ERCOT Market Manipulation." TCE alleges that this report supports its allegations of market manipulation. The MOD continues to investigate TCE's allegations of market manipulation.

C. PROCEDURAL BACKGROUND

TCE filed its Second Amended Complaint ("SAC") on February 3, 2004. In its SAC, TCE sues twenty-four defendants that can be classified into ten groups: (1) TXU Energy, Inc., TXU Generation Services Company, L.P., TXU Portfolio Management Company, L.P., and TXU Energy Solutions Management Company (collectively the "TXU Defendants"); (2) American Electric Power, Inc., AEP Texas Central Company, AEP Texas North Company, American Electric: Power Service Corp., and AEP Texas Commercial Industrial Retail, L.P. (collectively the "AEP Defendants"); [3] (3) CenterPoint Energy, Inc., CenterPoint Energy Houston Electric, L.L.C., and Texas Genco, L.P. (collectively the "Texas Genco Defendants"); [4] **[*21]** (4) Reliant Resources, Inc., Reliant Energy Electric Solutions, L.L.C., Reliant Energy Retail Services, L.L.C., and Reliant **[*20]** Energy Solutions, L.L.C. (collectively the "Reliant Defendants"); [5] (5) Automated Power Exchange, Inc. ("APX"); (6) the Electric Reliability Counsel of Texas ("ERCOT"); (7) TECO Energy Source, Inc. ("IES"); (8) Texas Independent Energy, L.P., Odessa-Ector Power Partners, L.L.P., and Guadalupe Power Partners, L.P. (collectively the "TE Defendants"); (9) Frontera Generation L.P. ("Frontera"); and (10) Tractebel Energy Marketing, Inc. ("Tractebel") . In its SAC, TCE alleges violations of *§§ 1* and *2* of the Sherman Antitrust Act, *§ 15.05(a)*, *(c)* and *§ 15.10* of the *Texas Free Enterprise and Antitrust Act* ("TFEAA"), fraud, negligent misrepresentation, breach of contract, defamation, business disparagement, civil conspiracy, and malicious and willful/flagrant conduct. [6]

ERCOT filed "Defendant Electric Reliability Council of Texas, Inc.'s Motion to Dismiss Second Amended Complaint, or in the Alternative, to Stay Proceedings, **[*22]** " on March 15, 2004. The TXU Defendants filed their Motion to Dismiss on March 15, 2004. The Texas Genco Defendants, Frontera, TES, the AEP Defendants, APX, the TIE Defendants, the Reliant Defendants, and Tractebel filed their Motions to Dismiss on March 16, 2004. TCE filed "TCE's Response to Defendants' Motions to Dismiss and, in the Alternative, Motion for Leave to Amend" on April 15, 2004. [7] The Court held a hearing on the motions on May 20, 2004. This Court now considers the motions.

III. DISCUSSION

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[3] The AEP Defendants contend that TCE's Bankruptcy Plan, P 4.4.1(11), dismissed AEP Texas central company and AEP Texas North Company from this action. (AEP's Reply at 3 n.l.)

[4] In its Response to Defendants' Motions to Dismiss, TCE states that it "respectively agrees with Centerpoint's argument that TCE's bankruptcy counsel, Harlin Womble, apparently released centerpoint during the bankruptcy proceedings. Accordingly, TCE agrees with Centerpoint that it should be dismissed." (Pl.'s Resp. to Def.'s Mot. to Dismiss at 140 n.511.) However, TCE fails to state which one of the two CenterPoint companies is to be dismissed. In its Reply to TCE's Response to Defendants' Motions to Dismiss, the Texas Genco Defendants state that the company in question is CenterPoint Energy Houston Electric, L.L.C. (Def.'s Reply at 2.)

[5] In its SAC, TXU collectively refers to CenterPoint Energy, Inc., CenterPoint Energy Houston Electric, L.L.C., Texas Genco, L.P., Reliant Resources, Inc., Reliant Energy Electric Solutions, L.L.C., Reliant Energy Retail Services, L.L.C., and Reliant Energy Solutions, L.L.C. as the "Reliant Defendants." However, the Texas Genco Defendants and the Reliant Defendants contend that they are separate entities and filed separate motions to dismiss. As a result, this Order will also refer to the Texas Genco Defendants and the Reliant Defendants separately. Therefore, whenever TCE, in its SAC, refers to the Reliant Defendants, this Court will assume that TCE is referring to both the Texas Genco Defendants and the Reliant Defendants.

[6] In its SAC, TCE references *§§ 1, 2, 3and 13a* of the Sherman Antitrust Act. (SAC P 337.) In its response, TCE clarifies that it is asserting only §§ 1 and 2 Sherman Act claims. (Pl.'s Resp. at 76 n.253.)

[7] This Court struck TCE's response on April 27, 2004. However, the court is aware of TCE's arguments and has fully addressed them herein TCE refiled its response on April 28, 2004.

A. MOTION TO DISMISS

Rule 12(b) (6) of the Federal Rules of Civil Procedure ***HN1***[] authorizes the court to dismiss a claim on the basis of dispositive law. *Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989)*. When ruling on **[*23]** a 12(b) (6) motion to dismiss, the Court must accept the plaintiff's factual allegations as true, and view these allegations in a light most favorable to the plaintiff. *Capital Parks, Inc. v. S.E. Adver. & Sales Sys., 30 F.3d 627, 629 (5th Cir. 1994)*. In a 12(b) (6) motion, the Court should not look beyond the pleadings. *McCartney v. First City Bank 970 F.2d 45, 47 (5th Cir. 1992)*. A 12(b) (6) motion should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)*; *Mitchell v. McBryde, 944 F.2d 229, 230 (5th Cir. 1991)*. The question before the Court in examining a Rule 12(b)(6) motion is whether the plaintiff's complaint states any valid claim for relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)*; *Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997)*. Since federal courts simply require "notice pleading," the Court construes Plaintiff's pleading liberally, and lack of **[*24]** detail does not constitute a sufficient ground to dismiss a complaint under *Rule 12(b)(6)*. *Strauss v. City of Chicago, 760 F.2d 765, 767 (7th Cir. 1985)*.

B. FEDERAL ANTITRUST CLAIMS

In its SAC, TCE alleges that Defendants violated *§§ 1and 2* of the Sherman Antitrust Act. Specifically, TCE alleges that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel violated the Sherman Antitrust Act by engaging in economic withholding, physical withholding, and market manipulation. TCE further alleges that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, and the Reliant Defendants violated the Sherman Antitrust Act by exercising monopoly power, attempting to monopolize, and/or conspiring to monopolize. Defendants move to dismiss TCE's federal antitrust claims under the filed rate doctrine.

1. The Sherman Antitrust Act Generally

a. Section 1 of the Sherman Antitrust Act

Section 1 of the Sherman Act states that ***HN2***[] "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, **[*25]** or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN3***[] In order to recover under *§ 1 of the Sherman Act*, a 'plaintiff must prove (1) the existence of an agreement (2) which unreasonably restrains trade (3) to the damage of the plaintiff.' *J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 791 (5th Cir. 1983)*. "Section one applies only to concerted action; unilateral conduct is excluded from its purview." *Johnson v. Hosp. Crp. of Am., 95 F.3d 383, 392 (5th Cir. 1996)*. To prove a conspiracy or concerted action, the plaintiff must prove that the conspirators had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Spectators' Communication Network v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001)*

b. Section 2 of the Sherman Antitrust Act

Section 2 of the Sherman Act states that ***HN4***[] "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...." *15 U.S.C. § 2*. **[*26]** ***HN5***[] This section of the Sherman Act denounces three actions: "monopolization, attempt to monopolize, and conspiracy to monopolize." *N. Mississippi Communications, Inc. v. Jones, 792 F.2d 1330, 1335 (5th Cir. 1986)*

HN6[] Under *§ 2 of the Sherman Act*, the offense of monopoly consists of two elements: "the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 781 (5th Cir. 1999). Specifically, the monopoly power element concerns the "power to control prices or exclude competition." Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 315 (5th Cir. 2000)

HN7[] An attempted monopoly in violation of Section 2 consists of three elements: "(1) that the defendant engaged in predatory or exclusionary conduct, (2) that the defendant possessed the specific intent to monopolize, and (3) that there was a dangerous probability that the defendant would succeed in his attempt." Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003). **[*27]**

HN8[] A conspiracy to monopolize can be established only through proof of "(1) the existence of specific intent to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." Stewart Glass & Mirror, Inc., 200 F.3d at 316.

c. Private Causes of Action

Section 4 of the Clayton Act, 15 U.S.C. § 15, **HN9**[] provides a private right of action to enforce the Sherman Act and requires a plaintiff to seek recovery for injury "in his business or property." Dillard v. Merrill Lynch, 961 F.2d 1148, 1159 (5th Cir. 1992). In order to show standing, the private claimant must demonstrate injury to business and property of a type that antitrust laws were intended to prevent. *Id.* Pleadings need not explain how the injury occurred; that the claimant sustained injury to business or property is a sufficient allegation. *Id.*

HN10[] Private antitrust liability under Section 4 of the Clayton Act requires the showing of (1) a violation of the antitrust laws, (2) that it was the defendant's conduct that **[*28]** actually caused injury to his business or property, and (3) some indication of the amount of damage. Bell Atl. Corp., 339 F.3d at 302; Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 675 (5th Cir. 1982). The plaintiff need only provide "a just and reasonable estimate of the damage based on relevant data." Bell Atl. Corp., 339 F.3d at 303.

2. The Filed Rate Doctrine Generally

HN11[] The filed rate doctrine "bars antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services." County of Stanislaus v. Pac. Gas and Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997) (holding that the filed rate doctrine barred federal antitrust price fixing claims brought under § 1 of the Sherman Antitrust Act); *see also* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424, 106 S. Ct. 1922, 1931, 90 L. Ed. 2d 413 (1986) (holding that the filed rate doctrine barred federal antitrust claims brought under § 1 of the Sherman Antitrust Act); Town of Norwood, Massachusetts v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000) (holding that the **[*29]** filed rate doctrine barred federal antitrust claims brought under §§ 1and 2 of the Sherman Antitrust Act). The doctrine "holds that any filed rate -- that is, one approved by the governing regulatory agency -- is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 18 (2nd Cir. 1994). In other words, "the filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable." *Id.* Moreover, "application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results." Marcus v. AT&T Corp., 138 F.3d 46, 58 (2nd Cir. 1998).

One legal scholar traces the Supreme Court's analysis of filed rates to 1906 when the Court reasoned that the Interstate Commerce Act had the purpose "to secure equality of rates as to all and to destroy favoritism." Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,* 56 VANO L. REV. 1591, 1599 (Nov. 2003) *(quoting* New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 50 L. Ed. 515, 26 S. Ct. 272 (1906). **[*30]** The Supreme Court first articulated the filed rate doctrine as a defense to antitrust liability in Keogh v. Chicago N.W. Ry. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). In *Keogh,* the plaintiff alleged that shipping rates filed by the defendant interstate freight carriers with the Interstate Commerce Commission ("ICC") were fixed at arbitrary and unreasonable high levels as a result of a conspiracy in violation of §

7 of the Anti-Trust Act of July 2, 1890. *Keohg, 260 U.S. at 159-60*. The Supreme Court held that since the shipping rates in question had been filed with and approved by the ICC, the plaintiff failed to state a cause of action under the Anti-Trust Act. *Id. at 162*.

In rejecting the plaintiff's antitrust claim, the Court in *Keogh* articulated a number of reasons in support of its holding. First, the regulatory structure governing rates charged by carriers provided a mechanism for the recovery of damages. *Id. at 162*. Second, antitrust liability requires an injury or violation of a legal right. "The legal rights of shipper as against carrier in respect to a rate are measured by the published **[*31]** tariff," and the plaintiff suffered no injury as a result of paying the published tariff. *Id. at 163*. Third, the award of antitrust damages to the plaintiff "might, like a rebate, operate to give [the plaintiff] a preference over his trade competitors." *Id.* Fourth, determining damages would require the court to "reconstitute the whole rate structure for many articles moving in an important section of the country." *Id. at 164*. Finally, "the damages alleged [by the plaintiff were] purely speculative." *Id.*

Since *Keogh,* the Supreme Court has revisited the filed rate doctrine on a number of occasions. *See e.g.,* *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912 (1951)*; *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)*; *Maislin Indus., U.S. v. Primary Steel, Inc., 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)*. In these decisions, the Supreme Court has been concerned with two corresponding interests: (1) "potential 'discriminations in rates as between ratepayers," *Wegoland, 27 F.3d at 19,* **[*32]** and (2) "the 'justiciability' of determining reasonable rates." *Id.*

The filed rate doctrine was established to protect consumers from discrimination by monopolies. Rossi, *56 VAND. IL. REV, at 1599*. Price discrimination is condemned because "it maximizes the monopolist's profits … while also encouraging the monopolist to waste resources in maintaining its dominant market position." *Id. at 1600*. ***HN12***[] "A utility with a filed tariff is prohibited from offering customers rebates and discounts that are at odds with the filed (and often approved) tariff." Jim Rossi, *Beynd Goldwasser: Ex Post Judicial Enforcement in Deregulated Markets,* *2003 MICH. ST. DCL L. REV. 717, 720 (Fall 2003)*. With respect to rate discrimination, the filed rate doctrine prohibits a party "from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. N.W. Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992)*.

As the Supreme Court explained in *Keogh,* any attempt by a court to determine relief from previously assessed rates would lead to complaining parties paying less than those who are not suing. **[*33]** *Keogh, 260 U.S. at 163*. Therefore, the filed rate doctrine prevents price discrimination between suing and non-suing parties. *Wegoland, 27 F.3d at 21*. In addition, the *Keogh* decision reasoned, "uniform treatment would not result, even if all [customers] sued, unless the highly improbably happened, and the several juries and courts gave to each the same measure of relief." *Keogh, 260 U.S. at 163*.

As a practical matter, the availability of class action litigation has developed since the *Keogh* decision and uniform treatment is more readily available now. *Square D, 476 U.S. at 423*. Additionally, "the greater sophistication in evaluating damages, might mitigate the expressed fears about the speculative nature" of antitrust damages. *Id.* "To be sure, the concerns for discrimination are substantially alleviated in … putative class actions." *Wegoland, 27 F.3d at 22*.

In regards to the justiciability of determining reasonable rates, the filed rate doctrine "preserves the exclusive role of agencies in approving rates for … services that are reasonable by keeping courts out of the rate-making issues. **[*34]** " *Marcus v. AT&T Corp., 138 F.3d 46, 58 (2nd Cir. 1998)*. As explained by the Second Circuit in *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.,45 F.3d 58, 62 (2nd Cir. 1995)*, "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." *Sun City, 45 F.3d at 62*.

In light of criticisms, the Supreme Court directly addressed the continuing viability of the filed rate doctrine in antitrust actions in *Square D Co. v. Niagara Frontier Tarif: Bureau, Inc., 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*. In *Square D,* the Supreme Court admitted that it could assume "the *Keogh* decision was unwise as a matter of policy." *Id. at 420*. Nonetheless, the Court declined to overrule *Keogh,* stating, "*[s]tare* decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled **[*35]** right." *Id. at 424*. "If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court." *Square D Co., 476 U.S. at 424, 106 S. Ct. at 1931*.

3. The Texas Electric Industry is a Regulated Industry

TCE contends that the filed rate doctrine does not apply to the instant action since FERC possesses no regulatory authority over the Texas electricity market. TCE describes the filed rate doctrine as a consequence of Congressional intent to vest exclusive jurisdiction over federal power issues to FERC. (Pl.'s Resp. P 2.18.) "Because Texas' electric power supply is strictly 'intrastate', FERC has no authority pursuant to the *Interstate Commerce Clause*" [8] (Pl.'s Resp. at 11) and the Court "should look to the Texas legislature's statutory intent not to invoke the filed rate doctrine." *(Id.* 91 2.18.)

[*36] ***HN13***[] Although the filed rate doctrine is commonly used to uphold rates approved by federal agencies such as FERC or the ICC, the doctrine was developed as a common law defense to federal antitrust litigation. *See Keogh, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47* (discussed in Section III.B.2 above). "The rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency." *H.J. Inc., 954 F.2d at 494*; *see also Wegoland, 27 F.3d at 20*; *M.R. Taffet v. S. Co., 967 F.2d 1483, 1494 (11th Cir. 1992)*

PUCT, as the regulatory agency charged with overseeing the Texas electricity market, possesses the institutional competence to address rate-making issues in the BES market, one of the principles underlying the filed rate doctrine. *See Sun City, 45 F.3d at 62*. ***HN14***[] Upon a finding of market power abuse by a participant in the Texas electricity market, PUCT is empowered by the Texas Legislature to remedy the situation by "seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Chapter 15, by imposing an administrative **[*37]** penalty as authorized by Chapter 15, or by suspending, revoking, or amending a certificate or registration as authorized by *Section 39.356*." *TEX. UTIL. CODE § 39.157(a)*. PUCT has demonstrated its institutional competence in addressing ratemaking issues when the MOD ordered market participants to return $ 30 million in illicit profits obtained as a result of abusive and improper scheduling practices in the BES market during August 2001. It must also be noted that MOD continues to investigate the market abuses alleged by TCE.

4. Savings Clause Does Not Bar Filed Rite Defense

The arguments of TCE focused on the savings clause and the intent of the Texas Legislature in drafting Senate Bill 7. TCE alleges that the filed rate doctrine should not apply to the Texas electricity market since the Texas Legislature did not intend for the restructuring of the Texas electricity market to prohibit civil antitrust lawsuits. Specifically, TCE cites to the savings clause in *Section 39.158(b) of the Texas Public Utility Code*:

> ***HN15***[] Nothing in [the chapter governing the restructuring process of the Texas electricity market] shall be construed to confer immunity **[*38]** from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities.

TEX. UTIL. CODE § 39.158(b). The Fifth Circuit has stated that ***HN16***[] "the primary rule in statutory interpretation [is] that a court must give effect to legislative intent." *Zer-Ilan v. Frankford (In re CPDC, Inc.), 337 F.3d 436, 442 (5th Cir. 2003)*. TCE's argument is that the savings clause expresses the Texas Legislature's intent that

[8] TCE's emphasis on the intra-state nature of the Texas energy market is noteworthy given that TCE is suing under federal antitrust laws. If the Texas energy market is truly intra-state, then this Court has no jurisdiction over the Sherman Antitrust Act Claims that require a nexus to interstate commerce. *15 U.S.C. §§ 1* and*2* (protecting "trade and commerce among the several states").

the filed rate doctrine does not apply because nothing in the Act "shall be construed to confer immunity from state or federal antitrust laws." TEX. UTIL. CODE § 39.158(b).

As an initial matter, **HN17**[] the filed rate doctrine does not provide *immunity* from antitrust liability. Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422, 106 S. Ct. 1922, 1929, 90 L. Ed. 2d 413 (1986) . Instead, the doctrine only acts to bar private antitrust suits seeking damages stemming from rates paid to a regulated utility. Id. Companies that engage in **[*39]** illegal antitrust activities regarding filed rates are still subject to criminal sanctions or equitable relief, neither of which TCE has sought in the instant suit. *Id.* Furthermore, the filed rate doctrine does not bar antitrust challenges based on mergers or sales of assets by regulated utilities. Town of Norwood, 202 F.3d at 422. Therefore, in accordance with the intent of the Texas Legislature, the filed rate doctrine does not confer immunity from federal or state antitrust laws.

In arguments before the Court, TCE relied on Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872 (2004) for the proposition that the savings clause found in § 39.158(b) precludes the application of the filed rate doctrine in the instant action. In *Verizon Communications, Inc.,* a case not involving the filed rate doctrine, the Supreme Court interpreted the following antitrust savings clause from the Telecommunications Act of 1996: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. **[*40]** " Verizon Communications, Inc., 124 S. Ct. at 878 (citing 47 U.S.C. § 152). The Supreme Court found that the Telecommunication Act's savings clause "barred a finding of implied immunity," *Id.,* and "preserves those claims that satisfy established antitrust standards." *Id.* The Supreme Court further stated that "just as the 1996 [Telecommunication] Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act 'modify, impair, or supersede the applicability' of the antitrust laws." *Id.*

TCE argues that the savings clause found in § 39.158(b) should be interpreted in the same manner as the savings clause found in the Telecommunications Act of 1996. The Court agrees with TCE's contention. By its own terms, the savings clause in § 39.158(b) does not purport to modify the application of existing state and federal antitrust provisions that include the well-established common law defense of the file rate doctrine.

The Fifth Circuit has held that **HN18**[] for a legislature to **[*41]** "abrogate a federal common law provision … [the legislature] must speak directly to the question addressed by the common law." Resolution Trust Corp. v. Miramon, 22 F.3d 1357, 1360 (5th Cir, 1994). TCE argues that in absence of FERC regulation, the Court must look to the state legislative intent to determine the applicability of the filed rate doctrine. What TCE fails to address is that **HN19**[] the filed rate doctrine is a recognized part of federal ***antitrust law*** and the United States Congress is best situated to abrogate the filed rate doctrine. Seeing no amendments to the Sherman Antitrust Act addressing the filed rate doctrine, the Court concludes that the legislative intent of the United States Congress is that the filed rate doctrine is a valid defense to federal antitrust claims.

In conclusion, application of the filed rate doctrine in the instant action does not contravene the intent of the Texas Legislature because it does not confer immunity against antitrust liability. Additionally, the legislative intent of the Sherman Antitrust Act presumably is that the file rate doctrine is a valid defense to liability.

5. Rates Paid in the BES Market are Filed Rates

[*42] TCE also asserts that the filed rate doctrine does not bar its antitrust claims since the Texas legislature did not include a filed rate requirement in the BES market. Prior to the 1999, electricity rates were set by the state, but Senate Bill 7 created market-based rates. The First Circuit has stated that **HN20**[] the filed rate doctrine applies to market based rates. Town of Norwood, Massachusetts v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000); *see also* Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.(In re Cal. Wholesale Elec. Antitrust Litig.), 244 F. Supp. 2d 1072, 1079-80 (S.D. Cal. 2003); T&E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C., 2003 U.S. Dist. LEXIS 16352, No. MDI 1405, 2003 WL 22110491, *4 (S.D. Cal. Aug 27, 2003); Campbell v. San Diego Gas & Elec. Co., 2001 U.S. Dist. LEXIS 24297, No. Civ. 00-2382-RHW, 2001 WL 1860381, *3 (E.D. Wash. Sept. 19, 2001). As explained in *Town of Norwod,* rates are considered filed rates and subject to agency review if the responsible regulatory agency is charged with "ensuring just and reasonable rates." *Id.* However, the court in *Town of Norwood* recognized that if "rates were truly left to the market, with no filing requirement or FERC supervision **[*43]** at all, the filed rate doctrine would by its terms no longer operate." *Id.*

In contrast, the Ninth Circuit had to decide whether insurance rates filed with Arizona and Wisconsin state regulatory agencies were entitled to protection under the filed rate doctrine. *Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992)*. In both states, insurance companies were required to file their insurance rates with state regulatory agencies that have the power to disprove the rates. *Id. at 393*. The Court observed that the "absence of meaningful state review allows the insurers to file any rates they want." *Id. at 394*. "If those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge." *Id.* Therefore, the filed rate doctrine was not applicable.

Unlike the insurance rates at issue in *Ticor Title,* the BES market based rates are subjected to meaningful review by PUCT. ***HN21***[] PUCT is required to ensure "safe, reliable, and reasonably priced electricity." *TEX. UTIL. CODE § 39.101(a)(1)* **[*44]** . PUCT is also required to ensure that Ancillary Services are available at "reasonable prices with terms and conditions not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." *TEX. UTIL. CODE § 39.004(e)*. In addition, rates in the BES market are capped at $ 1,000 per MWh. Therefore, wholesale power rates in Texas continue to be filed with PUCT since PUCT is charged with ensuring reasonably priced electricity, and the filed rate doctrine applies to market based rates in the ERCOT-administered electricity market.

6. The Competitor Exception to the Filed Rate Doctrine Does Not Apply to TCE's Claims

Finally, TCE asserts that its antitrust claims are exempt from the filed rate doctrine as a result of the "competitor exception" to the doctrine. ***HN22***[] The "competitor exception" to the filed rate doctrine holds that "an anticompetitive practice embodied in a [filed] tariff may violate the antitrust laws if it ... impacts upon competitors as opposed to customers." *City of Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2nd Cir. 1981)*. As explained in *City of Groton,* "if a utility that competes **[*45]** with a wholesale customer engages in a price squeeze bi charging the wholesale customer more than its retail customers, the filed rate doctrine may not be applicable." *Id.* However, TCE does not complain of a price squeeze. "The traditional price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers." *Town of Norwood, 202 F.3d at 418*. TCE only complains of rates paid for electricity as a wholesale customer in the BES market.

TCE cites *Essential Communications Sys., Inc. v. Am. Tel. & Tel Co., 610 F.2d 1114, 1122 (3rd Cir. 1979)*, for its support of the competitor exception. In *Essential Communications,* the Third Circuit justified the competitor exception by stating:

> In this case the plaintiff is not suing in the capacity of a customer for communication services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer **[*46]** services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the Section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

Essential Communications, 610 F.2d at 1122. The instant suit can be distinguished from the action in *Essential Communications.* Here, TCE is requesting damages based on the rate it paid for wholesale electricity in the BES market, and Defendants will be "asked to disgorge to [TCE] any revenues derived under the filed tariff." *Id.* Therefore, the competitor exception to the filed rate doctrine does not preclude the application of the doctrine to the instant case.

7. Conclusion

TCE's federal antitrust claims are barred by the filed rate doctrine. *See e.g.,* *County of Stanislaus, 114 F.3d at 862*; *Square D Co., 476 U.S. at 424, 106 S. Ct. at 1931*; *Keogh, 260 U.S. at 165, 43 S. Ct. at 50*. In the instant action, TCE claims that it was damaged by **[*47]** having to pay higher prices for electricity in the BES market as a result of Defendant's alleged economic withholding, physical withholding, market manipulation, monopolization, attempted monopolization and/or conspiracy to monopolize.

The filed rate doctrine applies to state regulatory agencies such as PUCT and PUCT provides meaningful review 1.0 the rates on the BES market. *H.J. Inc., 954 F.2d at 494*. Therefore, the filed rate doctrine bars TCE's federal antitrust claims based on the rates it paid in Texas's regulated energy market. Accordingly, this Court grants Defendants' Motions to Dismiss TCE's Sherman Antitrust Act and Clayton Act claims pursuant to the filed rate doctrine.

C. STATE ANTITRUST CLAIMS

In its SAC, TCE alleges that Defendants violated *§ 15.10* of the TFEAA. *Sections 15.01 et seq.* of the TFEAA ***HN23***[] are the state law counterparts to federal ***antitrust law***. *Apani Southwest, Inc. v. Coca-Cola Enters., 300 F.3d 620, 628 (5th Cir. 2002)*. The Texas legislature mandates that Texas ***antitrust law*** be harmonized with federal ***antitrust law***. *TEX. BUS. & COMM. CODE § 15.04*; *see also* *Apani, 300 F.3d at 628*. **[*48]** As a result, there is no need for federal courts to analyze TFEAA claims separately from Sherman Act claims. *Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 391 n.7 (5th Cir. 1996)*. Therefore, TCE's state antitrust claims under TFEAA must be dismissed pursuant to the filed rate doctrine as the Sherman Act claims have been dismissed.

D. FRAUD

HN24[] Under Texas law, to recover for fraud, the plaintiff must establish: "(1) a material representation; (2) it was false when made; (3) the speaker either knew it was false or asserted it without knowledge of its truth; (4) the speaker intended that it be acted upon; (5) the party acted in reliance; and (6) the party was injured as a result." *Malacara v. Garber, 353 F.3d 393, 403-04 (5th Cir. 2003)*

TCE alleges that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel committed fraud by making fraudulent and misleading statements and representations in their affidavits to the MOD. TCE contends that as a result of Defendants' fraudulent affidavits TCE continued to participate in the ERCOT and BES markets for electricity. **[*49]** Defendants move to dismiss TCE's fraud claim under the filed rate doctrine.

As with TCE's antitrust claims, TCE's fraud claim is barred by the filed rate doctrine. *Taffet, 967 F.2d at 1494-95* ***HN25***[] ("A regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action. Thus, even if the filed rate is obtained through fraud, it remains true that one does not suffer the predicate 'injury to business or property' by paying the filed rate.") . The alleged damage suffered by ICE as a result of participating in the Texas electricity market stems from the rates TCE paid for electricity. Any measure of harm suffered by TCE as a result of Defendants' fraud could only be determined by calculating the amount TCE overpaid for electricity, a result barred by the filed rate doctrine. *See Transmission Agency v. Sierra Pac. Power Co., 295 F.3d 918, 933 (9th Cir. 2002)*. As the Second Circuit explained in *Wegoland:*

> If courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulating agencies authority and **[*50]** thereby undermine the stability of the system. For only by determining what world be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids.

Wegoland, 27 F.3d at 21.

Therefore, as a result of the filed rate doctrine, this Court grants Defendants' Motions to Dismiss TCE's fraud claim.

E. NEGLIGENT MISREPRESENTATION

HN26[] To prevail in a negligent misrepresentation action in Texas, the plaintiff must prove:

> (1) the defendant made a representation in the course of his business, or in a transaction in which he had a pecuniary interest, (2) the defendant supplied false information for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 318 (5th Cir. 2002).

TCE's negligent misrepresentation claim mirrors its fraud claim. TCE claims that the **[*51]** TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel supplied false information in their affidavits filed with the MOD. TCE contends that it relied upon Defendant's affidavits to its detriment by continuing to participate in the ERCOT and BES markets fo electricity. Defendants move to dismiss TCE's negligent misrepresentation claim pursuant to the filed rate doctrine.

TCE's negligent misrepresentation claim is also barred by the filed rate doctrine. *Marcus v. AT&T Corp., 138 F.3d 46, 57-58, 64 (2nd Cir. 1998)* (stating that a claim for negligent misrepresentation was barred by the filed rate doctrine). Any award of damages on TCE's negligent misrepresentation claim would require the court to determine what the rate for electricity would have been absent Defendant's alleged conduct, a practice barred by the filed rate doctrine. *See* H.J. Inc., 954 F.2d at 488.

Therefore, pursuant to the filed rate doctrine, this Court grants Defendants' Motions to Dismiss TCZ's negligent misrepresentation claim.

F. BREACH OF CONTRACT

TCE alleges breach of contract claims **[*52]** against the TXU Defendants, the Texas Genco Defendants, the Reliant Defendants, and ERCOT. **HN27**[] The elements for breach of contract in Texis are: "1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of the contract by the defendant; and 4) damages to the plaintiff resulting from the breach." *Lewis v. Bank of Am., 343 F.3d 540, 545 (5th Cir. 2003)*.

1. TCE's Breach of Contract Claim against the TXU Defendants

TCE's breach of contract claim against the TXU Defendants stems from Confidentiality Agreements entered into between TCE and the TXU Defendants on August 6, 2002 and October 15, 2002. The TXU Defendants move to dismiss TCE's breach of contract claim under the filed rate doctrine. However, **HN28**[] the filed rate doctrine only applies to claims regarding the reasonableness of rates filed by a regulated industry, *see* Wegoland Ltd., 27 F.3d at 18, and TCE's breach of contract claim against the TXU Defendants does not implicate the prices it paid for electricity in the BES market.

In the instant action, TCE states a claim for relief against the TXU Defendants for breach of contract. TCE alleges that: **[*53]** (1) there were valid contracts between TCE and the TXU Defendants; (2) TCE satisfied all conditions precedent to the Confidentiality Agreements; (3) the TXU Defendants breached their confidentiality Agreements by disclosing TCE's financial and business status to both existing and prospective customers of TCE; and (4) TCE sustained damage to its business and financial reputation, lost income, lost business, and lost profits as a result of the breach by the TXU Defendants. *See* *Lewis, 343 F.3d at 545*. Therefore, TXU's Motion to Dismiss TCE's breach of contract claim pursuant to the filed rate doctrine is denied.

2. TCE's Breach of Contract Claim against the Texas Genco Defendants

The Texas Genco Defendants move for dismissal of TCE's breach of contract claim on the grounds that TCE had no contract with the Texas Genco Defendants. TCE fails to allege that a Confidentiality Agreement or any other valid contract was entered into with the Texas Genco Defendants. Therefore, TCE's breach of contract claim against the Texas Genco Defendants is dismissed for failure to allege the existence of a valid contract. *See* *Lewis, 343 F.3d at 545*. Therefore, the **[*54]** Texas Genco Defendants' Motion to Dismiss TCE's breach of contract claim is granted.

3. TCE's Breach of Contract Claim against the Reliant Defendants

The breach of contract claim against the Reliant Defendants arises from a Confidentiality Agreement entered into between TCE and the Reliant Defendants on February 27, 2003 The Reliant Defendants fail to address the breach of contract claims brought against them in their Motion to Dismiss, therefore, the Reliant Defendants' Motion to Dismiss the breach of contract claim is denied.

4. TCE's Breach of Contract Claims Against ERCOT

TCE bases its breach of contract claims against ERCOT on the "Standard Form Load Serving Entity Agreement" entered into on October 24, 2001, and the "Standard Form Qualified Scheduling Entity Agreement" entered into on July 5, 2002. TCE asserts two separate breach of contract claims against ERCOT: (1) that the defamatory statements made by Tom Noel, ERCOT's CEO, violated TCE's agreements with ERCOT and (2) that ERCOT's verbal dispatch instructions on February 25, 2003 to Defendant TXU for additional power violated TCE's agreements with ERCOT. ERCOT's Motion to Dismiss fails to address the first **[*55]** claim regarding the defamatory statements made by Tom Noel, therefore, ERCOT's Motion to Dismiss this claim is denied.

ERCOT moves to dismiss TCE's second breach of contract claim on the grounds that ERCOT did not violate its own protocols. However, TCE's breach of contract claim stemming from ERCOT's verbal dispatch instructions on February 25, 2003 to the TXU Defendants for additional power is barred by the filed rate doctrine. *See e.g.,* *ICOM Holding, Inc. v. MCI Worldcom, Inc., 238 F.3d 219, 222-23 (2nd Cir 2001)* (finding that a breach of contract claim is barred by the filed rate doctrine); *Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 488 (2nd Cir. 1998)*. TCE alleges that it suffered damages in the form of higher prices in the BES energy market as a result of ERCOT's failure to follow its own protocols. Any award of damages on TCE's breach of contract claim would require the court to determine what the rate for electricity would have been absent ERCOT's alleged breach, a practice barred by the filed rate doctrine. *See* *H.J. Inc., 954 F.2d at 488*. Therefore, the Court *sua sponte* dismisses TCE's second breach of contract **[*56]** claim against ERCOT pursuant to the filed rate doctrine. It is well settled that ***HN29***[] the Court may dismiss a complaint on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law. *Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991)*.

In conclusion, this Court dismisses TCE's breach of contract claim against the Texas Genco Defendants and TCE's breach of contract claim against ERCOT regarding ERCOT's verbal dispatch instructions to the TXU Defendants.

G. DEFAMATION

TCE alleges that ERCOT committed defamation when ERCOT's CEO, Tom Noel, made the following statements to the press: (1) "He doesn't know of any other company as active as TCE in the spot electricity market" (SAC P 394); (2) "TCE was in financial trouble almost a month before" (SAC P 394); (3) "TCE was briefly buying 100% of its power demand at that price, and was finally unable to meet its financial obligations" (SAC P 394); and (4) "TCE, which relied on the balancing energy market for its entire load during some periods, had charges of more than $ 5-million when balancing energy prices in ERCOT spiked." (SAC P 397.)

HN30[] To state a defamation **[*57]** claim in Texas, "the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." *WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571, 41 Tex. Sup. Ct. J. 1394 (Tex. 1998)*. ERCOT moves for dismissal on the grounds that Tom Noel's statements were not defamatory or malicious.

1. Defamatory

HN31[] A statement is "defamatory if it exposes a person to public contempt or financial injury, or if it impeaches a person's reputation." *Basic Capital Mgmt., Inc. v. Dow Jones & Co., Inc., 96 S.W.3d 475, 480 (Tex. App.-Austin 2002, no pet.)*. Whether a statement is "capable of a defamatory meaning is initially a question for the court." *Turner v. KTRK Television, Inc., 38 S.W.3d 103, 114, 44 Tex. Sup. Ct. J. 244 (Tex. 2000)*. "The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Columbia Valley Reg'l Med. Ctr. v. Bannert, 112 S.W.3d 193, 198 (Tex. App. -Corpus Christi 2003, no pet)*. **[*58]** A statement "may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances." *Columbia Valley, 112 S.W.3d at 198*. However, "when a publication is of ambiguous or doubtful import, the jury must determine its meaning." *Turner, 38 S.W.3d at 114*.

2. Mens Rea

Both TCE and ERCOT contend that the appropriate standard to be used in evaluating TCE's defamation claim is the malice standard for a public official or figure. Therefore, this court will limit its analysis to the question of whether or not ERCOT's statements were published with malice. ***HN32***[] Whether or not a statement was published by the defendant while acting with actual malice "focuses on the defendant's state of mind at the time of publication." *Forbes v. Granada Biosciences, Inc., 124 S.W.3d 167, 173, 47 Tex. Sup. Ct. J. 162 (Tex. 2003)*. To prove actual malice it must be shown that the "defendant made a statement with knowledge that it was false or with reckless disregard of whether it was true or not." *Id. at 171*. For a public figure to establish reckless disregard, **[*59]** the defendant must have "entertained serious doubts as to the truth of his publication." *Id.*

3. TCE's Defamation Claim

TCE states a claim for relief for defamation against ERCOT. In the instant case TCE alleges that ERCOT published statements; ERCOT's statements were defamatory since they injured TCE's business and financial reputation by casting TCE's financial and business position in a negative light; and ERCOT's statements were malicious since they were false, and ERCOT, as the entity under contract with PUCT to administer the BES market, had direct knowledge of TCE's financial affairs. This Court makes no prospective judgment on the merits of TCE's claim, only that TCE's claim has been adequately stated and pled. *Fed. R Civ. P. 8(a)*. Therefore, TCE states a valid claim for relief, and ERCOT's Motion to Dismiss TCE's defamation claim must be denied.

H. BUSINESS DISPARAGEMENT

TCE asserts a business disparagement claim against ERCOT. ***HN33***[] The elements of a claim for business disparagement are: (1) publication by the defendant (2) of disparaging words (3) which are false; (4) published with malice; (5) published without privilege; and (6) special damages to the plaintiff. **[*60]** *C.P. Interests, Inc. v. California Pools, Inc., 238 F.3d 690, 694 (5th Cir. 2001)*. "To prove special damages, a plaintiff must provide evidence of direct, pecuniary loss attributable to the false communications of the defendants." *Johnson v. Hosp. Corp. of Am., 95 F.2d 383, 391 (5th Cir. 1996)*. A claim for business disparagement is similar to a claim for defamation, but "defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interest." *Forbes, 124 S.W.3d at 170*. ERCOT moves for dismissal on tie grounds that Tom Noel's statements were not defamatory, were not malicious, and did not cause special damages.

Similar to TCE's claim for defamation, TCE states a valid claim for business disparagement against ERCOT. TCE alleges that ERCOT published statements that were false, disparaging and malicious. Furthermore, ERCOT fails to allege that it had a privilege to publish the statements. TCE alleges that it suffered special damages in the form of damage to its business and financial reputation, lost income, lost business, and lost profits. Again, this Court **[*61]** makes no prospective judgment on the Merits of TCE's claim, only that TCE's claim for business displacements has been adequately stated and pled. *Fed. R. Civ. P. 8(a)*. Therefore, TCE states a valid claim for relief, and ERCOT's Motion to Dismiss TCE's business disparagement claim must be denied.

I. CIVIL CONSPIRACY

TCE alleges that the TXU Defendants, AEP Defendants, Reliant Defendants, APX, Odessa-Ector Power Partners, Guadalupe Power Partners, Frontera Generation, Tractabel Energy Marketing, Inc., and ERCOT committed civil conspiracy. ***HN34***[] Under Texas law, five elements are necessary to establish an actionable claim for civil conspiracy: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Apani S.W., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 635 (5th Cir. 2002)*. In addition, TCE must plead an underlying tort for its civil conspiracy claim to be actionable. *See Tilton v. Marshall, 925 S.W.2d 672, 681, 39 Tex. Sup. Ct. J. 985 (Tex. 1996)*

The TXU Defendants move to dismiss TCE's civil **[*62]** conspiracy claim pursuant to the filed rate doctrine. The AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel move to dismiss TCE's civil conspiracy claim for failure to plead an underlying tort. In its SAC, TCE alleges that the underlying tort supporting its civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants. APX, TES, the TIE Defendants, Frontera, and Tractebel is fraud. Is stated above, TCE's fraud claim has been dismissed, and the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel's Motions to Dismiss TCE's civil conspiracy claim must be granted. *See Tilton, 925 S.W.2d at 681*. In addition, the Court *sua sponte* dismisses TCE's civil conspiracy claim against the TXU Defendants for failure to plead an underlying tort.

ERCOT moves to dismiss TCE's conspiracy claim on the grounds that TCE's underlying tort claim fails and TCE failed to set forth facts demonstrating that Defendants had a meeting of minds. TCE alleges that the underlying tort supporting its **[*63]** civil conspiracy claim against ERCOT is both defamation and business disparagement. Since TCE's defamation and business disparagement claims against ERCOT are not dismissed, TCE succeeds in pleading an underlying tort. In addition, TCE pleads that ERCOT had a meeting of the minds with Defendants to remove TCE from the Texas electricity market, and that TCE suffered damage as a result of ERCOT's defamation and business disparagement. *See Apani, 300 F.3d at 635*. Therefore, ERCOT's Motion to Dismiss TCE's civil conspiracy claim is denied.

J. ERCOT' S MOTION TO STAY

ERCOT moves to stay the instant case pursuant to either the doctrine of primary jurisdiction or the *Burford* abstention doctrine. In light of the fact that this Court is dismissing TCE's complaint, this Court denies ERCOT's Motion to Stay the proceedings as moot.

K. TCE's MOTION TO AMEND

TCE requests leave to amend its complaint. *Rule 15(a) of the Fed. R. Civ. P.* ***HN35***[] states that leave "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. TCE does not explain what amendments it would like to make to the SAC and how any amendment would **[*64]** save the claims that are dismissed by this Order. Given the fact that TCE has twice previously amended its complaint, the Court does not find granting TCE leave to amend its complaint a third time to be in the interest of justice. *See United States v. Regents of the Univ. of California, 363 F.3d 398. 403 (5th Cir. 2004)* (stating that leave to amend may be denied for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."). Therefore, TCE's request for leave to amend its complaint is denied.

IV. CONCLUSION

For the reasons stated above, Defendants' Motions to Dismiss are granted in part. This Court DISMISSES the following claims: TCE's *§§ 1and 2* of the Sherman Antitrust Act, and *§ 15.05 (a)-(c)* and *§ 15.10 of the TFEAA* claims against all Defendants; TCE's fraud claims against all Defendants; TCE's negligent misrepresentation claims against all Defendants; TCE's breach of contract claim against the Texas Genco Defendants; TCE's breach of contract claim against **[*65]** ERCOT regarding ERCOT's verbal dispatch instructions to TXU; and TCE's civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco Defendant, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel.

Because the federal action has been dismissed, this Court declines supplemental jurisdiction over TCE's remaining state law claims. *See 28 U.S.C. § 1367(c) (3)*; *see also Priester v. Lowndes County, 354 F.3d 414, 425 (5th Cir. 2004)*. In addition, this Court does not possess diversity jurisdiction over TCE's remaining state law claims since TCE, the TXU Defendants, and ERCOT are all citizens of Texas. See *28 U.S.C. § 1332 (a)(1)*; *see also Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 857 (5th Cir. 2003)*. Therefore, the following causes of action are DISMISSED *without* prejudice: TCE's breach of contract claims against the TXU Defendants, the Reliant Defendants, and ERCOT regarding Tom Noel's statements; TCE's defamation claim against ERCOT; TCE's business disparagement claim against ERCOT; and TCE's civil conspiracy claim against ERCOT. In addition, **[*66]** both ERCOT's Motion to Stay and TCE's Motion to Amend are DENIED.

SIGNED and ENTERED on this the *24th* day of June, 2004.

/s/ JANIS GRAHAM JACK

UNITED STATES DISTRICT JUDGE

FINAL JUDGMENT

Pursuant to this Court's Order Granting in Part Defendants' Motions to Dismiss, the Court hereby ENTERS Final Judgment.

The following causes of action are dismissed: TCE's *§§ 1and 2* of the Sherman Antitrust Act, and *§ 15.05(a)-(c)* and *§ 15.10 of the TFEAA* claims against all Defendants; TCE's fraud claims against all Defendants; TCE's negligent misrepresentation claims against all Defendants; TCE's breach of contract claim against the Texas Genco Defendants; TCE's breach of contract claim against ERCOT regarding ERCOT's verbal dispatch instructions to TXU; and TCE's civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel.

The following causes of action are DISMISSED *without* prejudice: TCE's breach of contract claims against the TXU Defendants, the Reliant Defendants, and ERGOT regarding Tom Noel's statements; TCE's defamation claim against ERGOT; TCE's **[*67]** business disparagement claim against ERGOT; and TCE's civil conspiracy claim against ERGOT.

SIGNED and ENTERED on this the *24th* day of June, 2004.

/s/ JANIS GRAHAM JACK

UNITED STATES DISTRICT JUDGE

Covad Communs. Co. v. BellSouth Corp.

United States Court of Appeals for the Eleventh Circuit

June 25, 2004, Decided ; June 25, 2004, Filed

No. 01-16064

Reporter

374 F.3d 1044 *; 2004 U.S. App. LEXIS 12861 **; 2004-1 Trade Cas. (CCH) P74,466; 17 Fla. L. Weekly Fed. C 729

COVAD COMMUNICATIONS COMPANY, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Company, Plaintiffs-Appellants, versus BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC., Defendants-Appellees.

Subsequent History: Rehearing, en banc, denied by *Covad Communs. Co. v. BellSouth Corp., 116 Fed. Appx. 257, 2004 U.S. App. LEXIS 27603 (2004)*

US Supreme Court certiorari denied by *Covad Communications Co. v. Bellsouth Corp., 2005 U.S. LEXIS 2247 (U.S., Mar. 7, 2005)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 00-03414-CV-BBM-1.

BellSouth Corp. v. Covad Communs. Co., 540 U.S. 1147, 157 L. Ed. 2d 1040, 124 S. Ct. 1143, 2004 U.S. LEXIS 670 (2004)

Disposition: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Core Terms

antitrust, prices, wholesale, allegations, costs, facilities, squeezing, interconnection, customers, Sherman Act, network, appropriate measure, unbundled, charges, orders, loop, district court, competitor, predation, courts, retail, rival, business relationship, tortious interference, anti trust law, retail price, Internet

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > Telecommunications Act > Federal Preemption

Antitrust & Trade Law > Regulated Industries > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Jurisdiction

HN1[] **Communications, State Regulation**

The Federal Telecommunications Act provides that nothing in the Act or the amendments made by the Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. Telecommunications Act of 1996, 104 Pub. L. No. 104, § 601(b)(1), 110 Stat. 56, 143.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

The Federal Telecommunications Act (FTCA) savings clause bars a finding of implied antitrust immunity. Thus, it is now clear that the FTCA and the Sherman Act are expressly intended to coexist.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

In the telecommunications industry, the unilateral termination of a voluntary course of dealing is a requirement for a valid refusal-to-deal claim.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Denial of Allegations

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN4[] **Defenses, Demurrers & Objections, Denial of Allegations**

The essential facilities doctrine is only viable where there is indeed unavailability of access. Where a state or federal agency is authorized to compel access to a competitor's infrastructure, as under the Federal Telecommunications Act, judicial precedent states that an essential facilities claim should be denied.

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > Federal Court Decisions

Governments > Courts > Judicial Precedent

HN5[] **Considerations Governing Review, Federal Court Decisions**

The denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] **Robinson-Patman Act, Claims**

A plaintiff's complaint must contain allegations that the two basic prerequisites for a showing of price predation under *15 U.S.C.S. § 2* of the Sherman Act have been met. First, the plaintiff must allege that the prices complained of are below an appropriate measure of its rival's costs. Second, the plaintiff must allege that the defendant had a dangerous probability of recouping its investment in below-cost prices.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Torts > ... > Liability > Federal Tort Claims Act > General Overview

Administrative Law > Sovereign Immunity

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

HN7[] **Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes**

In reviewing a *Fed. R. Civ. P. 12(b)(6)* motion, the court must accept the facts pleaded as true and construe them in a light favorable to plaintiffs.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN8[] **Communications, Sherman Act**

Federal courts are ill-equipped to manage the complicated disputes over 47 U.S.C.S. § 251(c)(3) duties that frequently arise out of telecom interconnection agreements. Instead, courts should defer to the Federal Telecommunications Act's preexisting regulatory framework rather than try to adjudicate complex Sherman Act lawsuits in the telecommunications area.

Administrative Law > Sovereign Immunity

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN9[] **Administrative Law, Sovereign Immunity**

Under 47 U.S.C.S. § 251(c)(3), a regional telephone service provider is required to provide nondiscriminatory access to network elements on an unbundled basis on rates that are just, reasonable, and nondiscriminatory in accordance with 47 U.S.C.S. §§ 251 and 252.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN10[] **Federal Acts, Telecommunications Act**

See 47 U.S.C.S. § 252(d)(1).

Antitrust & Trade Law > Regulated Industries > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN11[] **Antitrust & Trade Law, Regulated Industries**

The Federal Telecommunications Act employs the same baseline standard, namely, cost, for determining the validity of an ILEC's prices as does the Brooke Group antitrust test of price predation, which asks whether the prices complained of are below an appropriate measure of its rival's costs.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

While the Federal Telecommunications Act (FTCA) does not create new claims that go beyond existing antitrust standards, it also preserves claims that satisfy existing antitrust standards. The court's responsibility to harmonize the Sherman Act and the FTCA does not entail excluding facially valid antitrust claims at the pleadings stage.

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

Energy & Utilities Law > Administrative Proceedings > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Jurisdiction

HN13[] **Introducing Competition, Interconnection Agreements**

According to the United States Court of Appeals for the Eleventh Circuit, state public service commissions do have jurisdiction to adjudicate disputes over and interpret the terms of Federal Telecommunications Act-mandated interconnection agreements.

Counsel: FOR COVAD COMMUNICATIONS COMPANY, Appellant: Myers, Kimberly L., Rogers & Hardin, LLP, Atlanta, GA.

FOR DIECA COMMUNICATIONS, INC., Appellant: Guzman, Michael J., Washington, DC.; Powers, Tony G., Rogers & Hardin, Atlanta, GA.

FOR BELLSOUTH CORPORATION, Appellee: Clay, A. Stephens IV, Kilpatrick & Cody, Atlanta, GA.

FOR BELLSOUTH TELECOMMUNICATIONS, Appellee: Sarles, Jeffrey W., Mayer, Brown, Rowe & Maw, CHICAGO, IL; Walker, J. Henry, Bellsouth, Atlanta, GA; Kellogg, Michael K., Panner, Aaron M., Hansen, Mark C., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington, DC; Watson, Ahley B., BellSouth Corporation, Atlanta, GA; Bogan, James F. III, Kilpatrick Stockton, Atlanta, GA; Galonsky, Marc William Franklin; BellSouth Corporation; Atlanta, GA; Gary, Marc, Atlanta, GA; Shapiro, Stephen Michael, Mayer, Brown, Rowe & Maw; CHICAGO, IL

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, FLORIDA COMPETITIVE CARRIERS ASSOCIATION, Amicus.

FOR VERIZON COMMUNICATIONS INC., Amicus: Taranto, Richard G., Farr & Taranto, Washington, DC.

GEORGIA PUBLIC SERVICE COMMISSION, UNITED STATES TELECOM ASSOCIATION, Amicus.

Judges: Before BARKETT and MARCUS, Circuit Judges, and HIGHSMITH [*] , District Judge.

Opinion by: BARKETT

Opinion

[*1046] ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BARKETT, Circuit Judge:

[*] Honorable Shelby Highsmith, United States District Judge for the Southern District of Florida, sitting by designation.

After our decision in this case was issued on August 2, 2002, *Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002)*, the Supreme Court vacated our judgment and remanded for further consideration in light of its recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872 (2004)*. Having carefully reviewed this opinion, we find that *Trinko*'s interpretation of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, the leading case finding liability under *§ 2 of the Sherman Act* for refusal to cooperate with a rival, now forecloses several **[**2]** (but not all) of Covad's claims. Other claims are now barred by our recent en banc decision in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270 (11th Cir. 2003)* ("MCIMetro II").

This suit was brought by Covad, a DSL internet service provider, against BellSouth, a regional telephone service provider that also sells DSL service. Covad and BellSouth entered into an interconnection agreement pursuant to the 1996 Federal Telecommunications Act ("FTCA") to allow Covad to provide DSL service over BellSouth's existing telephone lines. Covad alleged that BellSouth had engaged in exclusionary conduct that violated the Sherman Antitrust Act, the FTCA, and various state anti-monopoly statutes. Covad also made various state breach of contract and tortious interference with business relations claims. [1]

[3]** On BellSouth's 12(b)(6) motion to dismiss for failure to state a claim, the trial judge threw out all of the counts relating to the Sherman Act except for two, allowing Covad to proceed with its allegations of predatory advertising and monopoly leveraging. The district court also allowed Covad's counts under state ***antitrust law*** and state law for tortious interference with business relations. [2] All other causes of action, the district court found, addressed **[*1047]** conduct implicated by the FTCA, and as such failed to state claims under the Sherman Act.

On appeal, we held first that the FTCA's savings clause, [3] as well as evidence of congressional and executive intent, unambiguously showed that there was no plain repugnancy between the FTCA and the Sherman Act, and thus that there could be no implied repeal of or immunity from the antitrust **[**4]** laws.

Second, in reviewing the district court's ruling that Covad had failed to state an antitrust claim, we found that Covad's causes of action under the Sherman Act fell into three kinds of alleged anticompetitive conduct: denial of the use of "essential facilities" (the network of phone lines); a refusal to deal; and price squeezing. [4] The first two categories of conduct (essential facilities and refusal to deal) relied on the same set of alleged facts: sometimes an outright denial of access to BellSouth's network and facilities, sometimes a denial of access on reasonable terms, with monopolistic intent. We concluded that, on a motion to dismiss, Covad had pleaded facts sufficient to meet the "exceedingly low" threshold for stating an antitrust **[**5]** claim with respect to all three categories of conduct. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983)*. We also reversed the district court's dismissal of Covad's breach of contract, FTCA, and tortious interference with business relations claims. [5] We now revisit Covad's claims in light of Trinko.

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[1] Only one of Covad's twenty-four counts relied directly and explicitly on the FTCA: count four, misappropriation of confidential customer information.

[2] The parties later stipulated to the dismissal with prejudice of all of these surviving counts. A judgment dismissing the action in its entirety was issued on October 11, 2001.

[3] ***HN1***[] The FTCA provides that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." ***Telecommunications Act of 1996, sec. 601(b)(1), § 152 note, 110 Stat. 56, 143 (1996)***.

[4] We treated Covad's monopoly leveraging claim as a theory that applied to all three categories of BellSouth's alleged anticompetitive conduct, rather than as a distinct count. As for Covad's predatory advertising claim, we note only that Trinko does not seem to bar Covad from proceeding with this cause of action, assuming that it not implicate any duties under the FTCA.

[5] The district court dismissed the breach of contract and FTCA claims for lack of jurisdiction, finding that they must first be presented to state public service commissions (PSCs). In reversing these dismissals, we relied on *BellSouth Telecomms., Inc. v.*

[6]** I. Trinko

We begin by noting that the Court in Trinko approved our view that ***HN2***[] the FTCA savings clause barred a finding of implied antitrust immunity. *Trinko, 124 S. Ct. at 878*. Thus, it is now clear that the FTCA and the Sherman Act were expressly intended to coexist. Emphasizing that the FTCA also does not create new claims that go beyond existing antitrust standards, id., the Court then proceeded to consider whether the conduct of which Trinko complained violated the Sherman Act.

Trinko originated in a complaint brought by AT&T and other competitive local exchange carriers ("CLECs") before the New York Public Service Commission ("PSC") and the Federal Communications Commission ("FCC"). The complaint alleged that Verizon, the incumbent LEC in New York state, had failed to fulfill its obligations under *47 U.S.C. § 251(c)(3)* to provide access to Verizon's operations support systems ("OSS"), one of several "unbundled **[*1048]** network elements." OSS access allows a CLEC to relay orders for service through an electronic interface with Verizon's ordering system, thus enabling a CLEC to fill its customers' orders. Trinko alleged that **[**7]** Verizon had delayed the filling of, or neglected to fill at all, CLEC customer orders. The FCC and the New York PSC opened parallel investigations of Verizon that led to a series of PSC orders and an FCC consent decree. The day after Verizon entered its consent decree with the FCC, one of AT&T's customers, the Trinko law firm, brought a claim under *§ 2 of the Sherman Act*. Trinko argued that Verizon's failure to fulfill its *§ 251(c)(3)* obligations was part of an anti-competitive scheme to discourage customers from becoming or remaining clients of CLECs. Such conduct, Trinko alleged, constituted a refusal to deal with rival firms under *§ 2 of the Sherman Act*. As the Supreme Court describes it, Trinko's complaint set forth only a single example of the alleged failure to provide adequate access: the discriminatory handling of CLEC customer orders that led to the PSC and FCC investigations.

The Court held, first, that Trinko failed to state a recognized Sherman Act claim under existing refusal-to-deal precedents. *Trinko, 124 S. Ct. at 880*. The Court found that Verizon's failure to provide OSS assistance to AT&T did not amount to an effort at monopolization. Rejecting **[**8]** Trinko's reliance on Aspen, the Court noted that Aspen was "at or near the outer boundary of § 2 liability." *Id. at 879*. The case before the Court involved none of the Aspen indicators of anticompetitive conduct and so did not fit within Aspen's "limited exception." *Id. at 880*.

In particular, the Court observed that Aspen involved a unilateral termination of a "voluntary (*and thus presumably profitable*) course of dealing." Id. (emphasis in original). But Trinko's complaint, the Court noted, "does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." Thus, Verizon's "prior conduct sheds no light upon the motivation of its refusal to deal." Id. Furthermore, the two cases differed in terms of pricing behavior. In Aspen the defendant's rejection of an offer to sell its services to a competitor "*even if compensated at retail price*," id. (emphasis in original), could support the requisite inference of monopolistic intent. By contrast, Verizon's reluctance to interconnect at the cost-based rate of compensation under *§ 251(c)(3)* **[**9]** is a neutral fact that does not support an inference of monopolistic intent. Id.

More fundamentally, the Court found that Aspen involved a defendant whose failure to sell even at retail cost to a competitor was a failure to sell otherwise publicly marketed services. In the case before it, the Trinko Court noted, "the services allegedly withheld are not otherwise marketed or available to the public." *Id. at 880*. The FTCA had created a "brand new" sharing obligation: "the wholesale market for leasing network elements." Id. (quoting *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 528, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002)*).

In support of its § 2 claims, Trinko also argued that Bell Atlantic failed to provide AT&T with access to its "essential facilities." The Trinko Court rejected this argument to the extent that it was distinct from Trinko's general § 2 argument. *Trinko, 124 S. Ct. at 881*. Despite having been invoked by some lower courts, observed Justice Scalia, this doctrine has never been recognized by the Supreme Court as established law, and in any case AT&T was not in fact deprived of such access. *Id. at 880-81* **[**10]** (relying on P. Areeda **[*1049]** & H. Hovenkamp, ***Antitrust***

MCIMetro Access Transmission Servs. , 278 F.3d 1223 (11th Cir. 2002) ("MCIMetro I"), which held that the state PSCs did *not* have jurisdiction to interpret and enforce interconnection agreements under the FTCA. Having found that the FTCA savings clause did not supersede other state or national laws, we reversed the trial judge's dismissal of the state law tortious interference claims as preempted by the FTCA.

Law (2003 Supp.), for the proposition that essential facilities claims should be denied where a state or federal agency has the power to compel and regulate sharing).

In the final part of its opinion, the Court observed that the FTCA created a broad and detailed regulatory environment that effectively abrogated the need for antitrust scrutiny in the case before it. The PSC and FCC investigations, orders, and consent decree in Trinko showed that the FTCA's distinctive regulatory regime was working just as Congress intended it to. The Court stated that federal courts are ill-equipped to handle cases alleging violations of 251(c)(3) duties to provide access because such allegations involve complex and constantly changing interactions between competitive and incumbent LECs. Antitrust courts should not be in the business of supervising highly detailed decrees on an ongoing basis. The Court noted that the FTCA does not authorize judges to invoke the Sherman Act in this context; rather, the 1996 act is itself an effective and even more ambitious mechanism for regulating the telecom industry. *Trinko, 124 S. Ct. at 881-83.* **[**11]** The FTCA attempts nothing less than to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Id. at 883* (quoting *Verizon, 535 U.S. at 476*). By contrast, *§ 2 of the Sherman Act* seeks merely "to prevent *unlawful monopolization*." *Trinko, 124 S. Ct. at 883* (emphasis in original). [6]

II. Covad's Claims after Trinko

As noted, we grouped Covad's Sherman Act claims into three forms of alleged anticompetitive conduct: refusal to deal, essential facilities, and price squeezing.

Trinko requires us, first, to reconsider whether Covad's refusal-to-deal allegations, if true, would state an antitrust claim under the "limited exception" of Aspen. *Trinko, 124 S. Ct. at 880*. In our earlier opinion, we distinguished Aspen from the instant case by **[**12]** noting that Covad was both customer and competitor of BellSouth, whereas the Aspen parties were solely competitors of each other. *Trinko*, however, treats the interconnection agreement between AT&T and Verizon as a mandatory accord between competitors, not a voluntary agreement between customers. *Trinko, 124 S. Ct. at 880*. That Verizon also supplies wholesale unbundled network elements at a cost-based rate to AT&T does not, in the Court's view, make the relationship a non-competitive one. ***HN3***[] Moreover, Trinko now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under Aspen. The relationship between AT&T and Verizon was mandated by the FTCA, and thus cannot be said to have initiated a "voluntary" course of dealing, profitable or otherwise. For the same reason, Verizon cannot be said to have failed to make available to AT&T otherwise publicly marketed services, whether at retail or a lower cost. Trinko emphasizes the coercive effect of the FTCA on incumbent LECs such as Verizon who - but for the FTCA - would not be required to make their network elements (including OSS) available **[**13]** to third parties such as AT&T. In short, Covad's refusal-to-deal claims do not survive Trinko and must be dismissed.

We consider next whether our application of the essential facilities doctrine to Covad's claims under this theory satisfies *Trinko*. Our earlier opinion quoted *Blue Cross & Blue Shield United of Wisconsin* ***[*1050]*** *v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995)*, to the effect that the essential facilities doctrine has been endorsed by the Supreme Court and remains valid until rejected by it. In Trinko, however, the Court stated that it would neither endorse nor reject the essential facilities doctrine. *Trinko, 124 S. Ct. at 881*. By contrast, the Court does endorse the view of two antitrust scholars that ***HN4***[] the doctrine is only viable where there is indeed unavailability of access. Id. Where a state or federal agency is authorized to compel access to a competitor's infrastructure, as under the FTCA, Trinko states that an essential facilities claim should be denied. Id. Thus, Covad's allegations under the essential facilities doctrine also fail to survive Trinko.

Third, we must consider whether Covad's price squeezing **[**14]** allegations are now a matter for FTCA regulatory enforcement rather than ***antitrust law***. As to these allegations, Trinko does not offer any definitive guidance. The plaintiffs' amended complaint in Trinko did not state any price squeezing claims, and the Court did not specifically address the issue in its opinion. BellSouth argues that the Fourth Circuit dismissed a price squeezing claim similar

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[6] In a concurring opinion, Justices Stevens, Souter, and Thomas found that Trinko had no standing to bring an antitrust claim in this case. Only AT&T could do so.

to Covad's in *Cavalier Telephone, LLC v. Verizon Virginia, Inc., 330 F.3d 176, 181, 190 (4th Cir. 2003)*, and that the Supreme Court's denial of certiorari in that case, *124 S. Ct. 1144, 157 L. Ed. 2d 1041 (2004)*, supports affirming the district court's judgment in the instant case. But ***HN5***[] the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver, 260 U.S. 482, 43 S. Ct. 181, 182, 67 L. Ed. 361 (1923)*.

We believe Covad's price squeezing claim survives because it is based on traditional antitrust doctrine and is not specifically barred by *Trinko*. As such, however, ***HN6***[] Covad's complaint must contain allegations that the two basic prerequisites for a showing of price predation under *§ 2 of the Sherman Act* **[**15]** have been met. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (finding that the prerequisites for recovery on a claim of price predation under *§ 2 of the Sherman Act* are the same as those for recovery on a claim of price discrimination under the Robinson-Patman Price Discrimination Act, *15 U.S.C. § 13(a)*). First, Covad must allege that "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group, 509 U.S. at 222*. Second, Covad must allege that BellSouth had "a dangerous probability[] of recouping its investment in below-cost prices." *Id. at 224*. Rereading Covad's complaint, we find that the allegations contained therein, although not as closely tied to these two prerequisites as they could have been, are sufficient to state a claim under *§ 2 of the Sherman Act*.

With respect to the first requirement, Covad alleges that

> The wholesale prices BellSouth offers to ISPs for DSL service, as well as its retail prices for combined DSL and Internet access service, are set so low relative to its unbundled wholesale loop **[**16]** prices that Covad cannot meet BellSouth's wholesale or retail prices and still make a reasonable return on its investment. If Covad charged retail DSL/Internet access customers the same price as BellSouth does, or charged comparable wholesale DSL prices, Covad could not recover the cost of providing the service, e.g., loop costs, collocation costs, transport costs, corporate overhead and sales and market costs.

[*1051] Covad Complaint at P 92. Whether the last sentence in this passage reflects "an appropriate measure of [BellSouth's] costs," *Brooke Group, 509 U.S. at 222*, is a factual matter for the district court to determine at a later stage of proceedings. For purposes of the pleading stage, Covad's complaint meets the first *Brooke Group* prerequisite for a showing of price predation.

With respect to the recoupment requirement, Covad alleges that

> If BellSouth had charged itself the same wholesale price for loops, BellSouth could not make a profit from its DSL service at current prices. . . BellSouth achieves the unlawful price squeeze by allocating costs so as to apportion only a *de minimis* cost to the loops over which it provides its own DSL service. **[**17]** . . As the costs are presently allocated, BellSouth must necessarily realize a significantly higher profit margin on its wholesale sales (for which it faces no competition) than it does on the corresponding retail sales (for which Covad is attempting to compete). BellSouth intended this artifical cost allocation to harm Covad, and it did.

Covad Complaint at PP 93-95. These allegations suggest that BellSouth is compensating for deliberately reduced profits on the retail end of its operations with correspondingly greater profits on the wholesale side, in order to stifle competition from firms such as Covad that are both wholesale customers and retail rivals. We find that these allegations are sufficient to allege "a dangerous probability" that BellSouth will "recoup[] its investment in below-cost prices." *Brooke Group, 509 U.S. at 224*. Whether the facts contained in Covad's complaint and in the record will bear out the recoupment allegation against BellSouth is also a matter for the district court to determine at a later stage, not on the basis of a motion to dismiss for failure to state a claim. Taken together, Covad's price predation allegations meet the **[**18]** "exceedingly low" threshold of sufficiency that a complaint must meet to survive a 12(b)(6) motion. *Quality Foods, 711 F.2d at 994-95* (finding that ***HN7***[] "we must accept the facts pleaded as true and construe them in a light favorable to plaintiffs").

Nor are Covad's price squeezing claims barred by Trinko's discussion of the FTCA's regulatory priority over ***antitrust law*** enforcement. See *Trinko, 124 S. Ct. at 882* (finding the FTCA regime to be "an effective steward of the antitrust function"). The Trinko Court observed that *HN8*[] federal courts are ill-equipped to manage the complicated disputes over *§ 251(c)(3)* duties that frequently arise out of telecom interconnection agreements. *Id. at 882-83* (finding that the costs of antitrust intervention in this context exceed the benefits and stating that "an antitrust court is unlikely to be an effective day-to-day enforcer of [the FTCA's] detailed sharing obligations"). Instead, courts should defer to the FTCA's preexisting regulatory framework rather than try to adjudicate complex Sherman Act lawsuits in the telecommunications area.

Here, we find that Covad's price squeezing claims depend **[**19]** upon Covad's FTCA-mandated interconnection agreement with BellSouth only in a circular sense. Covad alleges that the wholesale prices BellSouth charges ISPs for DSL service, and the retail prices it charges individual customers for combined DSL and Internet access service, are significantly lower than the unbundled wholesale loop prices BellSouth charges Covad and other CLECs pursuant to the interconnection agreement. If it is true that the wholesale prices BellSouth is charging ISPs for DSL service, and the **[*1052]** retail prices it is charging individual customers for combined DSL and Internet service, are "below an appropriate measure of [BellSouth's] costs," *Brooke Group, 509 U.S. at 222*, that fact suffices to satisfy the first prong of a price predation offense under *§ 2 of the Sherman Act. As* noted above, whether the unbundled wholesale loop prices BellSouth charges Covad pursuant to the interconnection agreement are the "appropriate measure of [BellSouth's] costs" is a matter for the trier of fact to determine. That these two measures may be the same does not somehow immunize BellSouth from the application of traditional antitrust principles. The unbundled wholesale **[**20]** loop prices that BellSouth charges Covad are made available to Covad pursuant to *§ 251(c)(3)* and *§ 252* of the FTCA. *HN9*[] *Section 251(c)(3)* requires BellSouth

> to provide . . . nondiscriminatory access to network elements on an unbundled basis . . . on rates . . . that are just, reasonable, and nondiscriminatory in accordance with . . . this section and section 252 of this title.

Section 252(d)(1), in turn, provides that

> *HN10*[] determinations by a State commission of the just and reasonable rate for . . . network elements for purposes of subsection (c)(3) of [section 251] shall be based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the . . . network element . . . and nondiscriminatory, and may include a reasonable profit.

As this language makes clear, *HN11*[] the FTCA employs the same baseline standard - namely, "cost" - for determining the validity of an ILEC's prices as does the Brooke Group antitrust test of price predation, which asks whether "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group, 509 U.S. at 222*. Thus, the at-cost measure that **[**21]** Covad invokes for purposes of stating a predatory pricing claim is tied to the FTCA only in a very formal, circular sense. To say that Covad's price squeezing claim defines the "appropriate measure of [BellSouth's] costs," id., in terms of an obligation created by the FTCA is to say very little when the FTCA itself relies upon "cost" as the appropriate measure by which to determine interconnection and network element rates. We conclude that Covad's price squeezing claim is based on traditional antitrust standards. As the Trinko Court noted, *HN12*[] while the FTCA "does not create new claims that go beyond existing antitrust standards," it also "preserves claims that satisfy existing antitrust standards." *Trinko, 124 S. Ct. at 878*. Our responsibility under Trinko to harmonize the Sherman Act and the FTCA does not entail excluding facially valid antitrust claims at the pleadings stage. [7]

[22]** We turn next to Covad's FTCA and state law breach of contract causes of action. Neither of these is affected by the Trinko decision. As noted earlier, the district court dismissed these claims on the ground that they

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[7] It is true that the same set of facts that Covad cites in support of its price squeezing claim might also be actionable under the FTCA. If BellSouth has sold (or is now selling) wholesale DSL service to ISPs at prices lower than those it charges Covad, as Covad alleges, BellSouth may well have violated the *§ 252(d)(1)* requirement of "nondiscriminatory" pricing for unbundled network elements. But such a claim - which Covad has not made in this case - would involve a dispute over the terms of the FTCA-mandated interconnection agreement between BellSouth and Covad. As we explain below, pursuant to MCIMetro II, a claim directly under the FTCA must be brought in the first instance before the relevant state PSCs.

must first be brought before a state PSC. In our initial opinion **[*1053]** in this case, we reversed the trial court's dismissal in light of our holding in *MCIMetro I, 278 F.3d at 1237* (holding that state PSCs are not authorized by *§ 252* of the FTCA to interpret interconnection agreements). In a subsequent en banc opinion, however, we overturned this judgment and held that ***HN13***[] state PSCs do have jurisdiction to adjudicate disputes over and interpret the terms of FTCA-mandated interconnection agreements. *MCIMetro II, 317 F.3d 1270*. Covad may now bring those claims before the relevant state PSCs, and judicial review of state PSC determinations is available in the federal courts pursuant to *47 U.S.C. § 252(e)(6)*. Accordingly, we now affirm the trial court's dismissal of Covad's FTCA and state law breach of contract causes of action.

Finally, we find that Covad's state law claims for tortious interference with business relations **[**23]** are wholly untouched by Trinko. These claims do not implicate any obligations arising under Covad's interconnection agreement with BellSouth, and so Covad may proceed with those claims after Trinko as before.

To summarize, in light of *Trinko* we now affirm the district court's dismissal of Covad's refusal to deal and essential facilities claims. In light of *MCIMetro II*, we now also affirm the district court's dismissal of Covad's FTCA and state law breach of contract claims. As in our earlier opinion, however, we reverse the district court's dismissal of Covad's price squeezing and tortious interference with business relations claims. This case is now remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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Larobina v. First Union Nat'l Bank

Superior Court of Connecticut, Judicial District of Stamford-Norwalk At Stamford

June 28, 2004, Decided ; June 28, 2004, Filed

CV990170845S

Reporter

2004 Conn. Super. LEXIS 1784 *

Vincent P. Larobina v. First Union National Bank

Notice: **[*1]** THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Motion to strike denied by *Larobina v. First Union Nat'l Bank, 2005 Conn. Super. LEXIS 1399 (Conn. Super. Ct., May 20, 2005)*

Prior History: *Larobina v. First Union Nat'l Bank, 2004 Conn. Super. LEXIS 163 (Conn. Super. Ct., Jan. 14, 2004)*

Core Terms

special defense, motion to strike, alleges, cause of action, argues, quotation, marks, preempted, consumer, provisions, limitations period, furnishers, notice, defamation, preemption, negligent misrepresentation, consumer reporting agency, statute of limitations, three year, occurrence, malice, state law claim, present case, reincorporates, violations, emotional, equitable, regulated, distress, damages

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Cross Complaints

Civil Procedure > Pleading & Practice > General Overview

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN1[] **Complaints, Cross Complaints**

See *Conn. Gen. Prac. Book, R. Super. Ct. § 10-39(a)(5)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN2[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. The purpose of a motion to strike is to contest the legal sufficiency of any answer, including any special defense contained therein. *Conn. Gen. Prac. Book, R. Super. Ct. § 10-39(a)(5)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Standards of Review, De Novo Review**

Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by a trial court, an appellate court's review of the court's ruling on a plaintiff's motion is plenary. The appellate court takes the facts to be those alleged in the complaint that has been stricken and it construes the complaint in the manner most favorable to sustaining its legal sufficiency. Thus, if facts provable in the complaint would support a cause of action, the motion to strike must be denied. Moreover, what is necessarily implied in an allegation need not be expressly alleged. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically. Where the legal grounds for such a motion are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN4[] **Defenses, Demurrers & Objections, Motions to Strike**

The granting of a motion to strike a special defense is not a final judgment and is therefore not appealable.

Banking Law > Consumer Protection > Fair Credit Reporting > Liability for Violations

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN5[] **Fair Credit Reporting, Liability for Violations**

See *15 U.S.C.S. § 1681h(e)*.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN6[] **Breach of Contract Actions, Elements of Contract Claims**

The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN7[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Constitutional Law > Supremacy Clause > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN8[] **Consumer Protection, Fair Credit Reporting**

The language of *15 U.S.C.S. § 1681h(e)* does not apply to preempt common-law claims alleging a breach of contract.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN9[] **Consumer Protection, Fair Credit Reporting**

See *15 U.S.C.S. § 1681s-2*.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Banking Law > Consumer Protection > State Law > General Overview

HN10[] **Consumer Protection, Fair Credit Reporting**

See *15 U.S.C.S. § 1681t(b)(1)(F)*.

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports

Torts > Public Entity Liability > Liability > General Overview

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Banking Law > Consumer Protection > Fair Credit Reporting > Liability for Violations

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN11[] **Fair Credit Reporting, Consumer Reports**

The Federal Credit Reporting Act (FCRA) governs the use of and the procedures related to credit reports. It sets forth responsibilities related to consumer reporting agencies and also the responsibilities of furnishers of information to consumer reporting agencies. The FCRA provides for civil liability due to both willful and negligent non-compliance. *15 U.S.C.S. §§ 1681n* and *1681o*. *15 U.S.C.S. §§ 1681s-2* and *1681t(b)(1)(F)* do not apply to breach of contract claims.

Banking Law > Consumer Protection > State Law > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Torts > Public Entity Liability > Immunities > Qualified Immunity

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN12[] **Consumer Protection, State Law**

The Federal Credit Reporting Act recognizes that a consumer may bring an action under state common law for defamation, slander or invasion of privacy, and negligence, but only if the consumer proves malice or willful intent to injure such consumer. That is, *15 U.S.C.S. § 1681h(e)* grants consumer reporting agencies, users of consumer reports, and furnishers of information qualified immunity from state law claims of this nature. *Section 1681h(e)* is therefore not a grant of federal subject matter jurisdiction, but rather creates a defense a consumer must overcome to succeed on a state law claim against someone acting in a capacity that is regulated by the Act.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Torts > Negligence > Proof > General Overview

Torts > Negligence > General Overview

HN13[] **Consumer Protection, Fair Credit Reporting**

Some courts have held that applying *15 U.S.C.S. § 1681h(e)* to a negligence claim would require a plaintiff to show that a defendant acted negligently and with malice or willful intent to injure. This results in a requirement that a plaintiff prove intentional or malicious negligence. This level of negligence is inherently contradictory in that negligence does not include an element of intent. In fact, intentional negligence is an oxymoron. A wilful and malicious injury is one inflicted intentionally without just cause or excuse. It does not necessarily involve the ill will or malevolence shown in express malice. Nor is it sufficient to constitute such an injury that the act resulting in the injury was intentional in the sense that it was the voluntary action of the person involved. Not only the action producing the injury but the resulting injury must be intentional. A wilful or malicious injury is one caused by design. Willfulness and malice alike import intent. Its characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Constitutional Law > Supremacy Clause > General Overview

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defenses > Privileges > Qualified Privileges

Torts > Intentional Torts > Invasion of Privacy > General Overview

Torts > Intentional Torts > Invasion of Privacy > Defenses

Torts > Procedural Matters > Preemption > General Overview

Torts > Public Entity Liability > Immunities > Qualified Immunity

HN14[] **Consumer Protection, Fair Credit Reporting**

The Federal Credit Reporting Act's two separate preemption provisions are contained in *15 U.S.C.S. § 1681t(b)(1)(F)*, which provides furnishers of credit with absolute immunity when filling their obligations under *15 U.S.C.S. § 1681s-2*; and *15 U.S.C.S. § 1681h(e)*, which provides furnishers of credit information with qualified immunity from suits "proceeding in the nature of defamation, invasion of privacy, or negligence." Importantly, Congress added the first, more sweeping, *15 U.S.C.S. § 1681t(b)(1)(F)* language in a series of 1996 amendments. Those amendments made no mention of the earlier *15 U.S.C.S. § 1681h(e)* language. The tension between these two provisions therefore results from the fact that *§ 1681h(e)* permits state tort claims, but requires a higher standard of proof for those in the nature of defamation, slander, or invasion of privacy, while *15 U.S.C.S. § 1681t(b)(1)(F)* prohibits all state claims covered by *15 U.S.C.S. § 1681s-2*.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Constitutional Law > Supremacy Clause > General Overview

Torts > Procedural Matters > Preemption > General Overview

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

HN15[] **Consumer Protection, Fair Credit Reporting**

Several district courts around the country have considered how and when to apply each preemption provision of the Federal Credit Reporting Act (FCRA) to pendent state common-law claims. Three approaches have emerged from these district courts. The first approach is to interpret *15 U.S.C.S. § 1681t(b)(1)(F)*, which was added to the FCRA after *15 U.S.C.S. § 1681h(e)*, as completely subsuming *§ 1681h(e)*. This approach, which would call for preemption of all pendent state law claims, has been rejected by at least one court because Congress left *§ 1681h(e)* in place when it added *15 U.S.C.S. § 1681t(b)(1)(F)*. The second approach is to read *15 U.S.C.S. § 1681h(e)* as applying to state tort actions and *15 U.S.C.S. § 1681t(b)(1)(F)* as applying to state statutory regulation. The third approach, called the temporal approach, has been applied most often.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN16[] **Consumer Protection, Fair Credit Reporting**

The temporal analysis approach to determining preemption of state common-law claims under the Federal Credit Reporting Act relies on the language of *15 U.S.C.S. § 1681t(b)(1)(F)* itself to conclude that *§ 1681t(b)(1)(F)* should only be used to preempt state actions premised upon a credit furnisher's conduct occurring after the furnisher receives notice of a dispute. *Section 1681t(b)(1)(F)* states, in part, that no requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under *15 U.S.C.S. § 1681s-2*, relating to the responsibilities of persons who furnish information to consumer reporting agencies. *Section 1681s-2*, in turn, only regulates conduct of furnishers of information after the furnishers have been either notified by the consumer that specific information is inaccurate, or notified by a consumer reporting agency that a dispute over the accuracy of information has arisen. Because the conduct regulated by *§ 1681s-2* has a temporal component and *15 U.S.C.S. § 1681t(b)(1)(F)* is based on *15 U.S.C.S. § 1681s-2*, it follows that the application of *15 U.S.C.S. § 1681t(b)(1)(F)* likewise depends on when the furnisher of information received notice of a dispute.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN17[] **Consumer Protection, Fair Credit Reporting**

The bottom line of the temporal analysis approach to determining preemption of state common-law claims under the Federal Credit Reporting Act is that preemption of state law claims arising before the furnisher of information receives notice of the dispute is governed by *15 U.S.C.S. § 1681h(e)* and preemption of state law claims arising after such a time is governed by *15 U.S.C.S. § 1681t(b)(1)(F)*.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN18[] **Consumer Protection, Fair Credit Reporting**

15 U.S.C.S. § 1681h(e) explicitly states that it is applicable to causes of action sounding in defamation.

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN19[] **Consumer Protection, Truth in Lending**

The provisions of the Truth in Lending Act, *15 U.S.C.S. § 1601 et seq.*, are applicable to creditors in Connecticut pursuant to *Conn. Gen. Stat. § 36a-678(a)*.

Banking Law > Consumer Protection > Truth in Lending > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN20[] **Consumer Protection, Truth in Lending**

See *Conn. Gen. Stat. § 36a-683(e)*.

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN21[] **Truth in Lending, Liability for Violations**

See *15 U.S.C.S. § 1647(a)*.

Banking Law > Consumer Protection > Equal Credit Opportunity > General Overview

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN22[] **Consumer Protection, Equal Credit Opportunity**

See *Conn. Gen. Stat. § 36a-678(a)*.

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

Governments > Legislation > Statute of Limitations > Time Limitations

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN23[] **Truth in Lending, Liability for Violations**

See *15 U.S.C.S. § 1640(e)*.

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

Governments > Legislation > Statute of Limitations > Time Limitations

Banking Law > Consumer Protection > Truth in Lending > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN24[] **Truth in Lending, Liability for Violations**

A consumer's rights under the Truth in Lending Act, *15 U.S.C.S. § 1601 et seq.*, are subject to a one-year limitation period that begins to run "from the date of the occurrence of the violation." *15 U.S.C.S. § 1640(e)*. Most of the reported cases which have considered the limitation provision of the Act have done so in the context of "close end" credit transactions. As a general rule the disclosures required by the Act are revealed to the consumer at the time the contract for the extension of credit is executed or, at the very latest, at the time of performance. Thus there is a specific time at which a violation occurs and a court can use that occurrence as the point from which the limitation period begins to run.

Banking Law > Consumer Protection > Truth in Lending > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN25[] Consumer Protection, Truth in Lending

An open end credit arrangement is distinguishable on several grounds from a close end transaction and necessitates a different rationale in applying the limitation provision of the Truth in Lending Act, *15 U.S.C.S. § 1601 et seq.* The Act defines open end credit plan in *15 U.S.C.S. § 1602(i)*: The term open end credit plan means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. As a practical matter, when a consumer applies for and is issued a credit card under an open end credit plan, there is no extension of credit from a lender to a potential borrower, because no debt has yet accrued. With the free ride period permitted under most credit cards, it is only when the first finance charge is imposed that a consumer usually becomes aware that a violation of the Act has occurred. This may be many months after the application for and issuance of the card. Under these circumstances it appears evident that the purpose of the Act - to ensure the informed use of credit - is best served if the starting point for the limitation period is deemed to be the date when there has been a finance charge which puts the consumer on notice that a violation has occurred.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN26[] Statute of Limitations, Revival

See *15 U.S.C.S. § 15b*.

Antitrust & Trade Law > Clayton Act > Scope

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN27[] Antitrust & Trade Law, Clayton Act

Although the Racketeer Influenced and Corrupt Organization (RICO) statute does not contain a statute of limitations, the U.S. Supreme Court has held that the four-year statute of limitations of the Clayton Act, *15 U.S.C.S. § 1 et seq.*, is analogous and therefore applicable to federal racketeering causes of action. Because of the RICO Act's unique "pattern of racketeering activity" requirement, the development of accrual theories for RICO causes of action has taken a somewhat different path to reach today what is by and large the same rule as that applied in ***antitrust law***.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Interlocking Directorates

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

HN28[] **Tying Arrangements, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 1 et seq.*, is a federal law enacted to deal with antitrust regulation and practices engaged in for the purpose of restraining trade. The Clayton Act prohibits activity such as price discrimination, tying and exclusive dealing contracts, mergers, and interlocking directorates, where the purpose is to lessen competition or to create a monopoly within an industry.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

HN29[] **Tolling of Statute of Limitations, Discovery Rule**

Three distinct approaches have emerged to determine when the four-year period of time commences to run under a Racketeer Influenced and Corrupt Organization (RICO) claim. Some Circuits, like the United States Court of Appeals for the Fifth Circuit, have applied an injury discovery accrual rule starting the clock when a plaintiff knew or should have known of his injury. Some circuits have applied the injury and pattern discovery rule, under which a civil RICO claim accrues only when the claimant discovers, or should discover, both an injury and a pattern of RICO activity. The United States Court of Appeals for the Third Circuit has applied a last predicate act rule. Under this rule, the period began to run as soon as the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but began to run anew upon each predicate act forming part of the same pattern.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Civil Procedure > Discovery & Disclosure > General Overview

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN30[] **Racketeer Influenced & Corrupt Organizations, Statute of Limitations**

The United States Court of Appeals for the Third Circuit has held that the injury discovery accrual rule applies to civil Racketeer Influenced and Corrupt Organization (RICO) claims. The Court reasoned that by tying the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery, the rule would extend the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete. A limitations period that would have begun to run only eight years after a claim became ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability. The fact that difficulty in identifying a pattern is inherent in civil RICO only reinforces the courts' reluctance to parlay the necessary complexity of RICO into worse trouble in applying its limitations rule.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview

HN31[] **Consumer Protection, Fair Credit Reporting**

Immunity will not attach to common-law claims where a credit reporting agency has furnished false information with malice or willful intent to injure.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Governments > Legislation > Statute of Limitations > General Overview

HN32[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Conn. Gen. Stat. § 42-110g(f) provides that an action alleging unfair trade practices under the Connecticut Unfair Trade Practices Act (CUTPA) may not be brought more than three years after the occurrence of a violation. The three-year limitations period for a CUTPA claim is a substantive rather than procedural limitation.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN33[] **Defenses, Demurrers & Objections, Motions to Strike**

In determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

HN34[] **Statute of Limitations, Time Limitations**

See *Conn. Gen. Stat. § 52-577*.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Begins to Run > Actual Injury

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN35[] **Statute of Limitations, Time Limitations**

Conn. Gen. Stat. § 52-577 is an occurrence statute, meaning that the time period within which a plaintiff must commence an action begins to run at the moment the act or omission complained of occurs. The Connecticut Supreme Court has held that in construing the general tort statute of limitations, *§ 52-577*, which allows for an action to be brought within three years from the date of the act or omission complained of, the Court has concluded that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred.

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Doctors & Physicians

Torts > Malpractice & Professional Liability > Healthcare Providers

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > Surgeons

Torts > Procedural Matters > Statute of Limitations > General Overview

HN36[] **Actions Against Healthcare Workers, Doctors & Physicians**

See *Conn. Gen. Stat. § 52-584*.

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > Defenses

Torts > ... > Fraud & Misrepresentation > Negligent Misrepresentation > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN37[] **Legislation, Statute of Limitations**

The three-year limitation of *Conn. Gen. Stat. § 52-577* is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of *§ 52-577* and enumerated in *Conn. Gen. Stat. § 52-584* or another section. Because negligent misrepresentation is not specifically enumerated in *§ 52-584*, that section is inapplicable to cases of negligent misrepresentation.

Civil Procedure > Preliminary Considerations > Equity > General Overview

Real Property Law > Financing > Foreclosures > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN38[] **Preliminary Considerations, Equity**

The unclean hands doctrine may be asserted as a special defense in a foreclosure action. Connecticut jurisprudence has recognized that those seeking equitable redress in the courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. It is applied for the advancement of right and justice. The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked.

Judges: D'ANDREA, Judge Trial Referee.

Opinion by: D'Andrea

Opinion

MEMORANDUM OF DECISION RE MOTION TO STRIKE (# 322)

In the present action, pursuant to the *Connecticut Practice Book § 10-39(a)(5)*, [1] Vincent Larobina (Larobina), moves to strike all of First Union National Bank's (First Union) special defenses. The facts alleged leading up to this action are as follows. On September 25, 1986, Larobina established a line of credit with Union Trust Bank (Union Trust) in the amount of $ 55,000. This line of credit was secured by a second mortgage on Larobina's home. The note was for ten years with an effective maturity date of September 25, 1996. At some point in 1991, Union Trust assigned the note and mortgage to First Fidelity Bank of Connecticut (Fidelity). On November 1, 1994, Larobina

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[1] *Section 10-39(a)(5)* states, in pertinent part, that: ***HN1***[] "Whenever any party wishes to contest . . . the legal sufficiency of any answer to any complaint, counterclaim or cross complaint, or any part of that answer including any special defense contained therein, that party may do so by filing a motion to strike the contested pleading or part thereof."

and Fidelity agreed to extend the maturity date on the note. [2] In 1996, Fidelity assigned the agreement and the mortgage to the defendant, First Union. From the time of the execution of the re-age agreement in 1994 through the time of the note's original **[*2]** maturity date of September 1996 and until October 1998, Larobina received regular and proper monthly statements and substantially complied with the agreement by tendering payments.

On July 20, 1998, Larobina received a letter from First Union stating that the note had **[*3]** matured as of September 25, 1996, and that the entire balance was due. Larobina alleges that he contacted First Union to inform them of his agreement with First Fidelity to extend the repayment date. In response, Larobina asserts that First Union claimed that the new minimum payment due was almost the entire balance of the note. Larobina further alleges that this new minimum balance due violated the terms of his agreement with Fidelity which stated that "your minimum installment payment will be 1/240th of your outstanding balance plus any finance charges owed on your account."

Larobina, filed a thirteen-count substitute complaint against First Union, on December 28, 2001. Therein he alleges breach of contract/(counts one through three), negligence by refusing to expunge false information from the plaintiff's credit report/(count four), defamation by publishing false information to the credit agencies/(count five), violation of *15 U.S.C. § 1647(a)* (*General Statutes § 36a-678(a)*), which requires home equity loans to be based on an index or rate of interest which is publicly available/(count six), mail fraud in violation of *18 U.S.C. § 1341* **[*4]** /(count seven), negligent infliction of emotional distress/(count eight), violation of the implied covenant of fair dealing pursuant to *General Statutes § 42a-1-203*/(count nine), violation of the Connecticut Unfair Trade Practices Act (CUIPA), specifically, *General Statutes § 42-110a(3)* and *(4)*/(count ten), negligent misrepresentation/(count eleven), promissory estoppel/(count twelve) and specific performance/(count thirteen).

On December 27, 2002, First Union filed an answer and special defenses to Larobina's substituted complaint. On October 3, 2003, Larobina moved to strike all of First Union's special defenses. The court, Hiller, J., granted Larobina's motion to strike all 11 special defenses. Larobina v. First Union National Bank, Superior Court, judicial district of Stamford, Docket No CV 990170845 (January 14, 2004, Hiller, J.). On January 30, 2004, First Union filed its substitute answer and special defenses. On February 13, 2004, Larobina filed another motion to strike First Union's special defenses.

In his memorandum in support, Larobina argues that First Union's special defenses contain "no subordinate facts from which **[*5]** [a] legal conclusion can flow." Larobina submits that all First Union has done, in this instance, is enhance each defense by quoting the allegations of his complaint. Larobina argues that First Union has, therefore, failed to present independent subordinate facts from which the legal conclusion of each defense can flow. On February 25, 2004, First Union filed its memorandum of law in opposition, in which it argues that Larobina's motion to strike lacks legal merit. The motion was heard on the short calendar on March 1, 2004.

HN2[] "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) *Fidelity Bank v. Krenisky, 72 Conn.App. 700, 718, 807 A.2d 968*, cert. denied, *262 Conn. 915, 811 A.2d 1291 (2002)*. The purpose of a motion to strike is "to contest . . . the legal sufficiency of any answer . . . including any special defense contained therein . . ." *Practice Book § 10-39(a)(5)*.

HN3[] "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings **[*6]** by the trial court, our review of the court's ruling on the [plaintiff's motion] is plenary . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus, if facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . Moreover . . . what is necessarily implied [in an allegation] need not be expressly alleged . . . It is fundamental that in determining the sufficiency of a complaint challenged by

[2] Specifically, in consideration of the extension, Larobina agreed to forfeit any further right to obtain any additional loans under the note, and in exchange, Fidelity expressly modified the term of the note by allowing Larobina to pay each monthly installment of interest and principal as defined under paragraph 2.2 of the note, until such time as the then existing balance was paid in full.

a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically . . . Where the legal grounds for such a motion are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied." (Citations omitted; internal quotation marks omitted.) *Commissioner of Labor v. C.J.M. Services, Inc., 268 Conn. 283, 292-93, 842 A.2d 1124 (2004)*. **[*7]**

HN4[] "The granting of a motion to strike a special defense is not a final judgment and is therefore not appealable." *Mechanics Savings Bank v. Townley Corp., 38 Conn.App. 571, 573, 662 A.2d 815 (1995)*.

A. First Special Defense to Count Three, Breach of Contract Claim

First Union's first special defense to count three states that Larobina's claim is preempted by the provisions of *15 U.S.C. § 1681h(e)*. [3] In support of this defense First Union cites the following from Larobina's complaint dated December 28, 2001. In paragraph sixteen, Larobina alleges that "starting in October 1998, and continuing until even date herewith, [First Union] has reported to Experian, Trans Union and Equifax credit reporting agencies that the plaintiff is in default under the Note." Larobina further alleges, in paragraph seventeen, that "in making said reports, [First Union] has failed, refused or neglected to report to said credit reporting agencies that the plaintiff disputed [First Union's] allegation of default, although [First Union] has due notice of the same. By its failure, refusal and/or neglect to report the plaintiff's dispute to said agencies, [First **[*8]** Union] violated the expressed terms of the Note as set forth in the penultimate un-numbered paragraph in the instrument." Larobina further alleges that "[First Union's] failure to report the plaintiff's dispute to the credit reporting agencies constitutes a breach of contract from which the plaintiff suffered damages." First Union argues, therefore, that despite the characterization of count three as a breach of contract claim, in reality, the claim is one sounding in defamation, invasion of privacy, or negligence, any of which is preempted by *§ 1681h(e)*.

[*9] ***HN6***[] "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.). *Rosato v. Mascardo, 82 Conn.App. 396, 411, 844 A.2d 893 (2004)*.

In the present case, Larobina alleges that First Union's failure to comply with various obligations under the note constitutes a breach of contract. In a prior decision on a motion to strike, Judge Hiller determined that Larobina stated a claim for breach of contract and that First Union may not relitigate the legal sufficiency of that count by way of special defenses. *Larobina v. First Union National Bank, supra*, Superior Court, Docket No. CV 99-0170845. Further, in another decision on a motion to strike, Judge Karazin also determined that Larobina, in count three, had sufficiently alleged a cause of action for breach of contract. Larobina v. First Union National Bank; Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. CV 99-0170845 (December 13, 2001, Karazin, J.). He noted that Larobina had alleged an agreement, performed the agreement, First Union breached the agreement and that, **[*10]** as a result of that breach, Larobina suffered damages. Based upon the determinations by both Judge Hiller and Judge Karazin that count three is a contracts claim, this court is not inclined to disturb their judgment.

HN7[] "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint . . ." (Emphasis added; internal quotation marks omitted.) *Fidelity Bank v. Krenisky, supra, 72 Conn.App. 718*. Moreover, ***HN8***[] the language of *§ 1681h(e)* does not apply to preempt common-law claims alleging a breach of

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[3] *15 U.S.C. § 1681h(e)* states that: ***HN5***[] "(e) Limitation of liability-Except as provided in *sections 1681n* and *1681o* of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to *section 1681g*, *1681h*, or *1681m* of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer."

contract and is, consequently, inapplicable to count three. Therefore, Larobina's motion to strike First Union's first special defense to count three is granted.

B. Second Special Defense to Count Three, Breach of Contract Claim

First Union's second special defense to count three states that Larobina's claim relates solely to the responsibilities imposed on First Union pursuant to 15 U.S.C. § 1681s-2 [4] **[*12]** and, therefore, is preempted by a second preemption provision in 15 U.S.C. § 1681t(b)(1)(F). [5] In support of this defense, First Union argues that it "is a person who furnishes information **[*11]** to consumer reporting agencies." Further, First Union incorporates the same allegations from its first special defense which rely on paragraphs sixteen through eighteen of count three of

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[4] 15 U.S.C. § 1681s-2 states, in pertinent part:

HN9[] (a) Duty of Furnishers of Information to Provide Accurate Information-

(1) Prohibition-

(A) Reporting Information wit Actual Knowledge of Errors-A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting Information After Notice and Confirmation of Errors-A person shall not furnish information relating to a consumer to any consumer reporting agency if-

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and (ii) the information is, in fact, inaccurate . . .

(2) Duty to Correct and Update Information-A person who-

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

(3) Duty to Provide Notice of Dispute-If the completeness or accuracy of any information furnished by any person to any consumer reporting agency is disputed to such person by a consumer, the person may not furnish the information to any consumer reporting agency without notice that such information is disputed by the consumer . . .

(b) Duties of Furnishers of Information upon Notice of Dispute-

(1) In General-After receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency, the person shall-

(A) conduct an investigation with respect to the disputed information;

(B) review all relevant information provided by the consumer reporting agency pursuant to section 1681i(a)(2) of this title;

(C) report the results of the investigation to the consumer reporting agency;

(D) if the investigation finds that the information is incomplete or inaccurate, report those results to all other consumer reporting agencies to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis . . .

[5] 15 U.S.C. § 1681t(b)(1)(F) states, in pertinent part: **HN10**[] "General Exceptions-No requirement or prohibition may be imposed under the laws of any State-(1) with respect to any subject matter regulated under . . . (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . ." This preemption provision "provides furnishers of credit with absolute immunity when fulfilling their obligations under § 1681s-2." Stafford v. Cross Country Bank, 262 F. Supp. 2d 776, 784 (W.D.Ky 2003).

the complaint. Larobina argues that, other than conclusory statements, First Union has not alleged that its conduct falls within the subject matter regulated by § 1681s-2.

HN11[] "The [Federal Credit Reporting Act] FCRA governs the use of and the procedures related to credit reports. It sets forth responsibilities related to consumer reporting agencies and also the responsibilities of furnishers of information to consumer reporting agencies. The FCRA provides for civil liability due to both willful and negligent non-compliance, Title 15 U.S.C. § 1681n and 1681o." Washington v. Direct General Ins. Agency, Inc., 130 F. Supp. 2d 820, 824 (S.D.Miss. 2000). **[*13]**

It has been determined, as previously noted, that count three has been sufficiently alleged as a breach of contract claim. Since the purpose of a special defense is to "plead facts that are consistent with the allegations of the complaint," Fidelity Bank v. Krenisky, supra, 72 Conn.App. 718, Title 15 U.S.C. §§ 1681s-2 and 1681t(b)(1)(F) do not apply to breach of contract claims. Therefore, Larobina's motion to strike First Union's second special defense to count three is granted.

C. First Special Defense to Count Four, Negligence Claim

First Union's first special defense to count four states that Larobina's claim of negligence is preempted by the provisions of 15 U.S.C. § 1681h(e) [6] because the claim alleges negligence with respect to the reporting of information to consumer agencies. First Union states that the allegations from paragraph one of its first special defense to count three is incorporated by reference in this special defense regarding the reporting of Larobina's default on the note. First Union argues that in his complaint, "Larobina alleges that 'starting in April 1999, [First Union] reported to Experian, **[*14]** Trans Union and Equifax credit reporting agencies that it had instituted foreclosure proceedings against the plaintiff through its attorney [and that] the defendant's actions constitute negligence from which the plaintiff has suffered damages." Larobina argues that his negligence claim falls within the exceptions to preemption as stated in § 1681h(e).

HN12[] "The FCRA . . . recognizes that a consumer may . . . bring an action proceeding under state common law for defamation, slander or invasion of privacy, [and negligence] but only if the consumer proves malice [or willful intent to injure such consumer]. That is, § 1681h(e) grants consumer reporting agencies, users of consumer reports, and furnishers of information qualified immunity from state law claims of this nature. Section 1681h(e) is therefore not a grant of federal subject matter jurisdiction, but rather creates a defense a consumer must overcome to succeed on a state law claim against someone acting in a capacity that is regulated **[*15]** by the Act." Stafford v. Cross Country Bank, supra, 262 F. Supp. 2d 782.

HN13[] Some courts have held that "applying § 1681h(e) to [a] negligence claim would require [a] plaintiff to show that [a] defendant . . . acted negligently and with malice or willful intent to injure. 15 U.S.C. § 1681h(e) (2003). This results in a requirement that [a] plaintiff prove intentional or malicious negligence. This level of negligence is inherently contradictory in that negligence does not include an element of intent. In fact, intentional negligence is an oxymoron." (Internal quotation marks omitted.) Carlson v. Trans Union, LLC, 261 F. Supp. 2d 663, 665 (N.D.Tex. 2003).

"A wilful and malicious injury is one inflicted intentionally without just cause or excuse. It does not necessarily involve the ill will or malevolence shown in express malice. Nor is it sufficient to constitute such an injury that the act resulting in the injury was intentional in the sense that it was the voluntary action of the person involved. Not only the action producing the injury but the resulting injury must be intentional . . . A wilful or malicious injury is one caused **[*16]** by design. Wilfulness and malice alike import intent . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances." (Citation omitted; internal quotation marks omitted.) Mingachos v. CBS, Inc., 196 Conn. 91, 102, 491 A.2d 368 (1985).

[6] See footnote 3.

Count four alleges a cause of action against First Union for [damages] due to its negligent credit reporting. First Union could be exempt from such action by virtue of the FCRA statute and case law; see Bank of New York v. Conway, Superior Court, judicial district of Hartford, Docket No. CV 02 0815603 (September 23, 2003, Freed, J.T.R.); see also *§ 1681h(e)*; unless "the credit reporting (agency) has furnished false information with malice or willful intent to injure." (Internal quotation marks omitted.) *New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)*.

Since negligence and willful and/or malicious intent to injure are alleged by Larobina in the fourth count notwithstanding contradictory implications, *§ 1681h(e)* could provide immunity for First Union if wilfulness or malice is not proven. Therefore, **[*17]** Larobina's motion to strike the first special defense to count four is denied.

D. Second Special Defense to Count Four, Negligence Claim

First Union's second special defense to count four states that it is subject to the FCRA's *§ 1681s-2* [7] and Larobina's claim is, therefore, preempted by the provisions of *§ 1681t(b)(1)(F)*. [8] In addition to incorporating paragraphs one through three of First Union's first special defense to count four as support for the reporting of Larobina's default on the note, First Union again submits that it is a person who furnishes information to consumer reporting agencies. Additionally, First Union cites to paragraphs eighteen [9] and nineteen [10] of count four of the complaint to bolster its argument that these activities plainly illustrate that *§ 1681s-2* is applicable to this dispute.

[*18] ***HN14***[] "The FCRA's two separate preemption provisions are contained in *§ 1681t(b)(1)(F)*, which provides furnishers of credit with absolute immunity when filling their obligations under *§ 1681s-2*; and *§ 1681h(e)*, which provides furnishers of credit information with qualified immunity from suits 'proceeding in the nature of defamation, invasion of privacy, or negligence.' Importantly, Congress . . . added the first, more sweeping, *§ 1681t(b)(1)(F)* language in a series of 1996 amendments. Those amendments made no mention of the earlier *§ 1681h(e)* language. The tension between these two provisions therefore results from the fact that *§ 1681h(e)* permits state tort claims, but requires a higher standard of proof for those in the nature of defamation, slander, or invasion of privacy, while *§ 1681t(b)(1)(F)* prohibits all state claims covered by *§ 1681s-2*." *Stafford v. Cross Country Bank, supra, 262 F. Supp. 2d 784-85*.

In *Bank One, N.A. v. Colley, 294 F. Supp. 2d 864, 868 (M.D.La 2003)*, the court was faced with this very same issue, whether a state law claim was preempted by *§ 1681t(b)(1)(F)*. The court stated that "the question of preemption of state common-law **[*19]** claims under the FCRA has not yet been addressed by a Circuit Court. However, ***HN15***[] several district courts around the country have considered how and when to apply each preemption provision to pendent state common-law claims. Three approaches have emerged from these district courts. The first approach is to interpret *§ 1681t(b)(1)(F)*, which was added to the FCRA after *§ 1681h(e)*, as completely subsuming *§ 1681h(e)*. This approach, which would call for preemption of all pendent state law claims, has been rejected by at least one court because Congress left *§ 1681h(e)* in place when it added *§ 1681t(b)(1)(F)*. The second approach is to read *§ 1681h(e)* as applying to state tort actions and *§ 1681t(b)(1)(F)* as applying to state statutory regulation. The third approach, called the temporal approach, has been applied most often.

HN16[] The temporal analysis relies on the language of *§ 1681t(b)(1)(F)* itself to conclude that *§ 1681t(b)(1)(F)* should only be used to preempt state actions premised upon a credit furnisher's conduct occurring after the furnisher receives notice of a dispute. *[Section] 1681t(b)(1)(F)* states, in relevant part, 'no requirement or prohibition

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[7] See footnote 4.

[8] See footnote 5.

[9] "The defendant had never instituted any litigation of any sort against the plaintiff since the beginning of the world until even date herewith."

[10] Notwithstanding the fact that the defendant was well aware that it had not instituted foreclosure proceedings against the plaintiff and that plaintiff was not in default of the Note, the defendant intentionally caused said false reporting to remain on the plaintiff's credit report from April 1999-December 1999."

may be imposed under the **[*20]** laws of any State with respect to any subject matter regulated under . . . *section 1681s-2* of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . .' *[Section] 1681s-2*, in turn, only regulates conduct of furnishers of information after the furnishers have been either 'notified by the consumer . . . that specific information is inaccurate' or notified by a consumer reporting agency that a dispute over the accuracy of information has arisen. Because the conduct regulated by *§ 1681s-2* has a temporal component and *§ 1681t(b)(1)(F)* is based on *§ 1681s-2*, it follows that the application of *§ 1681t(b)(1)(F)* likewise depends on when the furnisher of information received notice of a dispute. Thus, ***HN17***[] the bottom line of the temporal analysis is that preemption of state law claims arising before the furnisher of information receives notice of the dispute is governed by *§ 1681h(e)* and preemption of state law claims arising after such a time is governed by *§ 1681t(b)(1)(F)*." *Bank One, N.A. v. Colley, supra, 294 F. Supp. 2d 868-69*.

In the present case, the court finds that count four may be preempted by *§ 1681t(b)(1)(F)*. **[*21]** Based upon the reasoning in Bank One, N.A. v. Colley, and the facts alleged by First Union in its second special defense, a defense of preemption under a temporal analysis may apply to a furnisher of information whose conduct is regulated by *§ 1681s-2* and who has been notified by the consumer that specific information is inaccurate or notified by a consumer reporting agency that a dispute over the accuracy of the information has arisen. Therefore, Larobina's motion to strike the second special defense to count four of the complaint is denied.

E. First Special Defense to Count Five, Defamation Claim

First Union's first special defense to count five states that Larobina's claim is preempted by the provisions of *§ 1681h(e)*. Count five of Larobina's complaint reincorporates count four in its entirety and contends that First Union's conduct rises to the level of defamation. First Union, therefore, reincorporates its argument set forth in section C. The cause of action in the present count, however, is defamation, not negligence.

Section 1681h(e) ***HN18***[] explicitly states that it is applicable to causes of action sounding in defamation. Based upon the language of *§ 1681h(e)*, this court finds **[*22]** that First Union has pleaded sufficient facts to withstand a motion to strike. Therefore, Larobina's motion to strike *§ 1681h(e)* as a defense to count five is denied.

F. Second Special Defense as to Count Five, Defamation Claim

First Union's second special defense to count five states that Larobina's claim is preempted by the provisions of *§ 1681t(b)(1)(F)*. First Union reincorporates its argument set forth in sections B and D.

Based upon the facts alleged by First Union in its special defense and the reasoning in section D, this court finds that *§ 1681t(b)(1)(F)* could be a special defense. Therefore, Larobina's motion to strike the second special defense to count five of the complaint is denied.

G. First Special Defense to Count Six, Violation of *15 U.S.C. § 1647* Claim

First Union's first special defense to count six states that Larobina's claim is time barred by the provisions of *General Statutes § 36a-683(e)*. [11] **[*24]** First Union contends that Larobina's claim under the Federal Truth in Lending Act, *15 U.S.C. § 1601, et seq.*, or more specifically, *§ 1647(a)*, [12] is untimely. ***HN19***[] The provisions of

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[11] *General Statutes § 36a-683(e)* states: ***HN20***[] "Time limit for bringing action-Any action under this section shall be brought in any court of competent jurisdiction within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of *sections 36a-675 to 36a-685*, inclusive, in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action." Emphasis added.) See also *15 U.S.C. § 1640(e)*.

[12] *15 U.S.C. § 1647(a)* states: ***HN21***[] "(a) Index requirement-In the case of extensions of credit under an open end consumer credit plan which are subject to a variable rate and are secured by a consumer's principal dwelling, the index or other rate of interest to which changes in the annual percentage rate are related shall be based on an index or rate of interest which is publicly available and is not under the control of the creditor."

this act **[*23]** are applicable to creditors in Connecticut pursuant to *General Statutes § 36a-678(a)*. [13] First Union's special defense provides the following facts. The note was executed as part of the loan transaction between Larobina and Union Trust, which occurred on September 25, 1986. *Section 36a-683(e)* requires that all actions based on violations of the Connecticut Truth in Lending Act be commenced within one year of the date of the occurrence. Larobina's claims in count six are based on the note and first accrued on September 25, 1986. The cause of action asserted in count six was first alleged by Larobina in the revised complaint filed September 10, 1999. First Union states that these allegations clearly show that Larobina did not bring his claim within the one-year time period.

Larobina argues that First Union already presented its legal position as to the applicability of *§ 1640(e)* [14] at oral argument. At that time, the court concluded that "the statute of limitations began to run on the date that the plaintiff was first put on notice of a violation and not, as the defendant argues from **[*25]** the date that the note was executed fourteen years ago." (Internal quotation marks omitted.) *Larobina v. First Union National Bank, supra*, Superior Court, Docket No. CV 99 0170845.

HN24[] "A consumer's rights under the [Truth in Lending] Act are subject to a one-year limitation period that begins to run 'from the date of the occurrence of the violation.' *15 U.S.C. § 1640* **[*26]** (e). Most of the reported cases which have considered the limitation provision of the Act have done so in the context of 'close end' credit transactions . . . As a general rule the disclosures required by the Act are revealed to the consumer at the time the contract for the extension of credit is executed or, at the very latest, at the time of performance. Thus there is a specific time at which a violation occurs and a court can use that occurrence as the point from which the limitation period begins to run." *Baskin v. G. Fox & Co., 550 F. Supp. 64, 66 (D.Conn. 1982)*.

"However, ***HN25***[] an open end credit arrangement . . . is distinguishable on several grounds from a close end transaction and necessitates a different rationale in applying the limitation provision. The Act defines open end credit plan in *§ 1602(i)*: The term open end credit plan means a plan under which the creditor reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. As a practical matter, when a consumer applies for and is issued a credit card under an open **[*27]** end credit plan, there is no extension of credit from a lender to a potential borrower, because no debt has yet accrued. With the free ride period permitted under most credit cards, it is only when the first finance charge is imposed that a consumer usually becomes aware that a violation of the Act has occurred. This may be many months after the application for and issuance of the card." (Emphasis added; internal quotation marks omitted.) *Id., 66-67*.

"Under these circumstances it appears evident that the purpose of the Act-to ensure the informed use of credit-is best served if the starting point for the limitation period is deemed to be the date when there has been a finance charge which puts the consumer on notice that a violation has occurred." (Emphasis added.) *Id., 67*.

In the present case, Larobina alleges in count six that he had an open-end extension of credit. Judge Karazin stated, in a previous opinion, that "the statute of limitations began to run on the date that the plaintiff was first put on notice of a violation and not, as the defendant argues, from the date that the note was executed, fourteen years ago. [First Union] makes no argument that **[*28]** the plaintiff instituted this action more than one year from the date

[13] *General Statutes § 36a-678(a)* states: ***HN22***[] "(a) Except as otherwise provided in *sections 36a-675 to 36a-685*, inclusive, or regulations adopted by the commissioner, each person shall comply with all provisions of the Consumer Credit Protection Act (*15 U.S.C. § 1601 et seq.*) which apply to such person."

[14] *15 U.S.C. § 1640(e)* states, in pertinent part: ***HN23***[] "(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement-Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." (Emphasis added.)

he was first put on notice of a violation. Therefore, the motion to strike count six is hereby denied. " *Larobina v. First Union National Bank, supra*, Superior Court, Docket No. CV99 0170845. This court is inclined to agree with Judge Karazin and treat the credit as open ended as well. Therefore, the statute of limitations begins to run when Larobina was put on notice. Further, this special defense fails to submit any facts which would support the notion that this action was instituted more than a year from the date Larobina was first put on notice nor does First Union make that argument. Larobina's motion to strike First Union's first special defense to count six is granted.

H. First Special Defense to Count Seven, Mail Fraud Claim

First Union's first special defense to count seven states that Larobina's Racketeer Influenced and Corrupt Organization (RICO) claim in count seven is time barred pursuant to *15 U.S.C. § 15b*. [15] First Union argues that Larobina did not raise a claim of civil RICO until the filing of the revised complaint on December 28, 2001, and that his allegations point to **[*29]** a variety of acts, occurring prior to December 28, 1997, more than four years before asserting this count. Based upon the caselaw, the statute of limitations runs from when Larobina discovered or should have discovered the injury.

HN27[] "Although the RICO statute does not contain a statute of limitations, the Supreme Court has held that the four-year statute of limitations of the Clayton Act [16] is analogous and therefore applicable to federal racketeering causes of action . . . Because of the Racketeer Influenced and Corrupt Organization Act's unique 'pattern of racketeering activity' requirement, the development of accrual theories for RICO causes of action has taken a somewhat different path to reach **[*30]** today what is by and large the same rule as that applied in ***antitrust law***." (Citation omitted.) *Astoria Entertainment, Inc. v. Edwards, 159 F. Supp. 2d 303, 325 (E.D.La. 2001)*.

HN29[] Three distinct approaches have emerged to determine when the four-year period of time commences to run. "Some Circuits, like the Fifth . . . applied an injury discovery accrual rule starting the clock when a plaintiff knew or should have known of his injury.

Some applied the injury and pattern discovery rule . . . under which a civil RICO claim accrues only when the claimant discovers, or should discover, both **[*31]** an injury and a pattern of RICO activity.

The Third Circuit applied a last predicate act rule . . . Under this rule, the period began to run as soon as the plaintiff knew or should have known of the injury and the pattern of racketeering activity, but began to run anew upon each predicate act forming part of the same pattern." (Citations omitted; internal quotation marks omitted.). *Rotella v. Wood, 528 U.S. 549, 553-54, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*.

The Court held, in rejecting the two latter theories, that ***HN30***[] the injury discovery accrual rule applied to civil RICO claims. [17] *Id., 558*. The Court reasoned that "by tying the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery, the rule would extend the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete . . . A limitations period that would have begun to run only eight years after a claim became ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability . . . The fact . **[*32]** . . that difficulty in identifying a pattern is inherent in civil RICO . . . only reinforces our reluctance to parlay the necessary complexity of RICO into worse trouble in applying its limitations rule." (Citation omitted.) *Id., 558-59*.

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[15] *15 U.S.C. § 15b* states that: ***HN26***[] "Any action to enforce any cause of action under *section 15*, *15a*, or *15c* of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

[16] ***HN28***[] The Clayton Act is a federal law enacted to deal with antitrust regulation and practices engaged in for the purpose of restraining trade. The Clayton Act prohibits activity such as price discrimination, tying and exclusive dealing contracts, mergers, and interlocking directorates, where the purpose is to lessen competition or to create a monopoly within an industry. See *15 U.S.C. § 1 et seq.*

[17] That rule requires starting the clock when a plaintiff knew or should have known of his injury.

In the present case, First Union cites to facts alleged by Larobina in his complaint. Along with these facts First Union alleges that they occurred prior to December 28, 1997, and more than four years prior to the assertion of this count on December 28, 2001. First Union may assert this special defense to count seven provided, however, that First Union is able to prove specific instances where Larobina knew or should have known of his damages. Therefore, Larobina's motion to strike First Unions first special defense to count seven is denied.

I. First Special Defense to Count Eight, Negligent Infliction of Emotional Distress Claim

First Union's first special defense **[*33]** to count eight states that Larobina's claim is preempted by *§ 1681h(e)* because the claim alleges negligent infliction of emotional distress. First Union reincorporates its arguments made in section C. Larobina, also, reincorporates his arguments against First Union's first substitute defense to count four to this count.

Count eight alleges a cause of action against First Union for emotional distress due to its negligent credit reporting. Here again, the plaintiff could be exempt from such action by virtue of the FCRA statute and case law. See *§ 1681h(e)*. ***HN31***[] "Immunity will not attach to common-law claims where the credit reporting (agency) has furnished false information with malice or willful intent to injure." (Citation omitted; internal quotation marks omitted.) Bank of New York v. Conway, supra, Superior Court, Docket No. CV 02 0815603.

Based upon this court's reasoning in section C, *§ 1681h(e)* may provide a defense for First Union to count eight. Therefore, Larobina's motion to strike First Union's first special defense to count eight is denied.

J. Second Special Defense to Count Eight, Negligent Infliction of Emotional Distress Claim

First Union's second special defense to **[*34]** count eight states that Larobina's claim is preempted by the provisions of *§ 1681t(b)(1)(F)*. First Union reincorporates its argument set fort in sections B, D and F. Additionally, First Union states that: "Paragraph [twenty-two] of count [eight] further reinforces the position articulated above. Specifically, Mr. Larobina alleges that '[First Union's] refusal to comply with its obligations to notify the major credit reporting agencies of [Larobina's] dispute pertaining to [First Union's] allegation of default, in its refusal to expunge a false report of default and its refusal to expunge a false report for a foreclosure litigation purportedly pending against [Larobina], caused, and continues to cause, [Larobina] emotional distress.' This purported misconduct unequivocally falls within the scope of *Section 1681s-2*." Larobina states that the arguments raised as to the second special defense to count four be incorporated in this count against First Union.

Based upon the facts alleged by First Union in its special defense and reasoning in sections D and F, this court finds that *§ 1681t(b)(1)(F)* could be used as a special defense by First Union in this count. Therefore, **[*35]** Larobina's motion to strike the second special defense to count eight of the complaint is denied.

K. First Special Defense to Count Ten, CUTPA Claim

First Union's first special defense to count ten states that Larobina's claim under the Connecticut Unfair Trade Practices Act (CUTPA) is barred by the provisions of *General Statutes § 42-110g(f)*. In support, First Union states that "Larobina alleges in count ten that First Union has taken various actions that constitute violations of [CUTPA]. Further, First Union states that many of the alleged violations occurred more than three years prior to the date when the complaint was filed. Larobina states that "even if [First Union's] claim was valid, the fact that [First Union] admits that some of the violations did occur inside the three-year limitations period is a significant enough admission to render this defense legally insufficient. Beyond that, however, as set forth in the count, all of the alleged violations occurred only after the bank refused to acknowledge and abide by the re-age agreement which occurred in October 1998. The CUTPA action was filed in January 1999, inside the limitations period. **[*36]** "

"*Section 42-110g(f)* ***HN32***[] provides that an action alleging unfair trade practices under CUTPA may not be brought more than three years after the occurrence of a violation . . . The three-year limitations period for a CUTPA claim is a substantive rather than procedural limitation . . ." (Internal quotation marks omitted.) Chasin v. Pasicki, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 02 0079444 S (April 2, 2004, Bear, J.).

First Union states that many of the violations occurred more than three years prior to the date when the complaint was filed. First Union has not pinpointed one particular occurrence or one date on which a particular occurrence transpired. If any of these various allegations were to have occurred, however, more than three years prior to the filing of the complaint then First Union would have a defense to that occurrence.

HN33[] "In determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense." *County Federal Savings & Loan Ass'n v. Eastern Associates, 3 Conn.App. 582, 585, 491 A.2d 401*. There are enough facts present **[*37]** to deny Larobina's motion to strike First Union's first special defense to count ten.

L. First Special Defense to Count Eleven, Negligent Misrepresentation Claim

First Union's first special defense to count eleven states that Larobina's claim of negligent misrepresentation is time barred by the provisions of *General Statutes § 52-577*. First Union argues that the cause of action asserted in count eleven was first alleged in the filing of an amended complaint on September 10, 1999. Further, First Union argues that the cause of action occurred more than three years prior to September 10, 1999. Larobina argues that a tort claim does not accrue until a plaintiff discovers or should have discovered that he has been injured and that First Union has not alleged facts in its special defense consistent with the complaint.

General Statutes § 52-577 provides that: ***HN34***[] "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." *General Statutes § 52-577*. "*Section 52-577* ***HN35***[] is an occurrence statute, meaning that the time period within which a plaintiff must commence **[*38]** an action begins to run at the moment the act or omission complained of occurs. Our Supreme Court stated in *Fichera v. Mine Hill Corp., 207 Conn. 204, 212, 541 A.2d 472 (1988)*: In construing our general tort statute of limitations, *General Statutes § 52-577*, which allows for an action to be brought within three years from the date of the act or omission complained of, we have concluded that the history of that legislative choice of language precludes any construction thereof delaying the start of the limitation period until the cause of action has accrued or the injury has occurred." (Internal quotation marks omitted.) *Rosenfield v. Rogin, Nassau, Caplan, Lassman & Hirtle, LLC, 69 Conn.App. 151, 158-59, 795 A.2d 572 (2002)*.

In the present case, Larobina argues that the complaint affirmatively alleges facts that indicate that the earliest conceivable date that the plaintiff could have discovered his injury was on October 28, 1998, [18] the date of a letter from First Union indicating that Larobina's mortgage was payable in full. Larobina filed this action in February 1999, and amended the complaint to the current thirteen counts in **[*39]** January 2000, within the time prescribed by the subject statute of limitations. Larobina alleges that the negligent misrepresentation occurred in October of 1998, when he received a statement demanding the entire loan balance. First Union states that the cause of action asserted in count eleven occurred prior to September 10, 1996, and, therefore, should be barred by *§ 52-577*. There is clearly a dispute as to when notice was given to Larobina so as to commence the running of the statute of limitations. If the statute began to run on the date alleged by Larobina, he would clearly be within the time window for filing a complaint. If the date alleged by First Union proves to be valid, however, and the limitations period was to commence prior to that date then there would be merit to the applicability of the statute thus barring Larobina's claim.

Taking First Union's facts alleged as true, a statute of limitations defense under *§ 52-577* would **[*40]** be applicable if this cause of action for negligent misrepresentation was filed in Larobina's amended complaint in February of 2000. There are enough facts present to deny Larobina's motion to strike First Union's first special defense to count ten.

M. Second Special Defense to Count Eleven, Negligent Misrepresentation Claim

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[18] This is the date of the bank's alleged repudiation of the re-age agreement.

First Union's second special defense to count eleven states that Larobina's claim of negligent misrepresentation is time barred also by the provision of *General Statutes § 52-584*. [19] First Union argues that pursuant to *§ 52-584*, any action based on negligence must be commenced within three years from the date of the act complained of. First Union contends that the cause of action in count eleven was first alleged in the filing of the complaint on September 10, 1999. Since the allegation occurred prior to September 10, 1996, this count must be barred.

[*41] ***HN37***[] "The three-year limitation of *§ 52-577* is applicable to all actions founded upon a tort which do not fall within those causes of action carved out of *§ 52-577* and enumerated in *§ 52-584* or another section." (Internal quotation marks omitted.) *Rosato v. Mascardo, 82 Conn.App. 396, 407, 844 A.2d 893 (2004)*. Because negligent misrepresentation is not specifically enumerated in *§ 52-584*, that section is inapplicable to cases of negligent misrepresentation. Id. In the present case, *§ 52-577* is the applicable statute of limitations to a cause of action sounding in negligent misrepresentation and *§ 52-584* is not. Therefore, Larobina's motion to strike First Union's second special defense to count eleven is granted.

N. First Special Defense to Count Thirteen, Specific Performance Claim

First Union's first special defense to count thirteen, seeking specific performance, states that Larobina has failed and neglected to make any payments under either the note or the alleged re-age agreement since, at least, February of 1999. It further maintains that Larobina is not ready, willing and able to perform under the terms of the re-age agreement and by his own admission is in **[*42]** breach of the agreement. Therefore, First Union argues that the foregoing demonstrates that Larobina has unclean hands and cannot obtain the equitable relief he seeks.

HN38[] The unclean hands doctrine may be asserted as a special defense in a foreclosure action. *Thompson v. Orcutt, 257 Conn. 301, 777 A.2d 670 (2001)*. "Our jurisprudence has recognized that those seeking equitable redress in our courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court . . . It is applied . . . for the advancement of right and justice . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation . . . The trial court enjoys broad discretion in determining **[*43]** whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Citations omitted; emphasis added; internal quotation marks omitted.) *Ridgefield v. Eppoliti Realty Co., 71 Conn.App. 321, 334-35, 801 A.2d 902*, cert. denied, *261 Conn. 933, 806 A.2d 1070 (2002)*.

In this case, First Union alleges that Larobina is not entitled to the equitable remedy of specific performance because he has unclean hands. First Union alleges, in support of this special defense, that Larobina established a line of credit with Union Trust in the amount of $ 55,000 on September 25, 1986, which is set forth in the "Home Equity Line of Credit Agreement." Further, First Union alleges that "on or about November 1, 1994, by document captioned, Secured Credit Line Re-age Agreement, . . . the plaintiff and First Fidelity mutually agreed to extend said maturity date. Specifically, in consideration of the extension, the plaintiff agreed to forfeit any further right to obtain any additional loans under the Note, and in exchange, Fidelity expressly modified the terms of the Note by allowing the plaintiff to pay each monthly **[*44]** installment of interest and principal as defined under Paragraph 2.2 of the Note, until such time as the then existing balance was paid in full." Further, First Union alleges that the plaintiff has

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[19] *General Statutes § 52-584* states: ***HN36***[] "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed." (Emphasis added.)

made monthly payments pursuant to the note and the re-age agreement from the inception date of the note through February 1999.

Based upon these facts, First Union has essentially asserted that Larobina engaged in wilful misconduct with regard to the matter in litigation by ceasing to pay under the note from February of 1999 to the present. Therefore, Larobina's motion to strike the first special defense to count thirteen is denied.

Accordingly, Larobina's motion to strike First Union's special defenses is granted as to the first and second special defenses to count three, the first special defense to count six and the second special defense to count eleven. Larobina's motion to strike the remaining special defenses is denied.

D'ANDREA, Judge Trial Referee

Ferrell v. Wyeth-Ayerst, Labs., Inc.

United States District Court for the Southern District of Ohio, Western Division

June 30, 2004, Decided

Case No. C-1-01-447

Reporter
2004 U.S. Dist. LEXIS 15127 *; 2004 WL 6073010

MARJORIE FERRELL, et al, Plaintiffs, v. WYETH-AYERST, LABORATORIES, INC., et al, Defendants

Subsequent History: Motion denied by *Ferrell v. Wyeth-Ayerst Labs., 2005 U.S. Dist. LEXIS 59473 (S.D. Ohio, Mar. 1, 2005)*

Related proceeding at *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 2005 U.S. Dist. LEXIS 11676 (S.D. Ohio, June 13, 2005)*

Stay denied by *Ferrell v. Wyeth-Ayerst Labs., Inc., 2005 U.S. Dist. LEXIS 25358 (S.D. Ohio, Oct. 24, 2005)*

Disposition: [*1] Wyeth's motion to dismiss and to strike denied. Wyeth's motion for partial dismissal granted in part and denied in part.

Core Terms

unjust enrichment, indirect, purchaser, state law claim, named plaintiff, state law, allegations, prosecute, antitrust, antitrust statute, antitrust claim, reside, argues, Funds, motion to dismiss, Consolidated, consumer, estrogen, suits

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN1[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

28 U.S.C.S. § 1367 permits the exercise of supplemental jurisdiction over the state law claims that arise from a common nucleus of operative facts.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN2[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

It is important for a district court to be assured that supplemental state law claims, and the issues they raise, do not swallow the federal claims and become the real purpose of a law suit in federal court.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] **Justiciability, Standing**

The issue of a plaintiff's standing to sue the defendant must be distinguished from the issue of whether a class plaintiff can properly prosecute absent class members' claims. Standing is established when a potential plaintiff (1) has suffered an injury in fact, an invasion of a legally protected interest that is concrete and actual; (2) can demonstrate that a causal connection exists between the injury and the conduct of which the plaintiff complains; and (3) can demonstrate the likelihood, and not merely the speculative possibility, that the injury will be redressed by the requested relief.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Contracts Law > Statute of Frauds > General Overview

HN4[] **Private Actions, Purchasers**

New Jersey does not permit an indirect purchaser action under the state's antitrust statute, *N.J. Stat. Ann. § 56:9-1 et seq.*

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN5[] **Purchasers, Indirect Purchasers**

Louisiana law does not recognize an indirect purchaser's claim for damages under the state's antitrust statute.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN6[] **Private Actions, Purchasers**

The Arizona Supreme Court holds that the Arizona antitrust statute permits indirect purchaser anti-trust suits.

Counsel: For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers Health And Welfare Fund, Anita McDermott, Plaintiffs: Janet Gilligan Abaray, LEAD ATTORNEY, Lopez Hodes Restaino Milman & Skikos, Cincinnati, OH.

For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers Health And Welfare Fund, Barbara Forgue, Anita McDermott, Plaintiffs: Andrew Bennett Spark, Sarasota, FL.

For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers **[*2]** Health And Welfare Fund, Barbara Forgue, Anita McDermott, Plaintiffs: Elizabeth Fegan Hartweg, Kenneth A Wexler, The Wexler Firm, Jennifer Fountain Connolly, The Wexler Firm LLP, Anthony J Sievert, Chicago, IL.

For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers Health And Welfare Fund, Barbara Forgue, Anita McDermott, Plaintiffs: Craig R Spiegel, Hagens Berman LLP, Steve W Berman, Hagens Berman LLF, Seattle, WA.

For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers Health And Welfare Fund, Barbara Forgue, Anita McDermott, Plaintiffs: Daniel E Gustafson, Samuel D Heins, Heins Mills & Olson PLC, Minneapolis, MN.

For Marjorie Ferrell aka Margie Mattoon, Laurine Miller, Jacqueline Scarrett, Mary Savaglio, Elizabeth Zolnoski, Patricia S Spratt, Tina Lorraine **[*3]** Allen, United Food And Commercial Workers Unions And Employers Midwest Health Benefits Fund, Twin Cities Bakery Workers Health And Welfare Fund, Barbara Forgue, Anita McDermott, Plaintiffs: Joseph Edward Conley, Jr., Buechel & Conley, Crestview Hills, KY.

For Barbara Forgue, Plaintiff: Dianne M Nast, Roda & Nast PC, Lancaster, PA.

For Barbara Forgue, Plaintiff: Patrick E Cafferty, Miller Faucher & Cafferty LLP, Ann Arbor, MI.

For Wyeth-Ayerst Laboratories Inc, American Home Products Corporation, Defendants: Grant Spencer Cowan, James Ralph Adams, LEAD ATTORNEYS, Frost Brown Todd LLC, Cincinnati, OH.

For Wyeth-Ayerst Laboratories Inc, American Home Products Corporation, Defendants: Mark R Merley, LEAD ATTORNEY, Asim Varma, Douglas L Wald, Matthew D Meisner, Son B Nguyen, Arnold & Porter, William J Baer, Arnold & Porter LLP, Washington, DC.

For Wyeth-Ayerst Laboratories Inc, American Home Products Corporation, Defendants: Brian D Werner, Brooke B Holley, Peggy M Balesteri, Winston & Strawn, Chicago, IL.

For Wyeth-Ayerst Laboratories Inc, Defendant: David S Eggert, Arnold & Porter LLP, Washington, DC.

Judges: Sandra S. Beckwith, United States District Judge. **[*4]** Magistrate Judge Timothy S. Hogan.

Opinion by: Sandra S. Beckwith

Opinion

ORDER

Before the Court are the following motions:
Defendants motion to dismiss and to strike (Doc. 8); and
Defendants motion for partial dismissal (Doc. 39);
Plaintiffs opposition thereto (Doc. 43 and 44); and Defendants reply (Doc. 47).

BACKGROUND

Wyeth [1] **[*5]** manufactures Premarin, an estrogen replacement product that has been sold since 1943. (Compl.P 25) [2] The FDA approved Premarin for several uses, including relief from menopausal vasomotor symptoms, vulvar and vaginal atrophy, and prevention of osteoporosis. Premarin is used for both estrogen replacement therapy ("ERT") and hormone replacement therapy ("HRT"). Duramed Pharmaceuticals manufactures Cenestin. After Duramed unsuccessfully sought FDA approval to market Cenestin as a generic substitute for Premarin, it sought approval for Cenestin as a new, branded product. On March 24, 1999, the FDA approved Cenestin for a single indication: the treatment of vasomotor symptoms of menopause.

Duramed later filed suit against Wyeth in this district, contending that Wyeth engaged in monopolistic and anti-competitive practices designed to keep Cenestin from the market and/or from gaining market share. (Case No. C-1-00-735) Other lawsuits against Wyeth followed Duramed's, including the "direct purchaser" action (Case No. C-1-01-704); and these consolidated actions brought by "indirect purchasers" (or "end payors") of Premarin.

The Complaint generally alleges that, both before and after the FDA approved Cenestin, Wyeth engaged in a public campaign to tout the benefits of Premarin, while unfairly and untruthfully denigrating Cenestin. (Compl.P 46-50) Plaintiffs allege that, after Cenestin gained FDA approval, Wyeth engaged in a systematic attempt to keep Cenestin from growing market share, by entering into "exclusive" contracts with health insurers and pharmacy benefit managers (PBMs) in the United States. These exclusive contracts require **[*6]** that Premarin be the only conjugated estrogen product on the plans' drug formulary. Wyeth is able to procure these exclusive contracts by offering rebates, discounts, fees and other financial incentives to the plans and PBMs. (Compl. P61) Thus, Plaintiffs allege, the plans or PBMs would incur substantial financial losses by adding Cenestin to their formularies, as they would lose their bargained for rebates, discounts or fees if the plans failed to meet their sales targets for Premarin.

The "indirect purchaser" Plaintiffs in this case generally allege that Wyeth's monopolistic and anti-competitive conduct relative to Duramed's marketing of Cenestin has injured them in two ways: (1) Wyeth's conduct caused plaintiffs to pay more for conjugated estrogens than they otherwise would have paid, and (2) Wyeth's conduct excluded Duramed (and other unnamed potential competitors) from the market, "thereby restricting consumers' access to alternative conjugated estrogen products." (Compl. P35 (b) and (c))

ANALYSIS

I. Wyeth's Motion to Dismiss Or Strike.

Wyeth's first motion to dismiss and to strike (Doc 8) was addressed to Plaintiff's original Complaint (Doc 1). The motion **[*7]** to strike was directed to allegations in Paragraphs 41-46 of the original Complaint relating to Wyeth's activities in petitioning the FDA, on the grounds that those allegations are barred by the *Noerr-Pennington* doctrine. The Corrected Consolidated Amended Complaint (Doc. 31) omits the objectionable allegations concerning Wyeth's activities with the FDA. The Court has reviewed the Complaint, and is satisfied that its allegations do not run afoul of *Noerr-Pennington,* nor of this Court's order in *Duramed v. Wyeth.* Therefore, the motion to strike is denied as moot.

Wyeth's first motion to dismiss also asked this Court to decline jurisdiction over Counts III (various state antitrust claims) and Count IV (unjust enrichment claims) of the Complaint. Wyeth does not dispute that this Court has jurisdiction under *28 U.S.C. § 1331* over Plaintiffs' federal antitrust claims in Counts I and II. ***HN1***[ ] *28 U.S.C. § 1367* permits the exercise of supplemental jurisdiction over the state law claims that arise from a "common nucleus of operative facts." The allegations of Wyeth's monopolistic and/or anticompetitive conduct lie at the heart of all claims **[*8]** raised in the Complaint.

[1] Unless otherwise indicated and for ease of reference, "Wyeth" refers to the defendants Wyeth-Ayerst Laboratories Inc. and American Home Products Corporation (the latter apparently now known simply as "Wyeth").

[2] All references to the Complaint (or "Compl.") are to the Corrected Consolidated Amended Class Action Complaint (Doc. 31), unless otherwise indicated.

The Court notes that the federal claims are properly limited to a prayer for injunctive relief, while Counts III and IV seek money damages. This fact alone does not justify a refusal to exercise supplemental jurisdiction over the state law claims. ***HN2***[] But it is important to assure that the state law claims, and the issues they raise, do not "swallow" the federal claims. See, e.g., *De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 309 (3rd Cir. 2003)*, noting that a "federal tail" wagging a "state dog" raises sufficient grounds to deny supplemental jurisdiction over state law claims that are the "real" purpose of the lawsuit.

The Court cannot conclude that the state law antitrust and unjust enrichment claims are the "real" or dominant purpose of Plaintiffs' lawsuit at this stage. The allegations concerning Wyeth's alleged anti-competitive conduct, if accepted by the trier of fact, could form the basis for substantial injunctive relief under federal law. (See Compl. P70 and 75) Therefore, the Court denies the motion to dismiss Counts III and IV in their entirety based on *28 U.S.C. § 1367*.

II. Wyeth's Motion for Partial **[*9]** Dismissal

After Plaintiffs filed their Consolidated Amended Complaint, Wyeth filed a second motion to dismiss (Doc. 39). In this motion, Wyeth seeks dismissal with prejudice of the state law claims arising under the laws of states other than those in which the named Plaintiffs reside. Wyeth contends that the named Plaintiffs lack standing to pursue those claims.

Wyeth also seeks the dismissal of Count IV, Plaintiffs' state law "unjust enrichment" claim, in its entirety. Wyeth argues that such a remedy is inappropriate in states that do not permit antitrust indirect purchaser suits. And, in those states that do recognize such suits, Wyeth argues that the adequate remedy at law provided by the state antitrust statute makes equitable relief unavailable.

A. Count III (State Law Antitrust Claims).

Subsequent to the filing of the Consolidated Complaint (Doc. 31), seven of the eight named individual Plaintiffs were withdrawn as class representatives. (See Doc. 49) The remaining named Plaintiffs are: (1) Marjorie Ferrell, a resident of the state of Florida; (2) the United Food & Commercial Workers Midwest Health Benefits Fund ("UFCW Fund"), headquartered in Illinois, which pays for **[*10]** or reimburses its beneficiaries in the states of Arizona, California, Florida, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Michigan, Nevada, North Carolina, New York, Tennessee and Wisconsin (Compl. P20); and (3) the Twin Cities Bakery Workers Health & Welfare Fund ("TCBW Fund"), headquartered in Minnesota, which pays for or reimburses its beneficiaries in the states of Indiana, Minnesota, North Dakota, South Dakota, and Wisconsin. (Compl. P23) (Plaintiff McDermott in Case No. 01-878, consolidated with this action, is also a resident of Florida.)

1. Standing of the Individual Named Plaintiff

Wyeth argues that Ms. Ferrell lacks Article III standing to prosecute state law claims on behalf of residents in states other than Florida. (Wyeth does not contest Ms. Ferrell's standing to prosecute her own claims, both federal and state.)

HN3[] It is important to distinguish the issue of a plaintiff's standing to sue the defendant, from the issue of whether that plaintiff can properly prosecute absent class members' claims. *See* *Fallick v. Nationwide Mutual Ins. Co., 162 F.3d 410, 422 (6th Cir. 1998)*. Standing is established when a potential plaintiff (1) has **[*11]** suffered an injury in fact, an invasion of a legally protected interest that is concrete and actual; (2) can demonstrate that a causal connection exists between the injury and the conduct of which the plaintiff complains; and (3) can demonstrate the likelihood, and not merely the speculative possibility, that the injury will be redressed by the requested relief. *Fallick, supra* (quoting from *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992))*.

Wyeth relies on *In re Terazosin Hydrochloride Antitrust Litigation, 160 F. Supp. 2d 1365 (S.D. Fla. 2001)*, where the district court dismissed antitrust claims arising under the laws of states in which no named plaintiffs resided or purchased the drug at issue, relying on *Griffin v. Dugger, 823 F.2d 1476 (11th Cir. 1987)* and *Prado-Steiman ex rel.*

Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000). (*Griffin* and *Prado-Steiman* generally held that a claim cannot be asserted on behalf of a class unless the named plaintiff has "suffered the injury" that gives rise to that claim.) But in *Terazosin,* the district court had dismissed with **[*12]** prejudice the named plaintiffs' federal law claims, leaving **only** a collection of state law claims brought by individual plaintiffs under various state statutes. It was therefore proper to assure that each named plaintiff had actual standing to bring a claim against the defendant. Moreover, to the extent that *Griffin* and *Prado-Steiman* differ from *Fallick* (which the Court does not conclude), this Court is bound to follow *Fallick.*

Ms. Ferrell unquestionably has standing to prosecute her own claims against Wyeth. The propriety of her representation of other individual consumers residing in states other than Florida should be analyzed under Rule 23.

2. Standing of the Funds

Wyeth argues that the Funds have standing to raise state law claims only in the states where the funds are "located," thus limiting them to claims brought under Illinois law (UFCW Fund) and Minnesota law (TCBW Fund). Wyeth cites Maiden v. Biehl, 582 F. Supp. 1209, 1218 (S.D.N.Y. 1984). That case is inapposite, as it discusses application of a New York borrowing statute to determine the appropriate state's statute of limitation in a securities fraud case.

Here, the Complaint **[*13]** alleges that the Funds have paid (or co-paid) for Premarin on behalf of their members residing in various states. The Court rejects Wyeth's argument that they lack standing to prosecute claims anywhere but in their "home" states, because the **purchase** of Premarin - the critical event causing the alleged antitrust injury - did not take place only in Illinois or Minnesota. The actual purchase allegedly took place in the various states where the Funds' members reside.

The Court finds that the Funds have alleged sufficient facts to establish their Article III standing to pursue state law claims in the "Indirect Purchaser States" where their members purchased Premarin. Thus, UFCW Fund has standing to prosecute state law claims in Arizona, Florida, Kansas, Louisiana, Minnesota, Michigan, Nevada, North Carolina, New York, Tennessee, and Wisconsin. TCBW has standing to prosecute state law claims in Minnesota, North Dakota, South Dakota, and Wisconsin. [3]

[*14] 3. New Jersey, Louisiana, Arizona, Tennessee and Maine State Antitrust Claims.

Wyeth next argues that, if the Count III claims survive its standing challenge, claims under these five states' laws must be dismissed for failure to state a claim under those states' laws.

HN4[] New Jersey does not permit an "indirect purchaser" action under the state's antitrust statute, N.J.S.A. § 56:9-1 et seq. While Plaintiffs mention that statute in their opposition memo (Doc. 43, p. 12), the cases they cite deal with the New Jersey "consumer fraud" statute, N.J.S.A. § 56:8-1, et seq., which is not pled in the Complaint. The Court will not widen the scope of the claims at issue here in this fashion. Moreover, the Court has reviewed the two unpublished opinions from New Jersey trial courts which take diametrically opposed positions on the question of whether the "consumer fraud" statute can support an antitrust indirect purchaser action: *Kieffer v. Mylan Laboratories,* Case No. BER-L-365-99-EM (N.J. Super. Ct. Law Div., Sept. 9, 1999), and *Cement Masons Local Union No. 699 v. Mylan Laboratories,* No. MER-L-000431-99 (N.J. Super. Ct. Law Div., April 18, 2000). Given these facts, the Court will **[*15]** decline to exercise pendent jurisdiction over the Count III New Jersey claim, and that claim is dismissed without prejudice.

This Court follows the Fifth Circuit in finding that **HN5**[] Louisiana law does not recognize an indirect purchaser's claim for damages under the state's antitrust statute. Free v. Abbott Lab., 176 F.3d 298 (5th Cir. 1999), *aff'd on*

[3] UFCW has members in the states of Illinois, Kentucky, and Missouri, and TCBW in Indiana, but these four states are not included in the "Indirect Purchaser States" identified in the Complaint. Plaintiffs expressly exclude California from this action.

other grounds, 529 U.S. 333, 146 L. Ed. 2d 306, 120 S. Ct. 1578 (2000). The Count III claim under Louisiana law is dismissed with prejudice.

HN6[] The Arizona Supreme Court has held that the Arizona antitrust statute permits indirect purchaser suits. Bunkers Glass Co. v. Pilkington PLC, 206 Ariz. 7, 75 P.3d 99 (Ariz. 2003). The motion to dismiss the Count III claim under Arizona law is therefore denied, and the UCBW Fund has standing to prosecute that claim.

The Tennessee antitrust statute has been described as applying to conduct occurring within the state, or "predominantly intrastate transactions." See, e.g., Lynch Display Corp. v. National Souvenir Center, Inc., 640 S.W.2d 837, 840 (Tenn. Ct. App. 1982). A more recent decision clarifies the scope of the statute for indirect purchaser actions. **[*16]** See, Sherwood v. Microsoft Corp., 2003 Tenn. App. LEXIS 539, at *73 (Tenn. Ct. App. July 31, 2003) [Tennessee statute applies to conduct that "substantially affects commerce within this state."] While Wyeth contends this decision is "wrong," this Court is not inclined to second-guess the thoughtful determination by a state intermediate appellate court applying state law to the issue of indirect purchaser suits. [4]

The Complaint alleges UFCW Fund's relationship to its subscribers in Tennessee included paying, or copaying, for Premarin on behalf of those subscribers. Therefore, the Tennessee claim should proceed. A more developed factual record is needed concerning whether the conduct occurring within **[*17]** the state falls within the standards articulated by the Tennessee court. The same analysis apparently applies to the Maine antitrust statute. See In re Microsoft Antitrust Litig., 2001 Me. Super. Lexis 47 (Super.Ct. March 26, 2001). The motion to dismiss the Tennessee and Maine claims is denied.

B. Count IV (Unjust Enrichment)

Wyeth argues that the "unjust enrichment" claims in states that follow *Illinois Brick* and preclude antitrust damages claims by indirect purchasers must be dismissed, because the claim attempts to evade state law. Wyeth also seeks dismissal of the unjust enrichment claims in those states that permit indirect purchaser actions, arguing that the antitrust statutes in those states provide a "complete and adequate" remedy at law.

Plaintiffs cite In re Cardizem CD Antitrust Lit., 105 F. Supp.2d 618, 669-670 (E.D. Mich. 2001), to argue that their claims for unjust enrichment, purportedly brought under the laws of all fifty states, should survive. But the facts in *Cardizem* were far different. There, the individual plaintiffs were residents of just ten states who brought unjust enrichment claims in those ten states (along **[*18]** with state antitrust claims in eight of the ten). The case also involved an alleged per se illegal agreement between Cardizem's manufacturer and its generic competitors, involving many millions of dollars paid by the manufacturer to forestall the introduction of generic substitutes for Cardizem. The plaintiffs sought disgorgement of those payments under unjust enrichment principles.

In contrast, the district court in *In re Terazosin Hydrochloride Antitrust Lit., 160 F. Supp. 2d 1365 (S.D. Fla. 2001)* addressed a similar omnibus claim for unjust enrichment, brought under the common law of "every state." The district court dismissed the claim (without prejudice), describing it as an "end run" around state laws that do not permit indirect purchaser damage suits. The court permitted the claim to proceed only in states that also permit indirect purchasers to sue for antitrust damages.

As with the Count III claims, the named Plaintiffs must have standing to prosecute an unjust enrichment claim. Ms. Ferrell's claim under Florida law appears to be a valid alternative remedy to her statutory claim. While there is some Florida authority suggesting that unjust enrichment is not **[*19]** available if plaintiff has an "adequate legal remedy" (see, e.g., Martinez v. Weyerhaeuser Mortgage Co., 959 F. Supp. 1511 (S.D. Fla 1996) and cases cited therein), those cases are based on written contracts, which provide the "adequate legal remedy" to the aggrieved party. Moreover, in a more recent opinion, the *Terazosin* court certified both antitrust and unjust enrichment claims under

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[4] *See* Meridian Mutual Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999): "A federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise …"

Florida law. See, *In Re Terazosin Antitrust Lit., 220 F.R.D. 672, 2004 U.S. Dist. LEXIS 6176 (S.D. Fla., April 8, 2004)*.

Similarly, in the states in which the two Funds have standing to pursue the state law antitrust claims, Wyeth has not shown that an unjust enrichment claim is barred as a matter of law as an alternate remedy.

This Court is not persuaded that the unjust enrichment claims, which plaintiffs admit are pled as an alternate remedy to their state ***antitrust law*** claims, should be dismissed under *Rule 12*. As with the Count III claims, the question of whether the named Plaintiffs may prosecute their unjust enrichment claims on behalf of a class of "all" consumers in "all" fifty states is analyzed under *Rule 23*.

CONCLUSION

The Court denies **[*20]** Wyeth's motion to dismiss and to strike (Doc. 8). The Court grants in part and denies in part Wyeth's motion for partial dismissal (Doc. 39).

DATED: June 30, 2004

s/

Sandra S. Beckwith

United States District Judge

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Island Mortgages of New Jersey v. 3M (Minnesota Min. and Mfg. Co.)

Superior Court of New Jersey, Law Division, Passaic County

June 30, 2004, Decided

DOCKET NO. PAS-L-2997-03

Reporter

373 N.J. Super. 172 *; 860 A.2d 1013 **; 2004 N.J. Super. LEXIS 382 ***

ISLAND MORTGAGES OF NEW JERSEY AND PERENNIAL LAWN CARE, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY), DEFENDANT.

Subsequent History: [*1]** APPROVED FOR PUBLICATION, September 29, 2004.

Core Terms

antitrust, tape, retailers, consumer fraud, unconscionable, plaintiffs', purchasers, advertisement, allegations

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Motions to dismiss a plaintiff's complaint should be approached with great caution and should only be granted in the rarest of instances. Despite this caveat, a court must dismiss a plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, the plaintiff's obligation is not to prove the case, but only to make allegations, which, if proven, would constitute a valid cause of action.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The purpose of the New Jersey Consumer Fraud Act is to prevent deception, fraud, or falsity, whether by acts of commission or omission.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN4[] **Consumer Protection, Deceptive & Unfair Trade Practices**

See *N.J. Stat. Ann. § 56:8-2*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Consistent with its expansive language, the New Jersey Consumer Fraud Act must be applied broadly in order to accomplish its remedial purpose, namely to root out consumer fraud.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

HN6[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The heart of an unconscionable commercial practice is the capacity to mislead.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Justiciability > Standing > General Overview

HN7[] **Public Enforcement, State Civil Actions**

In determining standing, a court must look to whether a real possibility of conflict would exist if the New Jersey Consumer Fraud Act were to apply to a particular practice.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

See *N.J. Stat. Ann. § 56:9-3*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] Actual Monopolization, Anticompetitive & Predatory Practices

The purpose of the New Jersey Antitrust Act, *N.J. Stat. Ann. § 56:9-3*, is to prevent trade-restraining practices, which ordinarily deprive the public of the benefits of a competitive market.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Relations With Governments

HN10[] Public Enforcement, State Civil Actions

See *N.J. Stat. Ann. § 56:9-18*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN11[] Public Enforcement, State Civil Actions

N.J. Stat. Ann. § 56:9-18 clearly provides that New Jersey courts must look to federal case law for interpretation of the New Jersey statutes where New Jersey case law is silent.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Justiciability > Standing > General Overview

HN12[] Remedies, Damages

Pass-through purchasers of a defendant's products do not have standing to bring suit under the federal ***antitrust law***, § 1 of the Sherman Act. Only direct purchasers could bring such a suit under the Sherman Act, reasoning that the allowance of indirect suits would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness. To allow indirect plaintiffs to bring suit would be unfair as defendants are prohibited from setting forth the pass-through argument as an affirmative defense.

Governments > Legislation > Interpretation

HN13[] Legislation, Interpretation

It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter.

Counsel: *Daniel R. Lapinski (Squitieri & Fearon)* and *Timothy A. Scott,* of the Illinois Bar, admitted pro hac vice, for plaintiff Island Mortgage of New Jersey.

David M. Meisels, for defendant (*Herrick, Feinstein,* attorneys).

Judges: MINIMAN, J.S.C.

Opinion by: MINIMAN

Opinion

[*175] **[**1014]** MINIMAN, J.S.C.

The matter before the court involves a class action lawsuit initiated against defendant, Minnesota Mining and Manufacturing Company ("3M"), by plaintiffs, Island Mortgages of New Jersey and Perennial Lawn Care, Inc., and other companies that purchased 3M-brand Scotch tape ("plaintiffs"). Plaintiffs allege that defendant's conduct constitutes unconscionable commercial **[**1015]** practice and a violation of the *Consumer Fraud Act.* Defendant now moves to dismiss plaintiffs' complaint for failure to state a claim pursuant to *R. 4:6-2*.

HN1[] Motions to dismiss a plaintiff's complaint should be "approach[ed] with great caution" and should only be granted in "the rarest of instances." *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 771-72, 563 A.2d 31, 48 (1989).* **[***2]** Despite this caveat, a court must dismiss a plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. *Camden County Energy Recovery Assoc., L.P. v. New Jersy Dep't of Envtl. Prot., 320 N.J.Super. 59, 64, 726 A.2d 968, 970 (App. Div. 1999)*. ***HN2***[] On a motion to dismiss, the plaintiff's obligation is "not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." *Leon v. Rite Aid Corp., 340 N.J.Super. 462, 472, 774 A.2d 674, 680 (App.Div.2001)*. This court must determine whether plaintiffs have pled a viable cause of action under the *Consumer Fraud Act*.

The complaint alleges that plaintiffs represent a class of persons "who purchased invisible and transparent tape (collectively "transparent tape") products for home and office use in New Jersey during the period commencing four years prior to the filing of the Complaint through the date of the Complaint (the 'Class Period')." Paragraph 3 of the complaint states:

> To increase its profits and protect its powerful and extremely profitable position, 3M engaged in a course of unconscionable conduct aimed at restricting the access of plaintiffs **[***3]** and the class to lower-priced transparent tape offered by 3M competitors, such as LePage's Inc. ("Lepage's"). 3M's tactics prevented competitors from gaining or maintaining large volume sales by stifling growth of private label tape **[*176]** and by coordinating efforts aimed at large distributors to keep retail prices for Scotch tape high.

Plaintiffs allege that rival companies, such as Lepage's, only had a limited market share but still presented a threat to 3M's market dominance.

Paragraph 6 of plaintiff's complaint alleges:

> 3M's strategy was to tie retailers up in exclusive dealing arrangements which prohibited or, at the very least inhibited, retailers from purchasing private label Scotch tape. 3M offered retailers large lump-sum cash payments, promotional allowances and other cash incentives to encourage them to enter into exclusive dealing arrangements with 3M. 3M also lured retailers with a "bundled" rebate structure that rewarded retailers for refusing to carry private label Scotch tape. The effect of such arrangements was to prevent retailers from offering lower cost private label Scotch tape to plaintiffs and the class.

Plaintiffs allege that defendant's bundled **[***4]** rebates, exclusive dealing, and coercive activity "have caused significant harm to class members by increasing the price they have paid for transparent tape above competitive levels and/or by denying them a free choice in a competitive market, as well as the benefits of innovation."

HN3[] The purpose of the *Consumer Fraud Act* is to "prevent deception, fraud, or falsity, whether by acts of commission or omission." *Fenwick v. Kay American Jeep, Inc., 72 N.J. 372, 376, 371 A.2d 13, 15 (1977)*. The act specifically provides that

> ***HN4***[] The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that the others rely upon **[**1016]** such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice.
>
> [*N.J.S.A. 56:8-2*]

HN5[] Consistent with its expansive language, the *Consumer Fraud Act* must be "applied broadly in order to accomplish its remedial purpose, namely to root out consumer fraud." *Lemelledo v. Beneficial Mgmt. Corp. of America, 150 N.J. 255, 264, 696 A.2d 546, 551 (1997).* **[***5]**

Plaintiffs allege that defendant's coercive activities constitute unconscionable commercial practices. There is no allegation in the complaint that defendant has used deception, fraud or **[*177]** misrepresentations or has concealed material facts regarding the sale of its Scotch tape to plaintiff consumers. There is no allegation that suggests that defendant had any direct contact with any consumer in plaintiffs' class. Plaintiffs' sole legal theory is that defendant's alleged monopolistic conduct is, in itself, an unconscionable commercial practice as contemplated by the *Consumer Fraud Act*.

New Jersey courts have consistently held that ***HN6***[] the heart of an unconscionable commercial practice is the "capacity to mislead." *Fenwick, supra, 72 N.J. at 378, 371 A.2d 13*; *New Jersey Citizen Action v. Schering-Plough Corporation, 367 N.J.Super. 8, 13, 842 A.2d 174 (App.Div.)*, *certif. denied, 178 N.J. 249, 837 A.2d 1092 (2003)*. *Leon, supra, 340 N.J.Super. at 470, 774 A.2d 674*; In *Leon, supra, 340 N.J.Super. at 471-72, 774 A.2d 674* the court found that defendant drug store's use of a tiered pricing system whereby it charged more to certain customers while advertising **[***6]** its products as having the "best and lowest price" had the capacity to mislead customers. The court noted several times that defendant's pricing policies were relevant only in comparison with their advertisements and that the juxtaposition of the policy and the advertisement constituted a violation of the *Consumer Fraud Act.* *Ibid.* Likewise in *Fenwick, supra, 72 N.J. at 378, 371 A.2d 13* the Court found that the failure of a used car dealership to disclose the mileage of a vehicle in its advertisement could mislead a potential purchaser into believing that the vehicle had only been driven for an average number of miles when it could have been driven a far greater number of miles. The court finds the holdings in *Fenwick, Leon,* and *New Jersey Citizen Action* to be controlling. Plaintiffs have failed to set forth any factual allegation that would satisfy the requirement that a claim for unconscionable commercial practices demonstrate "a capacity to mislead." Even if plaintiffs' factual allegations were true, they have failed to demonstrate a valid cause of action.

The court also finds that even if plaintiffs had alleged a viable claim under the Consumer Fraud Act, plaintiffs **[***7]** lack standing **[*178]** to pursue their claim. Despite the wide reach of the Consumer Fraud Act, the New Jersey Supreme Court has held that in certain cases the Act is inapplicable. In *Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271-73, 390 A.2d 566, 568-70 (1978)*, the Supreme Court held that a private utility could not be held liable under the Consumer Fraud Act for fraudulently raising rates. The Court ruled that the pervasive control that the Public Utilities Commission exercised over the industry barred application of the Consumer Fraud Act. The Court articulated its concern regarding the "real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter." *Id. at 272, 390 A.2d at 569*.

The standard set by the Court in *Daaleman* does not rest on how many agencies or separate statutes govern the same practice. ***HN7***[] A "court must look to whether a 'real [**1017] possibility' of conflict would exist if the CFA were to apply to a particular practice." *Lemelledo, supra, 150 N.J. at 269, 696 A.2d at 553*. Applying the *Daaleman* analysis to the present matter, the court finds that the application of the Consumer Fraud Act in this case materially conflicts [***8] with *New Jersey's Antitrust Act*.

There is no dispute that plaintiffs' allegations of unconscionable commercial practices clearly fall within the jurisdiction of the New Jersey's Antitrust Act, which provides: ***HN8***[] "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." *N.J.S.A. 56:9-3*. ***HN9***[] The purpose of the act is to prevent trade-restraining practices, which ordinarily deprive the public of the benefits of a competitive market. *E Z Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc., 307 N.J.Super. 546, 704 A.2d 1364 (Ch.1996)*, *aff'd* *307 N.J.Super. 438, 704 A.2d 1309 (App.Div. 1996)*. However, as stated in *Daaleman* and *Lemelledo,* overlapping jurisdiction does not *necessarily* mean that the CFA should not also apply to the present matter.

In its motion papers and at oral argument, defendant argued that the application of the CFA would impermissibly conflict with [*179] the standing requirements of the New Jersey Antitrust Act. There are no published New Jersey cases that support defendant's position. However, federal ***antitrust law*** does provide guidance [***9] for this court. *N.J.S.A. 56:9-18* provides: ***HN10***[] "This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes."

HN11[] The statute clearly provides that New Jersey courts must look to federal case law for interpretation of the New Jersey statutes where New Jersey case law is silent. *Kugler v. Koscot Interplanetary, Inc., 120 N.J.Super. 216, 293 A.2d 682 (Ch.Div.1972)*.

In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.ED.2D 707 (1977)*, the State of Illinois, on behalf of 700 municipalities brought an antitrust treble damages suit under *§ 4 of the Clayton Act* alleging that concrete block manufacturers had fixed prices in violation of *§ 1 of the Sherman Act.* As in the case before the court, plaintiffs did not purchase directly from defendants. Instead plaintiffs purchased masonry structures from general contractors who purchased from masonry contractors who purchased from defendants. The Court held that plaintiffs, as ***HN12***[] pass-through purchasers of defendants' products, did not have standing to bring suit under federal ***antitrust law***. The Court held that [***10] only direct purchasers could bring such suit under the Act, reasoning that the allowance of indirect suits would "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id. at 737, 97 S.Ct. at 2070*.

The Court also determined that to allow indirect plaintiffs to bring suit would be unfair as defendants are prohibited from setting forth the pass-through argument as an affirmative defense. *See* *Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 20 L.Ed.2d 1231, 88 S.Ct. 2224 (1968)*, (where the Court held that defendant manufacturers could not argue that purchaser/retailer plaintiffs had mitigated their damages by passing on a portion of their increased costs to consumers).

[*180] In the instant matter, the record clearly demonstrates that plaintiffs' class is constituted of indirect or pass-through purchasers. Plaintiffs allege that they bought 3M products through independent retailers rather than directly from defendant. The holding in *Illinois Brick* clearly stands for the proposition that the instant [**1018] plaintiffs would be barred from bringing suit under federal antitrust statutes. *N.J.S.A. 56:9-18* [***11] incorporates *Illinois Brick* into New Jersey antitrust jurisprudence and bars plaintiffs from bringing suit under the New Jersey Antitrust Act.

This court finds that plaintiffs' attempt to bring suit under the Consumer Fraud Act is in direct conflict with the well-founded policies interpreting federal and New Jersey ***antitrust law***. Plaintiffs in this case allege conduct that is traditionally classified under ***antitrust law***. Although the CFA should be broadly applied, in this instance, allowing plaintiffs to move forward with their suit would undermine the standing requirements of the New Jersey Antitrust Act. ***HN13***[] "It is basic in the construction of legislation that every effort should be made to harmonize the law relating to the same subject matter." *State v. Green, 62 N.J. 547, 554-55, 303 A.2d 312, 316 (1973)*.

The court finds that plaintiffs have no standing to bring suit under the Consumer Fraud Act. As such, defendant's motion to dismiss the complaint for failure to state a claim is granted.

Massachusetts v. Microsoft Corp.

United States Court of Appeals for the District of Columbia Circuit

November 4, 2003, Argued ; June 30, 2004, Decided

No. 02-7155, No. 03-5030

Reporter
373 F.3d 1199 *; 362 U.S. App. D.C. 152 **; 2004 U.S. App. LEXIS 13489 ***; 2004-1 Trade Cas. (CCH) P74,468

COMMONWEALTH OF MASSACHUSETTS, EX REL., APPELLANT v. MICROSOFT CORPORATION, APPELLEE. UNITED STATES OF AMERICA, APPELLEE v. MICROSOFT CORPORATION, ET AL., APPELLEES THE COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION AND THE SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, APPELLANTS

Subsequent History: Related proceeding at *Hood ex rel. Mississippi v. Microsoft Corp., 428 F. Supp. 2d 537, 2006 U.S. Dist. LEXIS 26948 (S.D. Miss., 2006)*

Modification order at *United States v. Microsoft Corp., 2006 U.S. Dist. LEXIS 76862 (D.D.C., Sept. 7, 2006)*

Prior History: [*1]** Appeal from the United States District Court for the District of Columbia. (No. 98cv01233). (No. 98cv01232).

United States v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22861 (D.D.C., Nov. 12, 2002)
New York v. Microsoft Corp., 224 F. Supp. 2d 76, 2002 U.S. Dist. LEXIS 21185 (D.D.C., 2002)
United States v. Microsoft Corp., 2003 U.S. Dist. LEXIS 1480 (D.D.C., Jan. 11, 2003)

Disposition: Remedial order affirmed. Order denying intervention reversed and order approving consent decree in public interest affirmed.

Core Terms

district court, middleware, decree, operating system, disclosure, software, consent decree, interoperate, developers, competitors, server, rival, communications, public interest, Tunney Act, platform, proceedings, fragmentation, browser, non-Microsoft, intervenors, parties, Web, public comment, commingling, open-source, disclose, protocols, products, argues

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Admiralty & Maritime Law > ... > Federal Government > Suits in Admiralty Act > General Overview

Admiralty & Maritime Law > ... > Federal Government > Suits in Admiralty Act > Procedural Matters

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

The Tunney Act, *15 U.S.C.S. § 16(b)-(h)*, provides the district court with several procedural options to aid it in making its determination whether a proposed consent decree is in the public interest. The court may take testimony of Government officials or experts as it deems appropriate, *15 U.S.C.S. § 16(f)(1)*; authorize participation by interested persons, including appearances by amici curiae, *15 U.S.C.S. § 16(f)(3)*; review comments and objections filed with the Government concerning the proposed judgment, as well as the Government's response thereto, *15 U.S.C.S. § 16(f)(4)*; and take such other action in the public interest as the court may deem appropriate, *15 U.S.C.S. § 16(f)(5)*.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Standards of Review, Clearly Erroneous Review**

The appellate court reviews a federal district court's findings of fact for clear error, but resolve issues of law de novo.

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

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

HN3[] **Standards of Review, Abuse of Discretion**

And appellate court reviews the district court's decision whether to grant equitable relief only for abuse of discretion. The district court is clothed with "large discretion" to fit its decree to the special needs of the individual case.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN4[] **Private Actions, Standing**

It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > ... > Proof > Custom > Expert Testimony

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

In the context of fashioning an antitrust remedy, compliance with industry standards is largely a subjective undertaking, such that full compliance with a standard is often a difficult and ambiguous process.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

In fashioning an antitrust remedy, although a district court is empowered to fashion appropriate restraints on the antitrust violator's future activities both to avoid a recurrence of the violation and to eliminate its consequences, the resulting relief must represent a reasonable method of eliminating the consequences of the illegal conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In reviewing an antitrust remedy, the appellate court should be particularly disinclined to require more disclosure where the district court is adopting a forward-looking provision addressing conduct not previously held to be anticompetitive.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Courts > Authority to Adjudicate

HN8[] **Antitrust & Trade Law, Sherman Act**

Where the effect of a broad antitrust remedy upon an antitrust violator's incentive to innovate would be substantial, not even the broad remedial discretion enjoyed by the district court extends to the adoption of provisions so likely to harm consumers.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

In the context of fashioning an antitrust remedy, when the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed. True enough, but when the district court undertakes to block the untravelled roads by adopting a forward-looking provision, its discretion is necessarily less broad because, without liability findings to mark the way, it is in danger of imposing restrictions that prevent the defendant from forging new routes to serve consumers.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN10[] **Remedies, Injunctions**

To ensure that antitrust relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Private Actions, Standing**

Antitrust laws designed to protect competition, not competitors.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Private Actions, Remedies**

In the antitrust context, where the court views proposed relief as structural, it applies a test of causation wherein the district court is to consider whether divestiture is an appropriate remedy in light of the causal connection between the defendant's anticompetitive conduct and its dominant position in the market for operating systems. Structural relief is designed to eliminate the monopoly altogether and requires a clearer indication of a significant causal connection between the conduct and creation or maintenance of market power.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Private Actions, Remedies**

Among the objectives the United States Supreme Court deems relevant to fashioning relief in an antitrust case is to deny to the defendant the fruits of its statutory violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN14[] **Private Actions, Remedies**

The fruits of an antitrust violation must be identified before they may be denied.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] Private Actions, Remedies

A district court certainly does not abuse its discretion by adopting a remedy that denies an antitrust violator the ability to take the same or similar actions to limit competition in the future rather than a remedy aimed narrowly at redressing the harm suffered by specific competitors in the past. This distinction underlies the difference between a case brought in equity by the Government and a damage action brought by a private plaintiff.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Permissive Intervention

HN16[] Settlements, Consent Judgments

Fed. R. Civ. P. 24 governs intervention for purpose of filing appeal under Tunney Act.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Parties > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Parties > Intervention > General Overview

HN17[] Settlements, Antitrust Procedures & Penalties Act

Once a common question of fact or law is found, *Fed. R. Civ. P. 24(b)(2)* says that the district court, in exercising its discretion regarding intervention, shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. The "delay or prejudice" standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not only of the extra cost but also of an increased risk of error. Further, the "delay or prejudice" standard of *Rule 24(b)(2)* appears to force consideration of the merits of the would-be intervenor's claims.

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Parties > Intervention > General Overview

HN18[] Intervention, Motions to Intervene

Procedural defects in connection with intervention motions should generally be excused by a court.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN19[] Settlements, Antitrust Procedures & Penalties Act

Under the Tunney Act, *15 U.S.C.S. § 16(b)-(h)*, the district court's "public interest" inquiry into the merits of the consent decree is a narrow one: The district court should withhold its approval of the decree only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a 'mockery of judicial power. Such limited review is obviously appropriate for a consent decree entered into before a trial on the merits because the court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN20[] Settlements, Antitrust Procedures & Penalties Act

The Tunney Act, *15 U.S.C.S. § 16(b)-(h)*, does not distinguish between pre- and post-trial consent decrees; the Act simply requires the district court, "before entering any consent judgment" in a Government antitrust case, to determine that the entry of such judgment is in the public interest. *15 U.S.C.S. § 16(e)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN21[] Settlements, Consent Judgments

Although the district court may not ignore the grounds upon which the defendant was held liable, neither should it reject a consent decree simply because it believes the Government could have negotiated a more exacting decree. Any settlement, even one negotiated after a trial on the merits, may reflect a concession the government made in bargaining, and yet be within the reaches of the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN22[] **Settlements, Consent Judgments**

A district court has a continuing responsibility for interpretation of the consent decree, and it is entitled to insist on that degree of precision concerning the resolution of known issues as to make its task, in resolving disputes, reasonably manageable. A consent decree is not ambiguous in the sense disallowed in MSL merely because it contains words that are not defined therein, or because the intervenors think certain words could be defined differently or with greater specificity.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN23[] **Settlements, Consent Judgments**

The district court must withhold approval of a consent decree if the enforcement mechanism is inadequate.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN24[] **Settlements, Consent Judgments**

Compliance with the procedural requirements of the Tunney Act, *15 U.S.C.S. § 16(b)-(h)*, ensures the district court has before it the information it needs in order to make an informed determination whether the decree is in the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN25[] **Settlements, Antitrust Procedures & Penalties Act**

In the context of a consent decree in an antitrust action initiated by the United States Government, *15 U.S.C.S. § 16(b)(6)* calls only for a description and evaluation of alternatives to a proposal actually considered by the United States. It does not call for a "complete" description of all the Government's options, nor for any discussion of an alternative not "actually considered" by the Government.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN26[] **Settlements, Antitrust Procedures & Penalties Act**

The Tunney Act, *15 U.S.C.S. § 16(b)-(h)*, requires the defendant to file with the district court all written or oral communications by or on behalf of such defendant with any officer or employee of the United States concerning or relevant to a proposed consent decree. *15 U.S.C.S. § 16(g)*.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Governments > Federal Government > US Congress

HN27[] **Settlements, Consent Judgments**

15 U.S.C.S. § 16(g) required an antitrust defendant to disclose its communications with "any officer or employee of the United States." Reference is made to "United States" 18 times in the Tunney Act, *15 U.S.C.S. § 16(b)-(h)*. In all 17 references other than the one in *§ 16(g)* the term plainly denotes only the Executive Branch.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN28[] **Settlements, Consent Judgments**

See *15 U.S.C.S. § 16(b)*.

Governments > Legislation > Interpretation

HN29[] **Legislation, Interpretation**

It is a commonplace of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN30[] **Settlements, Consent Judgments**

Because only the Executive Branch can settle an antitrust case, only contacts with the Executive Branch are relevant to the purpose of the Tunney Act, *15 U.S.C.S. § 16(b)-(h)* -- namely, to block settlements that are not in the public interest. The United States Court of Appeals for the District of Columbia Circuit therefore concludes that the term "United States" as used in *15 U.S.C.S. § 16(g)* refers only to the Executive Branch.

Counsel: Steven R. Kuney argued the cause for appellant Commonwealth of Massachusetts, ex rel., in No. 02-7155. With him on the briefs were Brendan V. Sullivan, Jr., Thomas F. Reilly, Attorney General, Attorney General's Office of the Commonwealth of Massachusetts, and Glenn S. Kaplan, Assistant Attorney General. John E. Schmidtlein and Nicholas J. Boyle entered appearances.

Robert H. Bork argued the cause for appellants The Computer and Communications Industry Association, et al., in No. 03-5030. With him on the briefs were Kenneth W. Starr, Glenn B. Manishin, Stephanie A. Joyce, Mark L. Kovner, and Elizabeth S. Petrela.

Kenneth W. Starr, Robert H. Bork, David M. Gossett, Elizabeth S. Petrela, David M. Falk, and Mitchell S. Pettit were on the brief of amici curiae The Computer and Communications Industry Association, et al., in support of appellant in No. 02-7155. Glenn B. Manishin entered an appearance.

Deborah P. Majoras, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellee United States of America in No. 03-5030. With her **[***2]** on the brief were R. Hewitt Pate, Assistant Attorney General, and Catherine G. O'Sullivan and David Seidman, Attorneys.

Michael Lacovara and Steven L. Holley argued the causes for appellees. With them on the briefs were John L. Warden, Richard J. Urowsky, Richard C. Pepperman II, Bradley P. Smith, Thomas W. Burt, David A. Heiner, Jr., Charles F. Rule, and Dan K. Webb.

Judges: Before: GINSBURG, Chief Judge, and EDWARDS, SENTELLE, RANDOLPH, ROGERS, and TATEL, Circuit Judges. Opinion for the Court filed by Chief Judge GINSBURG.

Opinion by: [*1203] [156]** GINSBURG

Opinion

* * *

GINSBURG, *Chief Judge*: In *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (D.C. Cir. 2001)* (*Microsoft III*), we affirmed in part and reversed in part the judgment of the district court holding Microsoft had violated *§§ 1 and 2* of the Sherman Antitrust Act, vacated the associated remedial order, and directed the district court, on the basis of further proceedings, to devise a remedy "tailored to fit the wrong creating the occasion" therefor, *id. at 107, 118-19*. On remand, the United States and certain of the plaintiff states entered into a settlement agreement with Microsoft. Pursuant to the Antitrust Procedures and Penalties (Tunney) Act, *15 U.S.C. §§ 16(b)-(h)*, the district court held the parties' proposed consent decree, as amended to allow the court to act *sua sponte* to enforce the decree, was in "the **[*1204]** **[**157]** public interest." Meanwhile, the Commonwealth **[***4]** of Massachusetts and several other plaintiff states refused to settle with Microsoft and instead litigated to judgment a separate remedial decree. The judgment entered by the district court in their case closely parallels the consent decree negotiated by the United States.

Massachusetts alone appeals the district court's entry of that decree. It argues the district court abused its discretion in adopting several provisions Microsoft proposed while rejecting several others Massachusetts and the other litigating states proposed. Massachusetts also challenges a number of the district court's findings of fact. Based upon the record before us in *Microsoft III* and the record of the remedial proceedings following remand, we affirm the district court's remedial decree in its entirety.

The Computer and Communications Industry Association (CCIA) and the Software and Information Industry Association (SIIA) separately appeal the district court's denial of their motion, following the district court's approval of the consent decree between the United States and Microsoft, to intervene in the case for the purpose of appealing the district court's public-interest determination. They argue the **[***5]** factors the district court was to consider in determining whether to allow them to intervene weighed in their favor. We agree and reverse the district court's denial of their motion to intervene for the purpose of appealing that court's public-interest determination.

CCIA and SIIA make various arguments -- some overlapping those raised by Massachusetts -- that the consent decree between the United States and Microsoft is not in the public interest. They also argue the parties did not satisfy the procedural requirements of the Tunney Act. For these reasons, they seek vacatur of the district court's order approving the consent decree and a remand for entry of "a proper remedy." We find no merit in any of CCIA's and SIIA's objections, substantive or procedural. We therefore uphold the district court's approval of the consent decree as being in the public interest.

I. Background

The facts underlying the present appeals have been recounted several times. *See New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002)* (*States' Remedy*); *United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002)* (*U.S. Consent Decree*); *see also Microsoft* **[***6]** *III*. We therefore limit our discussion of the facts and of the proceedings to a brief review of events prior to our remand in 2001 and a more detailed account of what has transpired since then.

In May 1998 the United States filed a complaint against Microsoft alleging violations of federal antitrust laws. At the same time, a number of states and the District of Columbia filed a complaint against Microsoft alleging violations of both federal and state antitrust laws. The two complaints, which the district court consolidated, sought various forms of relief, including an injunction against certain of Microsoft's business practices.

After a lengthy bench trial the district court entered findings of fact, *United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999)* (*Findings of Fact*), and held Microsoft had violated *§§ 1 and 2* of the Sherman Act by illegally maintaining its monopoly in the market for "Intel-compatible PC operating systems," by attempting to monopolize the browser market, and by tying its Windows operating system to its Internet Explorer (IE) browser. *United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000)* (*Conclusions* **[***7]** *of Law*). The **[*1205]** **[**158]** district court also held Microsoft violated the antitrust laws of the several states. *Id. at 56*. Based upon its findings of fact and conclusions of law, the district court decreed that Microsoft would be split into two separate companies, one selling operating systems and one selling program applications. *See United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000)* (*Remedy I*). Microsoft appealed the decisions of the district court, alleging several legal and factual errors.

We upheld the district court's ruling that Microsoft violated *§ 2 of the Sherman Act* by the ways in which it maintained its monopoly, but we reversed the district court's finding of liability for attempted monopolization, and we remanded the tying claim to the district court to apply the rule of reason rather than the rule of *per se* illegality. *See Microsoft III*. We also vacated the district court's remedial decree, for three reasons: "First, [the district court had] failed to hold an evidentiary hearing despite the presence of remedies-specific factual disputes"; "second, the court did not provide adequate reasons for its decreed remedies"; **[***8]** and third, we had "drastically altered the scope of Microsoft's liability, and it [was] for the District Court in the first instance to determine the propriety of a specific remedy for the limited ground of liability which we had upheld." *Id. at 107*.

On remand the district court ordered the parties to file a Joint Status Report. This they did in September 2001, whereupon the district court ordered them to undertake settlement discussions. *See United States v. Microsoft Corp., 2001 U.S. Dist. LEXIS 24272 (D.D.C. Sept. 28, 2001)*. As a result, the United States and the States of Illinois, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, and Wisconsin, and the Commonwealth of Kentucky, agreed to enter into a consent decree with Microsoft. On November 6, 2001 the settling parties filed a Revised Proposed Final Judgment, 1 Joint Appendix in No. 03-5030 (hereinafter J.A. (I)) at 113-30, for the district court's review. The States of California, Connecticut, Florida, Iowa, Kansas, Minnesota, Utah, and West Virginia, the Commonwealth of Massachusetts, and the District of Columbia refused to enter into the consent decree. The district court **[***9]** therefore bifurcated the remaining proceedings: On "Track I" was the district court's "public interest" review of the proposed consent decree, as required by the Tunney Act whenever the Government proposes to settle a civil antitrust case, *see 15 U.S.C. § 16(e)*; on "Track II" was the continuing litigation between the nonsettling states (hereinafter "the States") and Microsoft concerning the remedy.

Track I

On November 15, 2001 the Government filed its Competitive Impact Statement (CIS), 1 J.A. (I) at 136-202, as required by the Act, *15 U.S.C. § 16(b)*, and on November 28, 2001 it published in the Federal Register both the Revised Proposed Final Judgment and the CIS for public comment. *66 Fed. Reg. 59,452 (Nov. 28, 2001)*. In February 2002 the Government filed with the district court its response to the more than 32,000 public comments it had received, along with a Second Revised Proposed Final Judgment, 6 Joint Appendix in No. 02-7155 (hereinafter J.A. (II)) at 3664-81, reflecting modifications agreed to by the settling parties in the light of the public comments.

The public comments, which the Government made available **[***10]** at its website in March 2002, were subsequently published in the Federal Register as well. *67 Fed. Reg. 23,654 (May 3, 2002)*. The Tunney Act also requires the defendant to file with the district court "any and all written or oral communications … with any officer or employee of the United **[*1206]** **[**159]** States" relating to the proposed consent judgment. *15 U.S.C. § 16(g)*. Microsoft made such a filing in December 2001 and again in March 2002. *See* Part III.C.2.

HN1[] The Tunney Act provides the district court with several procedural options to aid it in making its determination whether the proposed consent decree is in the public interest. The court may "take testimony of Government officials or experts" as it deems appropriate, *15 U.S.C. § 16(f)(1)*; authorize participation by interested persons, including appearances by *amici curiae*, *id.* *§ 16(f)(3)*; review comments and objections filed with the Government concerning the proposed judgment, as well as the Government's response thereto, *id*. *§ 16(f)(4)*; and "take such other action in the public interest as the court may deem appropriate," *id*. *§ 16(f)(5)*. The district court exercised **[***11]** several of these options. It held a hearing with the purpose of having the parties provide to the court information it needed to decide whether to approve the Second Revised Proposed Final Judgment. The district court denied CCIA's request to intervene in the case, *see id*. *§ 16(f)(3)*, but it did allow CCIA and SIAA to participate in the hearing as *amici curiae*. In July 2002 the district court concluded both the Government and Microsoft had complied with the requirements of the Tunney Act and held that the matter was ripe for the court to determine whether the decree was in the "public interest." *United States v. Microsoft Corp., 215 F. Supp. 2d 1, 23 (D.D.C. 2002)* (*Tunney Act Proceedings*).

On November 1, 2002 the district court ruled the Second Revised Proposed Final Judgment would be in the public interest if modified in one respect: The parties would have to provide for the district court to "retain jurisdiction to take action *sua sponte* in conjunction with the enforcement of the decree." *U.S. Consent Decree, at 202*. This they did in a Third Revised Proposed Final Judgment, which the district court duly entered. *United States v. Microsoft Corp., 2002 U.S. Dist. LEXIS 22861, 2002 WL 31654530 **[***12]** (D.D.C. Nov. 12, 2002)* (*Final Consent Decree*). [1]

On December 20, 2002 CCIA and SIIA filed a joint motion for leave to intervene, as of right or alternatively by permission, *see* *FED. R. CIV. P. 24*, for the purpose of appealing the district court's **[***13]** judgment that the consent decree was in the "public interest." The district court denied their motion, *United States v. Microsoft Corp., 2003 U.S. Dist. LEXIS 1480, 2003 WL 262324 (D.D.C. Jan. 11, 2003)* (*Order Denying Intervention*), and the movants now appeal both the district court's denial of their motion for leave to intervene and, if allowed, the district court's public-interest determination under the Tunney Act.

Track II

Pursuant to the district court's scheduling order of September 28, 2001, Microsoft and the States submitted competing remedial proposals in December of that year. This time the States did not propose to divide Microsoft but, as discussed in Part II.A.6, they did include proposals the district court considered structural in nature, including requirements that Microsoft offer "open source licensing for Internet Explorer" and "auction to a third party the **[*1207]** **[**160]** right to port Microsoft Office to competing operating systems." Microsoft objected to the States' proposed remedy and offered as an alternative the Revised Proposed Final Judgment to which it had agreed in the Track I proceedings. Both sides later submitted revised proposals. In February 2002 Microsoft submitted **[***14]** the Second Revised Proposed Final Judgment, and in March the States submitted a Second Proposed Remedy (SPR), 6 J.A. (II) at 3160-3201. The Second Revised Proposed Final Judgment and the SPR are the two proposals the district court ultimately reviewed.

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[1] The district court also held the "public interest" standard made applicable to the Government's case by the Tunney Act should be applied to the settlement between the settling states and Microsoft in order to meet the generally applicable requirement of circuit law that any consent decree "fairly and reasonably resolve[] the controversy in a manner consistent with the public interest." *New York v. Microsoft Corp., 231 F. Supp. 2d 203, 205 (D.D.C. 2002)* (citing *Citizens for a Better Env't v. Gorsuch, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (D.C. Cir. 1983))*. The district court's public-interest determination in the settling states' case is not at issue in the current appeals.

After an expedited discovery schedule, the hearing on remedies began in March 2002 and ran for 32 trial days spanning three months, over which time the court reviewed written direct testimony and heard live testimony from dozens of witnesses. [2] *States' Remedy, at 87*. The district court issued its findings of fact and its legal conclusions in a combined opinion. The final judgment in the proceedings on Track II -- that is, the remedy adopted by the district court -- is attached as an appendix to the district court's opinion. *See States' Remedy, at 266-77*.

[*15]** Massachusetts alone among the States appeals. We address the Commonwealth's appeal in Part II below and CCIA's and SIIA's appeal in Part III.

II. *Commonwealth of Massachusetts v. Microsoft*, No. 02-7155

HN2[] We review the district court's findings of fact for clear error, *United States ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co., 317 U.S. App. D.C. 145, 81 F.3d 240, 244 (D.C. Cir. 1996)*; *see also* FED. R. CIV. P. 52(a) ("findings of fact … shall not be set aside unless clearly erroneous"), but resolve issues of law *de novo*, *Modern Elec., Inc., 81 F.3d at 244*. ***HN3***[] We review the district court's decision whether to grant equitable relief only for abuse of discretion. *See Microsoft III, at 105*; *see also Ford Motor Co. v. United States, 405 U.S. 562, 573, 31 L. Ed. 2d 492, 92 S. Ct. 1142* (district court "clothed with 'large discretion' to fit the decree to the special needs of the individual case").

A. Remedial Proposals

Massachusetts objects to several provisions the district court included in the remedial decree. The Commonwealth also appeals the district court's refusal to adopt certain other provisions proposed **[***16]** by the States.

1. Commingling

In *Microsoft III* we upheld the district court's finding that Microsoft's integration of IE and the Windows operating system generally "prevented OEMs from pre-installing other browsers and deterred consumers from using them." *253 F.3d at 63-64*. Because they could not remove IE, installing another browser meant the OEM would incur the costs of supporting two browsers. *Id. at 64*. Accordingly, OEMs **[*1208]** **[**161]** had little incentive to install a rival browser, such as Netscape Navigator. Relying upon the district court's findings of fact, we determined that Microsoft took three actions to bind IE to Windows: (1) it excluded IE from the "Add/Remove Programs" utility; (2) it commingled in the same file code related to browsing and code used by the operating system so that removal of IE files would cripple Windows; and (3) it designed Windows in such a manner that, in certain circumstances, a user's choice of an internet browser other than IE would be overridden. *Id. at 64-65*. Although all three acts had anticompetitive effects, only the first two had no offsetting justification and, therefore, "constituted exclusionary conduct[] in violation **[***17]** of § 2." *Id. at 67*. As for overriding the user's choice of an internet browser, we held the plaintiffs had neither rebutted Microsoft's proffered technical justification nor demonstrated that its justification was outweighed by the anticompetitive effect. We therefore concluded Microsoft was not "liable for this aspect of its product design." *Id*.

On remand, turning to the commingling of IE and Windows code, the district court stated that an appropriate remedy "must place paramount significance upon addressing the exclusionary effect of the commingling, rather than the mere conduct which gives rise to the effect." *States' Remedy, at 156*. The court was concerned about adopting any remedy that would require Microsoft to remove Windows software code -- as the States' proposed remedy would do -- based upon what it perceived to be a very difficult, even if not "technologically impossible," task. *Id. at 157*. For instance, the court found the States did not offer a reasonable method of distinguishing "operating

[2] The States presented the testimony of thirteen fact witnesses: Peter Ashkin, James Barksdale, John Borthwick, Anthony Fama, Richard Green, Mitchell Kertzman, Dr. Carl Ledbetter, Michael Mace, Steven McGeady, Larry Pearson, David Richards, Jonathan Schwartz, and Michael Tiemann; and of two expert witnesses: Dr. Andrew Appel and Dr. Carl Shapiro. Microsoft presented the testimony of fifteen fact witnesses: Dr. James Allchin, Linda Wolfe Averett, Scott Borduin, David Cole, Heather Davisson, Brent Frei, William Gates III, James Thomas Greene, Chris Hofstader, Christopher Jones, Will Poole, W.J. Sanders III, Robert Short, Gregg Sutherland, and Richard Ulmer; and of four experts: Dr. John Bennett, Dr. Kenneth Elzinga, Dr. Stuart Madnick, and Dr. Kevin Murphy.

system" code from "nonoperating system" code, such as code that provides middleware functionality. [3] *Id*. Moreover, based upon "testimony of various [independent **[***18]** software vendors (ISVs)] that the quality of their products would decline if Microsoft were required to remove code from Windows," the court concluded both ISVs and consumers would be harmed if Microsoft were forced to redesign Windows by removing software code. *Id. at 158*. Finally, the district court was alert to "the admonition [in the case law] that it is not a proper task for the Court to undertake to redesign products." *Id.*; *see also* *United States v. Microsoft Corp., 331 U.S. App. D.C. 121, 147 F.3d 935, 948 (D.C. Cir. 1998)* (*Microsoft II*) ("Antitrust scholars have long recognized the undesirability of having courts oversee product design"). Accordingly, the district court instead approved the proposed requirement that Microsoft "permit OEMs to remove end-user access to aspects of the Windows operating system which perform middleware functionality." *States' Remedy, at 159*. Specifically, § III.H of the decree requires Microsoft to "allow end users … and OEMs … to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product …." *Id. at 270*.

[*19]** **[*1209]** **[**162]** Massachusetts maintains the district court erred by addressing the remedy to the exclusionary effect of commingling and not to the commingling itself. In response, Microsoft points out that in the liability proceedings the plaintiffs were concerned primarily with end-user access and that the decree originally entered by the district court likewise addressed Microsoft's binding its middleware to its operating system; the remedy was to allow both OEMs and end users to remove access to Microsoft middleware. *Remedy I, at 68*. That is why on remand the district court observed that "nothing in the rationale underlying the commingling liability finding requires removal of software code to remedy the violation." *States' Remedy, at 158*. We agree; the district court's remedy is entirely consistent with its earlier finding that "from the user's perspective, uninstalling Internet Explorer [with the Add/Remove Programs utility is] equivalent to removing the Internet Explorer program from Windows." *Findings of Fact P 165, at 51*.

The district court's decision to fashion a remedy directed at the effect of Microsoft's commingling, rather than to prohibit commingling, was within **[***20]** its discretion. The end-user access provision does this, and it avoids the drawbacks of the States' proposal requiring Microsoft to redesign its software. Allowing an OEM to block end-user access to IE gives the OEM control over the costs associated with supporting more than one internet browser. Indeed, had Microsoft not removed IE from the Add/Remove Programs utility in the first place, OEMs would have retained a simple and direct method of avoiding such costs. *See, e.g.,* Direct Testimony of Dr. Stuart Madnick P 177*,* 5 J.A. (II) at 2887.

Massachusetts says there is unrebutted testimony in the record indicating the removal of end-user access is insufficient "to reduce OEMs' disincentives to install rival middleware." Not so. The cited testimony is that end-users "may accidentally trigger one program when they mean to trigger another. This is especially so when, under Microsoft's Proposed Remedy, Windows is allowed to launch Microsoft middleware on a system on which a consumer has not chosen Microsoft's program to be the default version of the application." Direct Testimony of Peter Ashkin P 78*,* 5 J.A. (II) at 3100; *see also* PP 77, 79-80, *id*. at 3100-01. First, **[***21]** this testimony indicates only that removal of end-user access to IE may not eliminate every last "accidental" invocation of IE, not that the incidence will not be reduced, as it no doubt will be. Second, under § III.H.2 end users and OEMs may "designate a Non-Microsoft Middleware Product to be invoked in place of [a] Microsoft Middleware Product … in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product …," *States' Remedy § III.H.2, at 270-71*, which apparently provides OEMs a method to address the conduct about which Massachusetts is concerned.

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[3] As we explained in *Microsoft III*, the term "middleware" refers to software products that expose their "Applications Programming Interfaces," upon which software developers rely in writing applications. *253 F.3d at 53*; *see also Findings of Fact P 28, at 17*. The middleware at issue in *Microsoft III* was primarily web-browsing software. The district court's remedy in this case, however, covers a far broader array of middleware. Accordingly, the district court was at pains to define Microsoft's middleware and that of its rivals. ***See States' Remedy §§ VI.J, VI.K, VI.M, VI.N, at 275-76***. We need not here recount the district court's extensive treatment of those definitions, *see* ***States' Remedy, at 112-21***, but the definitions are discussed as needed below.

Finally, the accidental invocations claimed in the cited testimony do not reflect the nature of the concerns OEMs had at the time the district court made its *Findings of Fact*. The district court found Microsoft had combined commingling of code and removal of IE from the Add/Remove Programs utility in a manner that ensured the presence of IE on the Windows desktop. *See Findings of Fact P 241, at 69*. The lack of any way to remove end-user access to IE -- now squarely addressed in § III.H of the decree -- made the IE icon an "unavoidable presence" on the Windows desktop; **[***22]** that was what led "to confusion among novice users." *Id. P 217, at 63*. More, that is, was involved than the occasional invocation of IE by **[*1210]** **[**163]** accident; IE was always present because Microsoft prevented OEMs from removing both the code and the end-user's access to it. The accidental invocations of Microsoft middleware claimed in the Ashkin testimony -- to the extent not already resolved by § III.H.2 -- are hardly likely to generate the level of support costs OEMs faced when the IE icon was on every desktop. Certainly the cited testimony is no evidence of such significant costs.

The district court fashioned a remedy aimed at reducing the costs an OEM might face in having to support multiple internet browsers. The court thereby addressed itself to Microsoft's efforts to reduce software developers' interest in writing to the Application Program Interfaces (APIs) exposed by any operating system other than Windows. Far from abusing its discretion, therefore, the district court, by remedying the anticompetitive effect of commingling, went to the heart of the problem Microsoft had created, and it did so without intruding itself into the design and engineering of the Windows operating system. **[***23]** We say, Well done!

But soft! Massachusetts and the *amici* claim the district court nonetheless erred in rejecting a "code removal" remedy for Microsoft's commingling, principally insofar as the court was concerned with "Microsoft's ability to provide a consistent API set," which Microsoft referred to as the problem of Windows' "fragmentation." [4] They argue that any effort to keep software developers writing to Microsoft's APIs -- and thereby avoiding "fragmentation" -- is not procompetitive but rather "an argument against competition."

The **[***24]** district court raised its concern about fragmentation in connection with the States' proposal that Microsoft be required to remove its middleware code from the code of its Windows operating system, as follows:

> Microsoft shall not, in any Windows Operating System Product … it distributes … Bind any Microsoft Middleware Product to the Windows Operating System unless Microsoft also has available to license, upon the request of any Covered OEM licensee or Third-Party Licensee, and supports both directly and indirectly, an otherwise identical but "unbound" Windows Operating System Product ….

SPR § 1, 6 J.A. (II) at 3166. In other words, Microsoft would be required to make it possible for OEMs and end users to "readily remove or uninstall [from Windows] the binary code" of any Microsoft Middleware Product (as that term is defined in the States' proposal). *Id.* §§ 22.d & 22.e, 6 J.A. (II) at 3193. The district court found evidence the States' proposal "would hinder, or even destroy Microsoft's ability to provide a consistent API set." *States' Remedy, at 252*. This evidence included testimony that it would be

> impossible for Microsoft to maintain the same **[***25]** high level of operating-system balance and stability on which software developers and customers rely. Developers will be less likely to write software programs to an unstable or unpredictable operating system based on the risk that their programs will not function as designed, thereby reducing customer satisfaction.

[*1211] **[**164]** Direct Testimony of Scott Borduin P 61, 2 J.A. (II) at 1327. [5] The district court concluded, "The weight of the evidence indicates the fragmentation of the Windows platform would be significantly harmful to Microsoft, ISVs, and consumers." *States' Remedy, at 253*.

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[4] Massachusetts also argues the district court erred insofar as it rejected the States' proposal because the proposal did not provide adequate guidance for determining which code constitutes Microsoft middleware and was otherwise too difficult technically. The district court's findings, however, discussed in part at the outset of this section, fully support its reasons for rejecting the States' unbinding remedy. ***See States' Remedy, 245-52***; *see also* *id. at 255*.

[5] *See also* Madnick P 197, 5 J.A. (II) at 2899 ("To the extent that licensees used the non-settling States' remedies to create multiple versions of Windows with differing combinations of APIs, applications developers and consumers would lose one of the

[*26]** Massachusetts argues the district court's finding "ignores and is at odds with this Court's holding that Microsoft's desire to keep developers focused on its APIs was merely another way of saying it 'wants to preserve its power in the operating system market,'" citing *Microsoft III, at 71*. Indeed, as we stated in *Microsoft III*, "Microsoft's only explanation for its exclusive dealing [contracts with Internet Access Providers (IAPs)] is that it wants to keep developers focused upon its APIs -- which is to say, it wants to preserve its power in the operating system market." *Id.* We went on to state, however, that this "is not an unlawful end, but neither is it a procompetitive justification for the specific means here in question, namely, exclusive dealing contracts with IAPs." *Id.*

Massachusetts would turn our observation about Microsoft's rationale for its exclusive contracts with IAPs into a critique of the district court's concern with the extreme fragmentation of Windows the court found was likely to occur if it adopted the States' code removal proposal. But the two points cannot be equated. The States made a proposal the district court found might have resulted **[***27]** in there being "more than 1000" versions of Windows. *See States' Remedy, at 253* (citing Direct Testimony of Dr. John Bennett PP 47, 55, 5 J.A. (II) at 2997-98, 3001). Letting a thousand flowers bloom is usually a good idea, but here the court found evidence, as discussed above, that such drastic fragmentation would likely harm consumers. *See also* Direct Testimony of Dr. Kenneth Elzinga P 102, 5 J.A. (II) at 2739-40 ("Lowering barriers to entry by destroying … real benefits … harms consumers and is not pro-competitive"). Although it is almost certainly true, as both Massachusetts and the *amici* claim, that such fragmentation would also pose a threat to Microsoft's ability to keep software developers focused upon its APIs, addressing the applications barrier to entry in a manner likely to harm consumers is not self-evidently an appropriate way to remedy an antitrust violation. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* ***HN4***[] ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*,' " quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* **[***28]** (emphases in original)).

The district court's end-user access provision fosters competition by opening the channels of distribution to non-Microsoft middleware. It was Microsoft's foreclosure of those channels that squelched nascent middleware threats and furthered the dominance of the API set exposed by its operating system. The exclusive contracts into which Microsoft entered with IAPs were likewise aimed at foreclosing channels through which rival middleware might otherwise have been distributed. Prohibiting Microsoft from continuing those exclusive arrangements, *see States' Remedy § III.G, at 269-70*, would not have the **[*1212]** **[**165]** same deleterious effect upon consumers as would the fragmentation of Windows.

Amici CCIA and SIIA seem to view fragmentation as merely competition by another name. Accordingly, they see fragmentation as a natural, if only temporary, consequence of economic forces: "Competition of any kind will lead to a multiplicity of standards, at least temporarily." The redesign of Windows required by the States' proposal, however, would not be the result of competition on the merits, as CCIA and SIIA seem to suggest. Certainly they point to no economic force that would **[***29]** prompt (or, if such a redesign were mandated, sustain) the degree of fragmentation the States' proposal is predicted to produce. Nor do they explain how such fragmentation would, as they claim, "spark innovation that benefits consumers." They instead quote *National Society of Professional Engineers (NSPE) v. United States, 435 U.S. 679, 689, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, for the proposition that the Supreme Court has "foreclosed the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." But that case provides no support for CCIA's and SIIA's argument here. Like the two cases the Supreme Court cited in making the statement just quoted, *see United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*; and *United States v. Joint Traffic Ass'n, 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25 (1898)*, *NSPE* involved an agreement among competitors limiting the output of their services. Those arrangements, which were analyzed under *§ 1 of the Sherman Act*, are not analogous to Microsoft's monopoly of the market for operating systems, **[***30]** which is due not only to the exclusionary practices we found unlawful in *Microsoft III* but also to "positive network effects," *see Findings of Fact, at 20*. Moreover, in *NSPE* the district court made no findings there were any potential benefits from the profession's "ethical prohibition against competitive bidding." *435 U.S. at 686*.

greatest benefits of Windows -- a platform for applications that supports new functionality while providing backward compatibility for most existing applications").

In sharp contrast, here the district court made extensive findings both about the potential harm to consumers from fragmentation and about the dubious benefits of the States' proposal. [6] From these findings the court concluded, "There is no indication that there is any competitive or economic advantage to [the degree of fragmentation entailed in the States' proposal] and, quite to the contrary, such a result would likely be detrimental to the consumer." *States' Remedy, at 252-54*. Although we understand that competition on the merits itself would likely elicit multiple standards -- recall the competition between the VHS and Beta videotape standards -- or even that some as yet unimagined technology might reduce the harm to consumers from fragmentation, CCIA and SIIA fail to demonstrate the district court was unduly concerned **[***31]** about the extent of fragmentation likely to arise from the States' proposal.

Finally, Massachusetts argues the district court's findings relating to fragmentation "fail to respect" the findings of fact **[*1213]** **[**166]** made in the liability proceedings. Specifically, the Commonwealth points to *Findings of Fact P 193, at 56-57*: "Microsoft's contention that offering OEMs the choice of **[***32]** whether or not to install certain browser-related APIs would fragment the Windows platform is unpersuasive." That statement was addressed to the unbinding of IE and Windows, not to the States' proposal, from which the court anticipated far more extensive fragmentation. The district court's rejection of the States' proposal, therefore, is not inconsistent with any of the findings of fact in the liability proceedings.

Relatedly, the *amici* point to "Microsoft's *own* fragmentation" of Windows through the publication of successive versions, such as Windows 98, Windows 2000, and Windows XP. The district court addressed this concern and found such fragmentation to be of "relatively small degree" because "Microsoft is able to work towards maintaining backward compatibility with previous versions." *States' Remedy, at 253*.

To be sure, the remedy the district court adopted does not prevent all fragmentation of the Windows operating system; indeed, it adopted the end-user access provision, which allows OEMs to install rival browsers and other non-Microsoft middleware, with their associated APIs, and to remove the end user's access to IE. Accordingly, fragmentation may yet occur, **[***33]** but if so it will be caused by OEMs competing to satisfy the preferences of end users, not forced artificially upon the market as it would be under the States' proposal.

2. Java deception

Massachusetts argues the district court erred in not including a remedy addressed specifically to Microsoft's deception of Java software developers. Unbeknownst to Java software developers, Microsoft's Java developer tools included certain words and directives that could be executed only in Windows' Java runtime environment. We held this deception "served to protect [Microsoft's] monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive." *Microsoft III, at 77*. Because Microsoft failed to provide a procompetitive explanation for its deception of software developers -- indeed, there appears to be no purpose at all for the practice that would not itself be anticompetitive -- we held its conduct was exclusionary, in violation of *§ 2 of the Sherman Act*. *Id.*

On remand the district court found a lack of "any evidence" Microsoft's previous Java deception was a continuing threat **[***34]** to competition. *States' Remedy, at 265*. The Java deception "concerned a single, very specific incident of anticompetitive conduct by Microsoft," which conduct Microsoft had ceased in accordance with a consent decree into which it had entered in another case in another court. *Id.* For these reasons, the district court did not include a provision in the remedial decree addressed to this unlawful but now terminated conduct.

Massachusetts, quoting *United States v. W.T. Grant Co., 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)*, claims that without specific relief prohibiting such deception, Microsoft is "free to return to [its] old ways." Microsoft

[6] For example, the court found that ISVs would "fare worst" under the proposal because they "would not have any assurance that a particular functionality was present in any given configuration of the new unbound Windows [which,] at least in the short term … would likely cause existing applications to fail. [In the longer run there is the risk that] software code distributed with one ISV's application would conflict with that distributed with another ISV's application, leading to the so-called 'DLL Hell' problem that results when multiple versions of the same basic components try to coexist on a single PC." ***States' Remedy, at 253-54***.

responds that Massachusetts does not make a showing of the type of abuse contemplated by the Supreme Court in *W.T. Grant*. We agree. That case involved an interlocking directorate allegedly unlawful under *§ 8 of the Clayton Act.* Soon after the Government filed suit, the common director voluntarily resigned from the relevant boards, **[*1214]** **[**167]** after which the district court refused the Government's request for an injunction prohibiting him and the corporations from violating *§ 8* in the future. The Supreme Court held the defendants' **[***35]** sworn profession of an intention not to revive the interlock was insufficient to moot the case. However, the Court also held -- and this is key -- the district court was in the best position to determine whether there was a "significant threat of [a] future violation," and it had not abused its discretion in refusing to award injunctive relief. *Id. at 635-36*. Far from supporting Massachusetts' argument, therefore, *W.T. Grant* confirms the district court's broad discretionary power to withhold equitable relief as it reasonably sees fit.

Massachusetts maintains the district court abused its discretion insofar as it found "no evidence that this deception, or any similar deception, has persisted." *States' Remedy, at 190*. Massachusetts here claims Microsoft's Chairman and Chief Software Architect, William Gates III, in testimony "admitted that Microsoft routinely makes knowingly inaccurate claims regarding its compliance with industry standards," into which the district court should have inquired further. The cited testimony in fact concerns Microsoft's efforts to *comply* with frequently changing standards. [7] Not surprisingly, nothing Gates said suggests anything **[***36]** in the least nefarious.

Despite its failure to demonstrate any continuing competitive threat from Microsoft's previous deception of Java software developers, Massachusetts presses the States' proposed "truth in standards" provision, which would regulate certain business practices that were not at issue in *Microsoft III*. Specifically, the States' proposal would require Microsoft to (1) continue supporting any industry standard it has publicly claimed to support "until it publicly disclaims such support or the standard itself expires or is rescinded by the standardsetting body," and (2) "continue to support an industry standard any time it makes a proprietary alteration to the standard. **[***37]** " *Id. at 190*; *see also* SPR § 16, 6 J.A. (II) at 3183. As an initial matter, our holding the district court did not abuse its discretion in refusing to enjoin a recurrence of Microsoft's Java deception casts grave doubt upon the need for a broad provision applicable not only to Java but to all industry standards. Be that as it may, we address Massachusetts' arguments in favor of such a provision.

First Massachusetts claims the district court erred as a matter of law insofar as it regarded the proposed truth-in-standards provision as being "unrelated to the violation found by this court." That is not, however, how the district court saw the matter. Addressing only the first requirement quoted in the previous paragraph, the district court specifically referred to Microsoft's deception of Java developers in holding there was no showing a "broad order" prohibiting any similar deception was "either appropriate or necessary." *See States' Remedy, at 190*. It never said that requirement was "unrelated" to the violations found by this court in *Microsoft III*. That much we think is unarguable.

As Microsoft correctly points out, it was the second aspect of the truth-in-standards **[***38]** provision the district court deemed "unrelated to any finding of liability," *id. at 190, 263-64*, and correctly so. Indeed, this court held that Microsoft's development of **[*1215]** **[**168]** the Windows Java Virtual Machine (JVM), which was incompatible with Sun's JVM, did not violate the antitrust laws. *Microsoft III, at 75*. It was only Microsoft's having misled software developers into thinking the two were compatible that had an anticompetitive effect. *Id. at 76-77*. We therefore hold the district court permissibly refused to require that Microsoft continue to support a standard after making a proprietary modification to it, even if the modification makes the standard incompatible with the original.

Massachusetts also complains the record does not support the district court's other reasons for rejecting the proposed truth-in-standards provision. We disagree. The district court found no evidence the "industry standard" provision would "enhance competition in the monopolized market" for Intel-compatible PC operating systems. *States' Remedy, at 264* & n.134. ***HN5***[] Compliance with industry standards is "largely a subjective undertaking,"

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[7] *See* 4/24/02 pm Tr. at 4988-89 (Gates trial testimony), 6 J.A. (II) at 3141-42; *see also* Direct Testimony of Dr. Andrew Appel P 145, 2 J.A. (II) at 1303-04 (stating Microsoft has ability to mislead third parties with respect to standards, but giving neither instances nor any indication of likelihood of such conduct).

id. at 190, such that "full compliance with a standard **[***39]** is often a difficult and ambiguous process," *id. at 264* (quoting Madnick P 208, 5 J.A. (II) at 2905). Massachusetts points to no specific instance in which competition would have been or would be enhanced by compelling Microsoft to support an industry standard after it made a proprietary alteration thereto. Instead Massachusetts invokes expert testimony that Microsoft's proprietary control over "important interfaces" would make it "harder" for rival operating systems to compete with Windows. Direct Testimony of Dr. Carl Shapiro P 185, 2 J.A. (II) at 860. This is far too general a statement from which to infer the proposed truth-in-standards provision would enhance competition rather than merely assist competitors -- and perhaps retard innovation. The district court found that industry standards can "vary widely in complexity and specificity, such that various implementations of a particular standard are often incompatible." *States' Remedy, at 264* (quoting Madnick P 207, 5 J.A. (II) at 2904). Microsoft, therefore, may not be able to comply with some of the industry standards contemplated by the States' proposal. And the States' own economic expert testified that "slow-moving **[***40]** standards bodies" are commonly unable to keep up with rapidly changing technology markets. 4/14/02 pm Tr. at 3677 (Shapiro trial testimony), 8 J.A. (II) at 4572; *see also* CARL SHAPIRO & HAL R. VARIAN, INFORMATION Rules 240 (1999) (advocating business strategy that does not "freeze … activities during the slow standard-setting process").

The district court aptly described the problems with the States' truth-in-standards proposal and correctly concluded the proposed remedy went beyond the liability contemplated by this court. The court did not abuse its discretion, therefore, in refusing to adopt the proposal.

3. Forward-looking provisions

The district court exercised its discretion to fashion appropriate relief by adopting what it called "forward-looking" provisions, which require Microsoft to disclose certain of its APIs and communications protocols. Although nondisclosure of this proprietary information had played no role in our holding Microsoft violated the antitrust laws, "both proposed remedies recommended the mandatory disclosure of certain Microsoft APIs, technical information, and communications protocols for the purposes of fostering interoperation." *States' Remedy* ***[***41]*** *, at 171*. In approving a form of such disclosure -- while, as discussed below, rejecting the States' proposal for vastly more -- the district court explained "the remedy [must] not [be] so expansive as to be unduly regulatory or provide a blanket prohibition on all future anticompetitive conduct." *Id.* (citing *Zenith* ***[*1216] [**169]*** *Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*. We are also mindful that, ***HN6***[] although the district court is "empowered to fashion appropriate restraints on [Microsoft's] future activities both to avoid a recurrence of the violation and to eliminate its consequences," *NSPE, 435 U.S. at 697*, the resulting relief must "represent[] a reasonable method of eliminating the consequences of the illegal conduct," *id. at 698*.

a. Disclosure of APIs

The district court recognized the "hallmark of the platform threat" to the Windows monopoly posed by rival middleware is the ability to run on multiple operating systems: The "ready ability to interoperate with the already dominant operating system will bolster the ability of such middleware to support a wide range of applications so as to **[***42]** serve as a platform." *States' Remedy, at 172*. In order to facilitate such interoperation the district court required Microsoft to disclose APIs "used by Microsoft Middleware to interoperate with a Windows Operating System Product." *Id.* § III.D, at 268.

Massachusetts objects to this provision on several grounds. First, the Commonwealth argues "the middleware covered by § III.D lacks the platform potential of the middleware threat that Microsoft thwarted" and, therefore, "will necessarily be inadequate to restore competition." The validity of Massachusetts' objection depends upon the meaning of "Microsoft Middleware."

Microsoft Middleware is defined as "software code" that:

1. Microsoft distributes separately from a Windows Op-erating System Product to update that Windows Operating System Product;
2. is Trademarked or is marketed by Microsoft as a major version of any Microsoft Middleware Product …; and
3. provides the same or substantially similar functionali-ty as a Microsoft Middleware Product.

Id. § VI.J, at 275. A "Microsoft Middleware Product" includes, among other things, "the functionality provided by Internet Explorer, Microsoft's **[***43]** Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product." *Id.* § VI.K, at 275.

In support of its argument, Massachusetts notes that Microsoft's own experts "doubted the platform potential of several forms of middleware included in what became the remedy's definition." [8] In response, Microsoft points out that the definition of "Microsoft Middleware" adopted by the district court is not faulty simply because Microsoft's experts discounted as platform threats some of the middleware products it covers. The logic of that response is obvious, which makes it unsurprising that Massachusetts makes no reply.

[*44]** *Amici* CCIA and SIIA take a different tack, claiming the definition is defective because Microsoft itself determines which software code to distribute separately. Microsoft responds that the *amici* "ignore[] the thousands of Windows APIs **[*1217]** **[**170]** that Microsoft publicly discloses in the ordinary course of business," and cites testimony, most of it conclusory, extolling the adequacy of those APIs for software developers. *See, e.g.,* Direct Testimony of Brent Frei of Onyx Software PP 18-22, 6 J.A. (II) at 3413-15; Direct Testimony of Chris Hofstader of Freedom Scientific PP 57-59, 9 J.A. (II) at 5453-55. Be that as it may, the district court considered arguments by the States similar to the one now advanced by the *amici*, and it rejected the related testimony of the States' witnesses. *States' Remedy, at 116-17*. The court instead found "Microsoft often distributes separately certain technologies which are included in new releases of Windows because such distribution enables users of previous Windows versions to take advantage of the latest improvements to these technologies." *Id. at 117* (citing Direct Testimony of Microsoft's Christopher Jones P 61, 5 J.A. (II) at 2532, **[***45]** and Will Poole P 76, 5 J.A. (II) at 2493). The court explained:

> Such distribution benefits Microsoft, as it permits Microsoft to continually improve the quality of its products, even after they are sold, and to expand the user base of new technology without waiting for consumers to purchase an entirely new operating system.

Id. These benefits would be lost to Microsoft if it were to "manipulate its products to exclude specific code from the definition" of middleware. *Id.*

The *amici* do not deny Microsoft has routinely distributed its middleware separately from Windows. Instead, they speculate Microsoft may henceforth avoid separate distribution in order to avoid the disclosure contemplated by § III.D. They claim an expanded definition of middleware, such as that proposed by the States, is necessary to "prevent[] Microsoft from defining its obligations into meaningless superficiality."

Microsoft points to the district court's finding, supported by evidence in the record, that it is not necessary or even desirable, in order to remove the artificial impediments erected by Microsoft to the establishment of a platform threat to Windows, to expand the definition **[***46]** of Microsoft middleware to cover all software that "exposes even a single API." *Id. at 118-19*. The district court rejected the States' broader definition of middleware in part because it wanted "bright lines by which Microsoft can determine what portions of Windows code are affected by the remedy." *Id. at 117*. The *amici* do not respond to the district court's concerns about the expansive scope of the States' definition of middleware. Nor do they explain how the States' proposal would "identify the specific pieces of Windows," *id.*, constituting middleware for the purpose of Microsoft's disclosure obligation. Instead, they merely claim the States' proposal "adds sufficient precision to identify and enforce a concrete obligation." This unreasoned assertion is hardly a ground upon which to overturn the district court's reasoned explanation for adopting a "bright line[]" approach to Microsoft's disclosure obligation. Further, the *amici* fail to refute the district court's reasoning that "economic forces … countervail the likelihood" that Microsoft would stop separately distributing its software code in order to avoid having to disclose APIs pursuant to § III.D. **[***47]** *Id.*

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[8] *E.g.*, Direct Testimony of Dr. Kevin Murphy P 176, 5 J.A. (II) at 2648 ("the definition of 'Middleware' includes some products that pose no apparent (even nascent) threat to the operating system"); Elzinga P 135, *id.* at 2754 ("particularly implausible that an email client (such as Outlook Express) or instant messaging software (such as Windows Messenger) will become a platform threat").

We hold the district court did not abuse its discretion in delineating the middleware covered for the purposes of disclosure. As discussed, the term "Microsoft Middleware" both includes and extends beyond the functionality of the middleware at issue in this case. *Id.* §§ VI.J & VI.K, at 275-76; *see also id. at 115*. The *amici* merely **[*1218]** **[**171]** speculate that the middleware covered by § III.D will not provide a serious platform threat. Moreover, the district court's reasons for believing economic self-interest deters Microsoft from avoiding separate distribution of its software code are persuasive. And ***HN7***[] we should be particularly disinclined to require more disclosure where, as here, the district court is adopting a forwardlooking provision addressing conduct not previously held to be anticompetitive. *See generally,* Frank H. Easterbrook, *The Limits of Antitrust, 63 TEX. L. REV. 1, 14-15 (1984)* (supporting use of presumptions in ***antitrust law*** to avoid condemning procompetitive practices). Nonetheless, out of an abundance of caution the district court provided that, in the event Microsoft were to "make a practice" of sacrificing the advantages of separate distribution **[***48]** in order to frustrate the purpose of the remedy, Massachusetts "could petition the Court for relief on this point." [9] *States' Remedy, at 117 n.34*.

[*49]** Massachusetts further argues the district court made no finding the required disclosure of APIs under the decree would "meaningfully assist" developers of middleware. Massachusetts objects both to the breadth of disclosure -- that is, the number of APIs to be disclosed under § III.D -- and to the "depth" or detail of the disclosure, with respect to which Massachusetts claims "the remedy fails to require the disclosure of sufficient information to ensure that the mandated disclosure may be effectively utilized."

As to breadth, § III.D by its terms expands the scope of required disclosure beyond the functionality of the middleware at issue in our decision on liability, as discussed above. Such expanded but not unlimited disclosure "represents a reasonable method" of facilitating the entry of competitors into a market from which Microsoft's unlawful conduct previously excluded them, *NSPE, 435 U.S. at 698*, particularly in view of the inherently uncertain nature of this forwardlooking provision.

Moreover, in laying claim to still broader disclosure of APIs, Massachusetts simply ignores the district court's findings with respect to the economic and technological effects **[***50]** of disclosure. As Microsoft points out, however, these findings reflect the district court's concern that a forward-looking provision requiring overly broad disclosure could undermine Microsoft's incentive **[*1219]** **[**172]** to innovate and, more particularly, that the States' proposed disclosure provision could enable competitors to "clone" Windows. The extremely broad scope of the States' proposal bears out the district court's concern. First, "interoperate" is defined in a way that makes it essentially synonymous with "interchange." *See States' Remedy, at 227* (citing Madnick P 86, 5 J.A. (II) at 2836-37). Meanwhile, § 4 of the SPR would require Microsoft to disclose "all APIs" that enable any "Microsoft Middleware Product," Microsoft application, or Microsoft software program to interoperate with "Microsoft Platform Software." 6 J.A. (II) at 3172-73. Finally, "Microsoft Middleware Product" and "Microsoft Platform Software" are defined so broadly that, when required to "interoperate" with one another, they include essentially any two pieces of Microsoft software on a PC. *See States' Remedy, at 227-28*; *see also* Gates P 296, 8 J.A. (II) at 4772-73; Madnick WW 148-49, 151, 5 J.A. (II) at **[***51]** 2870, 2872. As a result, the district court found the broad scope of the APIs required to

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[9] Massachusetts also argues the district court abused its discretion by refusing to define Microsoft's Common Language Runtime (CLR) as a Microsoft Middleware Product and hence subject to the API-disclosure requirement of § III.D. The district court described the CLR as middleware similar to Java but a part of Microsoft's new ".NET framework," a Web-services initiative comprising "server-based applications that can be accessed directly by other software programs, as well as by the consumer through a variety of devices, including the PC, cellular phone, and handheld device." ***States' Remedy, at 126***; *see also* Borduin P 80, 2 J.A. (II) at 1333 (explaining importance of CLR in .NET initiative). As discussed in Part II.A.4 below, the district court refused to address Web services in the remedial decree, stating that "this case cannot be used as a vehicle by which to fight every potential future violation of the antitrust laws by Microsoft envisioned by Microsoft's competitors." ***States' Remedy, at 133***. Just so, and the district court therefore did not abuse its discretion by refusing to list the CLR along with the other functionalities specified in the definition of Microsoft Middleware Product. *See* ***id. at 275***. Because Microsoft's Web-services initiative and Microsoft Middleware are not mutually exclusive categories, however, the CLR may yet become subject to the disclosure requirement of § III.D if it satisfies the definition of Microsoft Middleware in the decree, ***see States' Remedy § VI.J, at 275***. That definition requires, among other things, the middleware to be "distributed separately" from Windows; according to Microsoft's counsel at oral argument, there is record evidence that has already occurred.

be disclosed under the States' proposal would give rivals the ability to clone Microsoft's software products; [10] and cloning would allow them to "mimic" the functionality of Microsoft's products rather than to "create something new." *States' Remedy, at 229*. They could also "develop products that implement Microsoft's Windows technology at a far lower cost [than Microsoft itself] since they would have access to all of Microsoft's research and development investment." *Id.* ***HN8***[] The effect upon Microsoft's incentive to innovate would be substantial; not even the broad remedial discretion enjoyed by the district court extends to the adoption of provisions so likely to harm consumers.

[*52]** The *amici* claim the district court's "concern about 'cloning' … rested in part on a misunderstanding of what an API is." This assertion is simply at odds with the testimony upon which the district court relied in concluding competitors could clone Microsoft's software and mimic its functionality. [11] Moreover, the *amici* fail entirely to address the district court's conclusion, based upon findings of fact, that cloning would deny "Microsoft the returns from its investment in innovation." [12] *Id. at 176*.

[*53]** Microsoft also points to the adverse technological effects that would have ensued from broader disclosure of its internal interfaces. The district court found overly broad disclosure of APIs would limit **[*1220]** **[**173]** Microsoft's ability to modify interfaces, a limitation that "threatens to stifle innovation and product flexibility." *Id. at 177*. The court also found that disclosure of internal interfaces, which the States' proposal would require, would force Microsoft to publish APIs where the interfaces are unstable. *Id. at 230-31*. That "could pose a substantial threat to the security and stability of Microsoft's software," *id. at 231*; reliance upon such interfaces may "cause third-party software not to work or Windows to crash," *id. at 230*. Massachusetts does not challenge any of these findings, although they clearly support the district court's refusal to require the broad disclosure of APIs proposed by the States.

Massachusetts also insists the depth of Microsoft's required disclosure under § III.D is "inadequate." The Commonwealth first argues the depth of Microsoft's disclosure obligation is unclear because the definition of "API" is circular and non-specific. The term is **[***54]** defined in § VI.A as an "application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D." *Id. § VI.A, at 274.* Massachusetts points to the testimony of the States' computer science expert, who said "Microsoft's definition of 'API' is almost entirely a circular reference to Section III.D, and it therefore does not adequately define what information must be provided as part of the API disclosure." Appel P 60, 2 J.A. (II) at 1269. We note that most of this expert's testimony regarding the definition of API is a legal analysis rather than the opinion of a computer scientist and is therefore beyond the "knowledge, skill, experience, training, or education" for which he was qualified as an expert. *FED. R. EVID. 702*. In any event, his legal analysis is wrong; the definition of API is not circular. API is defined in two places in the decree. The definition quoted above and cited by the States' computer expert is the one found in the "Definitions" section of the decree for the use of the term in every section of the decree other than § III.D. *See States' Remedy § VI.A, at 274*. The term is defined **[***55]** separately in § III.D, for the purpose of Microsoft's disclosure obligation under that section, as "the interfaces, including any associated callback interfaces," that permit Microsoft Middleware to obtain "services" from Windows. Microsoft clearly understood, as the States' computer

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[10] *See, e.g.,* ***States' Remedy, at 227*** (citing 5/10/02 pm Tr. at 7111-12 (Bennett trial testimony), 6 J.A. (II) at 3596 ("Well, if you read [the definition of Interoperate], it says: Effectively, access, utilize and/or support the full features and functionality of one another. That, to me, taken in its entirety … means the ability to clone.")).

[11] *See, e.g.,* ***States' Remedy, at 229*** (citing Gates WW 289-90, 8 J.A. (II) at 4770-71 ("Once provided with the equivalent of the blueprints for Windows, competitors … would have little trouble writing their own implementation of everything valuable that Windows provides today, including the capabilities it provides to developers via APIs")).

[12] In a footnote to its argument concerning the disclosure of communications protocols, Massachusetts asserts the district court clearly erred in suggesting the States' proposed definition could lead to cloning, for which assertion it cites the opinion of Dr. Appel that "the States' Remedy does not allow such copying," P 99, 2 J.A. (II) at 1284; *see also* PP 100-07, *id*. at 1284-88. This testimony, although contrary to the district court's finding that the States' broad definition of interoperation could lead to cloning, is hardly sufficient for us to conclude the district court's finding is clearly erroneous. *See* *Microsoft III, at 66* ("In view of the contradictory testimony in the record, some of which supports the District Court's finding …, we cannot conclude that the finding was clearly erroneous").

expert apparently did not, the latter definition is the one applicable to Microsoft's disclosure of APIs under the decree. [13]

Second, Massachusetts claims there is unrebutted testimony in the record indicating the depth of disclosure mandated by § III.D is not "adequate for those whose innovative software **[***56]** constitutes a potential threat to Windows." The cited testimony, however, does not cast doubt upon the district court's decision. The witnesses expressed concern that the extent of Microsoft's obligation to disclose file formats, registry settings, and similar information is unclear and explained the type of enhanced disclosure software developers would like, but the testimony amounts to no more than conclusory statements. [14] **[*1221]** **[**174]** That software developers prefer more, rather than less, expansive and detailed disclosure of APIs and technical information is hardly surprising, but the testimony is not sufficient to support Massachusetts' implication that the disclosures required by § III.D will not materially assist developers of potential middleware threats to Windows. Recall the district court did not undertake to assure the viability of Microsoft's rivals. Rather, the court settled upon a level of disclosure that would "bolster" the ability of rival middleware to serve as a platform threat to Microsoft; "help" rival middleware interoperate with Windows; and "have the potential to increase the ability of competing middleware to threaten [Windows]." *Id. at 172*.

[*57]** Finally, Massachusetts argues the disclosure mandated by § III.D need not be timely made. In the case of a "new major version of Microsoft Middleware," § III.D requires disclosure "no later than the last major beta test release of that Microsoft Middleware." For a new version of Windows, disclosure must occur in a "Timely Manner," defined as the time of the first release of a beta test version of Windows through the Microsoft Developer Network or upon the distribution of 150,000 or more copies of the beta version. *Id. § VI.R, at 276*.

Massachusetts nonetheless insists "the remedy is at odds with the record on timeliness." Microsoft responds by pointing to evidence that requiring disclosure "before the software code underlying those APIs has been fully developed and tested, as the … States requested, would create serious logistical problems for both Microsoft and third-party software developers." *See, e.g.,* Direct Testimony of Microsoft's Linda Wolfe Averett P 18, 6 J.A. (II) at 3261 ("Until Microsoft is confident that it has figured out how to provide a particular functionality, it does not want third-party developers building products that rely on our functionality"). **[***58]** Although clearly favoring the definitions of timeliness adopted by the district court, Microsoft's evidence is not required in this instance because the testimony Massachusetts cites itself underscores Microsoft's "strong incentive" to disclose its APIs in a timely fashion so that software developers will write applications based upon them. *See, e.g.,* Borduin P 35, 2 J.A. (II) at 1318-19. Without timely disclosure, "there would be far fewer and lower quality programs written for Microsoft's operating systems." *Id.* Microsoft's incentive to make timely disclosure of APIs is obvious: the ability of software developers to write applications that rely upon Microsoft's APIs depends upon the developers having access to them. As the district court found in the liability phase, "Microsoft must convince ISVs to write applications that take advantage of the new APIs, so that existing Windows users will have [an] incentive to buy an upgrade." *Findings of Fact P 44, at 21-22*. The court also found Microsoft offered inducements to software developers to ensure they "promptly develop new versions of their applications adapted to the newest version of Windows." *Id*. Massachusetts points **[***59]** to no evidence, and offers no reason to think, this incentive is insufficient to induce timely disclosure under § III.D of the decree. To the contrary, the evidence Massachusetts offers merely confirms the economic incentives Microsoft faces in re **[*1222]** **[**175]** leasing its APIs to ISVs in a timely manner.

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[13] *See* ***States' Remedy, at 235***; *see also* 5/2/02 pm Tr. at 6128 (Poole trial testimony) (stating in response to question whether he knew "exactly" which APIs Microsoft is obliged to disclose under § III.D: "Yes. We know how to look for the list of points they [sic] make their interfaces, associated call back interfaces, et cetera, and ensure that we are in compliance relative to the code that we separately distribute.").

[14] For instance, one developer requested disclosure of certain "complicated interfaces" that Microsoft "had not anticipated" software developers needing. 3/26/02 pm Tr. at 1452-53 (trial testimony of Steven McGeady), 6 J.A. (II) at 3375-76; *see also* 3/20/02 pm at Tr. at 732-35 (trial testimony of David Richards of RealNetworks), *id.* at 3404-05 (requesting further disclosure of technical information and APIs); Direct Testimony of David Richards P 65 & n.11, 2 J.A. (II) at 1081-83 (same); Direct Testimony of Richard Green P 161, *id.* at 982 (same). Massachusetts also cites testimony concluding the depth of Microsoft's disclosure obligation is "not clear." *E.g.*, Richards P 90, *id.* at 1099-1100.

In sum, the district court's findings are fully adequate to support its decision with respect to disclosure. They are comprehensive and sufficiently detailed to provide a clear understanding of the factual basis for the court's decision. *See Folger Coffee Co. v. M/V Olivebank, 201 F.3d 632, 635 (5th Cir. 2000)*; *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571 (2d ed. 1995). We do not find persuasive Massachusetts' arguments that the district court overstated or misapprehended the significance of the disclosure required by the decree. In light of the forward-looking nature of the API disclosure provision, the court reasonably balanced its goal of enhanced interoperability with the need to avoid requiring overly broad disclosure, which it determined could have adverse economic and technological effects, including the cloning of Microsoft's **[***60]** software. Moreover, we cannot overlook the threat -- as documented in the district court's findings of fact in the liability phase -- posed by Netscape and Java, which relied upon Microsoft's then more limited disclosure of APIs. Microsoft managed to squelch those threats, at least for a time, but that does not diminish the competitive significance of the disclosure of Microsoft's APIs, a disclosure enhanced by the decree.

We therefore hold the district court did not abuse its discretion in fashioning the remedial provision concerning Microsoft's disclosure of APIs.

b. Disclosure of communications protocols

The district court also included in the decree a provision requiring Microsoft to disclose certain communications protocols. *See States' Remedy § III.E, at 269*. As with APIs, we did not hold Microsoft's disclosure practices with respect to communications protocols violated *§ 2 of the Sherman Act*. Communications protocols involve technologies -- servers and server operating systems -- that are not "middleware" as we used that term in our prior decision. *See Microsoft III, at 53-54*. It is therefore not surprising the district court described the provision requiring the **[***61]** disclosure of communications protocols as the "*most* forward-looking" in the decree. *States' Remedy, at 173* (emphasis in original).

Communications protocols provide a common "language" for "clients" and "servers" in a computing network. A network typically involves interoperation between one or more large, central computers (the servers) and a number of PCs (the clients). By interoperating with the server, the clients may communicate with each other and store data or run applications directly on the server. The district court found that servers may use any of several different operating systems, *id. at 121* (citing Direct Testimony of Robert Short P 22, 6 J.A. (II) at 3528-29; Madnick P 44, 5 J.A. (II) at 2814-15), but most clients run a version of Windows, *id.* (citing Madnick P 44, 5 J.A. (II) at 1814-15). In a "heterogeneous network," that is, one comprising different types of hardware and of operating systems, interoperation can be difficult. One method of addressing the difficulty is to specify use of a "common language" understood by all the computing elements of the network. The district court specified one such language, known as "native communication," in § **[***62]** III.E of the decree. [15] **[*1223]** **[**176]** That section requires Microsoft to make available to third parties "on reasonable and non-discriminatory terms … any Communications Protocol that is … (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product."

Native communication differs from other forms of communication because it does not require that additional software be installed on the client. Other approaches may require adding "software to the server to make the client computer **[***63]** 'think' it is communicating in a homogeneous network," *id. at 122* (citing Madnick PP 68-75, 5 J.A. (II) at 2826-29), or adding "software code to the client which enables the client to communicate more effectively with the server," *id.* (citing Madnick PP 68, 76-82, 5 J.A. (II) at 2826-27, 2829-35). As the district court stated, "Interoperation made possible by software added onto Microsoft's PC operating system products is less clearly related to the facts of this case because it expands beyond the relevant market of Intel-compatible PC operating

[15] Examples of native communication include "basic Internet protocols like Transmission Control Protocol/Internet Protocol ('TCP/IP'), HyperText Transfer Protocol ('HTTP') and File Transfer Protocol ('FTP'), all of which are supported natively in both Windows clients and non-Microsoft servers." *See* Short P 36, 6 J.A. (II) at 3535-36.

systems to address the ability of an *application* to interoperate with a server." *Id. at 173* (emphasis in original). The court therefore held Microsoft need not disclose communications protocols used to interoperate non-natively.

In determining the scope of the remedy, the district court acknowledged that network and server-based applications are not middleware in the sense that "the software physically resides on the PC and functions as a platform for other applications." *Id. at 129*. Still, the court reasoned that such applications are capable of functioning in a manner similar to that of middleware "by providing a layer **[***64]** between the operating system and top-level applications." *Id*. The court's reasoning is supported by its finding that "software developers are increasingly writing programs that rely, or 'call,' on APIs exposed by server operating systems such that the server operating system provides the 'platform' for applications." *Id. at 123* (citing Direct Testimony of Novell, Inc.'s Dr. Carl Ledbetter PP 47-48, 2 J.A. (II) at 1163-64; Direct Testimony of Richard Green P 76, 2 J.A. (II) at 956; 5/27/02 am Tr. at 1508-09 (Ledbetter trial testimony)). For these reasons the district court, in extending Microsoft's disclosure to communications protocols, concluded "server operating systems can perform a function akin to that performed by traditional middleware." *Id. at 172*.

Massachusetts argues § III.E will not enhance interoperability and there is no evidence, and the district court made no finding, that it will. Microsoft responds that "a substantial degree of interoperability already exists between Windows desktop operating systems and non-Microsoft server operating systems" and the ability of third parties to license those protocols from Microsoft pursuant to § III.E will enhance **[***65]** interoperability. The parties' divergent predictions point up the difficulties inherent in crafting a forward-looking provision concerning a type of business conduct as to which there has not been a violation of the law.

To be sure, as the Supreme Court observed in *International Salt Co. v. United States, 332 U.S. 392, 400, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*, ***HN9***[] "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." True enough, but when the district **[**177]** **[*1224]** court undertakes to block the untraveled roads by adopting a forward-looking provision, its discretion is necessarily less broad because, without liability findings to mark the way, it is in danger of imposing restrictions that prevent the defendant from forging new routes to serve consumers.

Massachusetts objects that the district court should not have limited the disclosure requirement of § III.E to protocols for native communications, which the district court found is only "one of at least five basic approaches to achieving interoperability between Windows client operating systems and non-Microsoft **[***66]** server operating systems." *States' Remedy, at 234* (*citing* Short P 35, 6 J.A. (II) at 3535). We think the district court prudently sought not to achieve complete interoperability but only to "advance" the ability of non-Microsoft server operating systems to interoperate with Windows and thereby serve as platforms for applications. It was not an abuse of discretion for the court not to go further; indeed, to have done so in the absence of related liability findings would have been risky.

Massachusetts points to the testimony underlying the States' proposed findings for its claim that the disclosure required by § III.E "would not provide a level of interoperability sufficient to give competing software the opportunity to gain marketplace acceptability." Those proposed findings, however, called for "full" and "seamless" interoperability, *e.g.,* States' Proposed Findings PP 700, 708, 3 J.A. (II) at 1613, 1615, and, more specifically, for disclosure of the "proprietary protocols" for certain of Microsoft's software products, including the protocols that allow Microsoft's server-based email software (Microsoft Exchange) to interoperate with its PCbased email software (Microsoft **[***67]** Outlook), P 704, *id* at 1614. Microsoft responds that, though Massachusetts may want to extend the remedy to these products, the district court did not abuse its discretion by "refusing to extend the remedy so far beyond the liability determinations affirmed on appeal." We agree. It was not inappropriate for the district court to require only the disclosures necessary to provide a basic link between non-Microsoft operating systems and PCs running Windows. That there are other methods for achieving the same or an even greater degree of interoperability -- perhaps even methods allowing the "full" and "seamless" interoperability claimed by Massachusetts -- does not render insufficient what is already the "most forward-looking" provision in the decree.

Finally, Massachusetts argues the district court erred by failing to define the term "interoperate" in the decree. The district court found "the term 'interoperate' captures a continuum[] rather than an absolute standard.... The Court's remedial decree utilizes a very simple definition of the term which is intended to capture the reasonable spectrum of the continuum." *States' Remedy, at 172 n.75*. Evidence in the record supports **[***68]** the district court's finding. [16] The court rejected the States' proposed definition, which, as we have seen, the court found equates "interoperate" with "interchangeable" and would give others the ability to clone many of Microsoft's products. *Id. at 227* (citing 5/10/02 pm Tr. at 7111-12 (Bennett trial testimony), 6 J.A. (II) at 3596). In light of the conflicting testimony in the record, some of which clearly supports the district court's finding that "interoperation" **[*1225]** **[**178]** is reasonably understood not as a binary concept, meaning two network elements either do or do not interoperate, but rather as a "continuum," meaning their communication is a matter of degree, we cannot hold the district court's finding to be clearly erroneous. *Microsoft III, at 66*.

[*69]** In sum, the district court did not abuse its discretion or otherwise err in adopting a provision limiting to native communication Microsoft's obligation to disclose communications protocols.

4. Web Services

Massachusetts next argues the district court erred by failing to adopt a remedy addressed to Web services. In particular, Massachusetts claims the court should have extended Microsoft's disclosure obligation beyond interoperation of server operating systems and PCs running Windows to reach interoperation among "other nodes of the network encompassed by network-based computing and the Web services paradigm, such as multiple servers or handheld devices." [17] Microsoft responds by pointing out there was no mention of Web services in the liability phase of this case, and by claiming it has no monopoly power in the market for Web services, "if such a [market] exists." Also, the district court found "Web-browsing software of the type addressed during the liability phase will play no role in the creation, delivery, or use of many Web services." *States' Remedy, at 127*.

[*70]** Although the district court encountered "substantial disagreement" about what constitutes a Web service, *id. at 126*, it found the middleware at issue in *Microsoft III*, namely, Web-browsing software, "is not integral to the functioning of Web services because many Web services will involve direct communications between devices or programs and will not be accessed by an end user at all." *Id. at 126-27* (citing Direct Testimony of Dr. James Allchin PP 43-45, 2 J.A. (II) at 1218-19). Far from ignoring this area of rapid innovation, as Massachusetts claims, the district court concluded Web services are simply too far removed from the source of Microsoft's liability in this case -- as to which the relevant market is operating systems for Intel-compatible PCs -- to be implicated in the remedy. *Id. at 133* ("mere importance of Web services to Microsoft and the industry as a whole is not sufficient to justify extending the remedy in this case to regulate Microsoft's conduct in relation to Web services"). Nor did the court think the States had sufficiently "explained how the increase in the use of non-PC devices in conjunction with Web services will reduce Microsoft's monopoly **[***71]** in the market for PC operating systems." *Id. at 134*.

Massachusetts claims the district court excluded Web services based upon the clearly erroneous premise "that this new paradigm is a threat to the PC, and not to Windows." For a correct understanding Massachusetts points us to the testimony of Jonathon Schwartz, Chief Strategy Officer at Sun Microsystems: "So long as consumers can access Web services using competing devices and operating systems, they are free to switch away from Windows if competing alternatives are more attractive." Direct Testimony P 37, 2 J.A. (II) at 882; *see also* Direct Testimony of **[*1226]** **[**179]** John Borthwick P 74, 7 J.A. (II) at 4117 (if "developers of web services adopt industry standard protocols," then applications will not rely upon Windows and users will therefore be less reliant upon Windows). According to Massachusetts, the district court acknowledged as much when it stated:

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[16] *See, e.g.,* 5/10/02 pm Tr. at 7110 (Bennett trial testimony), 6 J.A. (II) at 3596 (explaining required disclosure as portion of continuum or spectrum of interoperability that allows "two programs [to] exchange and make effective use of each other's data").

[17] Although Massachusetts does not mention it, the States' proposal would have done just that, *see* SPR § C, 6 J.A. (II) at 3172; *see also* SPR § 4, *id.* at 3172-73, extending Microsoft's disclosure obligation to interoperability with respect to, among others, "Handheld Computing Devices" -- a term defined in the SPR to include "cellular telephones, personal digital assistants, and Pocket PCs," SPR § 22.k, *id.* at 3194.

> The Chief Strategy Officer for Sun Microsystems, Inc., Jonathon Schwartz, testifying on behalf of Plaintiffs … theorized that "if the most popular applications are delivered as Web services, instead of [as] stand-alone PC applications, the applications barrier protecting **[***72]** Windows could be substantially eroded."

States' Remedy, at 127 (brackets in original). Clearly, however, the district court expressed its view that Schwartz was "theorizing," not stating a conclusion based upon fact. In any event, the district court was primarily -- and correctly -focused upon whether a provision addressing Web services could be linked to Microsoft's liability in *Microsoft III*; it could not.

Moreover, it does not follow that, because a proposed requirement could reduce the applications barrier to entry, it must be adopted. Recall the applications barrier to entry arose only in part because of Microsoft's unlawful practices; it was also the product of "positive network effects." *84 F. Supp. 2d at 20*. If the court is not to risk harming consumers, then the remedy must address the applications barrier to entry in a manner traceable to our decision in *Microsoft III*. This the decree does by opening the channels of distribution for non-Microsoft middleware. The district court reasonably determined, based upon evidence in the record, a provision addressing Web services might not be so benign. *States' Remedy, at 134*.

Massachusetts also **[***73]** complains (albeit only in a footnote) that, because the district court included a remedy affecting servers, there is "no basis for distinguishing Web services," which are part of the same, new platform threat. We disagree. Disclosure of communications protocols is a "*most* forward-looking remedy," *id. at 173* (emphasis in original); the district court, which was not compelled to venture even that far from its moorings in *Microsoft III*, was well within its discretion, therefore, not to go further.

5. Market Development Programs

Massachusetts argues the remedy should be modified to prevent Microsoft from offering to OEMs discounts, known as Market Development Programs (MDPs). The Commonwealth's claim is based in part upon its concern that Microsoft will use MDPs "to ensure that OEMs will not exercise whatever flexibility the remedy provides" them. On its face, Massachusetts' concern appears to be that the new freedoms provided to OEMs under the decree will be ineffectual because Microsoft has retained the ability to offer OEMs favorable discounts. Be that as it may, the district court rejected the States' proposal to prevent Microsoft from offering discounts, *see* SPR **[***74]** § 2.a, 6 J.A. (II) at 3168, noting this court "did not condemn Microsoft's use of MDPs and, in fact, steadfastly refused to condemn practices which, at their core, 'offered a customer an attractive deal.' " *States' Remedy, at 166* (quoting *Microsoft III, at 68*). The district court also cited evidence in the record -- testimony both of Microsoft's and of the States' economic experts -- that MDPs may be employed procompetitively. *Id. at 211*. Upon weighing the evidence, the district court concluded "the weight of the economic testimony favors preservation of Microsoft's ability to offer MDPs, provided that Microsoft cannot impose the MDPs in a discriminatory or retaliatory manner." *Id.*; *see also id. at 166* (MDPs must be **[*1227]** **[**180]** "based upon reasonable, objective criteria, which are enforced uniformly and without discrimination").

Massachusetts argues the district court "committed an error of law" by failing to prohibit all MDPs, referring us to *United States v. Loew's, Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*, for the proposition that ***HN10***[] "to ensure … that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must **[***75]** sometimes be enjoined," *id. at 53*. In *Loew's*, several major film distributors had violated *§ 1 of the Sherman Act* by "block-booking," or tying popular films with less popular films in licensing agreements with television stations. *Id. at 40-41*. The district court enjoined the practice but did not accept the Government's proposal to enjoin certain "otherwise permissible practices" that could be used to "subject[] prospective purchasers to a 'run-around' on the purchase of individual films." *Id. at 55*. Although the Supreme Court ultimately adopted the Government's proposed modifications because they would help "to prevent the recurrence of the illegality," *id. at 56*, the Court pointed out that "the trial judge's ability to formulate a decree tailored to deal with the violations existent in each case is normally superior to that of any reviewing court," *id. at 52*. Here the district court did impose restraints upon Microsoft's "otherwise permissible practices" by requiring that any MDPs be both uniform and nondiscriminatory. *States' Remedy, at 166*. Massachusetts has not shown that any additional **[***76]** restraint is necessary.

Massachusetts also argues the district court clearly erred in determining MDPs are procompetitive because "this directly contradicts its own findings regarding Microsoft's ability to frustrate the remedy." The Commonwealth here relies upon testimony that Microsoft conditioned MDPs upon an OEM's compliance with certain technical requirements, including a specified configuration of hardware and software, restrictions on the boot-up sequence, and a specified allocation of computer memory. *See*, *e.g.*, Ashkin PP 119-22, 5 J.A. (II) at 3114-16. That testimony, however, reflects the competitive landscape as it was prior to the adoption of the remedy now in place. Whereas an OEM licensing Windows from Microsoft previously had little flexibility to include rival middleware, now it may choose either to distribute non-Microsoft middleware or to get a discount from Microsoft, as it sees fit. True, this choice may be skewed if Microsoft offers deep discounts, but the district court required Microsoft to offer MDPs to all comers on the same uniform and non-discriminatory terms; it cannot target a discount solely at an OEM that dallies with rival middleware. Massachusetts **[***77]** gives us no reason to think Microsoft is likely to pursue a deep discount strategy seemingly made bootless by those conditions.

Without a clear indication that Microsoft can or will use its discounts in a fashion that, as Massachusetts claims, "subverts" the other provisions of the remedy, we again refuse to condemn a practice that "offer[s the] customer an attractive deal." *Microsoft III, at 68*. Accordingly, we hold the district court did not abuse its discretion by refusing to prohibit, rather than placing protective conditions upon, Microsoft's offer of discounts.

6. Open Source Internet Explorer

Massachusetts argues the district court abused its discretion in rejecting the States' "open-source IE" provision, which would require that

> Microsoft … disclose and license all source code for all Browser software **[*1228]** [**[**181]** and that the license] grant a royalty-free, non-exclusive perpetual right on a non-discriminatory basis to make, use, modify and distribute without limitation products implementing or derived from Microsoft's source code….

SPR § 12, 6 J.A. (II) at 3178. Microsoft responds that this type of remedy is unnecessary because the decree already proscribes **[***78]** the anticompetitive conduct by which Microsoft had unlawfully raised the applications barrier to entry and thereby diminished the threat posed by platforms rivaling Microsoft's operating system.

The district court rejected the States' proposal for three reasons. First, the open-source IE proposal "ignores the theory of liability in this case," which was directed at Microsoft's unlawful "response to cross-platform applications, not operating systems," *States' Remedy, at 185*; the proposed remedy would directly benefit makers of non-Microsoft operating systems, even though the harm, if any, to them was indirect. Second, the proposal would "provide [a] significant benefit to competitors but [has] not been shown to benefit competition." *Id.* Finally, the proposal would work a "de facto divestiture" and therefore should be analyzed as a structural remedy pursuant to this court's opinion on liability. *Id. at 186*; *see also* *Microsoft III, at 106* ("In devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the OS market"). **[***79]** Here the court carefully considered the "causal connection" between Microsoft's anticompetitive conduct and its dominance of the market for operating systems, and held the causal link insufficient to warrant a structural remedy. *States' Remedy, at 186*.

Massachusetts argues the district court "improperly ignored evidence that IE's dominance is competitively important for Microsoft" and complains that Microsoft "advantages its own middleware by using the browser to limit the functionality of competing products." These are not objections, however, to the district court's reasons for rejecting the States' proposal. Rather, they are criticisms of what Massachusetts terms the district court's "implicit determination that [certain] facts were not relevant" to its analysis of the opensource IE provision. For instance, Massachusetts points to the testimony of David Richards of RealNetworks stating there would be "substantial end user benefit" if Microsoft disclosed enough APIs to allow competitors such as RealNetworks to create their own versions of the "Media Bar," one of Microsoft's recent additions to the IE interface. *See* Direct Testimony PP 79-84, 2 J.A. (II) at 1094-99. According **[***80]** to Richards, the Media Bar is a version of Microsoft's Windows Media Player "embedded as the default media player" in IE. P 79, *id.* at 1094-95. If Microsoft were to disclose the internal architecture of the Media Bar, including the APIs upon which it relies, he says, then end users could "play back more digital formats within the [IE] browser than [Microsoft's] Windows Media Player, including our own RealAudio and RealVideo formats." PP 81, 82, *id.* at 1098.

Massachusetts argues the district court's disregard of this testimony "was wrong as a matter of law," for which proposition it cites *FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862 (D.C. Cir. 1977)*. As an initial matter, Massachusetts' reliance upon *Texaco* is misplaced. In *Texaco* we said "the appellate court has the authority -- and the duty -- to determine the proper legal premise and to correct the legal error of the trial judge, without limitation by the doctrines of 'clearly erroneous' and 'abuse **[*1229]** **[**182]** of discretion' that are applicable to review of factual determinations." *Id. at 876 n.29*. Here the district court did not, as Massachusetts claims, commit an error of law "in assessing **[***81]** the link between Microsoft's unlawful acts and its control of the dominant browser." To be sure, Richards' testimony makes clear Microsoft's competitors would benefit from Microsoft's disclosure of the APIs necessary for them to replicate Microsoft's Media Bar. Neither that nor any other testimony Massachusetts cites, however, indicates the district court relied upon an improper "legal premise" in its "implicit determination" of relevance.

The district court's premise, as discussed more fully below, was that the fruit of Microsoft's unlawful conduct was not the harm particular competitors may have suffered but rather Microsoft's freedom from platform threats posed by makers of rival middleware. *See* Part II.B.1. The district court properly focused, therefore, upon opening the channels of distribution to such rivals; facts tending to show harm to specific competitors are not relevant to that task. Also recall the district court was properly concerned with avoiding a disclosure requirement so broad it could lead to the cloning of Microsoft's products. That, in essence, appears to be what the cited testimony would require with respect to Microsoft's Media Bar.

Massachusetts next **[***82]** argues the district court "misunderstood" that the States' open-source IE proposal could "reestablish a cross-platform browser," thereby allowing applications to be written to APIs exposed by IE and, as a result, lower the applications barrier to entry. As discussed in preceding sections of this opinion, the decree the district court approved includes several provisions addressed directly to Microsoft's efforts to extinguish nascent threats to its operating system. Specifically, the decree restores the conditions necessary for rival middleware to serve as a platform threat to Windows and thereby speaks directly to our holding with respect to liability. *See* *Microsoft III*. Moreover, the district court found the States' open-source IE proposal ignores the theory of liability in this case not because the court "misunderstood" the implications of the proposal but because the proposal would most likely benefit makers of competing operating systems, namely, Apple and Linux, rather than restore competitive conditions for potential developers of rival middleware. *States' Remedy, at 242-43*. [18] That is why the court concluded the open-source IE proposal would help specific competitors **[***83]** but not the process of competition. *See id. at 185, 244*; *see also* Elzinga P 85, 5 J.A. (II) at 2732 (open-source IE provision is a "transparent 'IP grab' " that would "help competitors but harm competition"). Massachusetts would refute the court's conclusion with the testimony of the States' economic expert, who said open-source IE would "lower the applications barrier." Shapiro P 101, 2 J.A. (II) at 829. But that conclusory statement, even if an accurate prediction, does not point up any error on the part of the district court in refusing to adopt the open-source proposal. There is more than **[*1230]** **[**183]** one way to redress Microsoft's having unlawfully raised the applications barrier. And it was certainly within the district court's discretion to address the applications barrier to entry as it did, namely, by restoring the conditions in which rival makers of middleware may freely compete with Windows. Indeed, to have addressed itself narrowly to aiding specific competitors, let alone competitors that were not the target of Microsoft's unlawful efforts to maintain its monopoly, could well have put the remedy in opposition to the purpose of the antitrust laws. *See* *Brooke Group, 509 U.S. at 224* **[***84]** ***HN11***[] (antitrust laws designed to protect "competition, not competitors").

[18] As an economic matter, of course, the source of the threat to Microsoft's monopoly of the market for Intel-compatible PC operating systems, whether it be rival middleware or rival operating systems, is not important. In remedying Microsoft's violations of the antitrust laws, however, it was reasonable for the district court to focus upon the restoration of competitive conditions facing makers of rival middleware rather than lending a hand to makers of rival operating systems; it was middleware with the potential to create a platform threat, not rival operating systems, against which Microsoft acted unlawfully. *Findings of Fact, at 28-30*.

Massachusetts also complains the district court, in rejecting the open-source IE provision, erred by probing the causal connection between Microsoft's unlawful acts and harm to consumers. In response Microsoft points out that the district ***HN12***[] court viewed the States' proposed relief as structural and therefore **[***85]** applied a test of causation along the lines we set out in *Microsoft III*. *See* *253 F.3d at 106-07*. Our instruction to the district court was to consider on remand whether divestiture was an appropriate remedy in light of the "causal connection between Microsoft's anticompetitive conduct and its dominant position in the … market [for operating systems]." *Id. at 106*. Structural relief, we cautioned, "is designed to eliminate the monopoly altogether … [and] requires a clearer indication of a *significant causal connection* between the conduct and creation or maintenance of market power." *Id.* (emphasis in original) (*citing* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 653b, at 91-92 (1996)).

As Massachusetts correctly notes, we were there addressing the district court's order to split Microsoft into two separate companies, whereas on remand, the district court was addressing the States' open-source IE proposal. But the district court reasonably analogized that proposal to a divestiture of Microsoft's assets. *States' Remedy, at 185, 244*. The court pointed to testimony both of Microsoft's and of the States' economic experts characterizing **[***86]** the open-source IE remedy as "structural" in nature. *Id. at 244* (citing Elzinga P 104, 5 J.A. (II) at 2740-41; 4/11/02 am Tr. at 3324 (Shapiro trial testimony), 8 J.A. (II) at 4502). Although Microsoft could continue to use its intellectual property under the opensource IE proposal, the "royalty-free, non-exclusive perpetual right" of others to use it as well would confiscate much of the value of Microsoft's investment, which Gates put at more than $ 750 million, P 128, 8 J.A. (II) at 4714, and the court clearly found to be of considerable value. *See States' Remedy, at 241, 244*.

Massachusetts claims *United States v. National Lead Co., 332 U.S. 319, 91 L. Ed. 2077, 67 S. Ct. 1634 (1947)*, upheld compulsory licensing as a remedy while at the same time rejecting the need for divestiture. The licenses in *National Lead*, however, were not to be free; on the contrary, the Supreme Court specifically pointed out that reducing "all royalties automatically to a total of zero … appears, on its face, to be inequitable without special proof to support such a conclusion." *Id. at 349*. (The Court left open the possibility that royalties might be set at zero or at a nominal **[***87]** rate, but only where the patent was found to be of nominal value.) Here the States proposed Microsoft be required to license IE "royalty-free," SPR § 12, 6 J.A. (II) at 3178. Therefore, *National Lead* is worse than no support for the States' proposal; it tells us that proposal is "on its face … inequitable." *332 U.S. at 349*.

[*1231] **[**184]** Finally, Massachusetts claims the district court erred in rejecting the open-source IE proposal on the ground it "is predicated not upon the causal connection between Microsoft's illegal acts and its position in the PC operating system market, but rather the connection between the illegal acts and the harm visited upon Navigator." This plainly misstates the issue as we remanded it. We were concerned a drastic remedy, such as divestiture, would be inappropriate if Microsoft's dominant position in the operating system market could not be attributed to its unlawful conduct. *Microsoft III, at 106-07*. The district court did not abuse its discretion by insisting that an analogous form of structural relief -- namely, divesting Microsoft of much of the value of its intellectual property -- likewise meets the test of causation. Massachusetts' statement **[***88]** that the open-source IE provision "is predicated … [upon] the connection between the illegal acts and the harm visited upon Navigator" highlights precisely why the district court was right to reject that provision: The remedy in this case must be addressed to the harm to competition, not the harm visited upon a competitor.

The district court's remedy is appropriately addressed to the channels of distribution for non-Microsoft middleware, including rival browsers such as Netscape Navigator. The court did not abuse its discretion by refusing to adopt the States' proposed open-source IE provision for the benefit of Microsoft's competitors.

7. Java must-carry

Massachusetts argues the district court erred in refusing to require Microsoft to distribute with Windows or IE a Suncompliant Java runtime environment, as the States had proposed. Consider:

> For a period of 10 years from the date of entry of the Final Judgment, Microsoft shall distribute free of charge, in binary form, with all copies of its Windows Operating System Product and Browser … a competitively

> performing Windows-compatible version of the Java runtime environment ... compliant with the latest Sun Microsystems **[***89]** Technology Compatibility Kit.

SPR § 13, 6 J.A. (II) at 3179-80. The district court rejected this proposal because it did not think appropriate a remedy that "singles out particular competitors and anoints them with special treatment not accorded to other competitors in the industry." *States' Remedy, at 189*. Microsoft adds that the proposal would give "Sun's Java technology a free-ride on Microsoft's OEM distribution channel."

Massachusetts argues the district court was wrong as a matter of law in thinking that mandated distribution of Java would benefit a competitor and not competition: "If the district court were correct that broad distribution of Java did not benefit competition, then this Court could not have held that Microsoft's undermining of Java's distribution was anticompetitive." Not surprisingly, this *non sequitur* misrepresents the reasoning of the district court. That court focused upon remedying Microsoft's unlawful foreclosure of distribution channels for rival middleware, not upon propping up a particular competitor. Massachusetts also complains that if any measure that helps a "would-be competitor of a monopolist" is rejected out of hand, then "competition **[***90]** can never be restored to a monopolized market." There is a real difference, however, between redressing the harm done to competition by providing aid to a particular competitor and redressing that harm by restoring conditions in which the competitive process is revived and any number of competitors may flourish (or not) based upon the merits of their offerings. Even in the latter instance, of **[*1232]** **[**185]** course, a competitor identifiable *ex ante* may benefit but not because it was singled out for favorable treatment.

Massachusetts also complains the district court ignored evidence "that the widespread availability of the crossplatform Java runtime environment on PCs would reduce the applications barrier to entry." According to Massachusetts, only if Java is available on PCs at "a percentage that approaches the percentage of PCs running Windows" will developers write to it. Testimony cited by Massachusetts extolling the benefits of Java ubiquity, *e.g.,* Green P 53, 2 J.A. (II) at 949; Shapiro P 131, *id.* at 840, does not, however, call into question the district court's rejection of the States' proposal as "market engineering," *States' Remedy, at 262* (quoting Murphy P 239, 5 J.A. **[***91]** (II) at 2678), aimed at benefitting a specific competitor.

B. Cross-cutting Objections

Massachusetts also raises arguments that pertain to multiple provisions of the remedial decree. One such objection goes to the district court's overall approach to fashioning a remedy.

1. "Fruits"

Massachusetts also objects that, because the district court did not require open-source IE licensing and mandatory distribution of Sun's Java technology, the decree fails to "deny Microsoft the fruits of its exclusionary conduct." As recounted in Part I above, we rejected the remedy at issue in *Microsoft III* in part because the district court had "failed to provide an adequate explanation for the relief it ordered." *253 F.3d at 103*. We had expected the district court to discuss the ***HN13***[] "objectives the Supreme Court deems relevant" to fashioning relief in an antitrust case. *Id.* One of those objectives, as Massachusetts notes, is to "deny to the defendant the fruits of its statutory violation." *Id.* (citing *United States v. United Shoe Mach. Corp., 391 U.S. 244, 250, 20 L. Ed. 2d 562, 88 S. Ct. 1496 (1968))*. The district court's omission of any discussion addressed to this objective **[***92]** was particularly troublesome because that court had ordered the break-up of a company that was not the product of mergers or acquisitions, *see, e.g., id. at 99, 106*, much less unlawful mergers or acquisitions. In any event, ***HN14***[] the fruits of a violation must be identified before they may be denied. This would be a difficult, not to say imprudent, task for a reviewing court to undertake in the first instance when the remedy requires a divestiture but there are no clear lines of perforation. We could not, for instance, "go[] into the record far enough to be confident" what had been identified as fruits were actually "the products of the unlawful practices which the defendants have inflicted on the industry," as the Supreme Court could in identifying "at least some" of the defendant's acquisitions as "the fruits of [the] monopolistic practices or restraints of trade" being remedied in *United States v. Paramount Pictures, Inc., 334 U.S. 131, 152, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*.

The present decree, however, does not require that Microsoft be broken up. Nor did the district court adopt any other of the States' proposals it deemed structural in nature -- open-source IE, as discussed **[***93]** above, and the "porting" of Microsoft Office. The district court also specifically rejected the idea that IE was the fruit of Microsoft's anticompetitive conduct, finding, "neither the evidentiary record from the liability phase, nor the record in this portion of the proceeding, establishes that the present success of IE is attributable entirely, or even in predominant part, to Microsoft's illegal conduct." *States' Remedy, at 185-86 n.81*; *see also id. at 244 n.121*. **[*1233]** **[**186]** Rather, the fruit of its violation was Microsoft's freedom from the possibility rival middleware vendors would pose a threat to its monopoly of the market for Intelcompatible PC operating systems. The district court therefore reasonably identified opening the channels of distribution for rival middleware as an appropriate goal for its remedy. By "prying open" these channels, *International Salt, 332 U.S. at 401*, the district court denied Microsoft the ability again to limit a nascent threat to its operating system monopoly. ***HN15***[] The district court certainly did not abuse its discretion by adopting a remedy that denies Microsoft the ability to take the same or similar actions to limit competition in the **[***94]** future rather than a remedy aimed narrowly at redressing the harm suffered by specific competitors in the past. This distinction underlies the difference between a case brought in equity by the Government and a damage action brought by a private plaintiff.

Massachusetts also complains the district court erred in applying a "stringent but-for test" of causation in determining whether "advantages gained by Microsoft could be considered a fruit of Microsoft's illegality." Here it points to a footnote in which the district court, in the course of rejecting the States' open-source IE proposal, questioned the extent to which the success of IE could be traced to Microsoft's unlawful conduct. *See States' Remedy, at 242* & n.119. We have already determined the district court properly refused to impose that structural remedy without finding a significant causal connection "between Microsoft's anticompetitive conduct and its dominant position in the … market [for operating systems]." *Microsoft III, at 106*; *see also* Part II.A.6. More important, the fruit of Microsoft's unlawful conduct, as mentioned, was its ability to deflect nascent threats to its operating system by limiting **[***95]** substantially the channels available for the distribution of non-Microsoft middleware. Therefore, to quote a leading treatise, regardless whether the "maximum feasible relief" in this case could have included either open-source IE or Java must-carry or both, the district court clearly did not abuse its discretion by adopting a more "tailored remedy" that directly addressed the fruit of Microsoft's unlawful conduct. 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 650, at 67-68 (2d ed. 2002). Finally, even if stunting Navigator and Java specifically were deemed the fruits of Microsoft's violations, the decree would still be adequate because it opens the way to their distribution, both directly through the end-user access provision in § III.H and generally through the other conduct prohibitions found in § III of the decree.

2. Presumption

Finally, Massachusetts charges the district court improperly indulged but did not acknowledge an "apparent presumption" in favor of Microsoft's proposed remedy, "while holding the States to a quantum of proof it did not demand of Microsoft." The district court's obligation in fashioning a remedial decree was, as we said in reviewing the **[***96]** original decree in the Government's case, "to enter that relief it calculates will best remedy the conduct it has found to be unlawful," *Microsoft III, at 105*. The district court brings broad discretion to its discharge of this obligation, again as we have explained before.

In this case, the district court was presented with two remedial proposals: The States made their proposal and Microsoft proposed the decree it had negotiated with the Government in the Track I proceedings. The district court considered both proposals and rejected most of the provisions the States proposed on the ground they went far beyond this court's rationale **[*1234]** **[**187]** in holding Microsoft had violated the antitrust laws. If that ground holds, then no "unspoken presumption" need be conjured up to explain the district court's decision.

Our review both of Microsoft's and of the States' proposals confirms the district court was on solid ground: Its reasoning was based upon evidence in the record, was sound, and involved no abuse of discretion. Some of the States' proposals exceeded, under any reasonable interpretation, our liability holding in *Microsoft III*. For instance, the open-source IE provision approached **[***97]** the type of structural relief we singled out when cautioning the district court against relief that exceeds evidence of a causal connection between Microsoft's anticompetitive conduct and its dominance in the operating systems market.

Massachusetts also claims the district court expressed concern about the "supposed lack of economic analysis" supporting the States' remedy without remarking the lack of economic analysis supporting the remedy it adopted. Massachusetts' claims are demonstrably incorrect.

As our review has shown, there is ample evidence in the record to support the district court's findings. Likewise, there was substantial economic testimony to support the district court's conclusions. We need not revisit each of the issues we have already addressed in order to reject the Commonwealth's broad, unsubstantiated claims to the contrary.

III. *CCIA and SIIA v. United States & Microsoft*, No. 03-5030

CCIA and SIIA seek to intervene for the purpose of appealing the district court's determination that the consent decree between the Government and Microsoft is in the "public interest," as required by the Tunney Act. They raise several of the issues we addressed in Part II **[***98]** and they raise a number of issues unique to the settlement proceedings, including the Government's and Microsoft's compliance with the procedural requirements of the Act.

A. Intervention

The district court denied the joint motion of CCIA and SIIA to intervene for purposes of appealing the court's public-interest determination in *U.S. Consent Decree*. They argue the district court erred in denying intervention because their "claim or defense and the main action have a question of law or fact in common," as required for permissive intervention pursuant to *Federal Rule of Civil Procedure 24(b)(2)*. *See also* *Massachusetts School of Law at Andover, Inc. (MSL) v. United States, 326 U.S. App. D.C. 175, 118 F.3d 776, 779 (D.C. Cir. 1997)* ***HN16***[] (Rule 24 governs intervention for purpose of filing appeal under Tunney Act). The district court had also to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *FED. R. CIV. P. 24(b)(2)*. In denying CCIA's and SIIA's motion, the district court was concerned only with this latter requirement, to which we **[***99]** shall return in a moment. First, we examine whether the would-be intervenors' claim does have a question of law or fact in common with the underlying action.

CCIA and SIIA say they have a "claim or defense" in common with the main action in this case because their members Netscape and Sun Microsystems -- "the very firms this Court identified as the victims of Microsoft's anticompetitive conduct" -- have brought "antitrust claims that overlap with the Government's case." *See Netscape Communications Corp. v. Microsoft Corp.*, No. 02-00097 (D.D.C., filed Jan. 22, 2002); *Sun Microsystems, Inc. v. Microsoft Corp.*, No. 02-01150 (N.D. Cal., filed March 8, 2002). Unable **[*1235]** **[**188]** to deny that point, the Government and Microsoft instead argue CCIA's and SIIA's intervention in this case would not produce the type of efficiency gains that ordinarily make intervention worthwhile when there are common issues because, unlike in *MSL*, there is no possibility in this case of a "trial on the merits." *MSL, 118 F.3d at 782*. Of course, there has already been a trial on the merits. Still, if we determine the consent decree is not in the public interest and remand the case for further **[***100]** proceedings on the remedy, then there is a possibility the final court-ordered remedy will provide some additional relief addressed to the issues Netscape and Sun have raised in their private actions.

The Government further contends permissive intervention in this case is inappropriate because Netscape and Sun, having sued Microsoft, may protect their rights apart from this proceeding. The Government cites *Roe v. Wade, 410 U.S. 113, 125-27, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*, in support of its claim that the "pendency of another action in which an applicant can protect its rights ordinarily counsels against permissive intervention." In *Roe*, however, the Supreme Court denied intervention because the intervenor -- a doctor seeking declaratory and injunctive relief in federal court "with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court," *id. at 126* -- had made "no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions." *Id.* Intervention was therefore denied pursuant to the "national policy **[***101]** forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Younger v. Harris, 401 U.S. 37, 41, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*. No such policy suggests the would-be intervenors in this case should be limited to another forum for airing their grievances. On the contrary, as in *MSL*, because the private antitrust claims of the associations' members overlap substantially with those here in suit, intervention "might produce efficiency gains." *118 F.3d at 782*.

Turning to the second requirement for intervention, recall what we said in *MSL*:

> ***HN17***[] Once a common question of fact or law is found, *Rule 24(b)(2)* says that the district court, in exercising its discretion, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The "delay or prejudice" standard presumably captures all the possible drawbacks of piling on parties; the concomitant issue proliferation and confusion will result in delay as parties and court expend resources trying to overcome the centrifugal forces springing from intervention, and prejudice will take the form not **[***102]** only of the extra cost but also of an increased risk of error.

118 F.3d at 782. Further, "the 'delay or prejudice' standard of *Rule 24(b)(2)* appears to force consideration of the merits of the would-be intervenor's claims." *Id.* Hence, the district court in this case noted CCIA's and SIIA's arguments regarding "defects" in the consent decree were "identical to those made in their Tunney Act filings." *Order Denying Intervention, 2003 U.S. Dist. LEXIS 1480, [WL] at *4*. And having once reviewed those filings in making its public-interest determination and finding them "not to fatally undermine" the proposed consent decree, the court held them insufficient to warrant intervention. *Id.*

CCIA and SIIA now argue that, if they are allowed to intervene, "There will be no **[*1236]** **[**189]** delay caused by [their] appeal because this Court will have to decide the proper remedy for Microsoft's antitrust violations in [Massachusetts'] appeal regardless of what happens here." The Government acknowledges there would be no "undue delay" because the "consent decree is currently in force, as is an identical and unchallenged decree in the litigation between Microsoft and the settling states."

We think it sufficient **[***103]** the consent decree was already in place in the settling states' case when CCIA and SIIA sought intervention in December 2002: Allowing them to appeal from the Tunney Act proceeding will not delay "adjudicating … the rights of the original parties," *FED. R. CIV. P. 24(b)*, because the settling states' decree requires Microsoft to conduct itself in the same manner as it must under the decree it entered into with the Government. *See* *New York v. Microsoft Corp., 231 F. Supp. 2d 203, 205-06 (D.D.C. 2002)*. Nor will the parties be otherwise prejudiced by the intervenors' appeal. CCIA and SIIA had already participated extensively in the proceedings before the district court by submitting public comments in response to the proposed consent decree, *see* Comments of CCIA (Jan. 28, 2002), 2 J.A. (I) at 455-598; Comments of SIIA (Jan. 28, 2002), 3 J.A. (I) at 990-1057, and appearing as *amici* in the hearing on the proposed decree, *see* 3/6/02 pm Tr. at 156-65, 3 J.A. (I) at 1536-45. Because the district court already confronted CCIA's and SIIA's arguments in rendering its decision, there is no reason to fear "issue proliferation, **[***104]** " "confusion," "extra cost," or "an increased risk of error," *see* *MSL, 118 F.3d at 782*, if the associations are allowed to appeal the district court's publicinterest determination. Thus do the unusual procedural and substantive circumstances in this case converge to obviate any undue "delay or prejudice" that might otherwise have attended CCIA's and SIIA's appeal. Accordingly, we reverse the order of the district court denying intervention and permit CCIA and SIIA to intervene for the purpose of appealing the district court's public-interest determination. [19]

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[19] The Government and Microsoft claim CCIA and SIIA may not intervene because they did not include with their motion to intervene "a pleading setting forth the claim or defense for which intervention is sought." *FED. R. CIV. P. 24(c)*. Neither the Government nor Microsoft explains what type of pleading the would-be intervenors could have filed in a case such as this, where a judgment had already been rendered. In any event, ***HN18***[] "procedural defects in connection with intervention motions should generally be excused by a court." *McCarthy v. Kleindienst, 239 U.S. App. D.C. 247, 741 F.2d 1406, 1416 (D.C. Cir. 1984)*. The Government acknowledged as much at oral argument, stating, "this Court and other courts have not been hypertechnical, actually, in making sure that … potential intervenors do file a pleading." The Government and Microsoft make no claim they had inadequate notice of the intervenors' appeal, and we find no reason to bar intervention based solely upon this technical defect, if defect it be.

[*105]** B. The Public Interest Finding

HN19[] Under the Tunney Act, the district court's "public interest" inquiry into the merits of the consent decree is a narrow one: The district court should withhold its approval of the decree "only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a 'mockery of judicial power.' " *MSL, 118 F.3d at 783*; *see also* *United States v. Microsoft, 312 U.S. App. D.C. 378, 56 F.3d 1448, 1462 (D.C. Cir. 1995)* (*Microsoft I*). Such limited review is obviously appropriate for a consent decree entered into before a trial on the merits because the "court's authority to review the decree depends entirely on the government's exercising **[*1237]** **[**190]** its prosecutorial discretion by bringing a case in the first place." *Microsoft I, at 1459-60*.

In a footnote CCIA and SIIA claim that in *Microsoft I* this court "suggested that the 'mockery' standard either does not apply or is met where, as here, a *post-trial* decree fails to comply with an existing 'judicial mandate.' " [20] (Emphasis in original.) Not surprisingly, however, we gave **[***106]** no consideration in *Microsoft I* to the standard we would apply to the district court's review of a consent decree entered into after a trial on the merits because that case did not involve a posttrial consent decree. In any event, ***HN20***[] the Tunney Act does not distinguish between pre- and post-trial consent decrees; the Act simply requires the district court, "before entering any consent judgment" in a Government antitrust case, to "determine that the entry of such judgment is in the public interest." *15 U.S.C. § 16(e)*.

[*107]** Moreover, if the district court approves a consent decree that "fails to comply" with our mandate, then the resulting consent decree surely does make a "mockery of judicial power"; hence, the "mockery" standard is no less appropriate merely because a consent decree is entered into after a trial on the merits. Finally, ***HN21***[] although the district court may not ignore the grounds upon which the defendant was held liable, neither should it reject a consent decree simply because it believes the Government could have negotiated a more exacting decree. Any settlement, even one negotiated after a trial on the merits, may reflect "a concession the government made in bargaining," *Microsoft I, at 1461*, and yet be "within the reaches of the public interest." *Id. at 1458*.

In the unusual posture of this case, we review the district court's public-interest determination not against the untested allegations of a complaint but rather against the findings of fact and conclusions of law entered by the district court and left undisturbed by our review in *Microsoft III*. This we do pursuant to the deferential standard we set out in *MSL, 118 F.3d at 783*.

1. Issues overlapping Massachusetts' **[***108]** case

CCIA and SIIA raise several objections to the district court's determination the consent decree is in the public interest. We addressed most of these issues in our disposition of Massachusetts' appeal, and we shall avoid, to the extent possible, duplicating here the analysis in Part II. Some repetition is necessary, however, because the overlap between the cases is neither complete nor exact. Most important, the district court in the Commonwealth's case was required to determine, in its broad discretion, the form of relief that would "best remedy the conduct … found to be unlawful." *Microsoft III, at 105*. For that purpose the district court had the benefit of the extensive factual record **[*1238]** **[**191]** compiled on remand per the instruction of this court. *Id. at 103*. In this Tunney Act case the court was charged not with fashioning its own remedy but with determining whether the consent decree agreed to by the

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[20] We are at something of a loss to understand the appellants' allusion; the phrase "judicial mandate" appears in *Microsoft I* only in some legislative history quoted in support of this court's statement that there were no cases prior to the Tunney Act in which "an appellate court had approved a trial court's rejection of a consent decree as outside the public interest." *56 F.3d at 1458* (citing *Antitrust Procedures and Penalties Act: Hearings on S.782 and S.1088 Before the Subcomm. on Antitrust and Monopolies of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 92 (1973) (Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Div., Dep't of Justice) ("Except in cases where a previous judicial mandate is involved and the consent decree fails to comply with that mandate, or where there is a showing of bad faith or malfeasance, the courts have allowed a wide range of prosecutorial discretion")).

Government and Microsoft is in the public interest. The district court's decision was to be based not upon the record of an evidentiary hearing but rather upon the information generated by the settling parties in compliance with the Tunney Act, as well as the submissions of **[***109]** other interested parties and of the public.

Despite the differences between the two proceedings, there was substantial overlap in both the legal and the factual issues presented. For instance, the public comments received in the Tunney Act proceedings raised several of the same issues the district court addressed in the States' litigation over the remedy in their case. [21] The overlap is further reflected in the similarity of the issues raised in CCIA's and SIIA's amicus brief in No. 02-7155 and the issues they raise in their briefs as intervenors in this case. With these similarities and differences in mind, we turn to the substance of CCIA's and SIIA's claims.

[*110]** a. Commingling

CCIA and SIIA first object to the consent decree on the ground it does not address our having held Microsoft's commingling of IE and Windows code was anticompetitive and unlawful. They argue in this case, as they did as *amici* in No. 02-7155, that securing the "user's ability to remove IE icons" is not an adequate remedy for Microsoft's unlawful integration of IE and Windows because, from a software developer's perspective, "the existence (or not) of a particular icon on a user's desktop is immaterial." They also disparage end-user access as an appropriate provision to address the applications barrier to entry.

The Government and Microsoft argue the provisions of the decree permitting end-user access to non-Microsoft middleware, namely, §§ III.C and III.H, effectively address our concern about Microsoft's integration of IE and Windows. Section III.C allows OEMs, among other things, to alter the configuration of the desktop, including "installing[] and displaying icons" of non-Microsoft middleware, and § III.H permits OEMs and end users to invoke non-Microsoft middleware in place of Microsoft middleware.

The district court accepted the view the Government espoused **[***111]** during the Tunney Act proceedings that the proper goal of the remedy is to avoid the anticompetitive effect, not necessarily to prohibit further instances, of commingling. *U.S. Consent Decree, at 180-81*. Indeed, the district court agreed with the Government that "it is not at all clear that the practice of commingling would be of antitrust concern" in the future. *Id. at 180*. In the past Microsoft's commingling had prevented OEMs from removing IE, thereby deterring them "from installing a second browser because doing so increased [their] product testing and support costs." *Microsoft III, at 66*. Going forward, however, the decree allows OEMs to disable end-user access to IE, and thereby to avoid the costs of having to support both IE and a rival browser. As a result, OEMs are more likely to install a rival browser based upon market determinants, **[*1239]** **[**192]** such as consumer demand. In this way, the decree removes the disincentive facing software developers otherwise interested in writing programs to APIs exposed by rival middleware. *See* Part II.A.1.

The Government reasonably predicted that OEMs' new freedom to respond to market demand would enhance competition between Microsoft **[***112]** and other manufacturers of middleware. *See U.S. Consent Decree, at 181*; *see also* CIS at 29-33, 45-48, 1 J.A. (I) at 163-67, 179-82. Whether CCIA's and SIIA's proposed alternative, prohibiting any commingling of code, would strengthen further the ability of rival platforms to attract software developers is irrelevant; the question before us is whether the remedy approved by the district court is within the reaches of the public interest. A consent decree that addresses the disincentive software developers faced but does not altogether prohibit commingling -- which would not be without its costs -- surely qualifies.

b. Java

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[21] *See, e.g.,* Comments of CCIA, 2 J.A. (I) at 455-598; Comments of SIIA, 3 J.A. (I) at 990-1057; *see also* Comments of Robert Litan, Roger Noll & William Nordhaus (Jan. 17, 2002), 1 J.A. (I) at 208-84; Comments of Am. Antitrust Inst. (Jan. 24, 2002), *id.* at 285-328; Comments of AOL Time Warner (Jan. 28, 2002), *id.* at 329-426; Comments of Project to Promote Competition & Innovation in the Digital Age (Jan. 28, 2002), 2 J.A. (I) at 650-813; Comments of SBC Communications Inc. (Jan. 28, 2002), *id.* at 814-989.

CCIA and SIIA next argue the consent decree is not in the public interest because it does not address Microsoft's efforts to prevent the emergence of Java as a competitor to Windows. Those efforts included the use of exclusive (so-called First Wave) agreements with ISVs; threatening Intel for its cooperation with Sun and Netscape in developing a Java runtime environment; and the deception of Java software developers discussed in Part II.A.2 above. *See* *Microsoft III, at 74-78*.

The Government and Microsoft respond that §§ III.F and III.G of the consent **[***113]** decree address Microsoft's attempts to exclude Sun's Java technology from the market. Section III.F provides that Microsoft shall "not retaliate against any ISV or [Independent Hardware Vendor (IHV)] … [for] distributing, promoting or supporting any software that competes with Microsoft Platform Software[.]" *Final Consent Decree, 2002 U.S. Dist. LEXIS 22861, [WL] at *3*. Section III.G prohibits Microsoft from entering into any agreement with an IAP, Internet Content Provider, ISV, IHV, or OEM to distribute, promote, use, or support Windows or Microsoft middleware exclusively. *2002 U.S. Dist. LEXIS 22861, [WL] at *4*. The district court concluded that " §§ III.F and III.G not only prohibit the anticompetitive conduct identified by the appellate court with regard to ISVs, IAPs, and IHVs, but these provisions extend further, to address Microsoft's conduct with other participants in the industry even though Microsoft's dealings with these entities did not give rise to liability in this case." *U.S. Consent Decree, at 186*.

Despite their failure to offer more than conclusory assertions that the provisions of the consent decree addressing Microsoft's exclusionary agreements and its retaliatory conduct are inadequate, CCIA and SIIA argue **[***114]** the absence of a requirement that Windows carry a Sun-compliant Java platform or, indeed, of any Java-specific remedy, "alone renders the settlement insufficient to satisfy the public interest." CCIA and SIIA misapprehend the district court's limited role under the Tunney Act in determining whether a consent decree is in the public interest. That court's "function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft I, at 1460* (emphases in original). Although the district court cannot ignore this court's liability holding in making its public-interest determination, neither can it be faulted for not insisting upon a provision that clearly is not required by our holding. *See* Part II.A.7.

Nor did the Government ignore our liability holding in negotiating the decree. In its response to public comments the **[*1240]** **[**193]** Department of Justice explained its decision not to pursue the States' proposed Java must-carry provision: "It is not the proper role of the government to bless one competitor over others, or one potential **[***115]** middleware platform over others." Response of the United States to Public Comments on the Revised Proposed Final Judgment (*U.S. Response to Public Comments*) P 431, at 215 (Feb. 27, 2002), 3 J.A. (I) at 1349. The Government instead negotiated provisions -- §§ III.F and III.G -- that prohibit use of the First Wave Agreements and the various tactics Microsoft had used against Java and Intel. The district court therefore reasonably deferred to the Government's rejection of the Java mustcarry provision.

c. Disclosure of APIs

CCIA and SIIA argue the consent decree will not prevent Microsoft from driving new middleware threats from the market. Because Microsoft is required to disclose only APIs used by Microsoft Middleware to interoperate with Windows, they claim Microsoft's competitors can "never offer middleware for use on Windows that does more than comparable Microsoft middleware." [22] The Government responds that such disclosure nonetheless prevents rival middleware "from being 'disadvantaged by comparison to Microsoft's middleware technology' … by insuring that non-Microsoft middleware can use the same APIs as the Microsoft middleware with which it competes," quoting *U.S.* ***[***116]*** *Consent Decree, at 187*. According to the Government, that disadvantage, which had prevented rival middleware from posing a platform threat to Windows, was the focus of its case for liability.

Like Massachusetts, CCIA and SIIA would have us overlook the district court's findings of fact -- crucial to holding Microsoft had stifled competition -- documenting the threat posed by Netscape and Java, both of which relied only upon the more limited set of APIs Microsoft then disclosed. *See* *Findings of Fact, at 28-30*; *see also U.S. Response*

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[22] They also point to provisions allowing Microsoft to prohibit certain modifications of the user interface, a matter we take up in Part III.B.2.b, below.

to Public Comments P 280, at 141, 3 J.A. (I) at 1275 (1994 development of Mosaic, a non-Microsoft Web browser, did not rely upon APIs used by IE because IE did not then exist). Moreover, the district court correctly recognized Microsoft's financial incentive -- noted during the settlement proceedings both by Microsoft **[***117]** and by the Government -- to make its APIs available to software developers. *U.S. Consent Decree, at 189*; *see also* Part II.A.3.a above. It was therefore appropriate for the district court to approve the decree without requiring the expansive disclosure sought by CCIA and SIIA.

CCIA and SIIA also note (actually, they footnote) that the decree, particularly the API disclosure provision, focuses only upon interoperability with Windows and "does not make Windows API specifications available to direct … competitors" in the market for operating systems, nor does it require Microsoft to disclose "API specifications" for Microsoft middleware that exposes APIs. The intervenors argue the lack of such disclosure "will only increase the applications barrier and reinforce the Windows monopoly by remaining Microsoftcentric." The Government responds that the disclosure of API specifications demanded by CCIA and SIIA is unrelated to the theory of liability in this case. Microsoft echoes the Government in claiming its violation of the antitrust laws did not involve practices directed at the developers of rival operating systems but **[*1241]** **[**194]** rather conduct directed at rival middleware, such as Netscape **[***118]** Navigator.

Although CCIA's and SIIA's argument is insufficiently developed to constitute a serious challenge to the district court's approval of the consent decree, *see* *Hutchins v. District of Columbia, 338 U.S. App. D.C. 11, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999)* ("We need not consider cursory arguments made only in a footnote"), we note the Government considered concerns similar to those raised by CCIA and SIIA and rejected the sort of broad disclosure they seek. *See, e.g.*, *U.S. Response to Public Comments*, at 142-43, 148, 3 J.A. (I) at 1276-77, 1282. The district court likewise considered various criticisms of the extent of disclosure required by § III.D and reasonably concluded they did not require it to disapprove that provision. *See U.S. Consent Decree, at 187-89*.

In sum, CCIA and SIIA neither point to any defects in the district court's reasons for approving the disclosure required by the consent decree, nor do they raise any other concern not already addressed above in Part II.A.3. We conclude, therefore, the district court reasonably held the degree of API disclosure required by the consent decree is consonant with the public interest.

d. Adequacy **[***119]** of definitions

CCIA and SIIA argue the consent decree is not in the public interest because it fails to define terms "critical to its enforceability." Specifically, they complain the definitions of "Windows Operating System Product" and "Microsoft Middleware" are vague, and they object to the absence of a definition of "server operating system product" and of "interoperate." Here they remind us the district court, in considering a proposed consent decree, "should pay special attention to the decree's clarity," *Microsoft I, at 1461*, and should withhold its approval "if any of the terms appear ambiguous." *MSL, 118 F.3d at 783*. The intervenors seek a greater degree of precision lest Microsoft itself be able to dictate which middleware is covered by the decree. Ultimately they are concerned with the disclosure of APIs required by § III.D, the extent to which communications protocols are covered by § III.E, and interoperability.

The district court specifically addressed various criticisms of the precision with which the consent decree was drafted. For instance, it rejected as unfounded the concern that Microsoft could falsely identify as part of Windows the software **[***120]** code of a separate middleware product and thereby avoid disclosing the APIs exposed by that product. That concern appears to have arisen out of the last sentence of the definition of "Windows Operating System Product," which states, "The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion." *Final Consent Decree § VI.U, 2002 U.S. Dist. LEXIS 22861, [WL] at *15*. The district court explained that the terms Windows Operating System Product and Microsoft Middleware Product -- the latter of which is nested in the definition of Microsoft Middleware, and where it helps define Microsoft's obligation to disclose APIs -- are not mutually exclusive: "Software code can simultaneously fall within both." *U.S. Consent Decree, at 166*. Therefore, Microsoft cannot avoid its disclosure obligation merely by deeming particular software code a part of Windows; if that code likewise has the functionality of a Microsoft Middleware Product, then it will be treated as such for the purpose of disclosure under § III.D. Therefore, Microsoft's obligation under that section is unaffected by its ability to determine which software code is part of Windows. *Accord U.S. Response* **[***121]** *to Public Comments* PP 121, 122, at 65-66, 3 J.A. (I) at 1199-1200.

[*1242] [195]** CCIA's and SIIA's complaint that the decree leaves undefined the terms "interoperate" and "server operating system product" is not a source of concern to the court. The intervenors suggest Microsoft may determine unilaterally what the former term means, but this, of course, overlooks the district court's retention of jurisdiction to interpret and to enforce the decree. *Final Consent Decree, 2002 U.S. Dist. LEXIS 22861, [WL] at *16*. Moreover, the district court explained how the undefined term "interoperate" is used in §§ III.D and III.E. *See U.S. Consent Decree, at 190-92*, *see also* Part II.A.3 above. We find nothing in CCIA's and SIIA's arguments that requires additional comment upon that term or, more broadly, upon the adequacy of the disclosures required by the consent decree.

As for the term "server operating system product," which is found in § III.E of the decree, CCIA and SIIA argue the absence of a definition leaves Microsoft's disclosure obligation indeterminate. As Microsoft correctly points out, however, the Government addressed this same concern in its response to public comments, stating the coverage of Microsoft servers **[***122]** was "broadened" in the decree to include not only the "Windows 2000 Server" but also other server products such as the "Windows 2000 Datacenter Server" and the "Windows 2000 Advanced Server." *U.S. Response to Public Comments* P 318, at 159-60, 3 J.A. (I) at 1293-94. Not only did the Government insist upon expanding the range of servers covered under the decree by including a term left intentionally undefined, but the district court viewed § III.E as "forwardlooking" and capable of addressing the "rapidly growing server segment of the market." *U.S. Consent Decree, at 189*. CCIA and SIIA offer no reason to think the district court would construe the term "server operating system product" narrowly, and thus narrow the disclosure required under § III.E. Rather, in this instance the absence of a definition is more likely to broaden than to narrow the range of server operating systems to which the decree applies.

HN22[] The district court has a continuing responsibility for interpretation of the consent decree, and it is "entitled to insist on that degree of precision concerning the resolution of known issues as to make [its] task, in resolving disputes, reasonably manageable." *Microsoft* ***[***123]*** *I, at 1461-62*. The consent decree is not ambiguous in the sense disallowed in *MSL* merely because it contains words that are not defined therein, or because the intervenors think certain words could be defined differently or with greater specificity. We do not find in the decree the kind of glaring ambiguities that might call into question the wisdom of the district court's having affixed its imprimatur. In sum, CCIA and SIIA offer no convincing reason the decree will not be construed so as to serve the public interest. We therefore hold the district court did not err in approving it.

e. "Fruits"

CCIA and SIIA lodge several broad objections to the district court's approval of a consent decree they claim fails to "terminate the illegal monopoly" or deprive Microsoft of the fruits of its violations. In their view the decree should include several of the remedies the district court rejected in the States' case, such as requiring Microsoft to "disentangle" its browser from its operating system code and imposing "more robust API and disclosure obligations requiring the 'open source' distribution of IE code." CCIA and SIIA do not make any arguments with respect to these proposals **[***124]** that we have not already addressed in connection with the district court's decision in the States' litigation. The intervenors also make a passing reference to the desirability of requiring Microsoft **[**196] [*1243]** to sell the right to "port" Microsoft Office to other operating system platforms. But they do not discuss the merits of such a provision, wherefore neither do we.

Finally, we pause to mention that CCIA's and SIIA's discussion of the "fruits" of Microsoft's unlawful conduct is misdirected (as was that of Massachusetts): As we explained in Part II.B.1, depriving an antitrust violator of the fruits of its violation does not entail conferring a correlative benefit upon the particular competitor harmed by the violation. Rather, as the Government explained in its response to public comments:

> The key to the proper remedy in this case is to end Microsoft's restrictions on potentially threatening middleware, prevent it from hampering similar nascent threats in the future, and restore the competitive conditions created by similar middleware threats. In this context, the fruit of Microsoft's unlawful conduct was

> Microsoft's elimination of the ability of potentially threatening middleware **[***125]** to undermine the applications barrier to entry.... The [proposed judgment] addresses and remedies precisely this issue.

U.S. Response to Public Comments P 17, at 9, 3 J.A. (I) at 1143. Just so.

2. Non-overlapping issues

CCIA and SIIA also raise issues that are either specific to the consent decree or that Massachusetts did not raise.

a. Enforcement

Section IV of the consent decree deals with compliance and enforcement. The Government and the settling states "have exclusive responsibility for enforcing the decree." *Final Consent Decree § IV.A.1, 2002 U.S. Dist. LEXIS 22861, [WL] at *7*. They have broad investigative powers, including, among other things, assured "access ... to inspect any and all source code" and to interview Microsoft's employees and officers about matters contained in the decree. *Id.* § IV.A.2. Section IV also sets up a threemember "Technical Committee" of "experts in software design and programming" to assist in enforcement of and compliance with the decree. *Id. § IV.B.1, 2002 U.S. Dist. LEXIS 22861, [WL] at *8*. The Committee has "the power and authority to monitor Microsoft's compliance with its obligations" under the decree. *Id. § IV.B.8.a, 2002 U.S. Dist. LEXIS 22861, [WL] at *9*. As the district court explained, "the committee **[***126]** is answerable to the government," *U.S. Consent Decree, at 197*; for instance, it must report in writing every six months "the actions it has undertaken in performing its duties pursuant to [the decree], including the identification of each business practice reviewed and any recommendations made by the [Committee]." *Final Consent Decree § IV.B.8.e, 2002 U.S. Dist. LEXIS 22861, [WL] at *10*. The Committee also has an independent reporting obligation "when [it] has reason to believe that there may have been a failure by Microsoft to comply with any term" of the decree. *Id.* § IV.B.8.f. As the district court pointed out, however, "Nothwithstanding all of the procedures in place with regard to the Technical Committee, ultimately the power to enforce the terms of the decree rests with the government." *U.S. Consent Decree, at 198*.

CCIA and SIIA object to the role of the "Technical Committee" and the adequacy of the enforcement provisions. They argue the Committee's enforcement role is illusory because the decree gives Microsoft and the Government "equal say in the Committee's membership"; the members lack legal expertise; its means for collecting and processing third-party complaints are inadequate; **[***127]** and the Committee's findings or recommendations may not be used in proceedings before the district court.

Although ***HN23***[] the district court must withhold approval of a consent decree if "the enforcement mechanism is inadequate," **[*1244]** **[**197]** *MSL, 118 F.3d at 783*, CCIA's and SIIA's arguments to that effect are unpersuasive. The Government addressed similar criticisms in its response to public comments. It explained there that a primary purpose of the Committee is to

> facilitate the resolution of potentially complex and technologically nuanced disputes between Microsoft and others over the practical workings of the [decree]. The [Committee] is not intended to have independent enforcement authority; that authority remains with the Plaintiffs and the Court.

U.S. Response to Comments P 386, at 190, 3 J.A. (I) at 1324. This was the district court's understanding as well: "The Technical Committee is not intended as a substitute for the enforcement authority of the United States." *U.S. Consent Decree, at 199*.

The intervenors do not explain why they think the design of the Committee is ill-suited to its structural purpose. The Committee is to play a leading role in **[***128]** providing technical competence to the Government in its enforcement of the decree -- a perfectly sensible division of labor -- and, we note, nothing in the decree precludes the Committee from enlisting expertise beyond its own membership. *See, e.g., U.S. Response to Public Comments* P 387, at 191, 3 J.A. (I) at 1325 (the Committee "can and should have available to it expertise broader than purely technical matters"). In sum, CCIA and SIIA offer no basis for doubting the ability of the Committee to inform and assist the Government in its enforcement efforts.

CCIA's and SIIA's criticisms of the process for collecting third-party complaints and of the inadmissibility of the Committee's findings in proceedings before the court seem entirely misconceived. They complain that "the most that can happen" when a meritorious third-party complaint is received by the Committee is that the Committee "shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure." *See Final Consent Decree § IV.D.4.c, 2002 U.S. Dist. LEXIS 22861, [WL] at *12*. Having no reason to believe the plaintiffs will not pursue Microsoft on a valid complaint, into court if necessary, we agree with the district court that the **[***129]** decree provides for an appropriate method of receiving and of acting upon third-party complaints. Moreover, as the district court correctly noted, "third-party concerns cannot supplant the ultimate enforcement role of the government, nor should third-party complaints burden mechanisms established for the government's and ultimately the Court's benefit." *U.S. Consent Decree, at 199*.

The limitation the decree places upon the use of the Committee's findings is also appropriate considering its purpose: "By ensuring that Microsoft's and third parties' communications will not be used directly against Microsoft, the [Committee] will benefit from heightened candor and information disclosure by Microsoft employees and others." *U.S. Response to Public Comments* P 385, at 190, 3 J.A. (I) at 1324. In addition, as the district court explained:

> The limitation on the use of Technical Committee work product does not preclude the government from "utilizing, relying on, or making derivative use of the [Technical Committee's] work product" in conjunction with its own enforcement activities, … nor does the provision preclude Plaintiffs from obtaining Microsoft documents from the **[***130]** committee for use in … enforcement proceedings.

U.S. Consent Decree, at 200.

Thus, viewed in context, the Government's ability to enforce the decree is clearly strengthened, not diminished, by the existence and composition of the Technical Committee.

[*1245] **[**198]** b. User interface

CCIA and SIIA next object to two provisions in the consent decree they claim "limit what competitor products [can] do," namely: § III.C.3, which provides that rival middleware may be launched automatically at the conclusion of the initial boot sequence or upon connection to or disconnection from the internet, but only if a Microsoft Middleware Product provides similar functionality and the rival middleware displays either no user interface or a user interface similar in size and shape to that of the corresponding Microsoft Middleware Product; and § III.C.5, which allows an OEM to "present[] in the initial boot sequence its own IAP offer provided that the OEM complies with reasonable technical specifications established by Microsoft." The intervenors express concern that Microsoft may attempt to "limit middleware competition only to the circumstances in which its own products launch," and that it **[***131]** may establish technical specifications that limit the capabilities of competing software and thus inhibit competition from non-Microsoft middleware.

These objections are moot because the limitations on the relief provided in §§ III.C.3 and III.C.5 of the consent decree are not included in the States' remedial decree; therefore, Microsoft may not implement or enforce them. The States' remedial decree allows Microsoft to restrict the launch of non-Microsoft middleware only if it would "drastically alter" the user interface; it does not limit automatic launches to situations in which a Microsoft Middleware Product provides similar functionality. *Compare States' Remedy § III.C.3, at 268*, *with Final Consent Decree § III.C.3, 2002 U.S. Dist. LEXIS 22861, [WL] at *2.* Nor does the remedial decree require an OEM to comply with Microsoft's "reasonable technical specifications" in order to present an IAP offer in the initial boot sequence. *Compare States' Remedy § III.C.5, at 268*, *with Final Consent Decree § III.C.5, 2002 U.S. Dist. LEXIS 22861, [WL] at *3*.

At oral argument when the court suggested the intervenors' challenge to §§ III.C.3 and III.C.5 had been rendered moot by the judgment in *States' Remedy*, counsel demurred only to the **[***132]** extent of stating that, "if a state settled with Microsoft, the only thing that would be available would be the decree in this case." But that is not correct. If CCIA and SIIA cannot convince even one of the states that is a party to that case to take up their cause, then the complainant may itself bring the alleged violation to the attention of the district court, which retained jurisdiction specifically so it "may act *sua sponte* to issue further orders or directions" to enforce the judgment or to punish violations thereof. *States' Remedy, at 277*. In any event, it is speculative at best to suggest the States will not be vigilant and energetic in the pursuit of anything Microsoft may do in violation of the remedial decree. [23]

[*133]** We therefore conclude the intervenors' complaint that Microsoft might attempt to manipulate the user interface has been mooted by the judgment in *States' Remedy*.

c. Anti-retaliation

CCIA and SIIA also argue (again in a footnote) the decree is inadequate to **[*1246]** **[**199]** prevent Microsoft from improperly terminating an OEM's license. Section III.A forbids Microsoft from retaliating against an OEM for developing, distributing, promoting, using, selling, or licensing software that competes with Windows or with Microsoft middleware; shipping a personal computer with both Windows and a non-Microsoft operating system installed; or exercising any other option available to it under the consent decree. *Final Consent Decree § III.A, 2002 U.S. Dist. LEXIS 22861, [WL] at *1*. If Microsoft moves for any legitimate reason to terminate an OEM's license for Windows, then it must first give the OEM an opportunity to "cure" the reason for the proposed termination. *Id.* Microsoft may terminate an OEM's license without giving it the opportunity to cure only if Microsoft has previously given the OEM two or more notices of proposed termination.

The intervenors object only to the last-mentioned part of § III.A, on the ground it may serve **[***134]** as a way for Microsoft still to retaliate against OEMs, apparently because the terms of a Windows license are "inherently complex." They claim "it would not be difficult to find an OEM in breach of multiple technical requirements," thereby giving Microsoft a pretext for terminating the OEM's license in apparent compliance with § III.A. They offer no details, however, and no example of how the "inherent[] complexity" of the license may be used unfairly against a licensee that, by hypothesis, is "in breach of multiple technical requirements." Their narrow focus also ignores both the overall effectiveness of § III.A and the severity of other prohibitions intended to prevent Microsoft's manipulation of the decree. We conclude the district court therefore did not err in approving § III.A.

C. Procedural Claims

CCIA and SIIA also claim both the Government and Microsoft have failed to comply with various of the procedural requirements of the Tunney Act: (1) the Government failed to identify and explain "any unusual circumstances giving rise to [the decree]," as required by *15 U.S.C. § 16(b)(3)*; (2) the CIS does not provide a "description and evaluation of **[***135]** alternatives" to the decree, as required by *15 U.S.C. § 16(b)(6)*; (3) the CIS does not adequately disclose the documents the Government considered to be "determinative" in formulating its proposal, *see id. § 16(b)*; and (4) Microsoft failed to satisfy its obligation under *§ 16(g)* to disclose all communications it had with the "United States," as that term is used in the Tunney Act. According to the intervenors, these alleged procedural defects "preclude a determination that the District Court engaged in the requisite 'independent' and 'informed' review of the consent decree."

HN24[] Compliance with the procedural requirements of the Tunney Act ensures the district court has before it the information it needs in order to make an informed determination whether the decree is in the public interest. According to the Government, the district court should evaluate the parties' discharge of their procedural obligations for substantial rather than for strict compliance, *see* *United States v. Bechtel Corp., 648 F.2d 660, 664 (9th Cir. 1981)*. As the Government correctly states, the district court's evaluation "inherently involves judgment and discretion. **[***136]** " Therefore, the Government urges us to review the district court's evaluation of the parties' compliance only for abuse of discretion. Meanwhile, CCIA and SIIA argue for a less deferential standard, claiming the Government's approach "assumes away the entire purpose of the disclosures." We need not decide which

[23] Indeed, the plaintiff states have set up a web site "established for coordinated state enforcement of federal court judgments against the Microsoft Corporation for Microsoft's unlawful monopoly conduct." *Coordinated State Enforcement of Microsoft Antitrust Judgments*, *at* http://www.microsoft-antitrust.gov. The site includes "an on-line complaint form that may be used by the public to report suspected violations of the judgments." *Id.*

standard to apply, however, because the district court was clearly correct in determining **[*1247] [**200]** both parties met the requirements of the Act.

1. Government's disclosure

CCIA and SIIA preface their objections to the Government's disclosures in this case with the claim that even "technical and formalistic failures to comply" with the procedural requirements of the Tunney Act are grounds for denying entry of a proposed judgment. For this counter-intuitive proposition they cite *United States v. Central Contracting Co., 527 F. Supp. 1101 (E.D. Va. 1981)*, but not surprisingly the procedural facts of that case bear no resemblance to those of the present case: The defects in the Government's compliance with the Act in *Central Contracting* were neither "technical" nor "formalistic"; rather, they frustrated the whole purpose of the Act. Indeed, the record was "devoid of **[***137]** any indication that any of the procedures [of the Tunney Act] other than the original filing had been complied with." *Id. at 1102*. It appeared the Government had not even published the CIS and the proposed consent decree in the Federal Register and newspapers of general circulation, as specifically required by *§ 16(b)*. *Id. at 1104*. As seen below, no similarly material defects mar the Government's disclosure here; *Central Contracting* is therefore no help to CCIA and SIIA in this case.

The intervenors' first objection to the Government's disclosure is that the CIS does not provide "an explanation of any unusual circumstances giving rise" to the proposed judgment, as required by *§ 16(b)(3)*. Specifically, they complain the CIS failed to satisfy *§ 16(b)(3)* because it did not include a discussion of the "unusual and perhaps unprecedented" circumstance that the consent decree was entered after a full trial on the merits and appellate review. The Government simply denies the alleged shortcoming.

As an initial matter we acknowledge, as did the district court, the Government's thorough discussion in the CIS of the substance of the consent decree. **[***138]** That document clearly reflects the Government's extensive study of the likely effects of the consent decree, and its consideration of the more than 32,000 comments submitted by the public.

CCIA's and SIIA's criticism of the Government's disclosure is narrowly focused upon the "unusual circumstances" requirement of *§ 16(b)(3)*. Although the Government nowhere in the CIS characterized the proceedings in this case as "unusual," it did explain fully the circumstances from which the consent decree arose, pointing out specifically that the parties settled only after this court had held that Microsoft violated *§ 2 of the Sherman Act*. The Government also explained in the CIS that our holding in *Microsoft III* substantially narrowed the grounds upon which Microsoft had been held liable by the district court, *see* CIS at 7-8, 1 J.A. (I) at 142-43, wherefore:

> [The] provisions in the Proposed Final Judgment are modeled after [the interim conduct provisions of the final judgment entered in June 2000, *see Remedy I*], with modifications, additions and deletions that take into account the current and anticipated changes in the computer industry, as well as the decision of the **[***139]** Court of Appeals, which reversed certain of the District Court's liability findings.

Id. at 61-62, 1 J.A. (I) at 195-96. The Government's discussion of this procedural context fully conveyed the "unusual" nature of the circumstances giving rise to the consent decree, as required by *§ 16(b)(3)*.

CCIA and SIIA next argue "the CIS fails to provide a complete description of **[*1248] [**201]** the settlement's conduct remedies or the requisite 'evaluation of alternatives' to the proposal submitted for approval." *See 15 U.S.C. § 16(b)(6)*. They also argue the Government's "failure to explain its decision to adopt conduct remedies less stringent than the interim conduct relief entered by the previous district judge evidences an even greater statutory breach." The Government defends the sufficiency of its disclosure and suggests the intervenors "misconceive the nature of the CIS, treating it as if it were an end in itself." According to the Government, the "CIS begins a public dialog [sic], and as the [district] court pointed out, the volume and quality of the public comments it stimulated shows it accomplished its purpose," citing *Tunney Act Proceedings, at 13*. **[***140]**

The intervenors clearly do attribute to the Tunney Act more than the statute requires. ***HN25***[] *Section 16(b)(6)* calls only for "a description and evaluation of alternatives to such proposal actually considered by the United

States." It does not call for a "complete" description of all the Government's options, as CCIA and SIIA claim, nor for any discussion of an alternative not "actually considered" by the Government. In this case the CIS set out the Government's contemplation (and rejection) of its obvious alternative, namely, litigating to judgment the tying claim and the question of the remedy. The Government explained its decision to forego further litigation based upon "the need for prompt relief in a case in which illegal conduct has long gone unremedied; the strength of the parties' respective positions in a remedies hearing and the uncertainties inherent in litigation; and the time and expense required for litigation of the remedy." CIS at 60-61, 1 J.A. (I) at 194-95. The CIS also addresses the Government's decision not to pursue a "structural break-up of Microsoft into separate operating system and applications businesses," *id.* at 61, 1 J.A. (I) at 195, based upon both our decision **[***141]** narrowing Microsoft's liability and the Government's desire "to obtain prompt, certain and effective relief," *id.*

The CIS did set out the various proposals made by industry participants and other interested individuals. These include requirements that Microsoft "license the Windows source code to OEMs" and allow them to modify it and distribute the modified versions; "disclose the entire source code" for Windows and Microsoft middleware; include certain non-Microsoft middleware, such as the Java Virtual Machine, with its distribution of Windows; manufacture and distribute Windows without Microsoft middleware; continue to support industry standards upon adopting them or "extending or modifying their implementation"; and waive its rights to intellectual property "in related APIs, communication interfaces and technical information" if the court finds Microsoft exercised such rights in order "to prevent, hinder, impair, or inhibit middleware from interoperating with the operating system or other middleware." *Id.* at 62-63, 1 J.A. (I) at 196-97. The Government rejected these proposals in part because, like the others contemplated in the CIS, they did not, in the Government's estimation, **[***142]** provide the effective, certain, and timely relief afforded by the consent decree.

The Government set out in the CIS all the realistic options it had in determining whether to enter into the consent decree with Microsoft. Even if the Government did not set out for each option the "complete evaluation" desired by CCIA and SIIA, it did fairly describe its options in a manner that informed public comment. That is what the Act requires and all that it requires. We therefore hold the district court did not err in approving the Government's disclosure in the CIS.

[*1249] **[**202]** Finally, CCIA and SIIA argue the Government failed to make available all "materials and documents which [it] considered determinative in formulating [the settlement] proposal." *See* 15 U.S.C. § 16(b). In the CIS, the Government stated, "No materials and documents of the type described in [§ 16(b) of the Tunney Act] were considered in formulating the Proposed Final Judgment." CIS at 68, 1 J.A. (I) at 202. The district court, relying upon our decision in *MSL*, concluded "the record of this case supports the government's position that there exists no document so significant that it could be considered **[***143]** alone, or in combination with other documents, to be a 'smoking gun.' " *Tunney Act Proceedings, at 12*.

The intervenors claim the Government's statement that no documents were determinative cannot be accurate: "Even in antitrust cases that are not nearly as complex as this one, courts have found similar disclaimers 'to be almost incredible,' " they say, quoting *Central Contracting, 527 F. Supp. at 1104*. As mentioned above, however, the record in *Central Contracting* was nearly "devoid" of any indication that either the Government or the defendant had complied with the procedures required by the Act. *Id. at 1102*. In that context it is not surprising the district court viewed a "silent record" as raising the "specter" of questionable practices the Tunney Act was intended to expose. *Id.* (citing 119 Cong. Rec. 24,598 (1973)). At any rate, this court has no basis for doubting the Government's characterization of what "[it] considered determinative" in this case, particularly when one recalls that we have previously held § 16(b) reaches "at the most to documents that are either 'smoking guns' or the exculpatory opposite." *MSL, 118 F.3d at 784.* **[***144]** On the contrary, given the complexity of this case, which involved thousands of documents, it is not at all surprising that the Government considered no particular "materials [or] documents" determinative.

In sum, we are not persuaded by any of CCIA's and SIIA's objections to the Government's compliance with the procedural requirements of the Tunney Act. We hold, therefore, the district court did not err in approving the Government's compliance with § 16(b).

2. Microsoft's disclosure

HN26[] The Tunney Act requires the defendant to file with the district court "all written or oral communications by or on behalf of such defendant … with any officer or employee of the United States concerning or relevant" to a proposed consent decree. *15 U.S.C. § 16(g)*. Microsoft first made the required disclosure under *§ 16(g)* on December 10, 2001; it included communications from September 28, 2001 forward. At a hearing held in March 2002 the district court questioned whether *§ 16(g)* required disclosure of contacts only as of the date the court ordered the parties to engage in settlement discussions -- September 28, 2001 -- or whether it extended back to the date this court remanded **[***145]** the case, namely, August 24, 2001. In response to the court's concern, Microsoft disclosed one additional communication, a September 27 meeting of counsel for the parties, which was also attended by an employee of Microsoft in order "to provide a demonstration of Windows XP and to answer questions about its functionality."

Asserting "it is widely known that since 1998 Microsoft has comprehensively lobbied both the legislative and executive branches of the federal government to end this case," CCIA and SIIA first claim the Tunney Act requires that Microsoft disclose all those contacts. The district court, however, limited Microsoft's obligation to disclosure of contacts the company had **[*1250]** **[**203]** with the Executive Branch, starting at the time this court remanded the case to the district court for further proceedings. *Tunney Act Proceedings, at 20-21*. We agree with that interpretation and application of the Act.

HN27[] *Section 16(g)*, as mentioned above, required Microsoft to disclose its communications with "any officer or employee of the United States." The question is whether that includes members or employees of the Legislative Branch. Reference is made to "United States" 18 times in the Tunney **[***146]** Act. *See* §§ *15 U.S.C. 16(b)-(h)*. In all 17 references other than the disputed one in *§ 16(g)* the term plainly denotes only the Executive Branch. *See, e.g., id. § 16(b)* HN28[] ("Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court … and published by the United States in the Federal Register"). HN29[] It is a commonplace of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *See Commissioner v. Lundy, 516 U.S. 235, 250, 133 L. Ed. 2d 611, 116 S. Ct. 647 (1996)*. CCIA and SIIA offer no reason to believe the reference in *§ 16(g)* to communications between Microsoft and "any officer or employee of the United States" uniquely extends the latter term beyond the Executive Branch. Moreover, HN30[] because only the Executive Branch can settle an antitrust case, only contacts with the Executive Branch are relevant to the purpose of the Tunney Act -- namely, to block settlements that are not in the public interest. We therefore conclude, as did **[***147]** the district court, the term "United States" as used in *§ 16(g)* refers only to the Executive Branch.

The intervenors also object to Microsoft's having disclosed "only meetings that occurred during the last round of settlement negotiations ordered by the Court." Microsoft responds:

> The Consent Decree was a direct outgrowth of the intense settlement discussions ordered by the District Court [on remand]. Any [settlement] discussions occurring prior to that time period did not concern and were not relevant to the Consent Decree ultimately agreed to by the parties…. Previous failed settlement discussions are irrelevant to the Consent Decree, which focuses on remedying the liability determinations affirmed on appeal.

We agree. The parties' relative positions were considerably changed by our decision in *Microsoft III*. Therefore the only communications "concerning or relevant" to the consent decree are those that took place after our remand to the district court. *See 15 U.S.C. § 16(g)*.

CCIA and SIIA offer no persuasive reason to believe Microsoft's disclosures do not comply with *§ 16(g)*. Those disclosures fully informed the district court **[***148]** of the communications relevant to the district court's public-interest determination, and that court did not err in approving them.

IV. Conclusion

The remedial order of the district court in No. 02-7155 is affirmed. In No. 03-5030, the order denying intervention is reversed and the order approving the consent decree in the public interest is affirmed.

So ordered.

Monsanto Co. v. Scruggs

United States District Court for the Northern District of Mississippi, Western Division

June 30, 2004, Decided ; July 6, 2004, Filed

CIVTL ACTION NO. 3:00CV161-P-A

Reporter

342 F. Supp. 2d 568 *; 2004 U.S. Dist. LEXIS 26691 **; 2005-1 Trade Cas. (CCH) P74,685

MONSANTO COMPANY VERSUS, PLAINTIFF v. MITCHELL SCRUGGS, EDDIE SCRUGGS, and SCRUGGS FAMILY FARM SUPPLY, DEFENDANTS

Subsequent History: Summary judgment granted by *Monsanto Co. v. Scruggs, 342 F. Supp. 2d 602, 2004 U.S. Dist. LEXIS 26634 (N.D. Miss., 2004)*

Affirmed by, Remanded by *Monsanto Co. v. Scruggs, 459 F.3d 1328, 2006 U.S. App. LEXIS 20914 (Fed. Cir., 2006)*

Prior History: *Monsanto Co. v. Scruggs, 342 F. Supp. 2d 584, 2004 U.S. Dist. LEXIS 26650 (N.D. Miss., 2004)*

Disposition: Plaintiff's Motion for Summary Judgment granted.

Core Terms

seed, herbicide, defendants', trait, soybean, growers, patent, markets, technology, summary judgment, license, cotton, relevant market, anti trust law, glyphosate, antitrust claim, Counterclaim, summary judgment motion, monopoly power, crops, patent law, license agreement, cotton seed, anti-competitive, monopolization, matter of law, genuine, rule of reason, market share, cottonseed

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] Entitlement as Matter of Law, Genuine Disputes

Fed. R. Civ. P. 56(c) authorizes summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] Entitlement as Matter of Law, Appropriateness

A judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] Entitlement as Matter of Law, Genuine Disputes

Although *Fed. R. Civ. P. 56* is peculiarly adapted to the disposition of legal questions, it is not limited to that role. The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material. With regard to "materiality", only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment. Where the summary judgment evidence establishes that one of the essential elements of the plaintiffs cause of action does not exist as a matter of law, all other contested issues of fact are rendered immaterial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN4[] Summary Judgment, Entitlement as Matter of Law

In making its determinations of fact on a motion for summary judgment, a court must view the evidence submitted by the parties in a light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

***HN5*[]** **Summary Judgment, Burdens of Proof**

In the summary judgment context, a moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

***HN6*[]** **Summary Judgment, Opposing Materials**

Fed. R. Civ. P. 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges its initial burden of demonstrating entitlement to summary judgment. Summary judgment cannot be supported solely on the ground that a plaintiff has failed to respond to defendants' motion for summary judgment, even in light of a local rule of the court mandating such for failure to respond to an opposed motion.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

***HN7*[]** **Entitlement as Matter of Law, Appropriateness**

Once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. In other words, the nonmoving litigant is required to bring forward "significant probative evidence" demonstrating the existence of a triable issue of fact. To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN8[] Summary Judgment, Burdens of Proof

While generally the burden to discover a genuine issue of fact is not on the court, Fed. R. Civ. P. 56 does not distinguish between documents merely filed and those singled out by counsel for special attention-the court must consider both before granting a summary judgment.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN9[] Intellectual Property, Misuse of Rights

On the one hand, intellectual property rights do not confer a privilege to violate the antitrust laws. On the other, conduct permissible under the patent laws cannot trigger any liability under the antitrust laws. The patent laws are in pari materia with the antitrust laws and modify them pro tanto. On balance, a patent holder may be held accountable under the antitrust laws only if its conduct falls outside the ambit of protection afforded by the patent laws.

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN10[] Conveyances, Royalties

The patent laws permit a patentee to exact royalties as high as he can negotiate with the leverage of that patent monopoly.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN12[] Antitrust & Trade Law, Sherman Act

Recovery for a violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1 requires proof of (1) a contract, combination or conspiracy (2) affecting interstate commerce (3) which imposes an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

The analytical approach to a § 1 of the Sherman Act, 15 U.S.C.S. § 1 claim differs depending on the nature of the challenged conduct. Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. Conduct of this type is per se illegal. All other activities are subject to more laborious scrutiny under what is known as the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Contracts Law > Personal Property > Personalty Leases > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN14[] Tying Arrangements, Per Se Rule

A tying arrangement is the sale or lease of one product on the condition that the buyer or lessee purchase a second product. The desired product is called the "tying" product; the other is the "tied" product. The essence of a tying claim is forcing. To prove a per se tying claim, a plaintiff must show: (1) the involvement of two separate products or services; (2) the sale of one product or service is conditioned on the purchase of another; (3) the seller has sufficient economic power in the market for the tying product; and (4) an effect on a not insubstantial amount of interstate commerce in the tied product.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Business & Corporate Compliance > ... > Environmental Law > Hazardous Wastes & Toxic Substances > Federal Insecticide, Fungicide & Rodenticide Act

Business & Corporate Compliance > ... > Environmental Law > Hazardous Wastes & Toxic Substances > Pesticides

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Disease & Pest Control

HN15[] Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products

Federal Insecticide, Fungicide and Rodenticide Act prohibits the use of any herbicide in a manner inconsistent with, its labeling. 7 U.S.C.S. § 136j(2)(G).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16[] Price Fixing & Restraints of Trade, Tying Arrangements

It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as the buyer is free to take either product by itself there is no tying problem.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN17[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

When conducting a rule of reason analysis, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. In the event the claimants bring forward evidence that an entity's actions have unreasonably restrained trade, the inquiry devolves to a balancing act: The court must then balance the anticompetitive evils of a restrictive practice against any procompetitive benefits or justifications within the confines of the relevant market. Proof that a defendant's activities, on balance, have adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

HN18[] Attempts to Monopolize, Elements

Section 2 of the Sherman Act, 15 U.S.C.S. § 2 proscribes unlawful monopolization and attempted monopolization. In order to prevail on a § 2 claim, claimants must prove that an entity possesses monopoly power in a relevant market; and that the entity has acquired or maintained that power wilfully (by means of anti-competitive practices) instead of competition on the merits.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN19[] Monopolies & Monopolization, Actual Monopolization

Cross-elasticity of demand, i.e., a rise in a price for a good within a relevant product market tends to create a greater demand for other like goods in that market, is the focal inquiry in determining what produces make up the relevant market for purposes of monopolization claims. Products need not be perfect substitutes to be included in the relevant market: Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN20[] **Monopolies & Monopolization, Actual Monopolization**

After defining the relevant market, defendants must then prove that an entity wields monopoly power in the relevant market. Monopoly power is defined as the power to control prices or exclude competition. Although several factors determine whether a firm possesses monopoly power in a relevant market, one of the most crucial is a firm's market share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN21[] **Monopolies & Monopolization, Actual Monopolization**

The final step in a monopolization claim, is that claimants must show the willful acquisition or maintenance of alleged monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident in the relevant market.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN22[] **Inequitable Conduct, Anticompetitive Conduct**

A patent is an exception to the general rule against monopolies and the right to access to a free and open market. Consequently, a patentee cannot be held liable under the antitrust, laws for the natural monopoly afforded under the Patent Act.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN23[] **Monopolies & Monopolization, Actual Monopolization**

A 25.6 percent market share in the United States market for soybean seeds and a 0 percent share in the market for cotton seeds are insufficient to support a § 2 of the Sherman Act, 15 U.S.C.S. § 2, claim as a matter of law.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN24[] **Monopolies & Monopolization, Actual Monopolization**

To prevail on a monopolization claim, the claimants must be able to demonstrate that an entity has engaged in behavior that not only (1) tends to impair opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Bad Faith Enforcement

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

HN25[] **Misuse of Rights, Patent Misuse Defense**

Regarding the patent misuse doctrine, the pivotal question is, whether, by imposing conditions that derive their force from the patent, the patentee has impermissible broadened the scope of the patent grant with anticompetitive effect. Where a restriction is reasonably within the patent grant, the defense cannot succeed.

Counsel: **[**1]** For Monsanto Company, Plaintiff: Adam E. Miller, Dutro E. Campbell, Erik L. Hansell, Glennon P. Fogarty, Joseph C. Orlet, Matthew R. Grant, Matthew T. Schelp, Michele L. Taylor, S. Christian Mullgardt, II, HUSCH & EPPENBERGER, LLC, St. Louis, MO; Charles Victor McTeer, Kimberly Georgette Jones, MCTEER & ASSOCIATES, Greenville, MS; Dale R. Joerling, Stephen G. Strauss, THOMPSON COBURN, One U.S. Bank Plaza, St. Louis, MO; Frank S. Thackston, Jr., LAKE TINDALL, LLP, Greenville, MS; Jonathan I. Gleklen, Kenneth A. Letzler, Michael D. Yeh, ARNOLD & PORTER, Washington, DC; Michael Noel Watts, Robert Bradley Best, HOLCOMB DUNBAR, Oxford, MS; Susan K. Knoll, HOWREY SIMON ARNOLD & WHITE, Houston, TX

For Mitchell Scruggs, Eddie Scruggs, Scruggs Farm Supply, Defendant: Dennis C. Sweet, III, SWEET & FREESE, Jackson, MS; Gary Myers, GARY MYERS, ATTORNEY, Oxford, MS; James L. Robertson, WISE, CARTER, CHILD & CARAWAY, Jackson, MS; Jim D. Waide, III, WAIDE & ASSOCIATES, PA, Tupelo, MS; Lisa Scruggs Rohman, LISA SCRUGGS ROHMAN, ATTORNEY, Tupelo, MS

For Mitchell Scruggs, Eddie Scruggs, Scruggs Farm Supply, Counter Claimant: Jim D. Waide, III, WAIDE & ASSOCIATES, PA, Tupelo, MS; Lisa Scruggs **[**2]** Rohman, LISA SCRUGGS ROHMAN, ATTORNEY, Tupelo, MS; Gary Myers, GARY MYERS, ATTORNEY, Oxford, MS

For Monsanto Company, Counter Defendant: Dale R. Joerling, THOMPSON COBURN, One U.S. Bank Plaza, St. Louis, MO; Joseph C. Orlet, Glennon P. Fogarty, Matthew T. Schelp, HUSCH & EPPENBERGER, LLC, St. Louis, MO; Michael Noel Watts, Robert Bradley Best, HOLCOMB DUNBAR, Oxford, MS; Michael D. Yeh, ARNOLD & PORTER, Washington, DC

Judges: W. ALLEN PEPPER, JR., UNITED STATE DISTRICT JUDGE

Opinion by: W. ALLEN PEPPER, JR.

Opinion

[*571] **MEMORANDUM OPINION**

This cause is before the Court on Monsanto's Motion for Summary Judgment on Counts Six, Seven, Eight and Nine of Defendants' Counterclaim (Defendants' Antitrust Claims) [401-1]. The Court, having reviewed the motion, the response, the briefs of the parties, the authorities cited and being otherwise fully advised in the premises, finds as follows, to-wit:

[*572] FACTUAL BACKGROUND

In the mid-1990's, Monsanto launched revolutionary new agricultural technologies. The new technologies have been described ad infinitum in other Memorandum Opinions issuing from the Court, as has the defendants' unauthorized use and replication of seed containing Monsanto's patented **[**3]** biotechnology. When Monsanto sued them for patent infringement, the Scruggses categorically denied liability for their conduct and turned the tables on Monsanto by alleging that Monsanto's commercial practices not only violated federal and state antitrust laws, but also constituted patent-misuse. The allegations, if proven true, are an absolute defense to Monsanto's infringement action.

The defendants target the gamut of Monsanto's marketing strategies as they pertain to Roundup Ready and Bollgard traits, Roundup Ready and Bollgard seed and the entire Line of Roundup herbicide products. Very broadly broken down, the principal foci of the Scruggses' attack are Monsanto's agreements with its seed partners, Monsanto's agreements with seed and herbicide dealers and Monsanto's dealings with individual growers. They contend Monsanto imposed restrictive terms at each level of the market for its technologies and that those restrictive terms amounted to unlawful restraints on trade. That same conduct, they argue, enabled Monsanto to extend its monopoly power in the markets for traits, seed and glyphosate herbicide.

After ample opportunity for discovery, Monsanto filed its Motion for Summary **[**4]** Judgment. The motion seeks dismissal of the defendants' federal and state antitrust claims as denominated in Counts Six, Seven and Nine. The motion also seeks judgment as a matter of law on the Scruggses' affirmative defense of patent misuse as denominated in Count Eight. The motion has been fully briefed and the Court is ready to rule.

STANDARD OF REVIEW

HN1[] *Rule 56(c) of the Federal Rules of Civil Procedure* authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265,106 S. Ct. 2548 (1986)*. The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. *Johny State of La. (Bd. Of T. for State C. & U., 757 F.2d 698, 712 (5th Cir 1985)*.

HN2[] A judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether **[**5]** there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN3[] Although *Rule 56* is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Prof'l Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986)*. "The mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." Id. "With regard to 'materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will **[*573]** preclude summary judgment. *Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 272 (5th Cir. 1987)*. Where "the summary judgment evidence establishes that one of the essential elements of the plaintiffs cause of action does not exist as a matter of law, **[**6]** … all other contested issues of fact are rendered immaterial. See *Celotex, 477 U.S. at 323, 106 S. Ct. at 2552*. *Topalian v. Ehrman, 954 F.2d 1125,. 1138 (5th Cir. 1992)*.

HN4[] In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in a light most favorable to the non-moving party. *McPherson v. Rankin, 736 F.2d 175, 178 (5th Cir. 1984)*.

HN5[] The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. *Union Planters Nat Leasing v. Woods, 687 F.2d 117 (5th Cir. 1982)*. The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *Topalian 954 F.2d at 1131*.

HN6[] "Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment]." John, 757 F.2d at 708. "Summary judgment cannot be supported **[**7]** solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment," even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. Id. at 709.

However, HN7[] once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. Ferguson v. National Broadcasting Co. Inc., 584 F.2d 111, 114 (5th Cir. 1978). In other words, "the nonmoving litigant is required to bring forward 'significant probative evidence' demonstrating the existence of a triable issue of fact." In Re Mun. Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5th Cir. 1982). To defend against a proper summary judgment motion, one may not rely on mere denial of material facts nor on unsworn allegations in the pleadings or arguments and assertions in briefs or legal memoranda. The nonmoving party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed. R. Civ. P. See also Union Planters Nat Leasing v. Woods, 687 F.2d at 119.

HN8[] While generally **[**8]** "the burden to discover a genuine issue of fact is not on [the] court, (Topalian 954 F.2d at 1137), "Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention-the court must consider both before granting a summary judgment." John, 757 F.2d at 712, quoting Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980).

LEGAL ANALYSIS

Antitrust Counterclaims

Monsanto's motion launches a two-pronged attack on the Scruggses' antitrust claims. In the first instance, they allege that the defendants lack standing to bring their federal antitrust claims. In the second, they urge that the defendants' claims also fail on their merits. The Court will address each of these arguments in turn.

I. Federal Antitrust Claims

A. Standing Inquiry

The defendants' counterclaim seeks both damages and injunctive relief under the federal antitrust laws. At oral argument, counsel for Monsanto conceded defendants' **[*574]** standing to seek injunctive relief under § 16 of the Clayton Act. 15 U.S.C. § 26. Monsanto's motion attacks only the defendants' standing to bring a **[**9]** private damages action under § 4 of the Clayton Act. 15 U.S.C. § 15. In light of the Court's decision on the merits of the antitrust counterclaims, infra, it is unnecessary to address Monsanto's standing argument.

B. Merits Inquiry

1. Conduct Falling Within the Patent Grant

This case implicates the peculiar intersection between the public interest in rewarding and encouraging innovation protected by the patent laws and the public interest in safeguarding competition protected by the antitrust laws. HN9[] On the one hand, "intellectual property rights do not confer a privilege to violate the antitrust laws." CSU, L.L.C. v. Xerox Corp. (In re Indep. Serv. Orgs. Antitrust Litig.), 203 F.3d 1322, 1325 (Fed. Cir. 2000). On the other, "conduct permissible under the patent laws cannot trigger any liability under the antitrust laws." SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981). "The patent laws … are in pari materia with the antitrust laws and modify them pro tanto." Simpson v. Union Oil Co. Of CaL., 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964). On balance, a patent holder may be held accountable under the antitrust laws only **[**10]** if its conduct falls outside the ambit of protection afforded by the patent laws. U.S. v. Line Material Co., 333 U.S. 287, 308, 92 L. Ed. 701, 68 S. Ct. 550 (1948). Two questions are paramount. What conduct do the Scruggses condemn as anticompetitive? Is that conduct protected under the patent laws?

Since introducing its biotechnology in 1996, Monsanto has always imposed certain requirements on growers through licensing provisions in its contracts with seed partners and individual formers. The agreements have always: a) required growers to only use seed containing Monsanto's biotechnology for planting a single crop; b) prohibited transfer or re-use of seed containing the biotechnology for replanting; and c) required payment of a royalty fee. Exhibits A and B to Monsanto's Motion for Summary Judgment.

Monsanto's no replant policy and its decision to charge growers a uniform technology fee are among the many practices the Scruggses target as anti-competitive. Monsanto urges its licensing provisions are a valid exercise of its rights under the patent laws. With regard to the ban on seed saving, Monsanto characterizes the restriction as nothing more than a limited use **[**11]** license, a practice permitted under the patent laws. *Mallinckrodt Inc. v. Medipart. Inc., 976 F.2d 700, 703 (Fed. Cir. 1992)*. This Court adopted that position in ruling on Monsanto's motion for a preliminary injunction, *Monsanto Co. v. Scruggs, 249 F. Supp.2d 746, 754 (N.D. Miss. 2001)*. In the interim since that, decision, the Federal Circuit Court of Appeals considered the identical no replant policy and held that "the restrictions in the Technology Agreement prohibiting the replanting of the second generation of ROUNDUP READY(R) soybeans do not extend Monsanto's rights under the patent starute." *Monsanto Co. v. McFarling, 363 F.3d 1336, 1343 (Fed. Cir. 2004)*. Accordingly, Monsanto's no replant policy is not subject to challenge under the antitrust laws.

With respect to Monsanto's imposition of uniform technology fees on all growers, the defendants contend Monsanto's practice is merely a guise for an illegal price fixing scheme. Monsanto urges its technology fees are simply royalties and that the patent laws permit it to charge any royalty it chooses. *Brulotte v. Thys Co., 379 U.S. 29, 13 L. Ed. 2d 99, 85 S. Ct. 176 **[*575]** (1964).* **[**12]** Monsanto's position is correct. ***HN10***[] The patent laws permit a patentee to "exact royalties as high as he can negotiate with the leverage of that [patent] monopoly." *Id. at 33*. Because its collection of a uniform technology fee is within the scope of the patent grant, Monsanto cannot be liable for a violation of the antitrust laws.

Defendants also attack Monsanto's refusal to license its soybean seed partners to stack the Roundup Ready trait with transgenic traits developed by Monsanto's competitors, as well as the provision expressly limiting the license grant by forbidding its seed partners from "engaging in any research or experimentation with 'Monsanto Know-How And Biological Material' or 'Licensed Patent Rights.'" Defendants' Memorandum at p. 17. The Court declines the defendants' invitation to scrutinize these restrictions; they are clearly field of use restrictions which fall within the scope of the patent monopoly and are, therefore, lawful. *B. Braun Medical. Inc. v. Abbott Laboratories, 124 F.3d 1419, 1426 (Fed. Cir. 1997)*.

2. *Sherman Act § 1* Claims

The Scruggses challenge numerous other aspects of Monsanto's business conduct as violative **[**13]** of *§ 1* of the Sherman Act. ***HN11***[] *Section 1* provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN12***[] Recovery for a violation of *§ 1* requires proof of 1) a contract, combination or conspiracy 2) affecting interstate commerce 3) which imposes an unreasonable restraint of trade. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1158 (5th Cir. 1992)*.

HN13[] The analytical approach to a *§ 1* claim differs depending on the nature of the challenged conduct. "Certain arrangements are conclusively presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition." *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 186 (5th Cir. 1972)*. Conduct of this type is per se illegal. All other activities are subject to more laborious scrutiny under what is known as the rule of reason. Defendants' urge their right to recover for violations of *§ 1* under both analytical models. [1] The Court will address **[**14]** each claim in turn.

a. Per Se Analysis

[1] Still other conduct may fall into a hybrid category known as a "quick look" *§ 1* case. Other than Monsanto's no replant policy already addressed supra, defendants do not contend that any of Monsanto's conduct fails the "quick look" test.

HN14[] "A tying arrangement is the sale or lease of one product on the condition that the buyer or lessee purchase a second product." *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc., 21 F.3d 83, 86 (5th Cir. 1994)*. The desired product is called the 'tying' product; the other is the 'tied' product." *United Farmers Agents Ass'n., Inc. v. Fanners Ins. Exch., 89 F.3d 233.236 n. 2 (5th Cir. 1996)* (citing 9 Phillip E. Areeda, **Antitrust Law** P 1700a (1991)). The essence of a tying claim is forcing. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. To prove a per se tying claim, a plaintiff must show: 1) the involvement of two separate **[**15]** products or services; 2) the sale of one product or service is conditioned on the purchase of another; 3) the seller has sufficient economic power in the market for the tying product; and 4) an effect on a not insubstantial amount of interstate commerce in the tied product. *Eastman Kodak Co. v. Image Tech. Serv.,* ***[*576]*** *Inc., 504 U.S. 451. 461-62, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*.

Defendants allege Monsanto engaged in illegal tying on four fronts. [2] They claim Monsanto tied the purchase of seed to the purchase of Roundup through its grower license agreements and grower incentive agreements, as well as its seed partner agreements. As a further matter, the Scruggses argue that Monsanto illegally tied the Roundup and Bollgard traits in cotton seed. The Court will address each of these arguments in turn.

[16]** i. Monsanto's Grower License Agreements

Defendants contend that the grower license agreements utilized by Monsanto from 1996 to 1998 employed a blatant tie between seed containing Monsanto's patented Roundup Ready trait and Roundup herbicide. The pertinent portion of the 1996 technology agreement reads:

> The Grower further agrees that if the Grower uses any glyphosate . . . containing herbicide in connection with the soybean crop produced, from this seed, the herbicide will be a ROUNDUP(R) BRANDED HERBICIDE (or other Monsanto authorized glyphosate-containing herbicide) labeled for use on ROUNDUP READY(R) soybeans. No other glyphosate containing herbicide may be used with this patent-protected seed.

Exhibit A to Monsanto's Motion for Summary Judgment. The 1997 and 1998 agreements provided: "If a herbicide containing the same active ingredient as Roundup Ultra herbicide (or one with a similar mode of action) is used over the top of Roundup Ready crops, you agree to use only Roundup branded, herbicide." Exhibit 2 to Scruggses' Supplemental Submission in Opposition to Monsanto's Motion for Summary Judgment.

Defendants contend the above-quoted language coerced growers **[**17]** into using Monsanto's Roundup line of herbicides when they may have preferred other brands of glyphosate-based herbicide. Monsanto contends, first and foremost, that nothing in the grower license agreements compelled farmers to purchase Roundup. Growers could choose not to use any herbicide "over-the-top" of Roundup Ready crops. They could also choose to use any non-glyphosate herbicide "over-the-top" of Roundup Ready crops. With regard to its prohibition on glyphosate-based herbicides other than Roundup, Monsanto avers that the restriction was necessary to assure compliance with the mandates of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *7 U.S.C. § 136 et seq.* **HN15**[

[2] Defendants also alleged that Monsanto's no replant policy creates a de facto tie between traits and germ plasm; however, the Federal Circuit considered precisely the same argument in McFarling and found it insufficient as a matter of law:

> We need not plumb the complexities of tying …, however, to determine that the district court correctly granted summary judgment for Monsanio. McFarling does not raise a typical tying allegation, and the mere recitation of the word "tying" is not sufficient….
>
> McFarling's "tying" argument instead centers on his desire to replant the entire seed, including the genetic modifications, and on Monsanto's refusal to grant him permission to do so. … At its simplest, McFarling effectively argues . . . that he should be granted a compulsory license to use the patent rights in conjunction with the second-generation ROUNDUP READY(R) soybeans in his possession after harvest. We decline to hold that Mosquito's raw exercise of its' right to exclude from the patented invention by itself is a "tying arrangement"…..

McFarling, 363 F.3d at 1342. The defendants also claimed that Monsanto tied the use of its traits to the purchase of seed in subsequent years. This, too, is an attack on Monsanto's no replant policy. It likewise fails.

] FIFRA prohibits the use of any herbicide **[*577]** in a manner inconsistent with, its labeling. *7 U.S.C § 136j(a)(2)(G)*. Because Roundup was the only product labeled for use "over-the-top" of Roundup Ready crops between 1996 and 1998, it was the only EPA-approved herbicide that could be used on Roundup Ready crops during that period. Beginning in 1999, Monsanto's license agreements and/or technology use guides authorized the use of any competing glyphosate-herbicide which mat-met E.P.A labeling **[**18]** requirements for "over-the-top" use as a permissible alternative to Roundup.

Defendants contend in their supplemental submission that the language in the 1996 technology license prohibits Any use of non-Roundup glyphosate herbicide, not just "over-the-top" use. Read in isolation, defendant's interpretation might be reasonable. However, defendants1 own submissions belie that interpretation. Defendant's Exhibit 59 also relates to the 1996 licensing restriction. It reads: "The Grower will use only Roundup branded herbicide if a herbicide containing glyphosate or any other EPSP synthase inhibitor is used over the top of Roundup Ready soybeans." Exhibit 59 to Defendant's Opposition to Monsanto's Motion for Summary Judgment (emphasis added). Defendants tout the fact that competing herbicides Glyfos and Touchdown were approved for certain uses with soybean crops as early as 1996, but they cannot disavow the fact that neither herbicide met the labeling requirements for "over-the-lop" use during the growing season. Nor is there any evidence before the Court from which a reasonable trier of fact could conclude that Monsanto's license agreement prohibited the application of competing **[**19]** glyphosate products for burndown or as a mere harvest aid. Based on the record before the Court, defendants have failed to meet their burden of producing significant probative evidence that Monsanto forced Farmers who wanted to purchase Roundup Ready seeds to purchase Roundup as well. [3]

[20]** ii. Monsanto's Grower Incentive Programs

The Scruggses also find fault with the Roundup Rewards program Monsanto offers to farmers. They assert that this program too constitutes an illegal tying scheme between Roundup Ready seed and Roundup herbicide. This claim is easily disposed of Defendants cannot demonstrate the coercion necessary to a tie-in. Growers who participate in the incentive program receive additional, voluntary benefits if they elect Roundup agricultural herbicides as the only systemic, non-selective herbicide to be used for burndown or in-crop applications on crops containing Monsanto traits. The program is entirely **[*578]** optional; customers who participate do so because they benefit from the incentives, not because Monsanto compels them to do so. Since the sale of Roundup Ready seed is not conditioned upon the purchase of Roundup herbicide, there is no tying arrangement.***HN16***[] "It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as the 'buyer is free to take either product by itself there is no tying problem.'" *Ungar v. Dunkin Dounts of Amcr. Inc., 531 F.2d 1211, 1226(3dCir. 1976)* (quoting **[**21]** *N. Pac. Ry. v. United States, 356 U.S. 1,6 n. 4,2 L. Ed. 2d 545, 78 S. Ct. 514 (1958))*.

iii. Monsanto's Seed Partner Agreements [4]

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[3] The same is true with regard to the defendants' challenge to Monsanto's grower license agreements since 1999. The Court categorically rejects the assertion that Monsanto's failure to list all approved non-Roundup glyphosate herbicides in the technology agreement causes consumer confusion and unduly bolsters Monsanto's branded products. The agreement provides: "Grower agrees … to use on Roundup Ready crops only a Roundup(R) agricultural herbicide or other authorized non-selective herbicide which could not be used in the absence of the Roundup Ready gene (see TUG [Technology Use Guide] for details on authorized non-selective products)." The language used communicates that glyphosate-based herbicides other than Roundup may be used with Roundup Ready crops and that additional information about alternative glyphosate-based herbicides may be obtained from the TUG. The 2003 TUG provides: "You may use another glyphosate herbicide, but only if it has been approved for use over Roundup Ready crops, and it has been labeled for this use by all required governmental agencies." The farmer need only consult the label of any competing glyphosate product to determine whether the product is suitable for use over-the-top of Roundup Ready crops.

[4] The Court doubts defendants' standing to challenge this aspect of Monsanto's seed partner agreements. A party who seeks injunctive relief under the antitrust laws must demonstrate some threatened loss or damage to his own interests. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. Defendants have made no showing that

Defendants also attack the terms of Monsanto's agreements with its seed partners. They contend Monsanto conditions the extension of licenses to its seed partaers on, an agreement to use Roundup herbicide. Among the Scruggses' exhibits are numerous copies of licensing **[**22]** agreements with various seed partners. An excerpt from Monsanto's with Griffith Seed Company is representative:

> 3.10
>
> If **GRIFFITH,** directly or indirectly, used any **GLYPHOSATE** containing herbicide or any other **EPSP** synthase inhibitor herbicide in connection with the **SOYBEAN** crop produced from **LICENSED COMMERCIAL SEED,** the herbicide shall be a **ROUNDUP[at] HERBICIDE** labelled for use on ROUNDUP READY **SOYBEANS.** No other **GLYPHOSATE** or other EPSP synthase inhibitor herbicide may be used with the patent-protected seed. This provision shall not limit the use of herbicides other than **GLYPHOSATE** on such **SOYBEAN** germ plasm.

Exhibit 16 to Defendants' Supplemental Submission in Opposition to Monsanto's Motion for Summary Judgment at p. 2.

Defendants fall short of demonstrating that Monsanto forces its seed partners to buy Roundup herbicide in order to obtain a desired license. Although the provision at issue forecloses seed partners from using glyphosate-based herbicides other than Roundup, Monsanto's seed partners are under no compulsion to buy Roundup. The seed partners remain free to refrain from the use of any glyphosate-based **[**23]** herbicide. They are likewise free to use any non-glyphosate herbicide they choose.

Furthermore, the nature of the business relationship between Monsanto and its seed partners provides an additional basis for a refusal to extend per se treatment to any alleged lie. The contract expressly provides that the parties seek "arrangements under which **MONSANTO** would license soybean growers the right to use **LICENSED COMMERCIAL SEED** exhibiting such resistance to **ROUNDUP(R) HERBICIDE…** and **GRIFFITH** (or its dealers or distributors) would produce and sell **LICENSED COMMERCIAL SEED** to soybean growers." Exhibit 16 alp. 1. All of the seed produced pursuant to the agreement bears Monsanto's Roundup Ready trademark-in essence warranting the product's suitability for use with Roundup. Accordingly, Monsanto has a vested **[*579]** interest in ensuring that seed so marketed is, indeed, tolerant to Roundup. The tie, if there be a tic, is not appropriate for per se treatment.

iv. Monsanto's Stacked Trait Cotton

Defendants also raise a tying claim in relation to stacked trait cotton. The Scruggses allege that Monsanto tied the sale of cotton containing the Roundup Ready trait to cotton **[**24]** containing the Bt trait. No lengthy analysis is necessary to dispose of this claim.

Nothing in the record remotely suggests that growers who wanted to purchase Roundup Ready cotton seed also had to purchase Bollgard seed. Instead, the defendants complain that Monsanto's required its seed partners to focus on stacked trait cotton (seed containing both the Roundup Ready and Bollgard traits) to the exclusion of single trait seed, e.g., cotton seed containing only the Roundup Ready gene. There are numerous problems with defendants' argument. In the first instance, it is unlikely that defendants can demonstrate the requisite tie between two products -- as opposed to a bundling of desirable traits into a single product offered to the consumer.

But beyond that,the record does not support the defendants' claim that Monsanto engineered a shortage of single trait cotton seed which "forced" growers to buy stacked trait seed when they would have preferred to purchase single trait Roundup Ready seed. Monsanto offered the affidavits of Don Threet and Randy Deaton to dispel the defendants' assertions in that regard. Exhibits C and K in Opposition to Defendants' Motion to Reconsider Preliminary **[**25]** Injunction. Mr. Threet, Vice President of U.S. Business of Emergent Genetics US, Inc. (formerly Stonevillac Pedigreed Seed Company), testified that his company began offering single trait Roundup Ready cottonseed in 2001 and the number of cotton lines containing the Roundup Ready trait alone has steadily increased since that time. He further testified that his company has no awareness of a "shortage" of cottonseed containing only the Roundup Ready trait; Emergent knows there is a demand for single trail cottonseed and the company

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they are in a position to market competing glyphosate-based herbicides to any of Monsanto's seed partners, and the Court cannot conceive of any other harm which might inure to defendants from the complained of provisions.

plans to continue offering single trait Roundup Ready seed so long as that demand continues. Mr. Deaton, Director of Monsanto's Global Cotton Business, testified to the meaning of the allegedly nefarious 75% provision in the Research Agreement between Monsanto and Delta & Pine Land Company (DPL). His testimony absolutely lays waste to the defendants' argument that the agreement forces DPL to incorporate Monsanto's Bollgard and Roundup Ready traits in three quarters of all cotton produced-allegedly restricting the output of both conventional and single trait Roundup Ready seed. Instead, the provision merely requires that DPL include Monsanto's slacked traits **[**26]** in at least 75% of new cotton lines offered in a given year. "The purpose of this provision [is] lo ensure that DPL gives growers the option of purchasing its newest cottonseed lines in the stacked trait version." [5] Exhibit K to Monsanto's Opposition to Motion to Reconsider Preliminary Injunction. Defendants offered no contrary evidence to refute the testimony of either gentleman; **[*580]** accordingly, their claim that Monsanto illegally "tied" its Roundup Ready trait to its Bollgard trait fails.

[27]** b. Rule of Reason

Simply put, defendants argue that Monsanto implemented a seed cartel through its vast web of contractual agreements with seed partners (of which there are close to three hundred). By means of the cartel, Monsanto and its seed partners control the markets for cottonseed and soybean seed, thereby enabling Monsanto and its seed partners to charge supra-competitive price for seed. Other than the practices identified above, [6] defendants specifically attack Monsanto's "any third party" clause, which binds distributors and dealers in the downstream markets to the same restrictions Monsanto imposes on its seed partners. Defendants also target aspects of Monsanto's financial incentive program with its seed partners, dealers and distributors; they contend that the incentives effectively shield Monsanto from competition in the markets for traits, seed and glyphosate.

[28]** ***HN17***[] When conducting a rule of reason analysis, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*. In the event the defendants bring forward evidence that Monsanto's actions unreasonably restrained trade, the inquiry devolves lo a balancing act: "The court must then balance the "anticompetitive evils of a restrictive practice … against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason." *Aparu Southwest, Inc., v. Coca-Cola Interprises, Inc., 300 F.3d 620, 627 (5th Cir. 200)* (quoting from *Doctor's Hosp. of Jefferson, Inc., v. Southeast Med. Alliance, Inc., 123 F.3d 301, 307* ***[**29]*** *(5th Cir. 1997)*.

Having reviewed the "any third party" clause in its context, the Court concludes That it cannot reasonably be construed as an unreasonable restraint on trade. The clause simply reiterates the limited nature of the seed partners' license, limits which this Court found valid in section L.B.I.

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[5] Deaton's affidavit also declares:

> This provision does not mean that 75% of all new varieties of cottonseed sold by DPL must contain the stacked trait gene by 2003. For example, DPL is Tree to offer the same new line of cottonseed in several versions, each of which is called a separate variety -- conventional, Roundup Ready(R) only, Roundup Randy(R)/Bollgard(R) stacked trait, or Bollgard(R) only-and still be in compliance with this agreement. Moreover, this provision contains no limitation on the quantity of seed without the stacked trait that DPL may sell.

Exhibit K at p. 2.

[6] The Court concludes that defendants' evidence of the "tying" practices fails manifestly to demonstrate an unreasonable restraint on trade. Furthermore, to the extent that, the "tying" practices might, under a tortured interpretation, be considered undue restraints, the pro-competitive justifications offered by Monsanto offset any adverse effects on competition-real or potential.

Likewise, Monsanto's seed partner agreements do not, contrary to defendants' assertions, require that its soybean licensees "exceed ninety percent (90%) of aggregate Herbicide -Resistant it Soybean Products sold…." Defendants' experts stop short of characterizing Monsanto's financial incentive program with its seed partners as exclusive dealing arrangements and with good reasons. Monsanto does not require its seed partners to incorporate Monsanto trails in a certain percentage&c of all commercial seed sold. The provision is merely a financial incentive offered by Monsanto in the event they do reach target sales levels, the seed partners receive a discount on applicable technology fees. However, seed partners are under no compulsion to reach a minimum sales level. The financial incentive agreements **[*581]** do not foreclose competition in a substantial share of the relevant product **[**30]** marke(s). The same analysis applies to the Scruggses1 financial incentive programs with its dealers and distributors. The defendants' *§ 1* rule of reason claims fail. [7]

3. *Sherman Act § 2* Claims

Next, the defendants repackage much of the previously complained of conduct and assert it as violative of *§ 2* of the Sherman Act. ***HN18***[] *Section 2* proscribes unlawful monopolization and attempted monopolization. *15 U.S.C. § 2*. In order to prevail on their *§ 2* claim, defendants must prove that Monsanto possessed monopoly power in a relevant market; and that Monsanto acquired or maintained that power wilfully (by means of anti-competitive practices) instead of competition on the merits. *Aspen Skiing Co., v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n. 19, 86 L. Ed. 2d 467, 105* ***[**31]*** *S. Ct. 2847(1985)*.

As a prerequisite to recovery, the Scruggses must first prove (define) the relevant market(s). *Queen City Pizza Inc., v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3d Cir. 1997)*. ***HN19***[] Cross-elasticity of demand, i.e., a rise in a price for a good within a relevant product market tends to create a greater demand for other like goods in that market, is the focal inquiry in determining what produces make up the relevant market. *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 400, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*. Products need not be perfect substitutes to be included in the relevant market: "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively." *Queen City Pizza. 124 F.3d at 437*.

HN20[] After defining the relevant market, defendants must then prove That Monsanto wields monopoly power in the relevant market. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. Monopoly power is defined as "the power to control prices **[**32]** or exclude competition" *Fineman v. Armstrong World Indus., 980 F.2d 171, 201 (3d Cir. 1992)*, cert denied, *507 U.S. 921, 122 L. Ed. 2d 677, 113 S. Ct. 1285 (1993)*. Although several factors determine whether a firm possesses monopoly power in a relevant market, one of the most crucial is a firm's market share. *U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 999 (11'" Cir. 1993)*. cert denied, *512 U.S. 1221, 129 L. Ed. 2d 837, 114 S. Ct. 2710 (1994)*; *Pa. Dental Ass'n v. Med. Serv. Ass'n, 745 F.2d 248, 260 (3d Cir. 1984)*, cert denied, *471 U.S. 1016, 85 L. Ed. 2d 303, 105 S. Ct. 2021 (1985)*.

HN21[] Finally, defendants must show the willful acquisition or maintenance of alleged monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident in the relevant market. *Grinnell, 384 U.S. at 570-71*.

Monsanto asserts the Scruggses cannot produce sufficient proof on any of these points to withstand summary judgment. In the first instance, the relevant markers proposed by the defendants' experts conflict with those plead in the Scruggses' **[**33]** counterclaim. In the second instance, the experts' proposed product markets conflict with one another. Beyond that, Monsanto asserts, the defendants are incapable of showing Monsanto possesses monopoly power or that it **[*582]** engaged in any anti-competitive conduct. The Court agrees with Monsanto on every point.

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[7] Defendants also raise a § I conspiracy claim in their Counterclaim, It suffers from the same evidentiary deficiencies as the Scruggses' other *§ 1* claims. There being no genuine issues of material fact, Monsanto is entitled to summary judgment on the conspiracy claim as well.

a. Failure to Define the Relevant Product Markets

In the first instance, the Scruggses' experts offer testimony which markedly contradicts the product markets alleged in the defendants' Counterclaim. The defendants' own pleadings state that the relevant markets are:

1. The United States markets for Roundup Ready cotton seed and Roundup Ready soybean seeds;
2. The United Slates markets for Roundup Ready cotton technology and Roundup Ready soybean technology and/or the relevant regional or geographically smaller submarkets within the United States; and
3. The United States and/or the relevant regional submarket for all cotton seed and soybean seeds. [8]

[34]** In marked contrast, defendants' various economic experts proffer at least six different market definitions. And those market definitions conflict with one another. Nothing in the record indicates that the defendants ever sought leave to amend their pleadings to alter their proposed market definitions; the Court refuses to countenance defendants' failure to do so by permitting proof of product markets other than those pleaded in their Counterclaim. Defendants are "saddled with their [Counterclaim] as filed in this Court." *Continental Trend Res. Inc., v. OXY USA Inc., 44 F.3d 1465,1482 n. 19 (10th Cir. 1995)*. And, in a similar vein, the conflict in the experts" proposed market definitions is fatal as well: "The fact that [defendant] has offered two experts who endorse . . . different market definitions seriously compromises [defendant's] claim to have defined any relevant markets at all" *Bepco Inc., v Allied Signal Inc., 106 F. Supp. 2d 814, 824 (M.D.N.C. 2000)*.

b. Failure to Demonstrate Monopoly Power

i. Market for Roundup Ready Technology

One of the proposed markets alleged in defendants' counterclaim is the market for Roundup Ready technology. This **[**35]** claim fails as a matter of law because the proposed mark et definition cannot state an antitrust claim. Monsanto holds patents on Roundup Ready cotton and soybean technology. ***HN22***[] "[A] patent is an exception to the general rule against monopolies and the right to access to a free and open market." *Precision Instrument Mfg., Co. v. Autorriotive Mamtenance Machinery Co., 324 U.S. 806, 816,89 L. Ed. 1381, 65 S. Ct. 993, 1945 Dec. Comm'r Pat. 582 (1945)*. Consequently, a patentee cannot be held liable under the antitrust, laws for the natural monopoly afforded under the *Patent Act*. See *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984)* (refusing to define market in terms of defendant's own product). See also *TV Communs. Network, Inc. v. Turner Network TV, Inc.. 964 F.2d 1022, 1025 (10th Cir. 1992)* (dismissing complaint for failure to allege a relevant market over which TNT was capable of exercising a monopoly in violation of the antitrust laws). Defendants cannot prevail on their claim that Monsanto monopolized and/or attempted lo monopolize the markets for Roundup ready soybean and cotton technology.

[*583] ii. Markets for Soybean Seed and Cottonseed

[36]** The other markets proposed by defendants arc the markets for Roundup Ready soybean seed and cotton seed and the overall markets for cotton and soybean seed. The defendants' evidence is insufficient to show a triable issue of fact as to Monsanto's possession of monopoly power any of the proposed markets. As noted supra, monopoly power is the power to control prices and exclude-competition. Defendants' experts never take that leap. Instead, Ian Ayers avers that Monsanto "affects" the price of soybeans and cotton. This is simply insufficient. Furthermore, Dr. Ayers' conclusion rests on a flawed basis. He, and the defendants' other experts, all assume the propriety of including the market shares of Monsanto's seed partners in determining Monsanto's share of the relevant market. No Legal precedent supports such a remarkable position. Monsanto's market share must be determined solely on the quantity of goods and/or services Monsanto sold to consumers. *Anchor, 7 F.3d at 999*. At best, only the market shares of Monsanto's wholly owned subsidiaries are to be included. *Grinnell, 384 U.S. 563*. After excluding Monsanto's seed partners, Monsanto possesses **[**37]** only ***HN23***[] a 25.6% market share in the

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[8] Defendants alleged a fourth relevant market: the United Staves market and/or the relevant regional submarket for glyphosate herbicide. Monsanto does not find fault with this proposed market definition. The Scruggses1 claims that Monsanto monopolized and/or attempted to monopolize the glyphosate market are addressed infra.

United States market for soybean seeds and a 0% share in the market for cotton seeds. Such market shares are insufficient to support a *§ 2* claim as a matter of law. *Jefferson Parish, 466 U.S. at 26-27*. Accordingly, no reasonable trier of fact could conclude that Monsanto possesses monopoly power in the proposed markets for cotton and soybean need. [9]

c. Failure to Demonstrate Anti-Competitive Conduct in Glyphosate Market

The Scruggses rely solely on the evidence discussed in relation to the defendants' *§ 1* claim to support their claim that Monsanto monopolized or attempted to monopolize the glyphosate market. ***HN24***[] To prevail on their claim, the defendants must be able to demonstrate that Monsanto engaged in "behavior that not only 1) tends to impair opportunities of rivals, but also 2) either does not further competition on the merits or does so in an unnecessarily **[**38]** restrictive way." *Aspen Skiing, 472 U.S. at 605 n. 32* (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** 78 (1978)). The same rule of reason analysis applies to a monopolization claim as an unreasonable restraint of trade claim. Having concluded that none of Monsanto's conduct, e.g., its grower license agreements, grower incentive programs and its dealer incentives, could reasonably be considered anti-competitive, no further discussion is necessary. Monsanto is entitled to summary judgment on the defendants' glyphosate monopolization claim. [10]

II. State Law Antitrust Claims

Defendants also seek recovery under *Miss. Code Annotated § 75-21-1*, ct seq., for violations of Mississippi's antitrust laws. Just as Monsanto is entitled to judgment as a matter of law on defendants' federal **[**39]** antitrust claims, they are also entitled to summary judgment well."). on defendants' state law antitrust claims. See *Hardy Bros. Body Shop v. State Farm Mut. Auto. Ins. Co., 848 F. Supp. 1276, 1290 (S.D. Miss. 1994)*("Where a **[*584]** court finds no federal antitrust violations, allegations of state law antitrust violations may be dismissed as well."). See also *Futurevision Cable Sys. v. Multivision Cable TV Corp., 789 F. Supp. 760, 780 (S.D Miss. 1992)*.

Patent Misuse Defense

As the Federal Circuit recognized in McFarling, the purpose of the patent misuse doctrine is "to prevent a patentee from, using the patent to obtain market benefit beyond that which inures in the statutory patent right." *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 704 (Fed .Cir. 1992)*. ***HN25***[] The pivotal question is, "whether, by imposing conditions that derive their force from the patent, the patentee has impermissible broadened the scope of the patent grant with anticompetitive effect. "*C.R. Bard, Inc. v. M3 Sys.., 157 F.3d 1340,1372 (Fed.Cir.1998)*. Where a restriction is reasonably within the patent grant, the defense **[**40]** cannot succeed. See *Gen2 Talking Pictures Corp. v. W. Elec. Co., 305 U.S. 124, 127, 83 L. Ed. 81, 59 S. Ct. 116, 1938 Dec. Comm'r Pat. 841 (1938)*. As the lengthy analysis, supra, shows, there is no evidence that Monsanto used its patents to secure rights beyond the scope of its lawful patent monopoly. Defendants' patent misuse defense thus fails.

CONCLUSION

Based on the foregoing facts and analysis, the Court concludes Monsanio's Motion for Summary Judgment on Counts Six, Seven, Eight and Mine of Defendants' Counterclaim (Defendants' Antitrust Claims) [401-1] is well-taken and should be granted. An Order will issue accordingly.

This, the 30th day of June, 2004.

W. ALLEN PEPPER, JR.

UNITED STATE DISTRICT JUDGE

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[9] Nor could one reasonably conclude that Monsanto had a dangerous probability of acquiring monopoly power.

[10] Defendants aver in their brief to Monsanto's control over the glyphosate molecule market; however, the Scruggses' counsel conceded at oral argument that the defendants had not pursued those issues in discovery.

ORDER

This cause is before the Court on the plaintiff's Motion for Summary Judgement on Counts Six, Seven, Eight and Nine of Defendant's Counterclaim (Defendant's Antitrust Claims) [401-1]. The Court, having considered the motion and being otherwise fully advised in the permises, finds as follows, to-wit:

In accordance with the Memorandum Opinion entered this day, the Court finds that the plaintiff's Motion is well-taken and should be sustained.

IT IS, THEREFORE, **[**41]** ORDERED AND ADJUDGED that the plaintiff's Motion for Summary Judgement on Counts Six, Seven, Eight and Nine of Defendants' Counterclaim (Defendant's Antitrust Claims) [401-1] is well-taken and should be, and hereby is, GRANTED.

This, the 30th day of June, 2004.

W. ALLEN PEPPER, JR.

UNITED STATE DISTRICT JUDGE

N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.

United States District Court for the Southern District of New York

June 30, 2004, Decided ; July 2, 2004, Filed

02 Civ. 9277 (JGK)

Reporter

323 F. Supp. 2d 559 *; 2004 U.S. Dist. LEXIS 12453 **; 2004-2 Trade Cas. (CCH) P74,492

NEW YORK MERCANTILE EXCHANGE, INC., Plaintiff, - against - INTERCONTINENTALEXCHANGE, INC., Defendant.

Subsequent History: Summary judgment granted by, Complaint dismissed at *New York Mercantile Exch., Inc. v. Intercontinentalexchange, Inc., 2005 U.S. Dist. LEXIS 22235 (S.D.N.Y., Sept. 29, 2005)*

Prior History: *N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 2003 U.S. Dist. LEXIS 22440 (S.D.N.Y., Aug. 11, 2003)*

Disposition: [1]** Plaintiff's motion to dismiss defendant's counterclaims granted with respect to defendant's first, second, and third counterclaims.

Core Terms

contracts, prices, settlement, alleges, trading, cleared, transactions, commodities, natural gas, crude oil, counterclaim, intermediation, monopoly, terms, markets, parties, relevant market, regulated, competitor, delivery, platform, market price, monopolization, cooperation, electronic, antitrust, sharing, monopoly power, entrant, anticompetitive conduct

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN1[] **Pleadings, Crossclaims**

On a motion to dismiss a counterclaim, the allegations in the counterclaim are accepted as true. In deciding a motion to dismiss a counterclaim, all reasonable inferences must be drawn in the counter-plaintiff's favor. A court's function on a motion to dismiss is not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient.

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

Evidence > Judicial Notice > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court may consider documents that are referenced in counterclaims, documents that a counter-plaintiff relies on in bringing suit and that are either in the counter-plaintiff's possession or that the counter-plaintiff knows of when bringing suit, or matters of which judicial notice may be taken. However, in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving a counter-plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

International Trade Law > General Overview

HN3[] **Regulated Practices, Monopolies & Monopolization**

15 U.S.C.S. § 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. Private parties are granted the right to sue for, and seek injunctive relief against, violations of the antitrust laws by § 4 and § 16 of the Clayton Act. 15 U.S.C.S. §§ 15 and 26.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] Sherman Act, Claims

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

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] Sherman Act, Claims

The elements of an essential facility claim under 15 U.S.C.S. § 2 of the Sherman Act are: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN6[] Sherman Act, Claims

The mere possession of monopoly power, and the concomitant charging of monopoly prices, does not constitute anticompetitive conduct that would establish the second element of a 15 U.S.C.S. § 2 of the Sherman Act monopolization claim. Because this requirement preserves the opportunity to charge monopoly prices, if only for a short period, it also preserves inducements to innovate and apply business acumen. For similar reasons, monopolists are generally permitted by the Sherman Act to choose those with whom they will deal. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate 15 U.S.C.S. § 2, but the United States Supreme Court has been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

The indispensable requirement for invoking an essential facility claim under *15 U.S.C.S. § 2* of the Sherman Act is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that essential facility claims should be denied where a state or federal agency has effective power to compel sharing and regulate its scope and terms.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Governments > Agriculture & Food > General Overview

HN8[] **Agriculture & Food, Commodity Exchange Act**

Various provisions of the Commodity Exchange Act (CEA) require exchanges--which are designated "contract markets" under the CEA--to disclose information, including settlement prices, in a prescribed fashion.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN9[] **Agriculture & Food, Commodity Exchange Act**

See *7 U.S.C.S. § 6g(e)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Governments > Agriculture & Food > General Overview

HN10[] **Agriculture & Food, Commodity Exchange Act**

7 U.S.C.S. § 7(d) of the Commodity Exchange Act sets forth "core principles" with which designated contract markets must comply in order to maintain their designation as contract markets.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN11[] **Agriculture & Food, Commodity Exchange Act**

See *7 U.S.C.S. § 7(d)(8)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

HN12[] **Agriculture & Food, Commodity Exchange Act**

Through regulation, the Commodity Futures Trading Commission (CFTC) has provided that contract markets must make their settlement prices readily available to the news media and the general public no later than the business day following the day to which the settlement prices pertain. *17 C.F.R. § 16.01(b)(2)*. The CFTC's "application guidance" for compliance with Core Principal 8, *7 U.S.C.S. § 7(d)(8)*, states that a contract market should provide to the public information regarding settlement prices, as determined by the CFTC, on a fair, equitable and timely basis. 17 C.F.R. pt. 38, app. B, Core Principle 8.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > General Overview

Governments > Agriculture & Food > General Overview

HN13[] **Agriculture & Food, Commodity Exchange Act**

The Commodity Exchange Act (CEA), in particular *7 U.S.C.S. § 19*, provides that, before promulgating regulations under the CEA, the Commodity Futures Trading Commission (CFTC) should consider the costs and benefits of the CFTC's action as well as any implications for the antitrust laws. *7 U.S.C.S. § 19(a)* of the CEA provides that the costs and benefits of CFTC action must be evaluated in light of, among other factors, protection of market participants and the public; the efficiency, competitiveness, and financial integrity of futures markets; and "price discovery." *7 U.S.C.S. § 19(a)(2)*. *Section 19(b)* requires that the CFTC take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objective of this chapter when the CFTC adopts rules and regulations or issues orders under the CEA. *7 U.S.C.S. § 19(b)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] **Monopolies & Monopolization, Actual Monopolization**

Where access exists, the essential facility doctrine in *15 U.S.C.S. § 2* of the Sherman Act serves no purpose, and essential facility claims should be denied where a state or federal agency has effective power to compel sharing and regulate its scope and terms.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Securities Law > Commodities Futures Trading > General Overview

Governments > Agriculture & Food > General Overview

HN15[] **Agriculture & Food, Commodity Exchange Act**

The Commodity Futures Trading Commission (CFTC), under the terms of the Commodity Exchange Act, specifically *7 U.S.C.S. § 19(a)(2)(B)*, is charged with making rules and regulations that take into consideration the interests of the antitrust laws and, among other things, the efficiency, competitiveness, and financial integrity of futures markets. The United States Supreme Court has instructed that antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Futures

Energy & Utilities Law > Antitrust Issues > General Overview

HN16[] **Monopolies & Monopolization, Actual Monopolization**

The standard in the United States Court of Appeals for the Second Circuit for a monopoly leveraging claim has been that the plaintiff must establish that the defendant (1) possesses monopoly power in one market; (2) has used that power to gain a competitive advantage in another distinct market; and (3) has caused injury by such anticompetitive conduct. However, the United States Supreme Court has held that this standard is erroneous to the extent it dispenses with a requirement that there be a "dangerous probability of success" in monopolizing a second market.

Counsel: For Intercontinental Exchange, Inc., Counter Claimant: James H. Carter, Sullivan & Cromwell LLP, NY, NY.

For Intercontinental Exchange, Inc., Defendant: Michael A. Cheah, Sullivan & Cromwell, LLP, New York, NY.

For Intercontinental Exchange, Inc., Defendant: Mark Edward Coyne, Sullivan and Cromwell LLP, NY, NY.

For Intercontinental Exchange, Inc., Defendant: Richard H. Klapper, Sullivan and Cromwell LLP, NY, NY.

For Intercontinental Exchange, Inc., Defendant: Deborah Martinez, Sullivan & Cromwell, LLP, New York, NY.

For Intercontinental Exchange, Inc., Defendant: Anne L. Quintal, Winston & Strawn, LLP, Chicago, IL.

For New York Mercantile Exchange, Inc., Counter Defendant: Herbert C. Ross, Jr., Olshan, Grundman, Frome, Rosenzweig & Wolosky, LLP, New York, NY; Martin I Kaminsky, Pollack & Kaminsky, New York, NY.

For Intercontinental Exchange, Inc., Defendant: Phyllis Staub Wallitt, Sullivan & Cromwell, LLP, New York, NY.

Judges: John G. Koeltl, United States District Judge.

Opinion by: John G. Koeltl

Opinion

[*560] ***OPINION and ORDER***

JOHN G. KOELTL, District Judge:

The **[**2]** plaintiff, New York Mercantile Exchange, Inc. ("NYMEX"), brings this action against the defendant, IntercontinentalExchange, Inc. ("ICE"), for copyright infringement, service mark infringement, dilution of the plaintiff's marks, and tortious interference with contract.

ICE has also filed counterclaims. Its First Amended Counterclaims allege four causes of action seeking certain declaratory relief and asserting that NYMEX engaged in monopoly maintenance and monopoly leveraging in violation of *§ 2 of the Sherman Act.* ICE's first cause of action alleges that NYMEX has engaged in anticompetitive conduct to maintain its monopoly power in two relevant markets: (1) the market for intermediation services for cleared contracts for the purchase and sale of Henry Hub natural gas, and (2) the market for intermediation services for cleared contracts for the purchase and sale of West Texas Intermediate ("WTI") crude oil. ICE's second cause of action seeks a declaratory judgment that NYMEX's settlement prices for cleared contracts in these commodities are an essential facility and that ICE has the right to obtain, refer to, and use NYMEX's settlement prices on the same terms as other members of **[**3]** the public. ICE's third cause of action alleges, in the alternative, that if the Court finds that there are separate markets for the intermediation of futures contracts based on these commodities and for the intermediation of cleared over-the-counter ("OTC") contracts based on the same commodities, that NYMEX violated *§ 2 of the Sherman Act* by leveraging its monopoly in the former market to gain an unlawful competitive advantage in the latter market. ICE's fourth cause of action seeks a declaratory judgment that NYMEX does not have a copyright in its settlement prices, or, alternatively, that NYMEX cannot enforce such a copyright against ICE, or that ICE has not infringed any such copyright.

NYMEX moves pursuant to *Federal Rules of Civil Procedure 12(b)(1)and 12(b)(6)* to dismiss ICE's First Amended **[*561]** Counterclaims. [1] In its memorandum of law in opposition to this motion, ICE characterizes its *§ 2* counterclaims as follows: "NYMEX has violated *Section 2 of the Sherman Act* by (1) engaging in sham litigation and creating publicity of such litigation, and (2) attempting to deny ICE access to an essential **[**4]** facility." (ICE's Mem. Opp. Mot. Dismiss at 8.) At the argument of the motion, ICE conceded that it could not prevail on its claim alleging sham litigation and accompanying publicity, and it agreed to withdraw the claim. (Transcript of Hearing dated June 7, 2004 ("Tr.") at 38.) Also at the argument of the motion, ICE asserted that its allegations comport with the *§ 2* refusal-to-deal claims recognized by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*, and *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*.

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HN1[] On a motion to **[**5]** dismiss a counterclaim, the allegations in the counterclaim are accepted as true. *See* *Universal Acupuncture Pain Services, P.C. v. State Farm Mutual Automobile Ins. Co., 196 F. Supp. 2d 378, 382 (S.D.N.Y. 2002)*; *see also* *Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir. 1998)*. In deciding a motion to dismiss a counterclaim, all reasonable inferences must be drawn in the counterplaintiff's favor. *See* *Universal Acupuncture, 196 F. Supp. 2d at 382*; *see also* *Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995)*; *Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)*. The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985)*. Therefore, NYMEX's present motion should be granted only if it appears that ICE can prove no set of facts in support of its claims that would entitle ICE to relief. *See* *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)*; *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; **[**6]** *Grandon, 147 F.3d at 188*; *Goldman, 754 F.2d at 1065*.

HN2[] In deciding a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the Court may consider documents that are referenced in the counterclaims, documents that the counterplaintiff relied on in bringing suit and that are either in the counterplaintiff's possession or that the counterplaintiff knew of when bringing

[1] For the reasons explained below in the text, the motion can be decided solely on the basis of *Rule 12(b)(6)*, and the Court need not reach the arguments that NYMEX makes under *Rule 12(b)(1)*. NYMEX's motion does not address ICE's fourth cause of action relating to NYMEX's copyright claim to its settlement prices, and therefore that cause of action cannot be dismissed.

suit, or matters of which judicial notice may be taken. *Chambers v. Time Warner, Inc. 282 F.3d 147, 153 (2d Cir. 2002)*; *see also* *Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993)*; *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991)*; *I. Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc., 936 F.2d 759, 762 (2d Cir. 1991)*; *Skeete v. IVF, Inc., 972 F. Supp. 206, 208 (S.D.N.Y. 1997)*; *Vtech Holdings Ltd. v. Lucent Techs., Inc., 172 F. Supp. 2d 435, 437 (S.D.N.Y. 2001)*. However, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving **[**7]** the [counter] plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)* (quoting *Poller v. Columbia Broad., 368 U.S. 464, 473,* ***[*562]*** *7 L. Ed. 2d 458, 82 S. Ct. 486 (1962))*.

II

ICE's First Amended Counterclaims allege the following relevant facts. NYMEX is a Designated Contract Market--the statutory term for a regulated futures exchange--that is subject to the *Commodity Exchange Act* ("CEA") and the jurisdiction of the Commodity Futures Trading Commission ("CFTC"). (First Amended Counterclaims ("FAC") P8.) NYMEX operates as an "open-outcry" system, in which brokers and traders transact with each other by physical communications on a physical trading "floor." (FAC PP8-9.)

NYMEX is the only Designated Contract Market that offers an active trading market for North American natural gas and crude oil futures contracts, among other commodities. (FAC P9.) Two of NYMEX's most successful futures contracts are its Henry Hub natural gas and WTI crude oil contracts. (FAC P10.) NYMEX's Henry Hub contract, which provides for delivery of natural gas at the Henry Hub natural gas pipeline **[**8]** in Louisiana, is the only actively traded natural gas futures contract in the United States. (FAC P10.) Similarly, the only actively traded crude oil futures contract in the United States is the NYMEX contract based on WTI light sweet crude oil, which provides for delivery in Oklahoma. (FAC P10.)

The Henry Hub natural gas and WTI crude oil contracts traded on NYMEX, like other futures contracts on physical commodities, provide for the purchase and sale of the underlying commodity at an agreed-upon price in a specified delivery month. (FAC P11.) Although physical delivery is possible under a futures contract, only a very small percentage of futures contracts traded on NYMEX result in physical delivery. (FAC P12.) In most cases, each party enters into an equal and offsetting transaction for the same contract prior to delivery, thereby liquidating the original contract and obviating the need for physical delivery. (FAC P12.)

Futures contracts are executed on the floor of the exchange, or through an electronic trading system, by the matching of buyers and sellers wishing to transact in the same quantities and at the same prices. (FAC P13.) Once a match occurs, a transaction is automatically **[**9]** novated to the NYMEX clearing house, which interposes itself between the original parties and becomes the buyer to every seller and the seller to every buyer. (FAC P13.) The clearing house thus assumes' the credit risk of each party to the transaction by effectively guaranteeing each party's performance obligations. (FAC P13.) Each party must deposit initial margin, which serves as a "performance bond" to secure its performance under the contract. (FAC P13.) On each day that the contract remains open, each party pays or receives additional variation margin based on changes in the value of the contract. (FAC P13.) The changes in the value of the contract are determined by reference to the settlement prices each day. (FAC P13.)

The settlement prices for Henry Hub natural gas and WTI crude oil futures contracts are determined by NYMEX's "settlement committee" at the end of each trading day. (FAC P15.) After NYMEX's floor closes at 2:30 p.m. each day, the trades executed during the closing range, which is usually the five minutes of trading prior to the close, are tabulated and circulated to the members of the settlement committee. (FAC P15.) The settlement committee then determines the **[**10]** NYMEX market price pursuant to the NYMEX Exchange Rules, a process that ICE alleges is mechanical and formulaic, **[*563]** not creative or original. (FAC P15.) NYMEX is alleged to have consistently represented that its settlement prices reflect actual trading activity and are not produced by NYMEX. (FAC P16.)

NYMEX's settlement prices play an important role in the economy by disclosing the market price for various commodities. (FAC P18.) The CEA requires that NYMEX report its settlement prices, among other data, to the public. (FAC P18.) NYMEX makes its settlement prices available to the public on an almost instantaneous basis by reporting them on its website and transmitting them to its "market data vendors"--third parties to whom NYMEX has granted worldwide, non-exclusive licenses to redistribute NYMEX market data. (FAC P19.) Some market data vendors provide NYMEX market data to their subscribers for a fee, while others provide the data to the public at no charge and with no restrictions. (FAC P19.) Members of the public can obtain settlement prices for free and without restriction from publicly accessible websites and in various national newspapers. (FAC P19.)

NYMEX does restrict the use **[**11]** of its settlement prices when subscribers receive the data on a "real time" basis, which is generally within thirty minutes of the data's release by NYMEX. (FAC P20.) NYMEX requires that subscribers who receive the settlement prices on a real-time basis enter into a "uniform subscriber addendum," which purports to limit the subscriber's use of NYMEX's real-time market data to its own "internal" business use and requires the subscriber to agree not to use NYMEX's real-time prices in competition with NYMEX. (FAC P20.) NYMEX does not impose these restrictions on subscribers who receive data on a "delayed" basis, which is generally one half hour after its release by NYMEX. (FAC P20.)

Because NYMEX is the only Designated Contract Market that offers an active trading forum for Henry Hub natural gas and WTI crude oil, trading liquidity for these contracts is concentrated on NYMEX, and NYMEX's settlement prices for these contracts have gained acceptance as the market prices for the underlying commodities. (FAC P21.) Third-party market participants thus use NYMEX settlement prices in transactions executed outside of NYMEX because NYMEX prices are considered benchmarks and because NYMEX has **[**12]** actively encouraged third parties to use its prices. (FAC P23.) For example, NYMEX encouraged the International Swaps and Derivatives Association ("ISDA") to adopt the NYMEX settlement prices for Henry Hub natural gas and WTI crude oil as price references in standard form ISDA contracts, which are widely used in over-the-counter ("OTC") transactions. (FAC P23.) NYMEX allegedly encouraged the adoption of its prices as standard terms in ISDA's forms, but has never licensed ISDA to use NYMEX's name or to refer to NYMEX's settlement prices. (FAC P24.) NYMEX is also alleged to be aware that participants in OTC transactions use and reference NYMEX prices in their agreements and when marking their positions to market. (FAC P25.) Other futures exchanges, including the Goldman Sachs Commodity Index on the Chicago Mercantile Exchange, also use NYMEX settlement prices to settle and clear certain contracts that they offer for trading, and NYMEX has allegedly never objected to these uses of its settlement prices or required the relevant parties to license their use. (FAC P26.)

As an alternative to purchasing and selling futures contracts, market participants may enter into off-exchange OTC transactions **[**13]** to purchase or sell the same underlying commodities. (FAC P27.) OTC transactions serve the same purposes as **[*564]** futures contracts because they allow parties to hedge against or speculate on the prices of the relevant commodities. (FAC P27.) Market participants have traditionally engaged in telephone negotiations to enter into OTC transactions that are then memorialized on a master agreement and a related confirmation. (FAC P28.) The parties in such instances deal directly with each other and are responsible for all aspects of the settlement of the transaction, including payment, delivery, and credit terms. (FAC P28.) Parties to OTC contracts may also execute their transactions through "voice brokers," who act as intermediaries and allow parties to find counterparties more efficiently. (FAC P28.) OTC contracts, like futures contracts, may be settled through offsetting contracts, rather than delivery, and many OTC contracts by their terms provide for settlement through cash payments rather than delivery. (FAC P29.)

Traditional OTC contracts are nonetheless distinct from futures contracts in a number of respects. (FAC P30.) Futures contracts are executed on a regulated exchange and may be **[**14]** traded by any market participant, including members of the general public. (FAC P30.) OTC contracts, by contrast, are traded outside regulated exchanges and are entered into between commercial and institutional entities. (FAC P30.) The most significant difference between futures contracts and traditional OTC contracts is that futures contracts are always cleared through a central clearing house, while OTC contracts generally have been settled bilaterally between the parties to the transactions, without any centralized clearing. (FAC P30.)

ICE was organized in 2000 to operate an Internet-based, electronic trading platform for OTC transactions in physical commodities and derivative products based on such commodities. (FAC P31.) ICE's electronic platform, which can be accessed through ICE's website, provides eligible participants with the ability to post bids and offers for transactions in a variety of products and to execute transactions against bids and offers posted by other participants. (FAC P31.) All of the participants on ICE's trading platform are required to be "eligible commercial entities" under the CEA, which defines the term to include commercial and institutional market **[**15]** participants that satisfy certain requirements. (FAC P32.)

ICE's goal is to provide participants in the OTC commodity markets with a more efficient means of trading. (FAC P33.) ICE allows market participants to trade with each other through an electronic platform, rather than through bilateral telephone negotiations or the use of voice brokers. (FAC P33.) From the commencement of trading on ICE in October 2000 through March 2002, ICE offered market participants an "execution only" facility, with no clearing alternative. (FAC P34.) Participants would post bids and offers and be matched according to time and price, and once the parties executed a transaction they were responsible for all settlement and clearing functions. (FAC P34.) At that point, ICE had no further role in the transaction. (FAC P34.)

Like ISDA and others in the OTC industry, ICE has referenced NYMEX contracts in its description of the products traded on its electronic platform since it commenced trading in October 2000. (FAC P35.) NYMEX contracts allegedly serve as the benchmark for both price and contract specifications, which market participants use when entering into most of their transactions. (FAC P35.) Market **[**16]** participants are therefore unwilling to trade an OTC Henry Hub or WTI contract unless its terms refer to NYMEX settlement prices. (FAC P35.)

[*565] OTC contracts have generally not been cleared, because parties to OTC contracts typically settled their transactions bilaterally, with each party responsible for its own performance and each party exposed to the risk of the other party's non-performance. (FAC P36.) ICE alleges that, in the past three years, especially following the collapse of Enron Corporation, market participants have been increasingly concerned with counterparty credit risk, and they have begun to demand OTC intermediation services that substantially reduce or eliminate direct counterparty credit risk. (FAC P37.) ICE alleges that, as a result of these developments, many participants in the OTC market demanded that providers of OTC intermediation services offer clearing as an alternative. (FAC P37.)

In 2001, ICE entered into an agreement with the London Clearing House ("LCH") to provide ICE participants with the opportunity to clear cash-settled OTC transactions executed on ICE in the Henry Hub natural gas "fixed for floating swap" and the WTI crude oil "bullet swap." (FAC **[**17]** P38.) The terms of these two contracts are substantially similar to NYMEX's futures contracts on Henry Hub natural gas and WTI crude oil. (FAC P38.) ICE's contractual arrangement and data connections with LCH allow ICE to provide its participants with both execution and clearing services that result in cleared OTC transactions. (FAC P39.) ICE alleges that, from the perspective of market participants, these contracts are considered economic substitutes of the NYMEX futures contracts based on the same commodities because both hedge the same price risks and eliminate counterparty credit risk. (FAC P39.)

A cleared contract must be marked-to-market on the basis of the market price for the underlying commodity. (FAC P40.) Because the prices of NYMEX's Henry Hub natural gas and WTI crude oil futures contracts are accepted benchmark prices for those commodities, ICE alleges that it must take these prices into account when it determines the prices at which ICE's cleared OTC contracts based on those commodities settle and clear. (FAC P40.) In determining its own settlement prices, ICE's settlement committee reviews both the NYMEX settlement prices, which it receives lawfully from a licensed **[**18]** market data vendor after the prices are made available to the public, as well as certain trading activity on ICE. (FAC P41.) Because NYMEX's prices are generally accepted as the market prices for Henry Hub natural gas and WTI crude oil, ICE's settlement prices are generally substantially similar to the NYMEX settlement prices. (FAC P41.) At maturity, a transaction executed on ICE and cleared through LCH is settled at the corresponding NYMEX settlement price. (FAC P42.) Market participants generally require this procedure because the NYMEX settlement price is the industry benchmark, and because virtually all other OTC transactions in the energy market are settled against this price. (FAC P42.) ICE alleges that if it did not finally settle its cleared contracts against the NYMEX price, the contracts would have little value to market participants, because even a small discrepancy results in the introduction of unacceptable "basis risk," which is the risk of incorrectly matching offsetting transactions. (FAC P42.)

III

ICE alleges that these facts state claims for violations of § 2 of the Sherman Act. **HN3**[] Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, **[**19]** or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. . . ." **[*566]** 15 U.S.C. § 2. Private parties are granted the right to sue for, and seek injunctive relief against, violations of the antitrust laws by § 4 and § 16 of the Clayton Act. 15 U.S.C. §§ 15,26. ICE asserts claims of monopoly maintenance and monopoly leveraging against NYMEX.

ICE alleges that NYMEX has long recognized the threat of electronic trading, and that when ICE began trading OTC contracts in late 2000 NYMEX viewed ICE as an emerging competitor. (FAC PP43-44.) ICE further alleges that in December 2001, when ICE announced that it would begin trading cleared OTC contracts, NYMEX realized that ICE had become a direct competitor in the same market for which NYMEX operated. (FAC P44.) ICE alleges that because both ICE and NYMEX charge a fee for transactions executed through them, decisions by market participants to execute and clear contracts through ICE, rather than through NYMEX, reduces NYMEX's revenues. (FAC P44.)

ICE alleges that NYMEX has responded to ICE's competition by **[**20]** threatening to prevent ICE from using NYMEX's settlement prices, and by publicizing NYMEX's claims to copyright protection in the settlement prices and this copyright infringement action, all in an alleged effort to cast doubt on ICE's future ability to use NYMEX settlement prices. (FAC P45.) ICE further alleges that in November 2002, just more than a week before NYMEX filed its complaint in this action, NYMEX announced that it would begin offering new contracts on its prior electronic platform, NYMEX ACCESS, that were designed to appeal to OTC market participants. (FAC P60.) ICE alleges that these contracts included contracts that resemble popular OTC contracts such as "swaps" based on the NYMEX price for Henry Hub natural gas and WTI crude oil, but that are actually exchange-traded futures contracts that are indistinguishable from the futures contracts already traded on NYMEX. (FAC P60.) In January 2003, NYMEX launched a new electronic platform, ClearPort, on which NYMEX's OTC-like contracts are now traded. (FAC P60.) ICE alleges that NYMEX took these actions to undermine the credibility and long-term viability of ICE's electronic platform in the eyes of market participants. (FAC **[**21]** P61.) ICE alleges that it has been harmed by NYMEX's actions because customers who might otherwise use ICE's services have turned elsewhere, in particular to NYMEX. (FAC P61.)

ICE alleges that the relevant markets for its antitrust claims are (1) the market for the intermediation of cleared contracts for the purchase and sale of Henry Hub natural gas, and (2) the market for the intermediation of cleared contracts for the purchase and sale of WTI crude oil. (FAC P62.) ICE alleges that the customers for these markets are located worldwide. (FAC P62.) ICE alleges that both ICE and NYMEX are intermediaries in transactions in Henry Hub natural gas and WTI crude oil, because they each provide a forum in which market participants can execute transactions based on these commodities. (FAC P63.) ICE alleges that NYMEX's forum is principally an open-outcry exchange, while ICE's forum is an Internet-based matching system, and that both NYMEX and ICE charge fees for contracts executed on their forums as well as fees for clearing those contracts (which fees are paid to LCH when the contracts are executed on ICE). (FAC P63.)

ICE alleges that futures and cleared OTC contracts are fungible economic **[**22]** substitutes. (FAC P64.) Both are contracts to purchase or sell a specified quantity of a commodity at an agreed-upon price in the future, and both therefore allow parties to the contracts to hedge or assume price **[*567]** risks. (FAC P64.) Both futures and cleared OTC contracts are cleared through a clearing house that acts as a counterparty in every transactions and thus obviates the risk of non-performance by a counterparty. (FAC P64.) By contrast, bilateral OTC contracts, according to ICE, are different from futures and cleared OTC contracts, because bilateral OTC contracts are not cleared through a clearing house and thus expose market participants to counterparty credit risk. (FAC P64.)

ICE alleges that NYMEX possesses monopoly power in both relevant markets, that ICE and NYMEX are the only two competitors in the relevant markets, and that there are substantial barriers to entry into the relevant markets. (FAC P67-68.) ICE also alleges that there are a number of barriers to entry to the relevant markets, because entrants incur significant capital costs in developing and operating an Internet-based trading platform, because entrants incur contracting costs in developing a relationship **[**23]** with one of the few clearing houses in the industry, and because entrants must demonstrate that their contracts and intermediation services will satisfy market participants' risk management needs. (FAC P70-72.) ICE alleges that a market participant's risk management needs can be met only if the entrant settles and clears its contracts at the market price for the given commodity. (FAC P72.) Because a new entrant will not have sufficient liquidity on its trading platform, ICE alleges that a new entrant is not able to determine its own prices based solely on its own trading. (FAC P72.) ICE alleges that this "network effect" raises a substantial barrier to any prospective entrants to the relevant markets. (FAC P72.)

ICE alleges that these barriers to entry allow NYMEX to control prices and restrict or eliminate competition. (FAC P73.) ICE alleges that a new entrant could mitigate the network effect between market prices and liquidity by referring to established market prices, which for the relevant markets are NYMEX's settlement prices for Henry Hub natural gas and WTI crude oil. (FAC P74.) ICE thus alleges that these conditions make NYMEX's settlement prices for Henry Hub natural gas **[**24]** and WTI crude oil an essential facility. (FAC P75.) ICE alleges that the market prices for these commodities, which NYMEX reports, cannot be reasonably duplicated, and that competitors must be permitted to use NYMEX's settlement prices if they are to compete in the relevant markets. (FAC P75.)

NYMEX moves pursuant to *Rule 12(b)(6)* to dismiss ICE's antitrust counterclaims for failure to state a claim upon which relief can be granted.

A

ICE's first cause of action alleges that NYMEX has engaged in conduct designed to maintain its monopoly in the following relevant markets: (1) the market for intermediation services for cleared contracts for the purchase and sale of Henry Hub natural gas, and (2) the market for intermediation services for cleared contracts for the purchase and sale of WTI crude oil.

HN4[] To make out a monopolization claim under *§ 2 of the Sherman Act*, a plaintiff must establish "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; **[**25]** *see also Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir. 1997)*. ICE alleges that NYMEX has violated *§ 2* by (1) engaging in sham litigation and creating publicity **[*568]** of such litigation, and (2) attempting to deny ICE the use of an essential facility. (FAC P3; ICE's Mem. Opp. Mot. Dismiss at 8.) As explained above, ICE withdrew its *§ 2* sham litigation claim at the argument of the motion. Also at the argument of the motion, ICE asserted that it has stated viable *§ 2* claims under the Supreme Court's decisions in *Aspen Skiing* and *Otter Tail,* as well as under the essential facilities doctrine.

HN5[] The elements of an essential facility claim under *§ 2* are: "'(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.'" *Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 569 (2d Cir. 1990)* (quoting *MCI Communications Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983))*. NYMEX contends that ICE has failed **[**26]** adequately to allege the first two elements of an essential facility claim.

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872 (2004)*, which reached the Supreme Court on a motion to dismiss, the Court explained some of the constraints imposed on the essential facility doctrine. First, the Court emphasized that ***HN6***[] the "mere possession of monopoly power, and the concomitant charging of monopoly prices," does not constitute anticompetitive conduct that would establish the second element of a *§ 2* monopolization claim. *Trinko, 124 S. Ct. at 879*. Because this requirement preserves the opportunity to charge monopoly prices, if only for a short period, it also preserves inducements to innovate and apply business acumen. *See id.* For similar reasons, monopolists are generally permitted by the Sherman Act to choose those with whom they will deal. *Id.* (citing *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919))*. "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*," but the Supreme Court has been **[**27]** "very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.*

The Supreme Court in *Trinko* rejected the determination by the Court of Appeals for the Second Circuit that the plaintiff had made out an essential facilities claim. *Id. at 880-81*. The Supreme Court noted that it had never recognized or rejected the essential facilities doctrine, but that to the extent such a doctrine exists, the plaintiff's allegations concerning Verizon's provision of services to rivals did not make out an essential facilities claim. "It suffices for present purposes to note that ***HN7***[] the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose. Thus, it is said that 'essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and regulate its scope and terms.'" *Id. at 881* (quoting P. Areeda & H. Hovenkamp, ***Antitrust Law***, p. 150, P773e (2003 Supp.)). Under the circumstances in *Trinko,* "the 1996 **[**28]** [Telecommunications] Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." *Id.*

So, too, in this case, where access to the alleged "essential facility" is regulated by the CFTC, a federal agency with effective power to compel sharing of NYMEX's settlement prices and regulate the scope and terms of such sharing. When asked by the Court at the argument of the motion whether the CFTC has the power **[*569]** under the CEA to regulate the use to which NYMEX's settlement prices can be put by others, ICE's counsel responded, "I think they do, frankly." (Tr. 42.) Indeed, ***HN8***[] various provisions of the CEA require exchanges--which are designated "contract markets" under the Act--to disclose information, including settlement prices, in a prescribed fashion. ***HN9***[] *Section 6g(e) of the CEA* requires: "Before the beginning of trading each day, the exchange shall, insofar as is practicable and under terms and conditions specified by the Commission, make public the volume of trading on each type of contract for the previous day and such other information as the Commission deems necessary in the public interest and prescribes by rule, order, or regulation." *7 U.S.C. § 6g **[**29]** (e).* ***HN10***[] *Section 7(d) of the CEA* sets forth "core principles" with which designated contract markets such as NYMEX must comply in order to maintain their designation as contract markets. *See 7 U.S.C. § 7(d)(1)*. ***HN11***[] Core Principle 8 provides that a designated contract market "shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market." *7 U.S.C. § 7(d)(8)*.

HN12[] Through regulation, the CFTC has provided that contract markets must make their settlement prices "readily available to the news media and the general public no later than the business day following the day to which the [settlement prices] pertain[]." *17 C.F.R. § 16.01(b)(2)*. The CFTC's "application guidance" for compliance with Core Principal 8 states that "[a] contract market should provide to the public information regarding settlement prices . . ., as determined by the Commission, on a fair, equitable and timely basis." 17 C.F.R. Pt. 38, App. B, Core Principle 8.

HN13[] The CEA also provides that, before promulgating regulations under the Act, the CFTC should consider **[**30]** the costs and benefits of the CFTC's action as well as any implications for the antitrust laws. *7 U.S.C. § 19*. *Section 19(a) of the CEA* provides that the costs and benefits of CFTC action must be evaluated in light of, among other factors, "protection of market participants and the public"; "the efficiency, competitiveness, and financial integrity of futures markets"; and "price discovery." *7 U.S.C. § 19(a)(2)*. *Section 19(b)* requires that the CFTC "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objective of this chapter" when the CFTC adopts rules and regulations or issues orders under the CEA. *7 U.S.C. § 19(b)*.

Given the CFTC's authority to regulate the scope and terms of access to NYMEX's settlement prices, ICE cannot make out a claim under the essential facilities doctrine. As the Supreme Court explained in *Trinko,* ***HN14***[] "where access exists, the [essential facility] doctrine serves no purpose," and essential facility claims should be denied "where a state or federal agency has effective power to compel sharing and **[**31]** regulate its scope and terms." *Trinko, 124 S. Ct. at 881* (internal quotation marks and citation omitted). This result is based, as the Court observed in *Trinko,* on the sound reasons that exist for leaving it to regulatory agencies, rather than antitrust courts, to regulate the terms of any forced access. As the Court noted, "enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Trinko, 124 S. Ct. at 879*.

[*570] Indeed, while the Supreme Court indicated in *Trinko* that the essential facility doctrine "serves no purpose" where access exists, ICE does not deny that it has access to NYMEX's settlement prices. At argument, ICE candidly conceded that it had access to the data: "We have access to the data." (Tr. 40.) It concedes it has access to the data, and there are lots of sources of the data. Its complaint is the uses to which it can put the data to which it unquestionably has access, but under *Trinko,* that is **[**32]** not a viable essential facility claim.

Moreover, ***HN15***[] the CFTC, under the terms of the CEA, is also charged with making rules and regulations that take into consideration the interests of the antitrust laws and, among other things, "the efficiency, competitiveness, and financial integrity of futures markets." *7 U.S.C. §§ 19(a)(2)(B)*. The Court in *Trinko* instructed that "antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." *Trinko, 124 S. Ct. at 881*. "One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* Here, not only does the CFTC regulate the dissemination of settlement prices, which are alleged to be an essential facility, but it must design its rules and regulations after taking into consideration the competitiveness of the futures markets and the interests of the antitrust laws generally. **[**33]** Because the CFTC has the authority to regulate the scope and terms of access to NYMEX's settlement prices, the essential facilities doctrine serves no purpose in the circumstances of this case. Furthermore, the CFTC is in a better position than a general antitrust court to determine the scope and terms of any forced sharing of settlement prices among the exchanges that it regulates, and then to oversee and enforce any such sharing of settlement prices. Because ICE has failed to make out a claim under the essential facilities doctrine, the counterclaim must be dismissed.

B

As explained above, at the argument of the motion, ICE asserted that its monopolization claims also fall under the category of claims recognized by the Supreme Court in *Aspen Skiing* and *Otter Tail.* These two cases were not cited, much less argued, in ICE's brief in opposition to NYMEX's motion to dismiss. They could hardly be construed as an independent basis for a claim, and any such argument would be waived. But, in any event, the arguments have no merit.

Though the Supreme Court in *Aspen Skiing* found *§ 2* liability based on a refusal to deal with a rival, the Court in *Trinko* instructed that " **[**34]** *Aspen Skiing* is at or near the outer boundary of *§ 2* liability." *Trinko, 124 S. Ct. at 879*. In *Aspen Skiing,* the defendant owned three of the four mountains that made up the Aspen downhill skiing market, and the plaintiff owned the fourth mountain. For a number of years, the defendant and the plaintiff had cooperated in marketing a joint ticket to skiers that provided admission to all four mountains. *Aspen Skiing, 472 U.S. at 590-91*. The defendant repeatedly and unsuccessfully demanded a larger share of the proceeds from the joint ticket, and eventually refused to continue the cooperative arrangement. *Id. at 591-93*. The plaintiff tried to market its own multi-mountain ticket to replace the joint ticket, and even offered to buy the defendant's tickets at retail price, an offer the defendant **[*571]** rejected. *Id. at 593-94*. The Supreme Court observed that:

> The monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market **[**35]** and had persisted for several years.

Id. at 603. The Court also noted that "it seems appropriate to infer that such [joint] tickets satisfy consumer demand in free competitive markets"--that is, that competition in the Aspen skiing market required some level of cooperation, because consumers demanded it. *Id.* Because the defendant's cooperation with the plaintiff would have entailed no cost to the defendant and indeed would have provided it with immediate benefits, and because consumers preferred the cooperative arrangement, the only apparent justification for the defendant's refusal to deal was anticompetitive malice: "Thus the evidence supports an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id. at 610-11*.

The allegations of a refusal to deal in this case do not fit "within the limited exception recognized in *Aspen Skiing*." *Trinko, 124 S. Ct. at 880*. The course of conduct by the defendant in *Aspen Skiing* that raised an inference of anticompetitive **[**36]** conduct is not present in this case. There is no history of cooperation between ICE and NYMEX in sharing the use of NYMEX's settlement prices. Therefore, NYMEX's "prior conduct sheds no light upon the motivation of its refusal to deal." *Id.* There is no indication that NYMEX is flouting consumer demand and foregoing short-term profits by refusing to cooperate with ICE. And unlike the defendant in *Aspen Skiing,* NYMEX has proffered a legitimate business justification for its refusal to deal with ICE. (Tr. 21-23.) NYMEX has a legitimate business interest in preventing its competitor, ICE, from free-riding on NYMEX's settlement prices. NYMEX's settlement prices have value because they are viewed as proxies for market prices, and NYMEX has a legitimate interest in preventing rivals from free-riding on this reputation. In any event, because the indicia of anticompetitive conduct that the Supreme Court located in *Aspen Skiing* are not present in the facts alleged in this case, ICE's *§ 2* claims of a refusal to deal do not fit the rubric of claims recognized by the Supreme Court in *Aspen Skiing.*

The other case that ICE invoked at oral argument is *Otter Tail,* although ICE **[**37]** provided no specific arguments about how the allegations in this case would state a *§ 2* claim under *Otter Tail.* Indeed, it is plain for several reasons that this is not an *Otter Tail* case. In *Otter Tail,* the Supreme Court found that the defendant--a private, highly-regulated utility company with monopoly power in the wholesale power market--had "sought to substitute for competition anticompetitive uses of its dominant economic power." *Otter Tail, 410 U.S. at 380*. The defendant utility sold electric power at retail in Midwestern towns under short-term municipally granted franchises. Because each town could accommodate only one power distribution system, each town formed a natural monopoly for the retail sale of electric power. When faced with efforts by the towns to displace the defendant with their own municipal distribution systems, the defendant engaged in such wrongful conduct as refusing to sell power to the towns at wholesale and refusing to "wheel," or transfer, power to the towns along its transmission lines, which were the only lines available, **[*572]** from other wholesalers. *Id. at 369-71*. The Supreme Court affirmed the district court's **[**38]** finding that "Otter Tail's refusals . . . to wheel were solely to prevent municipal power systems from eroding its monopolistic position." *Id. at 378*.

The allegations in this case do not fit the rubric of *Otter Tail.* NYMEX is not alleged to possess a natural monopoly, as the defendant possessed in *Otter Tail.* The allegations in this case also do not raise an inference that NYMEX's refusal to deal with ICE was animated "solely" by an exclusionary purpose. As explained above, NYMEX has a legitimate interest in preventing competitors from free riding on its settlement prices. Most significantly, however, this case differs from *Otter Tail* in that the Supreme Court there found that the Federal Power Commission, the applicable regulatory agency, lacked the authority to order the defendant to wheel the power, and thus break the bottleneck created by the defendant's monopoly of the transmission lines. *See id. at 375-76*. As explained above, the CFTC has the power to compel disclosure of the settlement prices and to regulate the scope and terms of such disclosure. For these reasons, *Otter Tail* provides no assistance to ICE.

Therefore, ICE has **[**39]** failed to make out a monopolization claim under *§ 2 of the Sherman Act*, and its first counterclaim for monopoly maintenance is dismissed. [2]

C

ICE's monopoly leveraging claim, its third counterclaim, is pleaded in the alternative in the event the Court determines that there are separate markets for the intermediation of futures contracts and for the intermediation of cleared OTC contracts in Henry Hub natural gas **[**40]** and WTI crude oil. ***HN16***[] The standard in the Second Circuit for a monopoly leveraging claim has been that the plaintiff must establish that the defendant "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market;

[2] Because ICE's second counterclaim seeks a declaratory judgment that NYMEX's settlement prices are an essential facility, which, for the reasons explained in the text, they are not, that counterclaim is dismissed. However, NYMEX has not made any arguments in this motion that would support dismissing ICE's fourth counterclaim, which seeks a declaratory judgment that NYMEX does not have a copyright in its settlement prices, or, alternatively, that NYMEX cannot enforce such a copyright against ICE, or that ICE has not infringed any such copyright. Therefore, ICE's fourth counterclaim is not dismissed.

and (3) caused injury by such anticompetitive conduct." *Virgin Atl. Airways v. British Airways, 257 F.3d 256, 272 (2d Cir. 2001)*. However, the Supreme Court in *Trinko* held that this standard was erroneous to the extent it "dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market." *Trinko, 124 S. Ct. at 883 n.4* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993))*.

In this case, ICE alleged that NYMEX used its monopoly power in the market for intermediation of futures contracts to gain an "unlawful competitive advantage" in the separate market for intermediation of cleared OTC contracts. (FAC P90.) At the time the counterclaims were asserted, a monopoly leveraging claim could be made out in this Circuit by alleging that the defendant used its monopoly power in one **[**41]** market to gain an unlawful "competitive advantage" in another distinct market. But the Supreme Court has made clear that a monopoly leveraging claim must allege that there was a "dangerous probability of success" in the defendant's attempt to monopolize the second market. **[*573]** ICE's counsel conceded at the argument of the motion that this claim is "dead in the water" after *Trinko,* and ICE voluntarily withdrew the claim. [3] (Tr. 37.)

CONCLUSION

For the reasons explained above, NYMEX's motion to dismiss ICE's First Amended Counterclaims is granted with respect to ICE's first, second, and third counterclaims.

SO ORDERED.

Dated: New York, New York

June 30, 2004

John G. Koeltl

[42] United States District Judge**

End of Document

[3] Because ICE's antitrust counterclaims are either voluntarily withdrawn or dismissed for failure to state a claim, there is no need to reach NYMEX's alternative arguments concerning implied repeal, antitrust standing, failure to allege harm to competition, and insufficiency of the alleged relevant markets.

Spanish Broad. Sys. of Fla. v. Clear Channel Communs.

United States Court of Appeals for the Eleventh Circuit

June 30, 2004, Decided ; June 30, 2004, Filed

No. 03-14588

Reporter

376 F.3d 1065 *; 2004 U.S. App. LEXIS 13468 **; 2004-1 Trade Cas. (CCH) P74,469; 17 Fla. L. Weekly Fed. C 711; 32 Comm. Reg. (P & F) 1251

SPANISH BROADCASTING SYSTEM OF FLORIDA, INC., Plaintiff-Appellant, versus CLEAR CHANNEL COMMUNICATIONS, INC., HISPANIC BROADCASTING CORPORATION, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Florida. D. C. Docket No. 02-21755-CV-PAS.

Spanish Broad. Sys., Inc. v. Clear Channel Communs., Inc., 242 F. Supp. 2d 1350, 2003 U.S. Dist. LEXIS 1416 (S.D. Fla., 2003)

Disposition: Affirmed.

Core Terms

monopolization, advertising, antitrust, competitor, amended complaint, allegations, relevant market, anticompetitive, district court, radio, anti trust law, market power, prices, practices, stations, markets, alleged facts, defendants', conspiracy, monopoly, factual allegations, adverse effect, amend, consumers, products, unfair, stock, anticompetitive conduct, antitrust violation, rule of reason

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Remedies > Damages > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN1[] **Remedies, Damages**

Under *15 U.S.C.S. §§ 1* and *2*, an antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor. The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] **Motions to Dismiss, Failure to State Claim**

An appellate court reviews de novo a district court decision to dismiss an antitrust complaint under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim. The appellate court accepts the factual allegations in the complaint as true and makes all reasonable inferences in favor of the non-moving party. The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low, and *Rule 12(b)(6)* dismissals are particularly disfavored in fact-intensive antitrust cases. The complaint should only be dismissed with prejudice if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Price Fixing & Restraints of Trade, Vertical Restraints**

15 U.S.C.S. § 1 prohibits combinations and conspiracies that restrain interstate or foreign trade. *Section 1* applies both to agreements between companies that directly compete with one another, called "horizontal" agreements, and to agreements between businesses operating at different levels of the same product's production chain or distribution chain, known as "vertical" agreements. In addition, although some restraints on trade remain illegal per se, such as certain agreements to fix prices, most asserted antitrust violations now require the finder of fact to decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. Section 1 claims that do not allege per se antitrust violations are analyzed under this "rule of reason," and the claims fail if the restraint on trade is reasonable. Section 1 applies only to agreements between two or more businesses; it does not cover unilateral conduct.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN5[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Under United States Court of Appeals for the Eleventh Circuit case law, alleged 15 U.S.C.S. § 1 agreements analyzed under the rule of reason require a plaintiff to prove (1) the anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the defendant's conduct has no pro-competitive benefit or justification. In alleging the anticompetitive effect of the defendant's conduct, an antitrust plaintiff must show harm to competition rather than to competitors. That is, the "anticompetitive effects" are measured by their impact on the market rather than by their impact on competitors. In order to prove this anticompetitive effect on the market, the plaintiff may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

In alleging an anticompetitive effect, a plaintiff at a minimum is required to define the relevant market and establish that the defendants possessed power in that market. Market power alone cannot be sufficient to show the potential for genuine adverse effects on competition. The burden of proving unreasonable effects in a rule of reason case rests with the antitrust plaintiff. Therefore, the plaintiff, after crossing the threshold of showing the defendant's market power, is required to establish that the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence of consumer welfare. Courts require specific allegations linking market power to harm to competition in that market.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Regulated Practices, Monopolies & Monopolization

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN8[] International Aspects, Commerce With Foreign Nations

15 U.S.C.S. § 2 makes it a crime to monopolize, to attempt to monopolize, or to conspire to monopolize any part of interstate or foreign trade. Section 2 covers behavior by a single business as well as coordinated action taken by several businesses.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN9[] Monopolies & Monopolization, Attempts to Monopolize

Attempted monopolization involves three distinct elements: (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Antitrust & Trade Law, Sherman Act

Like claims under 15 U.S.C.S. § 1, 15 U.S.C.S. § 2 claims require harm to competition that must occur within a "relevant", that is, a distinct market, with a specific set of geographical boundaries and a narrow delineation of the products at issue. Under 15 U.S.C.S. § 1, this "relevant market" must have been harmed by an unreasonable restraint on trade, while under 15 U.S.C.S. § 2, the alleged monopolist must possess enough power or potential power in this "relevant market" in order to harm competition.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Antitrust & Trade Law, Sherman Act

One company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

The first element of an attempted monopolization claim requires a plaintiff to allege facts that show that the defendant has engaged in predatory or anticompetitive conduct. This anticompetitive conduct criterion captures the critical antitrust idea of harm to competition, rather than to competitors. Regardless of the defendant's power or intent, its conduct may be incapable of producing monopoly, and thus unable to satisfy the attempt requirement. In fact, the conduct requirement is arguably the single most important aspect of attempted monopolization.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

As with *15 U.S.C.S. § 1* claims, conduct that injures individual firms rather than competition in the market as a whole does not violate *15 U.S.C.S. § 2*. Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws. Cases from the United States Court of Appeals for the Eleventh Circuit recognize that injury to a competitor need not always result in injury to competition. The use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN15[] **Standards of Review, Abuse of Discretion**

The appellate court reviews the denial of leave to amend for abuse of discretion.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN16[] **Relief From Judgments, Altering & Amending Judgments**

Under the Federal Rules of Civil Procedure, leave to amend shall be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be freely given. In the United States Court of Appeals for the Eleventh Circuit, these same standards apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to *Fed. R. Civ. P. 59(e)*.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN17[] **Antitrust & Trade Law, Sherman Act**

A court must accept the facts pleaded in a proposed amended complaint as true and construe them in the light most favorable to the plaintiff. An antitrust complaint need only meet an "exceedingly low" threshold of sufficiency in order to state a claim for relief and survive a motion to dismiss. The court must not assume that the plaintiff can prove facts not alleged or that defendants have violated the antitrust laws in ways not alleged. Moreover, even in the liberal pleading regime, antitrust plaintiffs must allege facts in support of each element of an antitrust violation. The United States Supreme Court has indicated that a complaint should not be dismissed unless it is found to be wholly frivolous. This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint must comprehend a so-called prima facie case, and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN18[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Conspiracy under United States Court of Appeals for the Eleventh Circuit law requires (1) an agreement in restraint of trade (2) deliberately entered into with the specific intent of achieving a monopoly (3) which could have had an anticompetitive effect and (4) at least one overt act in furtherance of the conspiracy.

Counsel: FOR HISPANIC BROADCASTING CORPORATION, Appellee: Terrell, G. Irvin, Baker Bott, LLP, Houston, TX; Nachwalter, Michael, Kenney Nachwalter, et al., Miami, FL; Ravkind, Lauren C., Miami, FL; Susman, Stephen D., Susman Godfrey, L.L.P., Houston, TX; Cooper, Samuel W., Baker Botts, LLP, Houston, TX; Josefsberg, Robert C., PODHURST, ORSECK, JOSEFSBERG, EATON, et al., Miami, FL.

Judges: Before BLACK, BARKETT and MAGILL, * Circuit Judges.

Opinion by: BARKETT

Opinion

[*1068] BARKETT, Circuit Judge:

Spanish Broadcasting System ("SBS") appeals the dismissal with prejudice of its First Amended Complaint under *Sections One and Two of the Sherman Act* against Clear Channel ("CC") and the Hispanic **[*1069]** Broadcasting Corporation ("HBC"). SBS and HBC are the two largest owners of Spanish-language radio stations in the United States. SBS owns fourteen stations in seven Spanish-language radio markets, including five of the top ten U.S. Spanish-language radio markets, while HBC owns fifty-five stations and operates in each of the top ten Spanish-language markets. CC owns the largest network of English-language radio stations in the United States, covering some 1200 stations in more than 300 markets. CC also owns 26% of HBC. SBS sued CC and HBC, claiming that they had attempted to limit the ability of SBS to compete in the Spanish-language radio market **[**2]** and sought to drive SBS out of business by engaging in numerous practices made unlawful by the *Sherman Act*.

Congress passed the *Sherman Act*, the first major piece of antitrust legislation, in 1890. Following the Civil War, rapid industrialization under relatively limited governmental regulation allowed large firms and coordinated groups in several industries to amass considerable economic power at the expense of smaller rivals. Congress sought to restore a competitive environment and limit the formation, persistence, and power of large, anticompetitive combinations. See, e.g., *Apex Hosiery Co. v. Leader, 310 U.S. 469, 491-95, 84 L. Ed. 1311, 60 S. Ct. 982 & n.15 (1940)* (discussing legislative history). *Section One of the Act* prohibits contracts, combinations and conspiracies in restraint of trade, while Section Two prohibits monopolization, attempted monopolization and conspiracy to monopolize. *15 U.S.C. §§ 1-2*. Although Congress has also barred specific practices through subsequent legislation, and although the interpretation and enforcement of these provisions has varied considerably over time, the *Sherman Act* remains the basic cornerstone of ***antitrust*** **[**3]** ***law***.

Because the *Sherman Act* contains only general language, courts have played an extremely important role in shaping the reach of the Act and the requirements for stating a cause of action under each section. Critically, ***HN1***[] under both sections, an antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor. See *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)* ("Harm to competition is a necessary element of all private antitrust suits under *Sections 1 and 2 of the Sherman Act*. . . ."). As the Supreme Court has explained:

> The purpose of the *[Sherman] Act* is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). This case turns in large part on whether SBS has met **[**4]** its obligation to allege facts that would support a showing of this harm to competition, rather than merely to itself.

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* Honorable Frank J. Magill, United States Senior Judge for the Eighth Circuit, sitting by designation.

The complaint [1] contained claims against both CC and HBC as follows: (1) CC and **[*1070]** HBC have conspired to adversely affect SBS's stock price by pressuring analysts not to cover SBS stock, by leaking confidential information about an attempted acquisition of SBS, and by encouraging investors to sell SBS stock; (2) CC and HBC have conspired to make it more difficult for SBS to acquire new radio stations by bidding up prices and by wrongfully appropriating business opportunities created by SBS; and (3) CC and HBC have induced various SBS employees to breach their contracts and join HBC. In addition, the complaint contained specific claims against CC alone: (4) CC hindered SBS's ability to raise capital by spreading rumors about an SBS executive and by threatening to withdraw CC's own business from an underwriting firm if it worked with SBS; and (5) CC leveraged its ownership of both concert venues and a Hispanic entertainment company in order to discourage advertisers from purchasing time on SBS.

[5]** SBS alleged that these practices constituted an agreement between CC and HBC to restrain trade in violation of *Section One of the Sherman Act* as well as attempted monopolization by both CC and HBC of the major Spanish-language radio markets in violation of *Section Two of the Act*. In addition to federal antitrust violations, SBS claimed causes of action under Florida and California statutes and under various common law theories.

The district court dismissed SBS's complaint with prejudice, pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, after concluding that SBS could not meet the requirements necessary to maintain a Sherman antitrust suit. On appeal, SBS argues that the district court erred as a matter of law in dismissing the complaint, abused its discretion in failing to grant leave to amend the complaint, and erred in dismissing the complaint with prejudice.

HN2[] We review de novo a district court decision to dismiss an antitrust complaint under *Rule 12(b)(6)* for failure to state a claim. *Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1229 (11th Cir. 1999)*. We accept the factual allegations in the complaint as true and **[**6]** make all reasonable inferences in favor of the non-moving party. The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low, and *Rule 12(b)(6)* dismissals are particularly disfavored in fact-intensive antitrust cases. *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983)*. The complaint should only be dismissed with prejudice if it appears beyond doubt that SBS can prove no set of facts which would entitle it to relief. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 953 (11th Cir. 1986)*.

In this case, neither the complaint nor the appellate briefs are models of clarity in defining the precise claims brought under the antitrust laws or describing how the factual allegations in the complaint satisfy the necessary elements of each specific claim. Nonetheless, we will attempt to categorize the claims in terms of existing antitrust case law.

[*1071] I. *Sherman Act Section One*

Section One of the Sherman Act provides:

> ***HN3***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or **[**7]** commerce among the several States or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. ***HN4***[] Thus, Section One prohibits combinations and conspiracies that restrain interstate or foreign trade. This provision applies both to agreements between companies that directly compete with one another, called

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[1] Unless otherwise noted, "complaint" in this opinion refers to the First Amended Complaint. SBS filed the First Amended Complaint before the defendants filed a response in order to cure technical difficulties with its original pleadings. The district court also treated allegations made at the oral hearing as part of this complaint. The court "allowed SBS to rectify orally the facial deficiencies in its Amended Complaint because at this procedural stage, the Court must draw all reasonable inferences in the Plaintiff's favor and consider, in the interests of justice and efficiency, the Plaintiff's best arguments." Order of Jan. 31, 2003 at 1 n.1. We have previously allowed district courts to consider allegations made in oral argument on the motion to dismiss. See, e.g., *Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182, 1194-95 (11th Cir. 2002)*. As discussed below, SBS also attempted to file a Second Amended Complaint with its motion for reconsideration.

"horizontal" agreements, and to agreements between businesses operating at different levels of the same product's production chain or distribution chain, known as "vertical" agreements. In addition, although some restraints on trade remain illegal per se, such as certain agreements to fix prices, most asserted antitrust violations now require "the finder of fact [to] decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)* (emphasis added). Section One claims that do not allege per se antitrust violations are analyzed under this **[**8]** "rule of reason," and the claims fail if the restraint on trade is reasonable. Both parties accept that the rule of reason applies to the Section One claims raised by SBS in this case.

Section One applies only to agreements between two or more businesses; it does not cover unilateral conduct. *Fisher v. City of Berkeley, 475 U.S. 260, 266, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)* ("Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under *§ 1* in the absence of agreement."). Thus, for the purposes of our Section One analysis, we only consider the alleged conspiracy between CC and HBC. Unfortunately, SBS does not specify the precise nature of the agreement alleged in its complaint or connect it to any particular anti-trust theory identified in the case law. Even if we were to assume that CC and HBC acted in concert for purposes of Section One, however, we would still affirm here, given that SBS failed to allege sufficient anticompetitive effect, a critical component of any antitrust claim.

HN5[] Under Eleventh Circuit case law, alleged Section One agreements analyzed under the rule of reason **[**9]** require a plaintiff "to prove (1) the anticompetitive effect of the defendant's conduct on the relevant market [2], and (2) that the defendant's conduct has no pro-competitive benefit or justification." *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996)*. In alleging "the anticompetitive effect of the defendant's conduct," an antitrust plaintiff must show harm to competition rather than to competitors. That is, the "anticompetitive effects" are measured by their impact on the market rather than by their impact on competitors. See, e.g., *Dickson v. Microsoft Corp., 309 F.3d 193, 206 (4th Cir. 2002)* ("To have an 'anticompetitive effect,' conduct 'must harm the competitive process and thereby harm consumers **[*1072]** . . . Harm to one or many competitors will not suffice.'") (quoting *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (D.C. Cir. 2001))*. In order to prove this anticompetitive effect on the market, the plaintiff "may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition. **[**10]** " *Levine, 72 F.3d at 1551* (internal quotations omitted).

In an attempt to meet this burden, SBS focuses upon the harm it allegedly suffered at the hands of HBC and CC, such as weakened stock prices, restricted access to capital markets, loss of employees, damaged reputation, and loss of advertising revenue. None of these allegations assert damage to competition itself rather than damage to SBS, one competitor in the Spanish-language advertising market. As the district court indicated, the amended complaint contains no allegations at all about a factual connection between the conduct alleged and overall impact on the advertising market. Indeed, **[**11]** at oral argument before the district court, SBS stated that CC worked to keep Spanish-language advertising rates *lower* in order to maximize English-language advertising revenues.

In *Aquatherm Industries v. Florida Power & Light Co., 145 F.3d 1258 (11th Cir. 1998)*, we upheld a *Rule 12(b)(6)* dismissal of a claim that the defendant's actions, including the dissemination of false information, violated the *Sherman Act*. We emphasized that damage to a single competitor, even as a result of deliberate misinformation, does not state a claim under *Section One of the Sherman Act*:

> Aquatherm does not show, or even claim, that the actions by FPL harmed competition in the [relevant] market. Its only claim is FPL acted unfairly by disseminating false information, and this unfair competition in turn harmed Aquatherm's business. This claim of unfair competition is *not* sufficient to support a claim under *§ 1* or

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[2] SBS asserted that it considered the relevant market to be advertising purchased in the top ten Spanish-language markets and that HBC earned 51 of the advertising revenue in that market. For the purposes of the 12(b)(6) motion, the district court assumed that a relevant market had been shown for the Section One claims. We make the same assumption here.

> any other federal antitrust provision. As long as no restraint on competition occurred, there is no cause of action under *§ 1*.

Aquatherm, 145 F.3d at 1263 (emphasis in original). Here, as well, we find that although SBS may have alleged **[**12]** "unfair" competitive practices, it did not adequately allege actual harm to competition.

On appeal, the plaintiffs argue that because SBS is the primary competitor of HBC in the Spanish-language advertising market, any damage it suffers inherently damages competition in that market. They rely upon *Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745 (10th Cir. 1999)*, and *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080 (D.C. Cir. 1998)*, as examples of complaints that survived motions to dismiss despite alleging damage to only one competitor. However, in those two cases, the plaintiffs also alleged harm to competition in general by pointing to the specific damage done to consumers in the relevant market. See *Full Draw, 182 F.3d at 753-54* (discussing the reduction in exhibition space at archery trade shows following the complete elimination of the sole competitor); *Carribean Broad. Sys. v Cable & Wireless PLC, 148 F.3d 1080, 1086-87, 331 U.S. App. D.C. 226* (discussing allegations that the defendants' complete monopoly on Caribbean English-language FM radio advertising actually caused consumers to pay higher prices **[**13]** and that the defendants' deceptive practices and frivolous objections to the plaintiff's license application helped sustain that monopoly). In both cases, the defendants' anticompetitive practices achieved a complete monopoly in the relevant market, leaving consumers with no alternative. That is simply not the case here. Although damage to a critical competitor ***[*1073]*** *may* also damage competition in general, SBS bears the burden of drawing that implication with specific factual allegations. It has not done so here. [3]

[14]** Concluding that no "actual damage to competition" has been sufficiently alleged in the plaintiff's amended complaint, we turn to the alternative method for alleging an anticompetitive effect: the "potential for genuine adverse effects on competition." *Levine, 72 F.3d at 1551*. ***HN6***[] At a minimum, this requires a plaintiff to "define the relevant market and establish that the defendants possessed power in that market." *Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1213 (11th Cir. 2002)*; see also *Levine, 72 F.3d at 1551*. For this claim, we assume without deciding, as did the district court, that the plaintiffs have alleged adequate market power in the relevant market. However, market power alone cannot be sufficient to show the potential for genuine adverse effects on competition. In *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, the case from which the Eleventh Circuit drew its test, see *Levine, 72 F.3d at 1551*, the Supreme Court never stated that market power alone could establish the potential for genuine adverse effects on competition. Rather, because the Court **[**15]** found "actual, sustained adverse effects on competition," there was no need for additional inquiry into market power. *476 U.S. at 460-61*. Similarly, in an earlier case on vertical price restraints in this circuit, we noted that market power would not be enough to state a Section One claim under the rule of reason:

> The burden of proving unreasonable effects in a rule of reason case rests with the antitrust plaintiff. Therefore, [the plaintiff], after crossing the threshold of showing [the defendant's] market power, was required to establish that the interbrand market structure was such that intrabrand competition was a critical source of competitive pressure on price, and hence of consumer welfare.

Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983) (internal citations and punctuation omitted). Other courts of appeals have reached the same conclusion and required specific allegations linking market power to harm to competition in that market. As the Second Circuit recently stated:

> Even assuming this market share data implies that [the defendant] possessed market power, [the plaintiff] still **[**16]** would fail to satisfy its burden under the adverse-effect requirement. Market power, while necessary to show adverse effect indirectly, alone is insufficient. A plaintiff seeking to use market power as a proxy for

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[3] We also note that the market for Spanish-language radio advertising is not limited to two competitors, as the argument by SBS implies. According to the numbers provided by SBS to the district court, some 26 of the market is not controlled by either HBC or SBS. That 26 includes the 10 market share belonging to Entravision, which is one-third owned by Univision, HBC's new merger partner. SBS made these factual allegations at the hearing on the motion to dismiss before the district court. Tr. at 20-23. See also supra note 1 (explaining the district court's consideration of allegations made at the hearing on the motion to dismiss).

> adverse effect must show market power, plus some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market.

Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998) (citations omitted); see also *Dickson, 309 F.3d at 205-07*.

[*1074] In this case, SBS has not described how the defendants' alleged behavior would be likely to harm competition. In fact, as the district court noted, SBS has expanded considerably over the past few years, has a share of the New York, Chicago and Miami markets somewhat comparable to that of HBC, and was itself engaged in merger talks with HBC. By its own admission, advertisers continue to shift larger portions of their budget toward the Spanish-language market as that market grows. SBS admitted that consumers currently pay less for Spanish-language advertising **[**17]** than they might in the absence of CC's activities. Given these alleged facts, [4] and in the absence of specific allegations detailing the threat to the Spanish-language advertising market, SBS did not state a claim for relief against CC or HBC under Section One, and the district did not err in dismissing the Section One claims of the First Amended Complaint.

II. *Sherman Act Section Two*

Section Two of the Sherman Act provides:

> ***HN7***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

15 U.S.C. § 2. Thus, ***HN8***[] Section Two makes it a crime to monopolize, to attempt to monopolize, or to conspire to monopolize any part of interstate or foreign trade. This provision covers behavior by a single business as well as coordinated **[**18]** action taken by several businesses.

The First Amended Complaint alleged only ***HN9***[] attempted monopolization, which involves three distinct elements: "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, 506 U.S. at 456*.

HN10[] Like claims under Section One, Section Two claims require harm to competition that must occur within a "relevant", that is, a distinct market, with a specific set of geographical boundaries and a narrow delineation of the products at issue. See *U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995 (11th Cir. 1993)* ("Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other."). [5] Under Section One, this "relevant market" must have been harmed by an unreasonable restraint on trade, *L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 421 (11th Cir. 1984)*, while under Section Two, the alleged monopolist **[**19]** must possess enough power or potential power in this "relevant market" in order to harm competition. *Morris Communications Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293-94 (11th Cir. 2004)*. As noted above, SBS explained that it considered the relevant market to be advertising purchased in the top ten Spanish-language markets and that HBC earned 51% of the advertising revenue in that market.

[*1075] We first address the allegations as they pertain to CC. There is no question that CC does not participate in the Spanish-language radio market. Thus, CC cannot attempt to monopolize that market. See *Aquatherm, 145 F.3d at 1261* (rejecting an attempted monopolization claim against a defendant who did not compete in the relevant market). SBS attempts to overcome this hurdle by pointing out that CC owns **[**20]** 26% of HBC, implying that this

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[4] See Amended Complaint P 12; Tr. at 20-23, 34-38.

[5] Many antitrust cases turn on the precise definition of this market, as defendants contest whether they possess market power or whether the restraint at issue affected the market as a whole.

either makes CC an effective participant in the relevant market or at least gives CC sufficient control over HBC to permit attempted monopolization. We reject this contention. Absent allegations of significant control over the policies of a subsidiary, a minority ownership share does not convert a parent corporation into a competitor. In Caribbean Broadcasting, a case heavily relied upon by SBS, the D.C. Circuit specifically rejected a claim against a parent corporation grounded upon a 27% ownership interest in the plaintiff's direct competitor. *148 F.3d at 1088*. As the court noted, ***HN11***[] "one company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals. To be a competitor at the level of the subsidiary, the parent must have substantial control over the affairs and policies of the subsidiary." Id.

Although the complaint alleges that CC has "veto power" over HBC merger and stock decisions, the complaint contains no allegations with respect to control over day-to-day operations or general corporate policies. [6] In fact, **[**21]** the (sealed) Second Amended Complaint contains factual allegations inconsistent with that level of influence. SBS has pointed to no case in which a minority shareholder can attempt to monopolize a market on behalf of its subsidiary, nor can we locate one. Thus, the only Section Two claim available against CC might be conspiracy to monopolize, which was not raised in the First Amended Complaint. [7] Accordingly, because CC does not participate in the relevant market, SBS's attempted monopolization claim against CC was properly dismissed.

[22]** We therefore turn to the attempted monopolization claim against HBC. ***HN12***[] The first element of this claim requires a plaintiff to allege facts that show that the defendant has engaged in predatory or anticompetitive conduct. This anticompetitive conduct criterion captures the critical antitrust idea of harm to competition, rather than to competitors. "Regardless of the defendant's power or intent, its conduct may be incapable of producing monopoly, and thus unable to satisfy the attempt requirement." Areeda & Hovenkamp, IIIA ***Antitrust Law*** P 806 (2002). In fact, "the conduct requirement is arguably the single most important aspect" of attempted monopolization. *Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981)*.

HN13[] As with Section One claims, conduct that injures individual firms rather than competition in the market as a whole does not violate Section Two. The Supreme **[*1076]** Court has explained that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993).* **[**23]** In this circuit, we have affirmed a directed verdict on an attempted monopolization claim in part because the plaintiff "failed to demonstrate any cognizable anticompetitive effect of [the defendant's] unfair competition." *Mfg. Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1043 (11th Cir. 1982)*. We noted that "our cases have recognized that injury to a competitor need not always result in injury to competition. The use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws." Id. Similarly, the Ninth Circuit upheld the dismissal of an attempted monopolization claim for failure to state a claim because the complaint merely alleged an attempt to eliminate two firms from the market rather than injury to competition:

> Nowhere in their AFA complaint, however, do appellants allege injury to the competitive market for PB [polybutylene]. Instead, they allege that the actions between Shell Oil defendants and their overseas affiliates "were taken for the purpose of eliminating [appellants] as representatives of Shell Chemical and as sellers of PB and PB-related products, and for the financial **[**24]** benefit of defendant Shell Chemical and the parties acting in concert with such defendant." Thus appellants fail to state an antitrust claim based on defendants' conduct with respect to PB and PB-related products. It is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant.

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[6] The complaint notes that the Department of Justice considered the two companies "sufficiently related" so as to block the transfer of radio stations. This does not imply control over day-to-day operations. Similarly, the allegation that CC executives acted "on behalf of HBC" may imply an agreement or conspiracy but not control such that CC should be considered a participant in the market.

[7] Moreover, even if SBS had alleged sufficient control over HBC by CC to state a claim for attempted monopolization by CC, this would not have cured the complaint's failure to allege harm to competition rather than harm to SBS alone.

McGlinchy v. Shell Chem. Co., 845 F.2d 802, 812-13 (9th Cir. 1988); see also Joseph Bauer & William H. Page, II Kintner's Federal ***Antitrust Law*** P 14.35 (2002) (noting that "practices that harm other firms without harming competition . . . cannot constitute unlawfully exclusionary conduct in the attempt context.")

Careful examination of the First Amended Complaint reveals no allegations of anticompetitive conduct that could sustain a claim under Section Two. With respect to HBC, SBS alleges that HBC leveraged its relationship with CC to obtain preferential treatment from auditors and investors, discouraged analysts and investors from dealing with SBS, misrepresented the state of SBS's finances in order to adversely affect SBS's stock price, and engaged in a bidding war with SBS over a Los Angeles radio station. **[**25]** As with the Section One claims, SBS essentially urges us to equate harm to it with harm to competition as a matter of law. We do not believe the law supports this proposition. While some of these specific practices might be characterized as unsavory, or even illegal under other laws, [8] **[**26]** they do not give rise to a federal antitrust claim without factual allegations specifically addressing how these practices have harmed competition. As the Supreme Court has stated, ***HN14***[] the antitrust laws "do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Brooke Group, 509 U.S. at 225* (internal quotation marks omitted). Because SBS has not alleged any harm to competition in the market, nor explained how any of the actions taken by HBC **[*1077]** could lead to monopolization of that market, SBS has not alleged anticompetitive conduct and thus has not stated a claim against HBC under Section Two. [9]

III. The Second Amended Complaint

Following the dismissal of its amended complaint with prejudice, SBS filed a motion for reconsideration along with a proposed Second Amended Complaint. The court conducted a "careful review of the proposed Second Amended Complaint" and concluded that SBS "cannot allege facts to survive dismissal." Order of Aug. 6, 2003, at 3 n.3 & 5. The court therefore denied the motion.

HN15[] We review the denial of leave to amend for abuse of discretion. *Long v. Satz, 181 F.3d 1275, 1278 (11th Cir. 1999)*; *O'Neal v. Kennamer, 958 F.2d 1044, 1047 (11th Cir. 1992)*. ***HN16***[] Under the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. The Supreme Court has emphasized that leave to amend must be granted absent **[**27]** a specific, significant reason for denial:

> In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be freely given.

Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) (internal quotation marks omitted). In this circuit, these "same standards apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to *Fed. R. Civ. P. 59(e)*." *Thomas v. Town of Davie, 847 F.2d 771, 773 (11th Cir. 1988)*. The district court found that the proposed amendments were futile because the Second Amended Complaint still failed to state a claim. Our review of the denial of leave to amend therefore turns on our assessment of whether the proposed complaint indeed failed to state a claim for relief.

As with the First Amended Complaint, **[**28]** ***HN17***[] we must accept the facts pleaded in the proposed Second Amended Complaint as true and construe them in the light most favorable to the plaintiffs. An antitrust complaint need only meet an "exceedingly low" threshold of sufficiency in order to state a claim for relief and survive a motion to dismiss. *Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002)*, vacated on other

[8] We need not decide whether any of these alleged practices would give rise to state law claims. We merely note that they do not automatically give rise to an antitrust claim.

[9] As with the Section One claims, SBS also argues that, as the principal competitor of HBC in the market, harm to it inherently constitutes harm to competition. For the reasons stated in the previous section, we reject this argument.

grounds by *157 L. Ed. 2d 1040, 124 S. Ct. 1143 (Jan. 20, 2004)*. Of course, "we must not . . . assume plaintiffs can prove facts not alleged or that defendants have violated the antitrust laws in ways not alleged." *Quality Foods, 711 F.2d at 995*. Moreover, even in our liberal pleading regime, antitrust plaintiffs must allege facts in support of each element of an antitrust violation:

> The Supreme Court has indicated that a complaint should not be dismissed unless it is found to be wholly frivolous. . . . This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint must comprehend a so-called prima facie case, and enough data must be pleaded so that each **[**29]** element of the **[*1078]** alleged antitrust violation can be properly identified. Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent.

Id. (citations and internal quotation marks omitted). With these principles in mind, we turn to the allegations of the proposed Second Amended Complaint, which, in addition to the claims discussed above, contains the further claim that HBC and CC conspired to monopolize the market for Spanish-language radio advertising in violation of *Section Two of the Sherman Act*. [10]

[30]** ***HN18***[] Conspiracy under Eleventh Circuit law requires (1) an agreement in restraint of trade (2) deliberately entered into with the specific intent of achieving a monopoly (3) which could have had an anticompetitive effect and (4) at least one overt act in furtherance of the conspiracy. *U.S. Anchor, 7 F.3d at 1001*. As with the Section One allegations in the first complaint, we agree with the district court that SBS has not alleged facts that would support a finding of "anticompetitive effect" in the relevant market. That is, we still do not believe that SBS has alleged facts sufficient to support a finding of harm to competition.

In dismissing the previous complaint with prejudice, the district court noted that "the Plaintiff has amended its complaint once already. The Court gave the Plaintiff extensive time to address the injury to competition element at oral argument. Still, SBS could only provide one vague and conclusory allegation of injury to general competition." Order of Jan. 31, 2003, at 21. SBS now argues that it has added language sufficient to overcome this finding by including specific references to "injury to competition." We disagree.

Careful review of the **[**31]** proposed complaint reveals only two general, conclusory statements about current injury to competition. [11] The complaint states that "Defendants' **[*1079]** exploitation of their dominance of those markets has caused injury to competition by limiting alternatives available to advertisers, performers and the

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[10] In its original order, the district court denied a previous request by SBS to amend the complaint and add a conspiracy allegation after finding that a non-participant in the market could not conspire with a participant. The court relied upon our statement in Aquatherm that "equally fatal to Aquatherm's conspiracy allegation is the fact that no authority exists holding a defendant can conspire to monopolize a market in which it does not compete." *145 F.3d at 1262 n.4*. However, in Aquatherm the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222 (5th Cir. 2001)* ("We conclude that there can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive."). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff. Appellee CC Br. at 18-19. However, the case turned upon the ability and motive of the defendant to injure the plaintiff (and competition in general), not whether that power came from more than one co-conspirator.

[11] The proposed complaint adds significant detail to the allegations of unsavory behavior by CC and HBC described in the First Amended Complaint as well as additional detail on the market for Spanish-language radio advertising. Largely because of this detail, the proposed complaint remains under seal. We therefore do not describe these additional factual allegations with specificity.

listening audience." Proposed Compl. at P 108. The complaint also states that "[defendants'] conduct has and will continue to affect prices for advertisements, the quality of programming, and the prices for advertisers' products." Id. at P 112. We note that neither statement claims that prices have actually risen or that the quantity of available Spanish-language advertising time has actually decreased. Nor is it clear what is meant by "limiting alternatives." Neither of these statements alleges actual harm to competition.

[32]** In addition, the complaint contains several vague statements about the potential general consequences of hypothetical monopolization of the Spanish-language radio market: it "ultimately results in supra-competitive prices for advertisements and reduces the number of Spanish stations available." Id. at P 113. A reduction in the number of stations, in turn, "reduces the inventory of available advertisements and hinders the advertisers' ability to target Hispanics of different origins." Id. Finally, this situation "ultimately results in higher prices for the advertisers' products," "will likely deteriorate programming quality," and "affect the viability of artists in the marketplace." Id. at PP 114-16. Unfortunately, SBS offers no specific factual allegations to support the likelihood of any of this happening. Rather, SBS merely assumes, conclusorily, a pernicious monopoly capable of limiting output and raising prices and then proceeds to describe the other evils that might flow from this monopoly. We hold that these conclusory allegations, unsupported by specific factual allegations, do not state a claim for relief under the antitrust laws. Because SBS, even in the proposed **[**33]** Second Amended Complaint, offered only conclusory allegations of harm to competition, we cannot say that the district court abused its discretion in denying the motion for reconsideration and the implicit motion for leave to amend the complaint.

AFFIRMED.

Unitherm Food Sys. v. Swift-Eckrich, Inc.

United States Court of Appeals for the Federal Circuit

July 12, 2004, Decided

03-1472, -1473

Reporter

375 F.3d 1341 *; 2004 U.S. App. LEXIS 14274 **; 71 U.S.P.Q.2D (BNA) 1705 ***; 2004-2 Trade Cas. (CCH) P74,470

UNITHERM FOOD SYSTEMS, INC. and JENNIE-O FOODS, INC., Plaintiffs-Appellees, v. SWIFT-ECKRICH, INC. (doing business as Conagra Refrigerated Foods), Defendant-Appellant.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Unitherm Food Sys. v. Swift-Eckrich, Inc., 2004 U.S. App. LEXIS 20729 (Fed. Cir., Sept. 14, 2004)*

Rehearing denied by, Rehearing, en banc, denied by *Unitherm Food Sys. v. Swift-Eckrich, Inc., 2004 U.S. App. LEXIS 20730 (Fed. Cir., Sept. 14, 2004)*

US Supreme Court certiorari granted by, in part *Unitherm Food Sys. v. Swift-Eckrich, Inc., 543 U.S. 1186, 125 S. Ct. 1396, 161 L. Ed. 2d 189, 2005 U.S. LEXIS 2083 (2005)*

US Supreme Court certiorari denied by *Swift-Eckrich, Inc. v. Unitherm Food Sys., 543 U.S. 1187, 125 S. Ct. 1399, 161 L. Ed. 2d 190, 2005 U.S. LEXIS 2094 (2005)*

Reversed by *Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974, 2006 U.S. LEXIS 916 (U.S., 2006)*

Prior History: [1]** Appealed from: United States District Court for the Western District of Oklahoma. Judge Robin J. Cauthron.

Unitherm Food Sys. v. Swift-Eckrich, Inc., 2003 U.S. Dist. LEXIS 25665 (W.D. Okla., Mar. 27, 2003)

Disposition: Affirmed-in-part, vacated-in-part, and remanded.

Core Terms

patent, antitrust, district court, patentee, anti trust law, damages, invalid, demonstrations, precooked, color, summary judgment, golden, terms, tortious interference, inventor, videos, patented process, antitrust claim, relevant market, oven, plain meaning, unenforceable, limitations, muscle, infringement, temperature, undisputed, turkey, prior sale, monopolization

LexisNexis® Headnotes

Patent Law > Statutory Bars > On Sale Bar > General Overview

Patent Law > Anticipation & Novelty > Prior Knowledge & Use of Invention

Patent Law > Statutory Bars > Public Use Bar > General Overview

HN1[] **Statutory Bars, On Sale Bar**

See *35 U.S.C.S. § 102(b)*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

HN2[] **Antitrust & Trade Law, Sherman Act**

Section 2 (*15 U.S.C.S. § 2*) of the Sherman Act defines the substantive violation of attempted monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN3[] **Monopolies & Monopolization, Attempts to Monopolize**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Private Actions, Remedies**

Private antitrust suits technically proceed under § 4 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN5[] **Private Actions, Remedies**

See *15 U.S.C.S. § 15(a)*.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN6[] **Infringement Actions, Claim Interpretation**

Where a patentee did not act as his own lexicographer and failed to specifically define a term, the court views the term with its plain meaning to one of skill in the art.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Remedies > Damages > General Overview

HN7[] **Remedies, Damages**

The enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act provided the other elements necessary to a *§ 2* case are present. In such event the treble damage provisions of § 4 (*15 U.S.C.S. § 15(a)*) of the Clayton Act would be available to an injured party.

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

HN8[] **Private Actions, Costs & Attorney Fees**

Antitrust laws also provide for reasonable attorneys' fees.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Patent Law > Infringement Actions > Summary Judgment > Appeals

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN9[] **Standards of Review, De Novo Review**

The appellate court reviews all grants of summary judgment de novo, construing the facts in the light most favorable to the non-movant.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

***HN10*[ ] Entitlement as Matter of Law, Materiality of Facts**

Summary judgment is appropriate when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*.

Patent Law > Statutory Bars > Public Use Bar > General Overview

***HN11*[ ] Statutory Bars, Public Use Bar**

Prior use under *35 U.S.C.S. § 102(b)* includes any use of the claimed invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor. Whether a patent is invalid due to a *§ 102(b)* public use is a question of law based on underlying questions of fact.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Patent Law > Infringement Actions > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Patent Law > Statutory Bars > On Sale Bar > General Overview

***HN12*[ ] Clearly Erroneous Review, Findings of Fact**

In order to invalidate a patent under the on-sale bar of *35 U.S.C.S. § 102(b)*, an accused infringer must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell more than one year before the application. A determination that a product was placed on sale prior to the critical date is a conclusion of law based on underlying findings of fact. The appellate court reviews the ultimate determination de novo, and the underlying factual findings for clear error.

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Patent Law > Infringement Actions > Summary Judgment > Appeals

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > Jurisdiction & Review > Standards of Review > General Overview

Patent Law > Statutory Bars > On Sale Bar > General Overview

Patent Law > Statutory Bars > Public Use Bar > General Overview

HN13[] **Summary Judgment, Appellate Review**

Taken together, an appellate court must review the district court's summary judgment of patent invalidity and unenforceability based on prior use or sale by considering whether the facts, viewed in the light most favorable to the patent holder, nevertheless provide clear and convincing evidence of either (or both) prior use or prior sale.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN14[] **Regulated Practices, Market Definition**

The United States Court of Appeals for the Federal Circuit applies Federal Circuit law to all antitrust claims premised on the bringing of a patent infringement suit. Whether a patentee's conduct in procuring or enforcing a patent is sufficient to strip its immunity from the antitrust laws is therefore a legal question that the Federal Circuit reviews de novo under Federal Circuit law. The Federal Circuit applies the law of the regional circuit to the elements of antitrust claims that are not unique to patent law. These elements include but are not restricted to considerations of antitrust standing, market definition, antitrust injury, and damages.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN15[] **Regulated Practices, Market Definition**

The United States Court of Appeals for the Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to de novo review. Market definition and antitrust injury, on the other hand, are intensely factual determinations. The appellate court must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN16[] **Jury Trials, Province of Court & Jury**

The United States Court of Appeals for the Tenth Circuit limits the review of a jury verdict challenged on appeal to determining whether the record--viewed in the light most favorable to the prevailing party--contains substantial evidence to support the jury's decision. The jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in evidence, and reaching ultimate conclusions of fact.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN17[] **Standards of Review, Substantial Evidence**

In conducting a review for substantial evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe.

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

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN18[] **Federal & State Interrelationships, Erie Doctrine**

A federal appellate court reviews state law causes of action under the applicable state law for matters not committed to the federal court's exclusive jurisdiction.

Civil Procedure > Appeals > Standards of Review > General Overview

HN19[] **Appeals, Standards of Review**

Oklahoma courts must affirm a jury verdict if there is any competent evidence reasonably tending to support it. This standard is unchanged even if the jury awards damages in amounts inconsistent with its finding of liability.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN20[] **Jury Trials, Jury Instructions**

In the context of jury instructions, the United States Court of Appeals for the Federal Circuit has doubted that Markman requires the trial judge to instruct as to an undisputed "claim construction" for every term, by simply parroting the words of the claim. The Federal Circuit doubts even more strongly that a district court is obliged to construe undisputed claim terms prior to issuing a summary judgment of invalidity.

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Governments > Courts > Judicial Precedent

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN21[] **Presumptions, Rebuttal of Presumptions**

It has been long recognized in United States Court of Appeals for the Federal Circuit precedent and in the precedent of that court's predecessor court, the United States Court of Customs and Patent Appeals, that dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of claim terms. But the intrinsic record also must be examined in every case to determine whether the presumption of ordinary and customary meaning is rebutted. This presumption will be overcome where the patentee, acting as his or her own lexicographer, has clearly set forth an explicit definition of the term different from its ordinary meaning. Further, the presumption also will be rebutted if the inventor has disavowed or disclaimed scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.

Patent Law > ... > Specifications > Definiteness > General Overview

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN22[] **Specifications, Definiteness**

Judges may rely on dictionary definitions when construing claim terms, so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN23[] **Infringement Actions, Claim Interpretation**

Where the district court's adoption of a plain meaning patent construction is presumptively correct, to overcome that presumption, the party opposing the construction must demonstrate that the intrinsic evidence provides both a clear and explicit disclaimer of the plain meaning and substitutes a more specific, technical construction of the term being construed.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN24[] **Infringement Actions, Claim Interpretation**

Where the plain language of a patent claim is clear and uncontradicted by anything in the written description or the figures, the district court should not rely upon the written description, the figures, or the prosecution history to add limitations to the claim. Under such circumstances, relying on the written description and prosecution history to reject the ordinary and customary meanings of the words themselves is impermissible. While claims are to be interpreted in light of the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims. There is sometimes a fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN25[] **Infringement Actions, Claim Interpretation**

A patentee cannot rebut the presumption of ordinary meaning simply by pointing to the preferred embodiment or other structures or steps disclosed in the specification or prosecution history.

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN26[] **Attempts to Monopolize, Sherman Act**

To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition. It may be that the patented process does not comprise a relevant market. There may be effective substitutes which do not infringe the patent. This is a matter of proof, as is the amount of damages.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN27[] **Monopolies & Monopolization, Attempts to Monopolize**

In order to prevail on a Walker Process claim, a competitor must establish: that the patentee attempted to enforce a patent; that the patent issued because the patentee defrauded the Patent and Trademark Office; that patentee's attempted enforcement threatened to lessen competition in a relevant antitrust market; that the competitor suffered antitrust damages; and that all other elements of attempted monopolization are met.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN28[] **Inequitable Conduct, Anticompetitive Conduct**

United States Court of Appeals for the Federal Circuit law governs all antitrust claims premised on the abuse of a patent right. In all antitrust cases, the Federal Circuit applies the same basic choice of law rule that it applies to all other matters--and for precisely the same reason. Because the Federal Circuit is in the best position to impose uniformity on the patent laws, it now decide issues raised in an antitrust claim that are unique to the patent law under Federal Circuit law, and all other issues under the law of the relevant regional circuit.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

HN29[] **Antitrust & Trade Law, Sherman Act**

The regional circuits retain appellate jurisdiction over cases in which the complaint does not allege a claim arising under federal patent law, but the answer does contain a patent-law counterclaim. As a result, antitrust claims met with counterclaims of infringement may not come before the United States Court of Appeals for the Federal Circuit. If the resolution of the dispute rests, in part, upon a determination of whether or not a patentee's behavior stripped it of its antitrust exemption, the appellate court hearing the matter will have to decide whether to apply Federal Circuit law or risk disturbing Congress's goal of ensuring patent-law uniformity, by applying its own law. Federal Circuit law determines whether or not the patentee enjoys antitrust immunity under the patent laws, while regional circuit law determines the other elements of the antitrust claim.

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > Invention Date & Priority > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN30[] **Antitrust & Trade Law, Sherman Act**

The fundamental question of United States Court of Appeals for the Federal Circuit ***antitrust law*** is whether or when a patentee's behavior in either procuring or enforcing a patent can give rise to antitrust liability. As a general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws. But this immunity is hardly absolute. Nearly forty years ago, the Supreme Court recognized that an inventor who obtains a patent by defrauding the patent office deserves no immunity. This recognition falls well within a long-established understanding of the limits of patent protection, as reflected in the Supreme Court's much earlier announcement that patentees who attempt to leverage their appropriately obtained patents beyond the claimed product lose the right to enforce their patents. The United States Supreme Court subsequently refined this notion of patent misuse and its consequent penalties, so that it is now, of course, familiar law that the courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or purged as the conventional saying goes.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN31[] **Antitrust & Trade Law, Sherman Act**

The patent laws which give a monopoly on making, using, or selling the invention are in pari materia with the antitrust laws and modify them pro tanto.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN32[] **Antitrust & Trade Law, Sherman Act**

The United States Supreme Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Bad Faith

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

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

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

HN33[] **Inequitable Conduct, Anticompetitive Conduct**

As a well-established matter of law, patentees acting under the color of their patents may nevertheless be liable for antitrust violations if they engage in any one of a number of improper activities. The patentee's right to exclude, however, is not without limit. A patentee's bad faith allegations that a competitor is infringing a valid patent may strip the patentee of the liability exemptions that the patent law generally provides patentees.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Damages > Collateral Assessments > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Remedies > General Overview

HN34[] **Remedies, Damages**

The gist of a Walker Process claim is that since the patentee obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act, but must answer under that section and § 4 (*15 U.S.C.S. § 15(a)*) of the Clayton Act in treble damages to those injured by any monopolistic action taken under the fraudulent patent claim. Nor can the interest in protecting patentees from "innumerable vexatious suits" be used to frustrate the assertion of rights conferred by the antitrust laws. It must be remembered that in such a case, the court deals only with a special class of patents, i.e., those procured by intentional fraud. Walker Process claims therefore relate to a single type of behavior capable of stripping a patentee's patent-law immunity and thereby exposing the patentee to liability under other laws. Though one cannot enumerate the full range of activities capable of effecting such a loss of immunity, the determination of which actions can cause a patentee or a patent applicant to lose the general protection of the patent law and to risk liability for damages is clearly an issue unique to the patent law--and therefore inappropriate for resolution under the potentially varying interpretations of the regional circuits.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN35[] **Bad Faith, Fraud & Nonuse, Fraud**

Federal Circuit ***antitrust law*** centers on a single critical question: What behavior by the patentee in procuring or in enforcing a patent can strip the patentee of antitrust immunity? When the courts consider a patentee's behavior under Federal Circuit law and determine that it involved nothing more than an appropriate attempt to procure a patent and an appropriate attempt to enforce a legitimately obtained patent, the antitrust inquiry is over with respect to the behavior at issue. When, on the other hand, the courts consider a patentee's behavior under Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN36[] **Scope, Exemptions**

The patent law's pro tanto modification of the ***antitrust law*** extends to behavior, not to either patents or patentees. It is entirely possible for a patentee to retain its antitrust exemption with respect to some behavior while being stripped of the exemption with respect to other behavior. Beyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law. The possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. The Sherman Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Patent Law > Remedies > Declaratory Judgments

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN37[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

An antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit. The logic governing Walker Process claims, however, suggests that a court should treat claims brought ancillary to Declaratory Judgment Actions precisely as it treats counterclaims.

Civil Procedure > Judgments > Enforcement & Execution > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Examinations > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Declaratory Judgments

Patent Law > Remedies > Declaratory Judgments

HN38[] **Judgments, Enforcement & Execution**

Strictly speaking, a Walker Process claim is premised upon the enforcement of a patent procured by fraud on the Patent Office. A plaintiff may bring a Declaratory Judgment Action of patent invalidity, however, even in the absence of overt enforcement actions. When the defendant's conduct, including its statements, falls short of an express charge, one must consider the "totality of the circumstances" in determining whether that conduct meets the first prong of the test for jurisdiction to hear a Declaratory Judgment Action. If the circumstances warrant, a reasonable apprehension may be found in the absence of any communication from defendant to plaintiff. If, on the other hand, defendant has done nothing but obtain a patent, there can be no basis for the required apprehension, a rule that protects quiescent patent owners against unwarranted litigation. Therefore, as a matter of United States Court of Appeals for the Federal Circuit ***antitrust law***, the standards that the Federal Circuit has developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity also define the minimum level of "enforcement" necessary to expose the patentee to a Walker Process claim for attempted monopolization.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Declaratory Judgments

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Remedies > Declaratory Judgments

HN39[] **Judgments, Declaratory Judgments**

On dismissal of both a Declaratory Judgment Action for invalidity and a Walker Process claim, it is enough to simply point out that the same facts that compel the conclusion that the plaintiff failed to establish declaratory judgment jurisdiction for the district court also compel the conclusion that no reasonable fact finder could find that the defendant has acted to enforce its patent. In other words, if the patentee has done nothing but obtain a patent in a manner that the plaintiff believes is fraudulent, the courts lack jurisdiction to entertain either a Declaratory Judgment Action or a Walker Process claim.

Criminal Law & Procedure > ... > Fraud Against the Government > False Statements > Elements

Governments > Courts > Common Law

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > False Statements > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Recklessness

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN40[] **False Statements, Elements**

Walker Process fraud is a variant of common law fraud, and the elements of common law fraud include: (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation. The court's determination of whether or not to strip a patentee of its antitrust immunity therefore requires the court to apply the facts of the case to each of these elements.

Patent Law > Invention Date & Priority > General Overview

Patent Law > Originality > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Oaths

HN41[] **Patent Law, Invention Date & Priority**

Patents are applied for "in the name of the actual inventor or inventors" according to *37 C.F.R. § 1.41(a)(1983)*. The inventor(s) must submit an oath or declaration attesting that they have reviewed and understand the contents of the specification and believe the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought. *37 C.F.R. § 1.63*.

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > Originality > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Examinations > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Filing Requirements > Oaths

HN42[] **Defenses, Inequitable Conduct**

In the patent context, the presumption of validity implies that the Patent Examiner believed the patent to be valid when it issued.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

HN43[] **Authority to Act, Apparent Authority**

A principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent, if the representation is: (a) authorized; (b) apparently authorized; or (c) within the power of the agent to make for the principal. The principal's liabilities do not depend upon the theory of respondeat superior but upon the reason underlying liability upon authorized or apparently authorized contracts.

Evidence > Admissibility > Circumstantial & Direct Evidence

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Evidence > Inferences & Presumptions > Inferences

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN44[] **Admissibility, Circumstantial & Direct Evidence**

Where clear and convincing circumstantial evidence establishes that, at the very least, a patentee's behavior exhibited a state of mind so reckless as to the consequences that it is held to be the equivalent of intent, such circumstantial evidence is sufficient to establish the intent element of common-law fraud. Intent need not be proven by direct evidence; it is most often proven by a showing of acts, the natural consequences of which are presumably intended by the actor. Generally, intent must be inferred from the facts and circumstances surrounding the applicant's conduct. The drawing of inferences, particularly in respect of an intent-implicating question is peculiarly within the province of the fact finder that observed the witnesses. However, given the ease with which a relatively routine act of patent prosecution can be portrayed as intended to mislead or deceive, clear and convincing evidence of conduct sufficient to support an inference of culpable intent is required. While intent to deceive the Patent and Trademark Office (PTO) may be found as a matter of inference from circumstantial evidence, circumstantial evidence cannot indicate merely gross negligence. Clear and convincing evidence must prove that an applicant had the specific intent to accomplish an act that the applicant ought not to have performed, viz., misleading or deceiving the PTO.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > Infringement Actions > Infringing Acts > General Overview

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > ... > Defenses > Patent Invalidity > Presumption of Validity

HN45[] **Inequitable Conduct, Effect of Inequitable Conduct**

The statutory pronouncement that "a patent shall be presumed valid," *35 U.S.C.S. § 282* implies that patent examiners are presumed to issue only valid patents.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN46[] **Bad Faith, Fraud & Nonuse, Fraud**

A patent by its very nature is affected with a public interest. The far reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. Where fraud is committed, injury to the public through a weakening of the patent system is manifest.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN47[] **Inequitable Conduct, Anticompetitive Conduct**

Once the court has determined that a patentee deserves no antitrust immunity, the inquiry shifts to apply the substantive antitrust laws of the regional circuit.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Torts > Business Torts > General Overview

HN48[] **Antitrust & Trade Law, Sherman Act**

An antitrust plaintiff must allege more than simply that the defendant's wrongful behavior directly damaged the plaintiff's business, but also that the accused behavior stifled competition. The line between antitrust claims and ordinary business tort and contract claims is not always clear. Some behavior can give rise to both sets of claims; the classic example is a near monopolist who burns down the plant of his only competitor. For the plaintiff to possess antitrust standing under United States Court of Appeals for the Tenth Circuit law, it must demonstrate that the patentee's behavior caused it to suffer an "antitrust injury."

Antitrust & Trade Law > Sherman Act > General Overview

HN49[] **Antitrust & Trade Law, Sherman Act**

An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Factors to consider in evaluating antitrust standing include: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN50[] **Market Definition, Relevant Market**

It is well settled that defining the relevant market is an issue of fact for the jury to determine.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

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

HN51[] **Sherman Act, Claims**

Under United States Court of Appeals for the Tenth Circuit law, claims of attempted monopolization under *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act require four elements of proof: (1) a relevant geographic and product market; (2) specific intent to monopolize the market; (3) anticompetitive conduct in furtherance of the attempt; and (4) a dangerous probability that the firm will succeed in the attempt.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN52[] **Market Definition, Relevant Market**

In the Tenth Circuit, a relevant product market is composed of products that have reasonable interchangeability for the purposes for which they are produced. Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes. To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume. Market definition therefore hinges on economic evidence.

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

Mergers & Acquisitions Law > Merger Guidelines

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN53[] **Market Definition, Relevant Market**

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose cross-elasticities of demand are small. Not only is economic substitutability critical to market definition, but it is improper to interpret the Sherman Act to require that products be fungible to be considered in the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN54[] **Regulated Practices, Market Definition**

Market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Preservation for Appeal

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

HN55[] **Regulated Practices, Market Definition**

As a matter of Federal Circuit law, for issues unique to that court's jurisdiction, a *Fed. R. Civ. P. 50(b)* motion is necessary to preserve a sufficiency of the evidence argument for appeal. On most issues related to *Rule 50* motions, however, the Federal Circuit generally applies regional circuit law unless the precise issue being appealed pertains uniquely to patent law.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > ... > Standards of Review > Substantial Evidence > Preservation for Appeal

HN56[] **Trials, Judgment as Matter of Law**

In the Tenth Circuit, the failure of a party to move for a judgment as a matter of law (JMOL) post-verdict does not bar the party from appealing the sufficiency of the evidence, provided that the party made the appropriate motion prior to the submission of the case to the jury.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN57[] **Commercial Interference, Contracts**

Oklahoma jurisprudence teaches that one has the right to prosecute a lawful business without unlawful molestation or unjustified interference from any person, and any malicious interference with that business is an unlawful act and an actionable wrong.

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN58[] **Intentional Interference, Elements**

In Oklahoma, interference with a prospective economic advantage usually involves interference with some type of reasonable expectation of profit, whereas interference with a contractual relationship results in loss of a property right. The basic elements of tortious interference with a business relationship are the existence of a valid business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN59[] Commercial Interference, Prospective Advantage

In Oklahoma, bad faith is a prerequisite to a state-law tortious interference claim.

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN60[] Appeals, Standards of Review

Oklahoma courts must affirm a jury verdict if there is any competent evidence reasonably tending to support it.

Counsel: Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, of Oklahoma City, Oklahoma, argued for plaintiffs-appellees. With him on the brief were Greg A. Castro and Jay P. Walters. Also on the brief was Dennis D. Brown, of Tulsa, Oklahoma.

Robert A. Schroeder, Bingham McCutchen LLP, of Los Angeles, California, argued for defendant-appellant. With him on the brief were Leigh O. Linder and Kevin K. Leung. Of counsel on the brief were John P. Passarelli and David H. Roe, McGrath North Mullin & Kratz, PC LLO, of Omaha, Nebraska.

Judges: Before SCHALL, GAJARSA, and LINN, Circuit Judges.

Opinion by: GAJARSA

Opinion

[*1707] [*1344]** GAJARSA, *Circuit Judge*.

Swift-Eckrich, Inc. (d/b/a ConAgra Refrigerated Foods) ("ConAgra") appeals the judgment of the United States District Court for the Western District of Oklahoma following a jury verdict, granting the claims of Unitherm Food Systems, Inc. ("Unitherm") and of Jennie-O Foods, Inc. ("Jennie-O") (collectively, "plaintiffs") that ConAgra was liable for attempted monopolization and for tortious interference **[**2]** with prospective economic advantage, and that same court's earlier partial summary judgment finding U.S. Patent No. 5,952,027 ("the '027 Patent") invalid and unenforceable under *35 U.S.C. § 102(b)* [1] and dismissing ConAgra's counterclaim for infringement. *Unitherm Food Systems, Inc. & Jennie-O Foods, Inc., v. Swift-Eckrich, Inc., 2003 U.S. Dist. LEXIS 25665, Case No. CIV-01-347-C (W.D. Okla, March 27, 2003)*.

The district court construed the disputed claim terms in the '027 Patent correctly, and properly found the '027 Patent invalid and unenforceable for reasons of both prior use and prior sale under *35 U.S.C. § 102(b)*. The district court was also correct, under Oklahoma law, in allowing the jury to decide the issue of tortious interference **[**3]** and in accepting the jury's findings on both liability and damages. The district court erred, however, in allowing the jury to decide Unitherm's antitrust claims despite the total absence of economic evidence capable of sustaining those claims. We therefore affirm-in-part, vacate-in-part, and remand to the district court for further proceedings consistent with this opinion. **[***1708]**

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[1] *HN1*[] "A person shall be entitled to a patent unless . . . the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. . . . " *35 USCS § 102(b)*.

BACKGROUND

A. The '027 Patent

On May 11, 1998, a ConAgra engineer named Prem Singh filed a patent application for "A Method for Browning Precooked Whole Muscle Meat Products" with the United States Patent and Trademark Office ("PTO"). That application became the '027 Patent, which the PTO issued to Singh on September 14, 1999. Singh assigned the patent to ConAgra.

In early 2000, ConAgra wrote to several companies who sell equipment and/or processes for preparing and browning pre-cooked meats. ConAgra attached a copy of the '027 Patent to that letter, which included the explicit warning: "Others in the industry may approach your company regarding this patent, and we would appreciate it if you would inform them that we intend to aggressively protect all of our rights under this patent."

[*1345] Unitherm, which **[**4]** describes itself as "a manufacturer and supplier of equipment and processes used in the food industry," did not receive one of ConAgra's letters. Unitherm, however, believed--and asserts as the basis of this suit--that its President, David Howard, had conceived the process claimed in the '027 Patent and reduced it to practice as the "Unitherm process" no later than September 1993.

In July 2000, ConAgra sent out another round of letters, this set to its direct competitors in the pre-cooked meats business. ConAgra attached both a copy of the patent and a blank license to this letter, and announced that it was "making the '027 Patent and corresponding patents that may issue available for license at a royalty rate of 10 cents per pound, adjusted for inflation, to all responsible parties who have not infringed these patents." No one licensed the '027 Patent on these or any other terms.

Jennie-O (a division of Hormel), a direct ConAgra competitor in the pre-cooked meats business, received one of these letters. Some time earlier, Jennie-O had installed Unitherm equipment at its plant in Montevideo, MN, where it used the Unitherm process to brown roughly 18,000,000 pounds of meat per year. **[**5]** Upon receiving ConAgra's letter, Jennie-O undertook an investigation to determine its rights and responsibilities. Jennie-O executives later testified that their investigation led them to conclude that the Unitherm process and the '027 Patent process were one and the same, that David Howard had invented that process no later than 1993, and that unless a court invalidated the '027 Patent, Jennie-O would be infringing it by using the Unitherm process. According to Jennie-O executive Robert Wood, ConAgra's letter had "a chilling effect on any further possibility of Unitherm selling its products to Jennie-O."

On February 23, 2001, Unitherm and Jennie-O together sued ConAgra alleging numerous causes of action. Only three causes of action are relevant to this appeal: (1) a Declaratory Judgment Action for invalidity and unenforceability of the '027 Patent; (2) a state law claim for tortious interference with Unitherm's prospective economic relationships; and (3) Unitherm's *Walker Process* claim that ConAgra violated *Section 2 of the Sherman Act*. [2] All of the plaintiffs' other claims were either dismissed or otherwise resolved in ways that the parties do not appeal. In addition, ConAgra **[**6]** counterclaimed that Jennie-O infringed the '027 Patent. The district court granted Jennie-O summary judgment of noninfringement. ConAgra does not appeal the summary judgment of noninfringement.

B. Summary Judgment **[**7]** *of Invalidity*

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[2] ***HN2***[] *Section 2 of the Sherman Act* defines the substantive violation of attempted monopolization. It states, in pertinent part: ***HN3***[] "Every person who shall . . . attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." *15 U.S.C. § 2*. ***HN4***[] Private antitrust suits, including this one, technically proceed under *Section 4 of the Clayton Act*, which states, again in pertinent part: ***HN5***[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in . . . district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15(a)*.

Both parties moved for dismissal of and/or for summary judgment on various claims. The district court first considered the plaintiffs' claim that the '027 Patent is invalid and unenforceable under *§ 102(b)*. The '027 Patent includes 36 claims. Claims 1 and 20 are independent. The **[*1346]** other 34 claims are dependent. The independent claims read:

> 1. A process for browning precooked, whole muscle meat products comprising: coating a browning liquid pyrolysis product onto at least a portion of the surface of a precooked whole muscle meat product; and then exposing the coated surface to an energy source and selectively heating the coated surface of the whole muscle meat product at a temperature **[***1709]** and for a time sufficient to develop a *golden-brown color* on the exposed surface, without substantial shrinking the precooked, whole muscle meat product.

'027 Patent, col. 8, ll. 4-14 (emphasis added).

> 20. A process for browning a precooked chicken breast or a turkey breast comprising: coating at least a portion of the surface of a precooked chicken breast or a precooked turkey breast with from about 0.05 to about 1.0 wt. %, based on the weight of the breast, **[**8]** of a browning liquid pyrolysis product obtained from hardwoods or sugars; and then selectively heating the coated surface of the breast in an environment having a temperature greater than about 60[deg] C. with energy provided by a circulating air oven, an impinging air oven, a laser light source, a medium wavelength energy infra red radiation source or a source of microwave radiation for a time sufficient to develop a *golden-brown color* on the coated surface, where the shrinkage of the precooked, whole muscle meat product is less than 4 wt. % based on the initial weight of the meat product.

'027 Patent, col. 9, ll. 17-33 (emphasis added). All of the remaining claims represent minor variations on these themes; they vary heat source temperatures, core meat temperatures, amounts of shrinkage, browning liquids for pyrolysis, amounts of browning product, masking/flavoring agents, and energy sources.

Though ConAgra, in its brief opposing the motion for summary judgment, stressed the importance of having the district court construe all disputed claim limitations, it failed either to identify disputed claim terms or to submit specific interpretations of claim terms. Instead, **[**9]** ConAgra countered the plaintiffs' interpretation of the claim language with little other than a sweeping objection. The sole claim term in the '027 Patent that ConAgra disputed explicitly was "golden brown." Nevertheless, ConAgra argues on appeal that "claim construction could not be properly addressed without a separate hearing, given stringent page limitations. . . . "

The district court provided a formal construction for only the single term that ConAgra had actually disputed: "golden brown." ConAgra contends (and the plaintiffs do not dispute) that "the 'golden-brown' limitation is obviously the heart of the '027 patent." The heart of the dispute over this term both below and on appeal, in turn, is whether or not the proper construction of "golden brown" flows from the term's plain meaning. The plaintiffs argued that it does. ConAgra, on the other hand, noted that the patent's five illustrative examples all included Hunter-Lab Color Meter measurements to describe color, asserted that construction according to plain meaning was therefore misplaced, and proposed a more technical definition gleaned from the examples.

The district court first reviewed the intrinsic evidence to determine **[**10]** that "the '027 ***HN6***[] patentee did not act as his own 'lexicographer' and failed to specifically define the term 'golden brown.' Thus, the Court **[*1347]** views the term 'golden brown' with its plain meaning to one of skill in the art." Having failed to find a precise meaning in the intrinsic evidence, the district court turned to *Webster's Third New International Dictionary* 975 (1986) as a source of plain meaning, and formally construed "golden brown" as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust."

Given that claim construction, the district court next considered whether or not the Unitherm process and the patented process were the same process. The district court described the Unitherm process in detail, compared the voluminous documentary evidence describing the Unitherm process to the individual claim limitations claimed in the '027 Patent, reviewed what it characterized as undisputed evidence of prior sales and concluded that the '027 Patent "describes a process that was both on sale and in public use prior to May 11, 1997. Thus, the Court finds that the 1999 **[**11]** issuance of the '027 Patent was in error." The district court granted the plaintiffs' motion for summary judgment of invalidity and unenforceability for reasons of both prior use and prior sale under *§ 102(b)*, and consequently also granted Jennie-O's motion for summary judgment of noninfringement on the grounds that the '027 Patent is invalid and unenforceable.

C. Antitrust

Both plaintiffs also claimed that ConAgra's behavior in securing and enforcing the '027 Patent violated the antitrust laws. ConAgra moved to have Unitherm's claim dismissed for lack of antitrust standing, and Jennie-O's **[***1710]** claim dismissed for lack of cognizable antitrust injury. The district court considered both of these motions at its summary judgment hearing, and determined that the plaintiffs had pled a viable claim, citing the Supreme Court's *Walker Process* decision:

> ***HN7***[] The enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2 of the Sherman Act* provided the other elements necessary to a *§ 2* case are present. In such event the treble damage provisions of *§ 4 of the Clayton Act* would be available to an injured party.

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965). **[**12]** The district court then ruled that Unitherm, but not Jennie-O, had antitrust standing because first, as ConAgra's direct competitor for sales of browning/smoking processes, Unitherm was susceptible to the types of injuries that the antitrust laws are supposed to prevent, and second, ConAgra's threats to enforce its patents could cause those injuries. The district court dismissed Jennie-O's antitrust claim, but allowed Unitherm's claim to proceed to trial. Jennie-O has not appealed the dismissal.

At the end of the trial, the judge gave the jury various instructions concerning ***antitrust law***. Of particular relevance to the issues raised on appeal, Jury Instruction number 11 defined the relevant market:

> Monopoly power must be found to exist within an economically meaningful market. Plaintiff asserts the relevant market consists of the browning process defined in the 027 patent. It is for you to determine if Plaintiff's definition is proper. . . The product market consists of processes that have reasonable interchangeability for the purposes for which they are developed when price, use, and qualities are considered. . . .

Jury Instruction number 14 defined antitrust injury: **[**13]**

> Plaintiff must establish that it was injured as a result of Defendant's alleged **[*1348]** attempt to gain a monopoly. . . . To establish injury, Plaintiff must prove that some damage flowed to Unitherm as a result of Defendant's alleged attempt to gain a monopoly. . . . It is enough if Plaintiff proves that the alleged attempt to gain a monopoly was a material cause of its injury.

The verdict form simply asked the jury to find for plaintiff Unitherm or for defendant ConAgra on the claim of attempted monopolization. The jury returned a verdict for Unitherm.

D. Other Claims and Damages

The district court proceedings led to final judgments on all claims. In addition to the antitrust claims, the court also allowed the plaintiffs to proceed to trial on their claims of tortious interference with prospective economic relationships and of actual or constructive fraud on Unitherm. The jury found that ConAgra was liable for tortious interference with prospective economic relationships, but not for fraud on Unitherm. Unitherm has not appealed the finding of no fraud.

The jury then awarded Unitherm $ 18 million in antitrust damages ($ 6 million, trebled), $ 2 million for ConAgra's **[**14]** tortious interference with their prospective economic advantage, and $ 2 million in punitive damages consequent to the tortious interference. Because the parties had stipulated that antitrust damages would subsume any damages assessed for tortious interference, the district court entered judgment for $ 18 million plus applicable interest. Because the ***HN8***[] antitrust laws also provide for reasonable attorneys fees, the court awarded the plaintiffs an additional $ 1,022,445. ConAgra timely appealed. We have jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(1).

DISCUSSION

A. Standard of Review

This appeal requires us to consider a number of different issues, and raises a number of questions concerning choice of law and standard of review. The district court granted the plaintiffs' summary judgment motion to find the '027 Patent invalid and unenforceable under *both* the prior sale and prior use bars of § 102(b). **HN9**[] We review all grants of summary judgment de novo, construing the facts in the light most favorable to the non-movant. *Liquid Dynamics Corp. v. Vaughan Co., 355 F.3d 1361, 1367 (Fed. Cir. 2004)*. **HN10**[] Summary judgment is appropriate **[**15]** when there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

HN11[] Prior use under *§ 102(b)* includes any use of the claimed invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor. *Netscape Communications Corp. v.* ***[***1711]*** *Konrad, 295 F.3d 1315, 1320 (Fed. Cir. 2002)*. Whether a patent is invalid due to a *§ 102(b)* public use is a question of law based on underlying questions of fact. *Id.*

Our standards for reviewing a district court's finding of *§ 102(b)* prior sale are similar: **HN12**[] "In order to invalidate a patent under the on-sale bar of *35 U.S.C. § 102(b)*, an accused infringer must demonstrate by clear and convincing evidence that there was a definite sale or offer to sell more than one year before the application." *3M v. Chemque, Inc., 303 F.3d 1294, 1301 (Fed. Cir. 2002)*. "A determination that a product was placed on sale prior to the critical date is a conclusion **[**16]** of law based on underlying findings of fact. We review the ultimate determination de **[*1349]** novo, and the underlying factual findings for clear error." *Linear Tech. Corp. v. Micrel, Inc., 275 F.3d 1040, 1047 (Fed. Cir. 2001)*.

HN13[] Taken together, then, we must review the district court's summary judgment of invalidity and unenforceability by considering whether the facts, viewed in the light most favorable to ConAgra, nevertheless provide clear and convincing evidence of either (or both) prior use or prior sale. *See* *Linear Tech., 275 F.3d at 1047*; *Liquid Dynamics, 355 F.3d at 1367*.

The district court also entered judgment against ConAgra after the jury found antitrust liability on Unitherm's *Walker Process* claim. **HN14**[] We apply Federal Circuit law to all antitrust claims premised on the bringing of a patent infringement suit. *Nobelpharma AB v. Implant Innovations, 141 F.3d 1059, 1068 (Fed. Cir. 1998)* (en banc in relevant part). Whether a patentee's conduct in procuring or enforcing a patent is sufficient to strip its immunity from the antitrust laws is therefore a legal question that we review de novo under Federal Circuit law. **[**17]** *Id.* We apply the law of the regional circuit, in this case, the Tenth Circuit, to the elements of antitrust claims that are not unique to patent law. *Id.* These elements include but are not restricted to considerations of antitrust standing, market definition, antitrust injury, and damages. *Id.*

HN15[] The Tenth Circuit recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to de novo review. *Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, 1253-1254 (10th Cir. 2003)*; *Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 389 (10th Cir. 1985)*. Market definition and antitrust injury, on the other hand, are intensely factual determinations. *See e.g.*, *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 482, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* ("The proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* ("To survive petitioners' motion for summary judgment, respondents must establish **[**18]** that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury."). We must therefore review the evidence supporting the jury's necessary findings of a relevant antitrust market and of antitrust injury.

HN16[] The Tenth Circuit limits the review of a jury verdict challenged on appeal to

> determining whether the record--viewed in the light most favorable to the prevailing party--contains substantial evidence to support the jury's decision. The jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in evidence, and reaching ultimate conclusions of fact.

Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 959 (10th Cir. 2002). ***HN17***[] In conducting our review for substantial evidence, we must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)*.

This same standard for reviewing a jury verdict **[**19]** applies to the jury's finding that ConAgra was liable for tortious interference with prospective economic advantage, a state law question. ***HN18***[] We review state law causes of action under the applicable state law for matters not committed to this court's exclusive jurisdiction, *Univ. of W. Va. v.* ***[*1350]*** *Van Voorhies, 278 F.3d 1288, 1296 (Fed. Cir. 2002)*, here the laws of Oklahoma. ***HN19***[] Oklahoma courts must affirm a jury verdict if there is any competent evidence reasonably tending to support it. *Computer Publ'ns., Inc. v. Welton, 2002 OK 50, 49 P.3d 732, 735 (Okla. 2002)*. This standard is unchanged even if the jury awards damages in amounts inconsistent with its finding of liability for tortious interference. *See* *Pine Island RV Resort, Inc. v. Resort Mgmt., 1996 OK 83, 922 P.2d 609, 615 (Okla. 1996)*. **[***1712]**

B. Claim Construction

Neither ConAgra's generalized request that the district court conduct a *Markman* hearing nor its insistence on appeal that many complex issues lurk in various unnamed claim terms creates a disputed issue of material fact. As noted, the district court construed the only term that ConAgra disputed explicitly: "golden brown. **[**20]** " Presumably, all other claim terms were undisputed because one of ordinary skill in the art would understand their plain meanings. ***HN20***[] In the context of jury instructions, we have doubted "that *Markman* requires the trial judge to instruct as to an undisputed 'claim construction' for every term, by simply parroting the words of the claim. . . ." *U.S. Surgical Corp. v. Ethicon, Inc., 103 F.3d 1554, 1567 (Fed. Cir. 1997)*. We doubt even more strongly that a district court is obliged to construe undisputed claim terms prior to issuing a summary judgment of invalidity. *See also* *PSC Computer Prods., Inc. v. Foxconn Int'l, Inc., 355 F.3d 1353, 1357* ("Although an infringement analysis typically begins with claim construction, the district court here did not construe the claims. . . because their meaning is not disputed."). ConAgra's attempt to preserve its right to identify new "disputed" claims on appeal by requesting a generalized *Markman* hearing must therefore fail. *See* *United States Surgical, 103 F.3d at 1567*.

As to the content of the district court's construction, colors can indeed pose challenging construction tasks. At one level, **[**21]** they are commonly used terms with well-accepted plain definitions that rarely need construction. At another, they are precise scientific terms corresponding to very specific portions of the spectrum that require precise definitions and constructions. ConAgra argued below--and argues again on appeal--that the court should extract the range of Hunter-Lab Color Meter measurements from the '027 Patent's examples, and construe the term "golden brown" to include colors falling between "about" the low end and the high end of the illustrated ranges.

This dispute follows a classic pattern. The district court found no specific definition in the intrinsic evidence, and used a dictionary to find the term's plain meaning; ConAgra would have us extract a more technical construction by reading limitations into the claims from the examples. We discussed both the nature and the appropriate resolution of such disputes in *Texas Digital Systems v. Telegenix, Inc., 308 F.3d 1193, 1202-04 (Fed. Cir. 2002)*:

> ***HN21***[] It has been long recognized in our precedent and in the precedent of our predecessor court, the Court of Customs and Patent Appeals, that dictionaries, encyclopedias and treatises **[**22]** are particularly useful resources to assist the court in determining the ordinary and customary meanings of claim terms. . . .

> [But] the intrinsic record also must be examined in every case to determine whether the presumption of ordinary and customary meaning is rebutted. . . . [This] presumption . . . will be overcome where the patentee, acting as his or her own lexicographer, has *clearly set forth an explicit definition of the term different from its ordinary meaning*. Further, **[*1351]** the presumption also will be rebutted if the inventor has disavowed or disclaimed scope of coverage, by using *words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.* . . .

Id. (emphasis added).

The district court here did not consult a dictionary prior to searching the intrinsic evidence for a definition. To the contrary, the district court explicitly concluded that "the '027 patentee did not act as his own 'lexicographer' and failed to specifically define the term 'golden brown'" as a *precursor* to concluding that the proper construction of "golden brown" flowed from its plain meaning. Given that conclusion, the district court **[**23]** *then* consulted a dictionary to affix a legal definition at least somewhat more precise than an intuitive understanding of a color. The district court's approach is proper. ***HN22***[] We have often noted that "[judges may] rely on dictionary definitions when construing claim terms, so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." *Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1584 n.6 (Fed. Cir. 1996)*. Such is the case here; the dictionary definition that the district court adopted did not contradict any definition that one of ordinary skill in the art could ascertain from the intrinsic evidence in the record.

HN23[] The district court's adoption of a plain meaning construction is therefore presumptively correct. To overcome that presumption, ConAgra must demonstrate that the intrinsic evidence provides both a clear and explicit **[***1713]** disclaimer of the plain meaning and substitutes a more specific, technical construction of "golden brown." *See* *Tex. Digital, 308 F.3d at 1203*. ConAgra's suggestion that we glean numeric ranges from examples represents neither clear nor explicit **[**24]** disavowal of the common meaning. In fact, the examples are precisely what they purport to be: *examples* of Hunter-Lab Color Meter measurements falling within the commonly understood range of "golden brown." ConAgra does little other than "invite[] a violation of our precedent counseling against importing limitations into the claims." *Id. at 1204*.

We recently reversed a district court's claim construction for doing precisely as ConAgra urges--reading a limitation from an example into a claim term:

> ***HN24***[] Because the plain language of the claim was clear and uncontradicted by anything in the written description or the figures, the district court should not have relied upon the written description, the figures, or the prosecution history to add limitations to the claim. Under such circumstances, relying on the written description and prosecution history to reject the ordinary and customary meanings of the words themselves is impermissible.

Liquid Dynamics, 355 F.3d at 1368 (citations omitted). This admonition was hardly new. We have often stated that while . . . claims are to be interpreted in light of the specification and with a view **[**25]** to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims. We recognize that there is sometimes a fine line between reading a claim in light of the specification, and reading a limitation into the claim from the specification.

Comark Communications v. Harris Corp., 156 F.3d 1182, 1187 (Fed. Cir. 1998) (citations omitted). *See also* *CCS Fitness, Inc. v. Brunswick Corp., 288 F.3d 1359, 1366 (Fed. Cir. 2002)* (explaining that ***HN25***[] a patentee cannot rebut the presumption of ordinary meaning "simply by pointing to the preferred embodiment or other structures or **[*1352]** steps disclosed in the specification or prosecution history").

In short, the district court properly considered all intrinsic evidence before determining that none of it could overcome the presumption favoring plain meaning, and only then turned to a dictionary to affix the plain meaning that one of ordinary skill in the art would assign to the color "golden brown." The district court therefore correctly construed the only disputed term according to its plain meaning as one of ordinary skill in the art would understand it, and we affirm its **[**26]** claim construction.

C. Invalidity and Unenforceability

ConAgra argues that the district court erred by ignoring numerous disputed facts that should have precluded its entry of summary judgment of invalidity and unenforceability. The district court, however, considered undisputed evidence that Unitherm had entered into the record, and concluded that Unitherm's enumeration of the parallels between the Unitherm process and the '027 Patent's process succinctly demonstrated that the two processes are one and the same. This undisputed evidence combined contemporaneous correspondence, color photographs, witness testimony, and promotional videos. Together, it established numerous points of identity between the Unitherm process and the patented process.

The evidence showed that in 1993, Unitherm demonstrated and attempted to sell its process to Rocco Foods, Bilmar, Carolina Turkeys, *and ConAgra*. These demonstrations were performed in Elk Grove, Illinois and included: removing purge from and drying precooked, whole muscle turkey and ham products; the use of Maillose; quickly conveying products dipped in browning liquid pyrolysis products through Unitherm's RapidFlow circulating air **[**27]** oven over a range of temperatures (250-350 [degree] C) to demonstrate any shade of naturally baked, smoked, or roasted golden-brown desired with minimal shrinkage; applying the pyrolysis products at times and concentrations providing 0.05-1.0 wt. % and 0.15-0.3 wt. % pick-up; shrinkage of as little as 1% or less; as little as 1 [degrees] C or less increase in core temperature; mixtures of broth and Maillose or liquid smoke in broth concentrations of 5% and higher; and core temperatures remaining below 5 [degrees] C (41 [$0degrees F).

These demonstrations alone proved Unitherm's prior public use of every limitation of independent Claims 1 and 20. The process of Claim 1 browned muscle meats by coating them with a pyrolysis product, and then exposing them to an energy source for a time and at a temperature sufficient for them to become golden brown, without substantial shrinkage. *See* '027 Patent, col. 8, ll. 4-14. The **[***1714]** similar process of Claim 20 browned chicken or turkey breasts, but also specified that the pyrolysis product had to be obtained from hardwoods or sugars, and added specificity to the amount of pyrolysis product and the allowable amounts of shrinkage. *Id.* **[**28]** at col. 9, ll. 17-33. Maillose is a sugar derivative, and the 1993 demonstrations met both the pyrolysis usage and the allowable shrinkage specified in Claim 20.

Unitherm did not, however, cease demonstrating its process in public in 1993. Between 1994 and the critical date of May 11, 1997, Unitherm's demonstrations to *ConAgra*, Carolina Turkeys, Hudson Foods (now Willow Brook), Jennie-O, Foster Farms, Perdue, Plainville, and Wilson Foods involved (in various combinations): temperatures of 250 [degrees] F and higher; dip times of 10-70 seconds in 20-70% Maillose or liquid smoke solutions; measured liquid pickup amounts of 0.05% and higher; the use of infrared energy for purge removal and drying; and the achievement of any **[*1353]** shade or darkness of golden-brown desired. One of Unitherm's presentations to Perdue explained that "by altering dwell time or temperature, you dial in the degree of color you require," implying at least much of the variability captured in the various '027 Patent claims.

Unitherm also prepared promotional videos in 1993 and 1996. The 1993 video includes demonstrations of precooked, whole muscle turkey breasts and hams dipped in Maillose or liquid smoke and **[**29]** then conveyed through the RapidFlow oven. To broadly demonstrate the ability to produce any shade desired, the video shows product colors matching light oven-roasted, medium oven-roasted, Black Forest oven-roasted, and smoked ham and smoked, skinless turkey. The video notes that a spray station can be added for smoking, flavoring, or enhancing product browning. Unitherm distributed approximately 500 copies of this video throughout the industry.

The 1996 videos showed whole muscle ham logs in a tub of Maillose, conveyed through the RapidFlow oven for 7.5 minutes to provide an oven-roasted, golden-brown color. The videos also showed one and then six Maillose-dipped, precooked whole muscle turkey breasts being delivered through the oven to produce a golden-brown color. Unitherm distributed approximately 500 copies of these videos in 1996, with no obligation of secrecy. Taken together, Unitherm's overwhelming evidence of prior public use captures every limitation in every one of the '027 Patent's claims.

Unitherm also submitted evidence that, prior to the critical date of May 11, 1997, it had sold both its RapidFlow ovens and the process that it had been demonstrating. In addition to **[**30]** its 1995 sale to Jennie-O, Unitherm proved sales to Thorn Apple in 1995 and to Hudson Foods in 1996. Unitherm further proved that Plantation ordered a Unitherm system on February 7, 1997 and that Foster Farms ordered a system and made its first payment by May 9, 1997. Jennie-O's Robert Wood testified that the process that Jennie-O purchased from Unitherm "was able to prepare the surface, apply liquid smoke and set liquid smoke." The demonstrations to ConAgra alone suggest that ConAgra was aware of the Unitherm process for at least several years prior to the critical date.

ConAgra does not dispute this evidence, but rather insists that material factual disputes about the identity of its patented process and the Unitherm process remain--and that therefore the district court should not have entered summary judgment of either prior use or prior sale. Even on appeal, however, ConAgra appears unable to point to any specific disputed material fact. Broadly speaking, ConAgra's briefs to this court either mischaracterize Unitherm's general desire to protect its trade secrets as evidence that the Unitherm process was a trade secret or attempt to demonstrate that not every use of Unitherm's **[**31]** ovens was consistent with the patented process.

First, ConAgra argues that the district court's reliance on Unitherm's promotional videos was misplaced because Unitherm itself admitted that the videos do not meet *all* of the patent claims. ConAgra cites as support a Unitherm document showing the correspondence between its videos and the '027 Patent's claim terms. In this document, Unitherm asserts that the processes demonstrated in its video meets all limitations of Claims 1-7, 10-12, 15-23, 26, 29-36, and renders Claims 8, 9, 13, 24-27 obvious under *§ 103(a)*. This purported "admission" therefore fails to account for only dependent claims 14 and 28. These two claims differ from others only in requiring a slightly more restricted temperature **[*1354]** range. This argument does not establish a material factual dispute.

Second, ConAgra asserts that Unitherm gave conflicting testimony concerning whether or not its process remained a trade secret in 1998. In support, ConAgra cites Unitherm's admission that the Unitherm process **[***1715]** was not a secret, while nevertheless maintaining nondisclosure agreements with various customers and competitors and expressing a general desire to keep its trade secrets **[**32]** secret. This argument does not establish a material factual dispute.

Third, ConAgra contrasted the district court's statement that Unitherm's President, David Howard, first disclosed the Unitherm process to ConAgra in 1993 with a letter from Howard stating that Unitherm first revealed the process to ConAgra in 1995. While this discrepancy could have been significant if the critical date had been in 1994, apparent confusion between two equally invalidating dates does not qualify as *material*. This argument does not establish a material factual dispute.

Fourth, ConAgra turns to one of its own witnesses, Dr. Syed Hussain. ConAgra suggests that the district court placed great weight on a factually sparse data sheet describing Unitherm's 1993 demonstrations to Dr. Hussain. While these data sheets are, in fact, less than clear, so is the district court's reliance on them. ConAgra has not pointed to a specific place in which the district court found these sheets particularly significant. ConAgra also cites to Hussain's testimony that he could not remember whether or not the demonstrated Unitherm process produced a "golden brown" finish. It is unclear why Hussain's inability to recall **[**33]** a color should create a dispute. This argument does not establish a material factual dispute.

Fifth, ConAgra asserts that the district court ignored triable issues of fact by pointing to experiments that do not show that the Unitherm process met the limitations of the '027 Patent. While this argument is true, there is no particular basis for its conclusion that these experiments *did not* meet the limitations. This argument does not establish a material factual dispute.

Sixth, ConAgra cites from the testimony of a Hudson executive. Unitherm's sale of both product and process to Hudson was among the district court's key undisputed prior sales. ConAgra argues that the witness lacked a personal knowledge of the details of the process. ConAgra also points to some handwritten documents that are difficult to read and whose significance is unclear. ConAgra does not assert that they establish a material dispute, but rather that they fail to provide solid evidence. Again, even if true, this argument does not establish a material factual dispute.

In short, Unitherm's undisputed evidence proved that its own process included each and every limitation of every claim of the '027 Patent. ConAgra's **[**34]** evidence failed to establish even a single material factual dispute. The district court correctly determined that the undisputed facts--Unitherm's various demonstrations to ConAgra and its sales to Hudson, Jennie-O and other suppliers--constituted clear and convincing evidence of *both* prior use and prior sale. The claim language in the '027 Patent was straightforward, a detailed construction was unnecessary, and the district court correctly granted summary judgment. *See 3M*, 303 F.3d at 1301. The '027 Patent is invalid and unenforceable by reason of prior use and sale under § 102(b).

D. Antitrust

(i) Elements

It is important to outline the elements of a *Walker Process* claim before considering ConAgra's appeal of the jury verdict. Unitherm **[*1355]** alleged that ConAgra attempted to enforce the '027 Patent, which it obtained by defrauding the PTO. If true, ConAgra would lose its exemption from the antitrust laws. *Walker Process, 382 U.S. at 177*. On the same basis, ConAgra's good faith attempts to behave in accordance with the patent laws would furnish a complete defense, and ConAgra would retain its antitrust exemption; ConAgra would have done **[**35]** little but attempt to enforce a patent right which it reasonably believed itself to possess. *Id.*

The elimination of ConAgra's antitrust immunity would mark only the beginning of the antitrust inquiry, not its endpoint.

> ***HN26***[] To establish monopolization or attempt to monopolize a part of trade or commerce under *§ 2 of the Sherman Act*, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition.

Id. It may be that the patented process "does not comprise a relevant market. There may be effective substitutes . . . which do not infringe the patent. This is a matter of proof, as is the amount of damages . . ." *Id. at 178*.

HN27[] In order to prevail on its *Walker Process* claim, Unitherm must therefore establish: that ConAgra attempted to enforce the '027 Patent; that the '027 Patent issued because ConAgra defrauded the PTO; that ConAgra's attempted **[***1716]** enforcement threatened to lessen competition in a relevant antitrust market; that Unitherm suffered **[**36]** antitrust damages; and that all other elements of attempted monopolization are met. *Id.* These requirements frame our antitrust inquiry.

(ii) Choice of Law

ConAgra appeals the jury's antitrust verdict, claiming that Unitherm did not produce evidence sufficient to support findings of a relevant antitrust market, a dangerous probability of success, antitrust injury, or standing--all critical elements of a *§ 2* attempted monopolization claim. *See generally* *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 157 L. Ed. 2d 823, 540 U.S. 398, 124 S. Ct. 872 (2004)*. Unitherm counters that it provided the jury with "substantial evidence," but does not point to any.

Both parties cite Tenth Circuit law to guide our analysis. This pointer is only partially correct; ***HN28***[] Federal Circuit law governs all antitrust claims premised on the abuse of a patent right. *Nobelpharma, 141 F.3d at 1067-68*. We first announced this rule of Federal Circuit ***antitrust law*** as a unanimous en banc court in 1998. *Id. at 1067 n.5*. We explained that in all future antitrust cases, we would apply the same basic choice of law rule that we **[**37]** apply to all other matters--and for precisely the same reason. *Id. at 1067-68*. Because this court is in the best position to impose uniformity on the patent laws, we now decide issues raised in an antitrust claim that are unique to the patent law under Federal Circuit law, and all other issues under the law of the relevant regional circuit--in this case, the Tenth Circuit. *Id. at 1067-68*. The parties' confusion about the choice of law, however, suggests that we need to clarify both the reasons that we introduced Federal Circuit ***antitrust law*** and the relationship between our law and that of the regional circuits. [3]

[38]** ***HN30***[] **[*1356]** The fundamental question of Federal Circuit ***antitrust law*** is whether or when a patentee's behavior in either procuring or enforcing a patent can give rise to antitrust liability. *Id.* As a general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws. *Simpson v. Union Oil Co., 377 U.S. 13, 24, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* ***HN31***[] ("The patent laws which give a . . . monopoly on making, using, or selling the invention are in pari materia with the antitrust laws and modify them pro tanto.").

But this immunity is hardly absolute. Nearly forty years ago, the Supreme Court recognized that an inventor who obtains a patent by defrauding the patent office deserves no immunity. *Walker Process, 382 U.S. at 174*. This recognition fell well within a long-established understanding of the limits of patent protection, as reflected in the Supreme Court's much earlier announcement that patentees who attempt to leverage their appropriately obtained patents beyond the claimed product lose the right to enforce their patents. *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 513, 61 L. Ed. 871, 37 S. Ct. 416, 1917 Dec. Comm'r Pat. 391 (1917).* **[**39]** The Supreme Court subsequently refined this notion of patent misuse and its consequent penalties, so that it "is now, of course, familiar law that the courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or 'purged' as the conventional saying goes." *United States Gypsum Co. v. Nat'l Gypsum Co., 352 U.S. 457, 465, 1 L. Ed. 2d 465, 77 S. Ct. 490 (1957)*. More broadly, ***HN32***[] "the Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next." *Eastman Kodak, 504 U.S. at 479 n.29*.

The Supreme Court itself noted the policy consistency between penalizing patent misuse and stripping antitrust immunity from patentees who defraud the PTO. *Walker Process, 382 U.S. at 176*. ***HN33***[] As a well established matter **[***1717]** of law, then, patentees acting under the color of their patents may nevertheless be liable if they engage in any one of a number **[**40]** of improper activities. *See, e.g.*, *Eastman Kodak, 504 U.S. at 479 n.29*; *CSU, L.L.C. v. Xerox Corp., 203 F.3d 1322, 1326 (Fed. Cir. 2000)* ("The patentee's right to exclude, however, is not without limit."); *Zenith Elecs. Corp. v. Exzec, Inc., 182 F.3d 1340, 1355 (Fed. Cir. 1999)* (holding that a patentee's bad faith allegations that a competitor is infringing a valid patent may strip the patentee of the liability exemptions that the patent law generally provides patentees). In short, the policy rationale behind stripping selected patentees of their antitrust immunity is straightforward.

HN34[] The gist of a *Walker Process* claim

> **[*1357]** is that since [the patentee] obtained its patent by fraud it cannot enjoy the limited exception to the prohibitions of *§ 2 of the Sherman Act*, but must answer under that section and *§ 4 of the Clayton Act in* treble

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[3] The Supreme Court has ruled that ***HN29***[] the regional circuits retain appellate jurisdiction over cases in which the complaint does not allege a claim arising under federal patent law, but the answer does contain a patent-law counterclaim. *Holmes Group v. Vornado Air Circulation Sys., 535 U.S. 826, 827, 153 L. Ed. 2d 13, 122 S. Ct. 1889 (2002)*. As a result, antitrust claims met with counterclaims of infringement may not come before this court. If the resolution of the dispute rests, in part, upon a determination of whether or not a patentee's behavior stripped it of its antitrust exemption, the appellate court hearing the matter will have to decide whether to apply Federal Circuit law or risk disturbing "Congress's goal of ensuring patent-law uniformity," *id.*, by applying its own law The choice of law rule that we announced in *Nobelpharma, 141 F.3d at 1067-68*, is a sensible approach to preserving the uniformity of the patent law without regard to the appellate forum: Federal Circuit law determines whether or not the patentee enjoys antitrust immunity under the patent laws, while regional circuit law determines the other elements of the antitrust claim.

> damages to those injured by any monopolistic action taken under the fraudulent patent claim. Nor can the interest in protecting patentees from "innumerable vexatious suits" be used to frustrate the assertion of rights conferred by the antitrust laws. It must be remembered that we deal **[**41]** only with a special class of patents, i.e., those procured by intentional fraud.

Walker Process, 382 U.S. at 176. *Walker Process* claims therefore relate to a single type of behavior capable of stripping a patentee's patent-law immunity and thereby exposing the patentee to liability under other laws. Though we cannot enumerate the full range of activities capable of effecting such a loss of immunity, the determination of *which* actions can cause a patentee or a patent applicant to lose the general protection of the patent law and to risk liability for damages is clearly an issue unique to the patent law--and therefore inappropriate for resolution under the potentially varying interpretations of the regional circuits. *Nobelpharma, 141 F.3d at 1067-68*.

As a result, ***HN35***[] Federal Circuit ***antitrust law*** centers on a single critical question: What behavior by the patentee in procuring or in enforcing a patent can strip the patentee of antitrust immunity? When the courts consider a patentee's behavior under Federal Circuit law and determine that it involved nothing more than an appropriate attempt to procure a patent and an appropriate attempt to **[**42]** enforce a legitimately obtained patent, the antitrust inquiry is over with respect to the behavior at issue. [4] When, on the other hand, the courts consider a patentee's behavior under Federal Circuit law and determine that it involved either an inappropriate attempt to procure a patent or an inappropriate attempt to enforce a patent, the remainder of the antitrust inquiry must proceed under the law of the regional circuit. *Id. at 1068*.

[43]** (iii) Patent Enforcement

The present matter implicates ConAgra's behavior in *obtaining* the '027 Patent. Unitherm's allegations differ from standard *Walker Process* claims in that Unitherm raised them as ancillary to its Declaratory Judgment Action, rather than as a counterclaim to an allegation of patent infringement. *See* *id. at 1068* ***HN37***[] ("An antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit."). The logic governing *Walker Process* claims, however, suggests that we should treat claims brought ancillary to Declaratory Judgment Actions precisely as we treat counterclaims, *see* *Walker Process, 382 U.S. at 176-77*, though this atypical posture does raise an additional question. ***HN38***[] Strictly speaking, a *Walker Process* claim is premised upon "the ***[*1358]*** *enforcement* of a patent procured by fraud on the Patent Office." *Id. at 174*. A plaintiff may bring a Declaratory Judgment Action of patent invalidity, however, even in the absence of overt enforcement actions.

> When the defendant's conduct, including its statements, falls **[**44]** short of an express charge, one must consider the "totality of the circumstances" in determining whether that conduct meets the first prong of the test [for jurisdiction to hear a Declaratory Judgment Action]. If the circumstances warrant, a reasonable **[***1718]** apprehension may be found in the absence of any communication from defendant to plaintiff. If, on the other hand, defendant has done nothing but obtain a patent, there can be no basis for the required apprehension, a rule that protects quiescent patent owners against unwarranted litigation.

Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 736 (Fed. Cir. 1988). We therefore hold that, as a matter of Federal Circuit ***antitrust law***, the standards that we have developed for determining jurisdiction in a Declaratory Judgment Action of patent invalidity also define the minimum level of "enforcement" necessary to expose the patentee to a *Walker Process* claim for attempted monopolization.

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[4] ***HN36***[] The patent law's pro tanto modification of the ***antitrust law***, *Simpson, 377 U.S. at 24*, extends to behavior, not to either patents or patentees. It is entirely possible for a patentee to retain its antitrust exemption with respect to some behavior while being stripped of the exemption with respect to other behavior. "Beyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law. . . . The possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United States v. Singer Mfg. Co., 374 U.S. 174, 196-197, 10 L. Ed. 2d 823, 83 S. Ct. 1773, 1963 Dec. Comm'r Pat. 547 (1963)*. The Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage." *Id.*

This holding adopts the reasoning that we once applied prior to our announcement of Federal Circuit ***antitrust law***, at a time that we evaluated all antitrust issues under the law of the regional circuits, [5] in affirming **[**45]** a district court's ***HN39***[] dismissal of both a Declaratory Judgment Action for invalidity and a *Walker Process* claim: "It is enough to simply point out that the same facts that compel the conclusion that [the plaintiff] failed to establish declaratory judgment jurisdiction for the district court also compel the conclusion that no reasonable fact finder could find that [the defendant] has acted to enforce [its] patent." *Cygnus Therapeutic Sys. v. ALZA Corp., 92 F.3d 1153, 1162 (Fed. Cir. 1996)*. In other words, if the patentee has done nothing but obtain a patent in a manner that the plaintiff believes is fraudulent, the courts lack jurisdiction to entertain either a Declaratory Judgment Action or a *Walker Process* claim. *See Gen-Probe Inc. v. Vysis, Inc., 359 F.3d 1376, 1379 (Fed. Cir. 2004)*.

(iv) Fraud on the PTO

Unitherm's *Walker* **[**46]** *Process* claim alleges that ConAgra attempted to enforce a patent that it obtained only because it defrauded the PTO. We have consistently explained that ***HN40***[] *Walker Process* fraud is a variant of common law fraud, *see, e.g.*, *In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 807 (Fed. Cir. 2000)*; *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998)*; *Nobelpharma, 141 F.3d at 1069-71*, and that the elements of common law fraud include:

> (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.

Spalding, 203 F.3d at 807 (citations omitted). Our determination of whether or not to strip ConAgra of its antitrust immunity therefore requires us to apply the facts of this case to each of these elements:

[*1359] The first element **[**47]** of the alleged fraud was ConAgra's relevant material representation to the PTO that Prem Singh invented the claimed process, and that he neither used it in public nor offered it for sale prior to May 11, 1997. Though the plaintiffs' have provided no direct evidence proving that either Singh or ConAgra actually made this material representation, we may nevertheless presume that Singh, the named inventor and applicant, must have reviewed the specification and signed the required declaration before the application was filed. [6] *Glaxo Inc. v. Novopharm Ltd., 52 F.3d 1043, 1051 (Fed. Cir. 1995)*. Any other conclusion would

> completely ignore[] the *requirement* that ***HN41***[] patents are applied for "in the name of the actual inventor or inventors" according to *37 C.F.R. § 1.41(a) (1983)*. The inventor(s) must submit an oath or declaration attesting that they have "reviewed and understand[] the contents of the specification" and believe **[***1719]** "the named inventor or inventors to be the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought." *37 C.F.R. § 1.63*; see also *37 C.F.R. § 1.51(a)(2)* **[**48]** .

Id. (emphasis in the original). This presumption, of course, would hold only Singh himself liable for the material misrepresentation. It is undisputed, however, that Singh filed the patent application as a ConAgra employee and

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[5] We decided *Cygnus Therapeutic Sys. v. ALZA Corp., 92 F.3d 1153, 1162 (Fed. Cir. 1996)* as a matter of Ninth Circuit law.

[6] Under normal circumstances, we would expect the prosecution history to play a critical role in proving that a patentee defrauded the PTO. The prosecution history is, after all, the record of all correspondence between the patentee and the PTO, and therefore provides the best *direct* evidence of every representation that the patentee made. In the present matter, neither party placed the prosecution history in the record. Because of this omission, the plaintiffs must build an entirely circumstantial case using inferences and presumptions. ***HN42***[] The presumption of validity implies that the Examiner believed the patent to be valid when it issued. *American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1359 (Fed. Cir. 1984)*. Regulations required the named inventor, Singh, to sign an oath attesting to his inventorship. *37 C.F.R. § 1.63*. We may therefore presume that Singh represented to the PTO that he was the process' original inventor.

assigned the patent to ConAgra. Nor is there any dispute that both Singh and numerous ConAgra colleagues and supervisors knew of Howard's demonstrations of the Unitherm process to ConAgra.

[49]** According to the *Restatement (Second) of Agency § 257*, ***HN43***[] "[a] principal is subject to liability for loss caused to another by the other's reliance upon a tortious representation of a servant or other agent, if the representation is: (a) authorized; (b) apparently authorized; or (c) within the power of the agent to make for the principal." Comment (a) explains that "the principal's liabilities do not depend upon the theory of respondeat superior but upon the reason underlying liability upon authorized or apparently authorized contracts." *Id.* The undisputed facts surrounding Singh's patent application demonstrate that he filed it as an employee of ConAgra, to whom he assigned it. These same facts therefore establish ConAgra's potential liability for any damages arising from Singh's misstatements.

The second element of the alleged fraud, the falsity of ConAgra's material representation to the PTO, is evident from the same facts that led the district court to conclude, and this court to affirm, that David Howard invented the process claimed by the '027 Patent no later than 1993, and both used it and sold it numerous times prior to the critical **[**50]** date--thereby rendering the '027 Patent invalid under *§ 102(b)*.

[*1360] The third element of the alleged fraud, ConAgra's intent to deceive, is the most difficult to prove. Nevertheless, ***HN44***[] clear and convincing circumstantial evidence establishes that, at the very least, ConAgra's behavior exhibited "a state of mind so reckless as to the consequences that it is held to be the equivalent of intent." *Spalding, 203 F.3d at 807*. Such circumstantial evidence is sufficient to establish the intent element of common-law fraud. *Id.*

> Intent need not be proven by direct evidence; it is most often proven by a showing of acts, the natural consequences of which are presumably intended by the actor. Generally, intent must be inferred from the facts and circumstances surrounding the applicant's conduct. The drawing of inferences, particularly in respect of an intent-implicating question . . . is peculiarly within the province of the fact finder that observed the witnesses. . . . However, given the ease with which a relatively routine act of patent prosecution can be portrayed as intended to mislead or deceive, clear and convincing evidence of conduct sufficient to support an inference **[**51]** of culpable intent is required. . . . While intent to deceive the PTO may be found as a matter of inference from circumstantial evidence, circumstantial evidence cannot indicate merely gross negligence. . . . Clear and convincing evidence must prove that an applicant had the specific intent to accomplish an act that the applicant ought not to have performed, viz., misleading or deceiving the PTO.

Molins plc v. Textron, 48 F.3d 1172, 1180-1181 (Fed. Cir. 1995).

Unitherm's burden at trial was therefore to present evidence that a reasonable jury could view as clear and convincing proof that ConAgra intended to defraud the PTO. *See id.* ConAgra argues on appeal that Unitherm failed to meet that burden. We must therefore review the sufficiency of Unitherm's evidence, while assuming that the jury disbelieved all evidence favorable to ConAgra. *See Reeves, 530 U.S. at 151*.

Unitherm proffered ample evidence that its personnel performed several browning demonstrations for ConAgra between September 1993 and January 1994. The key ConAgra representative at these demonstrations was Syed Hussein, ConAgra's product development manager and a co-worker **[**52]** of the named inventor, Prem Singh. At trial, on direct examination, Hussein testified that "to the best of his recollection," when he presented the product to a group of his co-workers, Singh was part of the group. Unitherm's David Howard also testified that Singh had attended a marketing seminar at which Howard personally spoke for about ninety minutes, and other Unitherm personnel provided a video demonstration of the product. This evidence demonstrates that ConAgra knew of prior uses of the process.

Unitherm also proffered ample evidence of a second round of demonstrations for ConAgra between 1995 and 1997. At his deposition, ConAgra's Arnold Mikelberg testified that shortly after becoming president of Armour Swift-Eckrich in mid-1995, he invited **[***1720]** David Howard to demonstrate his process, and that this demonstration led to further testing at ConAgra. ConAgra and Unitherm followed these tests with further discussions. On April 25, 1996, for example, Unitherm directed a fax to Singh containing drawings and schematics for a browning line. Unitherm proffered numerous other documents indicating that, at the very least, Unitherm directed detailed plans to Singh. On April 21, 1997, Howard **[**53]** wrote to ConAgra's David Liddle, noting that: "I have sold the process to four competitors. How do I get [you] to move forward?" This letter indicates **[*1361]** that ConAgra knew of prior sales, as well as the prior demonstrations.

Unitherm submitted additional documents and testimony to bolster its arguments even further. ConAgra questioned the implications of some of the documents and the accuracy of some of the witnesses' memories. ConAgra also denied that its patented process was the same as the Unitherm process, and insisted that it was impossible to know what "golden brown" meant without formal measurements. Such responses, however, cannot save ConAgra from the limited factual review that we apply to sufficiency of evidence arguments about jury findings. *Reeves, 530 U.S. at 151*.

The jury was entitled to find *all* of Unitherm's evidence credible and to disbelieve *every* assertion that ConAgra made about a disputed fact. *Id.* Viewed in this light, it is reasonable for the jury to have concluded that Singh was fully aware that his "invention" was precisely the Unitherm process that David Howard had been trying to sell to ConAgra since 1993. The jury could also **[**54]** have concluded reasonably that Singh intended to deceive the PTO by claiming that he was "the original and first inventor or inventors of the subject matter which is claimed and for which a patent is sought," *37 C.F.R. § 1.63*, when he knew that he was not.

The best evidence of the fourth element of the alleged fraud, the PTO's justifiable reliance on Singh's deception that induced PTO action, is that the PTO issued the patent. ***HN45***[] The statutory pronouncement that "a patent shall be presumed valid," *35 U.S.C. § 282* implies that patent examiners are presumed to issue only valid patents. *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1359 (Fed. Cir. 1984)*. Singh's misrepresentation of his own inventorship, and his omission of the evidence that ConAgra possessed about the Unitherm process and about Unitherm's demonstrations and sales of that process, defrauded the PTO. *See* *Nobelpharma, 141 F.3d at 1070*. Had the PTO not relied on this fraud, the Examiner would have reached the same conclusion as did the district court and this court--that David Howard had invented the claimed process no later than **[**55]** 1993, and that no valid patent could issue from Singh's application.

The fifth element of the alleged fraud, injury to the PTO and to the public that it serves, arises as a matter of course whenever the other four elements are met, because

> ***HN46***[] [a] patent by its very nature is affected with a public interest. The far reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. Where fraud is committed, injury to the public through a weakening of the Patent System is manifest.

Norton v. Curtiss, 57 C.C.P.A. 1384, 1406, 433 F.2d 779 (1970) (citations omitted).

Taken together, then, (1) ConAgra is liable for Singh's material representation to the PTO that he invented the claimed process, which had been neither used nor sold more than a year prior to filing his patent application; (2) David Howard invented the claimed process and both used or sold it before the critical date; (3) ConAgra intended to deceive the PTO by filing a patent application misrepresenting **[**56]** the material facts of inventorship; (4) The PTO relied upon ConAgra's misrepresentations to issue the '027 Patent; and (5) ConAgra's fraud injured the public through a weakening of the patent system. *Norton*, 57 C.C.P.A. at 1406. ConAgra's knowing and willful misrepresentation **[*1362]** therefore constituted fraud on the PTO. *See* *Molins, 48 F.3d at 1180-1181*; *Spalding, 203 F.3d at 807*.

Unitherm has thus met the first and most basic requirement for bringing a *Walker Process* claim. Unitherm has shown that, as a matter of Federal Circuit ***antitrust law***, ConAgra attempted to enforce a patent that it obtained through fraud on the PTO. ConAgra is therefore stripped of its antitrust immunity and susceptible to antitrust liability--provided that Unitherm can show that ConAgra's behavior met all other necessary elements of a *§ 2* claim subject to Tenth Circuit law.

(v) Standing

Federal Circuit ***antitrust law*** is directed, almost entirely, to a single question: "Whether **[***1721]** conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws." *Nobelpharma, 141 F.3d at 1068*. ***HN47***[] Once we have determined, **[**57]** as we have here, that a patentee deserves no antitrust immunity, our inquiry shifts to apply the substantive antitrust laws of the regional circuit. *Id.*

ConAgra challenges on appeal, as it did below, Unitherm's standing to bring its antitrust claim. It is widely recognized ***HN48***[] that an antitrust plaintiff must allege more than simply that the defendant's wrongful behavior directly damaged the plaintiff's business, but also that the accused behavior stifled competition. *See, e.g.*, *Ill. Brick Co. v. Illinois, 431 U.S. 720, 724, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*; *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 4 (1st Cir. 2004)*; *Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979)*. The line between antitrust claims and ordinary business tort and contract claims is not always clear. Some behavior, (according to Unitherm, ConAgra's behavior), can give rise to both sets of claims; the classic example is a near monopolist who burns down the plant of his only competitor. *See E. Food, 357 F.3d at 4*.

For Unitherm to possess antitrust standing under Tenth Circuit law, it must demonstrate that ConAgra's **[**58]** behavior caused it to suffer an "antitrust injury." *Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, 1252 (10th Cir. 2003)*.

> ***HN49***[] An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. . . . Factors to consider in evaluating antitrust standing include: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment.

Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d 874, 882 (10th Cir. 1997) (internal citations and quotations omitted). *See also Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 882 (Fed. Cir. 1985)*.

Unitherm's allegations met all six of the Tenth Circuit's enumerated factors: (1) ConAgra's attempts to block **[**59]** the "Unitherm process" by enforcing the '027 Patent caused Unitherm to lose prospective sales; (2) ConAgra's fraud of the PTO demonstrated improper intent; (3) Antitrust laws provide remedies for competition reduced in a relevant antitrust market, which Unitherm pled; (4) Enforcement of a patent right directly reduces competition; (5) A lost-sales analysis could, in theory, measure the harm; **[*1363]** and (6) Damage calculations should be neither unusually complex nor duplicative. The district court was therefore correct in ruling that Unitherm had antitrust standing and in allowing its action against ConAgra to proceed.

(vi) Market Definition

Despite possessing antitrust standing, however, Unitherm never presented any evidence that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept either its proposed market definition or its demonstration of antitrust injury. ***HN50***[] "It is well settled that defining the relevant market is an issue of fact" for the jury to determine. *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir. 1986)*. ConAgra challenges the jury's **[**60]** factual findings. We must therefore review Unitherm's proffered evidence, once again disregarding all disputed evidence favorable to ConAgra, *Reeves, 530 U.S. at 151*, to determine whether a reasonable jury could have accepted Unitherm's definition of the relevant market.

HN51[] Under Tenth Circuit law, "claims of attempted monopolization under *§ 2 of the Sherman Act* require four elements of proof: (1) a relevant geographic and product market; (2) specific intent to monopolize the market; (3) anticompetitive conduct in furtherance of the attempt; and (4) a dangerous probability that the firm will succeed in the attempt." *United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003)*. ***HN52***[] A relevant product market, in turn, is

> composed of products that have reasonable interchangeability for the purposes for which they are produced . . . Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the relevant market rests on a determination of available substitutes. . . To define a market in product and geographic terms is to say that if prices were appreciably raised **[***1722]** **[**61]** or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume. . . .

Telecor Communications., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1130-1131 (10th Cir. 2002).

Market definition therefore hinges on economic evidence. If Unitherm provided economic evidence sufficient to convince a reasonable jury of its proposed market definition and to demonstrate antitrust injury, ConAgra's appeal must fail; the district court would have been correct in allowing the jury to consider Unitherm's antitrust claim--and in accepting their conclusion. But if, on the other hand, Unitherm provided economic evidence insufficient to convince any reasonable jury that ConAgra's enforcement of the '027 Patent harmed a relevant antitrust market, the antitrust claims should never have reached the jury. We therefore review the sufficiency of the economic evidence that Unitherm proffered in support of its antitrust claim.

Unitherm's brief to this court asserts that its expert, Dr. Mangum, testified at length **[**62]** on the lack of substitutes for the patented process. Mangum's testimony, or at least the relevant excerpts in the appellate record, cannot sustain Unitherm's definition of a relevant market. Mangum defined the market as: "the process for browning precooked whole muscle products by coating with a browning agent and applying sufficient heat to brown the product without substantial shrinkage." He relied on his understanding of the **[*1364]** court's summary judgment ruling to assume that the patented process and the Unitherm process were the same process--and therefore the only one included in his market definition. Consequently, he defined the scope of the '027 Patent as coterminous with a relevant antitrust market.

Mangum identified seven technical benefits that the patented process provided, and explained that no other process could provide all seven of these benefits. This unique combination of benefits led Mangum to conclude that no substitutes exist for the patented process (a.k.a. the Unitherm process), and therefore that it defined a relevant antitrust market. He also, however, concluded that pre-cooked turkeys prepared using the patented process competed with pre-cooked turkeys not prepared **[**63]** by the patented process at the retail level, but somehow not at the wholesale level. He never explained this seeming anomaly.

Mangum did not explain the relationship between technological substitution and economic substitution. Nothing in the record addresses whether potential customers of the patented process faced with a price increase would shift to other processes offering different combinations of benefits. *Id.* This determination, however, lies at the heart of market definition in antitrust analysis. ***HN53***[] "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose cross-elasticities of demand are small." *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 613, n.31, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. Not only is economic substitutability critical to market definition, but it is improper to interpret "the Sherman Act to require that products be fungible to be considered in the relevant market." *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 394, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).* **[**64]** *See generally* U.S. Department of Justice, Merger Guidelines (1982), ch. 1.1 (describing the agencies' approach to product market definition in a merger analysis and the critical rule of *economic* substitutability).

Mangum's testimony specifically described the market in terms of technological substitutability, not economic substitutability. The scant economic evidence in the record suggests strongly that his market definition is incorrect. ConAgra's inability to attract any licensees is indicative of a lack of pricing power--*the* single most important element in defining a relevant antitrust market. ***HN54***[] "Market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output." *Eastman Kodak, 504 U.S. at 464* (citations omitted). Mangum's reliance upon technological, rather than economic, substitution is therefore a fatal flaw in establishing his proposed market definition; it left him with no economic content to sustain his relevant market.

Furthermore, on cross-examination, Mangum testified that he was unaware of anyone who had ever **[**65]** sold the process that defined his relevant market--other than tied to the sale of an oven. Mangum explicitly testified that, to the best of his knowledge, there has never been a transaction in his proposed relevant **[***1723]** market. He steadfastly refused to clarify the relationship among the market for the specific browning process that he had identified, the market for browning processes generally, and the market for ovens that enabled their owners to use either the specific browning process or browning processes more generally. He testified to a lack of **[*1365]** knowledge as to whether or not the bundling of the identified process with an oven bore any relation to the prices charged for enabling ovens. Mangum's testimony cannot sustain the narrow market that he defined and that Unitherm pleads as a relevant antitrust market.

Beyond that initial omission, Mangum's testimony on other points is short on economic content. His assessment of ConAgra's "dangerous probability of success," another critical component of an attempted monopolization claim, *Spectrum Sports v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*, essentially rests upon a tautology: Because he defined the relevant **[**66]** market as coterminous with the '027 Patent, any attempt to enforce the patent would qualify as an attempt with a dangerous probability of succeeding. He then pointed to ConAgra's counterclaim against Jennie-O and ConAgra's letters as evidence of attempted patent enforcement.

Finally, when asked about antitrust injury, Mangum pointed to the analysis of Dr. Kinrich, Unitherm's damages expert. According to Mangum, Kinrich's ability to measure damages proves that Unitherm suffered antitrust injury. Kinrich, however, "was asked to assume that the jury finds in favor of Unitherm and finds against Swift-Eckrich and compute what the damages were or would have been to Unitherm if liability is found." Kinrich's testimony gave no indication that he ever tried to differentiate harm attributable to ConAgra's *antitrust* liability from harm attributable to other allegations for which ConAgra might be liable. Nor, for that matter, did either Mangum or Kinrich try to differentiate between ConAgra's liability and other potential causes of the losses that Kinrich measured. In other words, neither Kinrich's testimony nor Mangum's testimony attempted to show any form of causality, a critical element **[**67]** needed to establish antitrust injury, *Ashley Creek, 315 F.3d at 1252*, and a point upon which the judge instructed the jury correctly.

In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its *Section 2* claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with the patent based entirely on issues of *technical* substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide any evidence capable of sustaining the jury's finding of antitrust liability. We therefore vacate the court's judgment of ConAgra's antitrust liability and the award of the consequent damages. [7]

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[7] ConAgra failed to renew its motion for judgment as a matter of law ("JMOL") after the verdict pursuant to *Federal Rules of Civil Procedure 50(b)*. Unitherm contends that ConAgra therefore waived its right to dispute the sufficiency of the evidence supporting the jury's antitrust verdict. We have ruled ***HN55***[] as a matter of Federal Circuit law that, for issues unique to our jurisdiction, a 50(b) motion is necessary to preserve a sufficiency of the evidence argument for appeal. *Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 850, 859-62 (Fed. Cir. 1991)*. On most issues related to *Rule 50* motions, however, we generally apply regional circuit law unless the precise issue being appealed pertains uniquely to patent law. *Duro-Last, Inc. v. Custom Seal, Inc., 321 F.3d 1098, 1106 (Fed. Cir. 2003)*. Because we decide antitrust issues that do not implicate patent law, including market

[68]** ***[*1366]*** *E. Tortious Interference*

ConAgra also appeals the jury verdict finding it liable for tortious interference with prospective economic advantage, a state law claim. [8] The Oklahoma Supreme Court has explained its approach to this tort largely by incorporation:

> ***HN57***[] Oklahoma jurisprudence teaches that one has the right to prosecute a lawful business without unlawful molestation or unjustified **[***1724]** interference from any person, and any malicious interference with that business is an unlawful act and an actionable wrong. For a discussion of the difference between interference with a prospective economic advantage and with contractual or business relations, see *Overbeck v. Quaker Life Ins. Co., 1984 OK CIV APP 44, 757 P.2d 846, 847-48 (Okla. Civ. App. 1984)*. See in this connection [e.g.] *Lakeshore Community Hosp., Inc. v. Perry, 212 Mich. App. 396, 538 N.W.2d 24, 27 (Mich. App. 1995)*. . . for the elements of tortious interference with advantageous business relationships or prospective economic relations.

Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 150, n.96 (Okla. 1998). ***HN58***[] "Interference with a prospective economic advantage usually involves interference **[**69]** with some type of reasonable expectation of profit, whereas interference with a contractual relationship results in loss of a property right." *Overbeck, 757 P.2d at 847-48*.

> The basic elements of tortious interference with a business relationship are the existence of a valid business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted.

Lakeshore Cmty., 538 N.W.2d at 27.

Oklahoma law therefore required Unitherm to prove first, that it possessed a reasonable expectation of future profits from future sales of its browning process (likely in conjunction with its ovens), and **[**70]** second, that ConAgra intentionally interfered with that reasonable expectation. *See Gaylord, 958 P.2d at 150 n.96*. Unitherm's President, David Howard, and of one of its salesmen, Ron Snider, both testified that they expected future profitable sales, and offered the names of prospective customers. Unitherm's damages expert, Dr. Kinrich, presented an event study purporting to show that Unitherm's business declined beginning about the time that news of ConAgra's patent application spread throughout the industry. Kinrich also showed that his study measured losses somewhere between $ 4.5 million and $ 7.5 million.

This proffered evidence could lead a reasonable jury to conclude that Unitherm possessed a valid business expectancy. [9] **[*1367]** ConAgra knew that Unitherm sold browning processes to pre-cooked meat producers, such as Jennie-O. ConAgra's attempts to enforce its fraudulently obtained patent were an intentional interference with the future of Unitherm's business relationship with Jennie-O, and Kinrich's model measured Unitherm's damages. The jury's finding was not inherently unreasonable given this evidence. ***HN60***[] Oklahoma courts must affirm a

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definition, under the law of the regional circuits, *Nobelpharma, 141 F.3d at 1067 n.5*, we similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. ***HN56***[] In the Tenth Circuit, the failure of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence, provided, as is the case here, that the party made the appropriate motion prior to the submission of the case to the jury. *See Cummings v. Gen. Motors Corp., 365 F.3d 944, 950-51 (10th Cir. 2004)*. The absence of a *Rule 50(b)* post-verdict motion for JMOL, however, precludes our entering judgment in favor of ConAgra. "The only remedy available is a new trial." *Id. at 951*. Thus, we may only vacate the jury's verdict in favor of Unitherm.

[8] ***HN59***[] "Bad faith is a prerequisite to [a] state-law tortious interference claim; without it, the claim is preempted by patent law." *Zenith, 182 F.3d at 1355*.

[9] Under Tenth Circuit law, ConAgra preserved its right to appeal the sufficiency of the evidence by moving for a directed verdict at the close of Unitherm's evidence and again at the close of its defense, despite failing to move for a post-verdict JMOL. *See Cummings, 365 F.3d at 950-51*.

jury verdict if there is any competent **[**71]** evidence reasonably tending to support it. *Computer Publs., 49 P.3d at 735*. We therefore affirm the jury's finding of liability for intentional interference with prospective advantage, and of the consequent damages.

CONCLUSION

Because the district court construed the only disputed term in the '027 Patent correctly and properly granted summary judgment that the '027 Patent is invalid and unenforceable under *35 U.S.C. § 102(b)*, we affirm those judgments. Because the district court was also correct, under Oklahoma law, in allowing the jury to decide the issue of tortious interference and to accept the jury's findings on both liability and damages, we affirm those judgments **[**72]** as well. Because the district court erred, however, in allowing the jury to decide Unitherm's antitrust claims despite the total absence of economic evidence capable of sustaining those claims, we vacate the judgment finding ConAgra liable for violating *§ 2 of the Sherman Act.* We also vacate all damages awarded consequent to antitrust liability. We remand the matter to the district court for further proceedings consistent with this opinion.

AFFIRM-IN-PART, VACATE-IN-PART, AND REMANDED

COSTS

Each party shall bear its own costs. **[***1725]**

C.H. Robinson Worldwide, Inc. v. Ghirardelli Chocolate Co.

United States District Court for the District of Minnesota

July 19, 2004, Decided

Civil No. 03-2978 (JRT/FLN)

Reporter

2004 U.S. Dist. LEXIS 13943 *; 2004 WL 1630873

C.H. ROBINSON WORLDWIDE, INC., Plaintiff, v. GHIRARDELLI CHOCOLATE COMPANY, Defendant.

Subsequent History: Motion denied by, Motion to strike denied by *C.H. Robinson Worldwide, Inc. v. Ghirardelli Chocolate Co., 2005 U.S. Dist. LEXIS 12090 (D. Minn., May 23, 2005)*

Disposition: [*1] Plaintiff's motion to dismiss [Docket No. 32] granted in part and denied in part; one cause of action dismissed with prejudice.

Core Terms

parties, motion to dismiss, unfair competition, counterclaim, shipping, declaratory judgment, member of the public, business practice, negotiating, consumer, argues, unfair, cases

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss should not be granted unless a party can prove no set of facts entitling it to relief.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Motions to Dismiss, Failure to State Claim**

For a *Fed. R. Civ. P. 12(b)(6)* dismissal to properly lie, a complaint must reveal an insuperable bar to relief on its face. A court must accept as true, in a hypothetical sense, all of the factual claims of the complaint, and must view those facts in a light most favorable to the nonmoving party. In treating the factual allegations of a complaint as true, the court does not, however, blindly accept the legal conclusions drawn by the pleader from the facts. In construing the facts, the court shall reject conclusory allegations of law and unwarranted inferences. Finally, the court must only consider the pleadings in determining whether a plaintiff has stated a claim upon which relief may be granted.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17200 prohibits "unfair competition" including any unlawful, unfair or fraudulent business act or practice. Except in cases brought by competitors alleging anticompetitive practices, business conduct need not be illegal to implicate the statute.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4[] **Regulated Practices, Trade Practices & Unfair Competition**

In an unfair competition context, a breach of the duty of good faith and fair dealing will support an injunction under *Cal. Bus. & Prof. Code § 17200*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Legislation > Interpretation

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

In an unfair competition context under *Cal. Bus. & Prof. Code § 17200*, the test is that a practice merely be unfair. The statute is far-reaching, and California courts have consistently interpreted the language of *§ 17200* broadly.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

In an action by a competitor alleging anticompetitive practices, the alleged misconduct must be conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

In an unfair competition context, *Cal. Bus. & Prof. Code § 17200* reaches any "business practice or act" and does not necessarily require repeated acts of misconduct.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Evidence > Burdens of Proof > General Overview

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

In an unfair competition context under *Cal. Bus. & Prof. Code § 17200*, the only requirement is that the defendant's practice is unlawful, unfair, deceptive, untrue, or misleading. The burden of proof is modest: a representative plaintiff must show that members of the public are likely to be deceived by the practice.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

In an unfair competition context, *Cal. Bus. & Prof. Code § 17200* is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN10[] **Fraud & Misrepresentation, Actual Fraud**

See *Cal. Civ. Code § 1710*.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN11[] **Business Torts, Fraud & Misrepresentation**

The elements of actionable fraud in California include a false representation, actual or implied, or concealment of matter of fact, that is material to transaction, made falsely; knowledge of falsity, or statements made with such disregard and recklessness that knowledge is inferred; intent to induce another into relying on representation; reliance by one who has right to rely; and resulting damage.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN12[] **Business Torts, Fraud & Misrepresentation**

Minnesota law requires a party asserting a fraud claim to plead the following with specificity that there was a false representation regarding a past or present fact, the fact was material and susceptible of knowledge, the representor knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, the representor intended to induce the claimant to act or justify the claimant in acting, the claimant was induced to act or justified in acting in reliance on the representation, the claimant suffered damages, and the representation was the proximate cause of the damages.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13[] **Business Torts, Fraud & Misrepresentation**

In a fraud context, where a representation regarding a future event is alleged, an additional element of proof is that the party making the representation had no intention of performing when the promise was made.

Counsel: Richard J. Nygaard, RIDER BENNETT, Minneapolis, MN for plaintiff.

David A. Schooler, LARSON KING, St. Paul, MN for defendant.

Judges: JOHN R. TUNHEIM, United States District Judge.

Opinion by: JOHN R. TUNHEIM

Opinion

MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION TO DISMISS

C.H. Robinson Worldwide, Inc., ("CHR"), a shipping and logistics company, sued Ghirardelli Chocolate Company ("Ghirardelli") alleging Ghirardelli had failed to pay for shipping services provided by CHR. Ghirardelli brought several counterclaims, and Ghirardelli also brought a separate action in California state court. The California case was removed to federal court, and transferred to the District of Minnesota, and has been consolidated with this case. CHR has moved to dismiss Ghirardelli's claims of unfair competition and fraud, as well as Ghirardelli's request for declaratory judgment. After CHR filed this motion, but before the Court heard argument, Ghirardelli filed an amended answer and counterclaim. The parties addressed the amended counterclaim in supplemental briefing. For the **[*2]** reasons discussed below, the Court grants CHR's motion to dismiss the unfair competition claim, and denies the motion to dismiss in all other respects.

BACKGROUND

The Court provides the following preliminary sketch of the background of this dispute. Beginning in about 1999, CHR provided warehousing, shipping and distribution services to Ghirardelli. In 2001, the parties contemplated "stepping up" their relationship, and began negotiating a contract by which CHR would provide additional services to Ghirardelli. Based initially on a bid, Ghirardelli agreed to hire CHR contingent upon the parties successfully negotiating an appropriate written contract. The negotiations proceeded for several months. Ghirardelli claims that CHR sent a final version of the contract to California in spring of 2002, and Ghirardelli executed the contract in California on May 6, 2002. Ghirardelli claims the final, executed contract was then faxed to CHR.

CHR argues that the parties negotiated, but that they never reac hed an agreement. CHR claims that it continued to provide services to Ghirardelli under their prior understanding, and that Ghirardelli owes CHR about $ 4 million for those services. **[*3]** CHR says that the "contract" Ghirardelli purportedly executed was really just a template that would allow the parties to continue their negotiations.

CHR claims that beginning in 2002, Ghirardelli consistently refused to pay invoices. Ghirardelli claims that CHR provided substandard service and failed to provide important services, such as vital monthly reports, and communications capabilities. Ghirardelli also claims that it detrimentally relied on CHR's representations that CHR was proceeding under the contract. For example, Ghirardelli claims that it consolidated three eastern warehouses, had CHR take on the management role of Ghirardelli's west coast provider of warehousing, and implemented a new shipping schedule and minimum order policy. (Amended Counterclaim at P 11.) Ghirardelli further claims that CHR failed to carry out its obligations under the contract.

The parties ended the relationship in 2003. This lawsuit followed.

ANALYSIS

I. Standard of Review

HN1[] "A motion to dismiss should not be granted unless [Ghirardelli] can prove no set of facts entitling [it] to relief." Kottschade v. City of Rochester, 319 F.3d 1038, 1040 (8th Cir. 2003). HN2[] For **[*4]** a 12(b)(6) dismissal to properly lie, the complaint must reveal an insuperable bar to relief on its face. United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1376 (8th Cir. 1989). The Court must accept as true, in a hypothetical sense, all of the factual claims of the complaint, and must view those facts in a light most favorable to the nonmoving party, in this case Ghirardelli. *See* Schaller Telephone Co. v. Golden Sky Systems, Inc., 298 F.3d 736, 740 (8th Cir. 2002); Anderson v. Franklin County, 192 F.3d 1125, 1131 (8th Cir. 1999). In treating the factual allegations of a complaint as true, the Court "does not, however, blindly accept the legal conclusions drawn by the pleader from the facts." Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). In construing the facts, the Court shall "reject conclusory allegations of law and unwarranted inferences." Silver v. H & R Block, Inc., 105 F.3d 394, 397 (8th Cir. 1997). Finally, the Court must only consider the pleadings in determining whether the plaintiff has stated a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6) **[*5]** .

II. "Unfair competition"

Ghirardelli brings a claim of "unfair competition" pursuant to California Business and Professions Code § 17200, which HN3[] prohibits "unfair competition" including "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. *See also* ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. of America, 14 Cal. 4th 1247, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (Cal. 1997). Except in cases brought by competitors alleging anticompetitive practices, business conduct need not be illegal to implicate the statute. *See* State Farm Fire & Cas. Co. v. Superior Court, 45 Cal. App. 4th 1093, 53 Cal. Rptr. 2d 229 (1996) (holding that HN4[] a breach of the duty of good faith and fair dealing will support an injunction under § 17200). [1] Rather, HN5[] the "test … is that a practice merely be unfair." Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 249 Cal. Rptr. 872, 883 (1988). The statute is far-reaching, and "California courts have consistently interpreted the language of section 17200 broadly." South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 309 (Cal. Ct. App. 1999). **[*6]**

HN7[] The statute reaches any "business practice or act" and does not necessarily require repeated acts of misconduct. **[*7]** Cal. Bus. & Prof. Code § 17200; *see also* Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89, 102 (Cal. Ct. Ap. 1996) (acknowledging previous requirement of pattern or course of injury, but noting that 1982 amendment "presumably permit[s] invocation of the UCA based on a single instance of unfair conduct").

CHR asserts that Ghirardelli's claim fails as a matter of law, because Ghirardelli has not pled (and could not prove) that any member of the public is likely to be deceived--or is impacted in anyway--by the alleged misconduct. Ghirardelli disputes the necessity of pleading that members of the public are impacted by the business practice or act at issue.

Support, at least in a general sense, for each of these propositions may be found in California case law. In Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 249 Cal. Rptr. 872, 884-85 (Cal. Ct. App. 1988), the California Court of Appeals noted that no California case required that a "business practice" had to affect more than one victim to be actionable. The court continued, "there is nothing in the word 'practice' that necessarily **[*8]** limits section 17200 cases to those actions involving multiple victims." Id. The court left the question open, however,

[1] The California Supreme Court, in Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 543 - 44 (Cal 1999), announced that HN6[] in an action by a competitor alleging anticompetitive practices, the alleged misconduct must be "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." The *Cel-Tech* court explicitly limited its discussion to actions by competitors alleging only anticompetitive practices. "Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as 'fraudulent' or 'unlawful' business practices or 'unfair, deceptive, untrue or misleading advertising.'" Id. at 544 n.12.

"because [plaintiff] is a cooperative comprised of over 1,000 growers, many of whom were victims, and there was also evidence at trial that there were non-Allied victims …." *Id.*

CHR, in contrast, cites several cases for the proposition that the "public" must be impacted by the alleged business practice, and indeed, many California courts assume a public or consumer component to claims brought pursuant to *§ 17200*. *See, e.g., Prata v. Superior Court, 91 Cal. App. 4th 1128, 111 Cal. Rptr. 2d 296, 308 (Cal. Ct. App. 2001)* (noting that ***HN8***[] "the only requirement is that the defendant's practice is unlawful, unfair, deceptive, untrue, or misleading. The burden of proof is modest: the representative plaintiff must show that **members of the public** are likely to be deceived by the practice.") (emphasis added); *South Bay Chevrolet v. General Motors Acceptance Corp., 72 Cal. App. 4th 861, 85 Cal. Rptr. 2d 301, 309 (Cal. Ct. App. 1999)* (noting that "*Section 17200* ***HN9***[] 'is not confined to anticompetitive business practices, but is also **[*9]** directed toward the **public's** right to protection from fraud, deceit, and unlawful conduct.'") (emphasis added) (quoting *Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 63 Cal. Rptr. 2d 118 (Cal. Ct. App. 1997))*. Most of the cases cited by the parties involve some sort of "public" or consumer component, or contain language intimating such a component. *See, e.g., Podolsky, 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89* (addressing suit against nursing home operator brought by relatives of nursing home residents who had guaranteed payment to nursing homes for services provided to residents); *Schnall v. Hertz Co., 78 Cal. App. 4th 1144, 93 Cal. Rptr. 2d 439, 456-59 (Cal. Ct. App. 2000)* (involving alleged fraudulent concealment of certain car rental charges in contract likely to deceive members of the public).

Although the Court recognizes that *Section 17200* is intended to provide broad protection, Ghirardelli cited no case, and the Court's own research has revealed none, in which an unfair competition claim under *Section 17200* was maintained by a sophisticated business entity dealing at arm's length with a business associate. **[*10]** Contrary to Ghirardelli's representation, Ghirardelli is not a "consumer" of CHR's services--at least as how that term is discussed in *Section 17200* cases. *See, e.g., Schnall, 93 Cal. Rptr. 2d at 457-59* (discussing members of the public who rent cars as "consumers"); *Podolsky, 58 Cal. Rptr. 2d at 98-100* (discussing "unfairness" prong is intentionally broad, and noting that it is intended to prevent conduct injurious to consumer--in this case, relatives of nursing home residents). In this case, there is no indication that the interactions between CHR and Ghirardelli had any impact on the "public" or "consumers." There is no indication that this is the type of conduct the California legislature intended to reach. As such, the Court grants CHR's motion to dismiss this claim.

III. Fraud

Ghirardelli also brings a cause of action pursuant to *California Civil Code § 1710(a)*, alternatively asserts a common law fraud action under Minnesota common law. Ghirardelli suggests that CHR's promises to enter into a contractual relationship, and its statements and actions affirming the existence of the contractual relationship amount **[*11]** to fraud, because at the time CHR made the statements and affirmed the contract, CHR had no intention of performing. Ghirardelli claims that it relied on CHR's promises to its detriment.

California law defines "actual fraud" as ***HN10***[] "any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3) The suppression of that which is true, by one having knowledge or belief of the fact; 4) A promise made without any intention of performing it; or, 5) Any other act fitted to deceive." *Cal. Civ. Code § 1710*.

HN11[] The elements of actionable fraud in California include a false representation, actual or implied, or concealment of matter of fact, that is material to transaction, made falsely; knowledge of falsity, or statements made with such disregard and recklessness that knowledge is inferred; intent to induce **[*12]** another into relying on representation; reliance by one who has right to rely; and resulting damage. *Ach v. Finkelstein, 264 Cal. App. 2d 667, 70 Cal. Rptr. 472, 477 (Cal. Ct. App. 1968)*.

HN12[] Minnesota law requires a party asserting a fraud claim to plead the following with specificity: "that there was a false representation regarding a past or present fact, the fact was material and susceptible of knowledge, the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, the representer intended to induce the claimant to act or justify the claimant in acting, the claimant was induced to act or justified in acting in reliance on the representation, the claimant suffered damages, and the representation was the proximate cause of the damages." *Martens v. Minnesota Mining & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000)*. In this case, Ghirardelli suggests that CHR made a false statement as to CHR's future intent. HN13[] "Where a representation regarding a future event is alleged, as here, an additional element of proof is that the party making the representation had no intention of performing when the promise **[*13]** was made." *Id.*

Ghirardelli adequately has pled the elements required by both California and Minnesota law, therefore CHR is not entitled to dismissal of the fraud cause of action. [2]

IV. Declaratory Judgment

The "contract" contained a paragraph titled "Freight Cost Reduction Initiative" on which Ghirardelli appears to premise its claim for declaratory judgment. The paragraph provides:

> a. It is understood by both Shipper (Ghirardelli) and CHRW that this agreement was entered into by Shipper for the purpose of reducing overall transportation costs. Therefore, based on the proposed rates supplied by CHR, the cost of transportation services provided by CHR under this agreement **[*14]** would yield, in 2002, a one time freight cost reduction of 10% in the freight cost per pound shipped when compared to a mutually agreed baseline of the Shipper actual costs per pound shipped in the calendar year 2001.

CHR argues that Ghirardelli has not stated a claim for declaratory judgment because the contract, even if there is one, does not provide for the requested relief as the quoted paragraph creates only an initiative, not a guaranteed 10% cost reduction. In addition, CHR argues that the "baseline" is not identified in the contract, so there will be no way to calculate the 10% savings. Ghirardelli counters that the claim should not be dismissed unless the Court concludes that Ghirardelli will be entitled to no manner of declaratory relief should it prevail at trial. Ghirardelli also argues that the "baseline" was understood by the parties, and that because CHR drafted the contract (and is the moving party in this motion to dismiss) any ambiguity should be resolved in favor of maintaining the claim.

Construing the facts in the counterclaim in the light most favorable to Ghirardelli, it appears that Ghirardelli could establish that it will be entitled to some form of declaratory **[*15]** relief. Ghirardelli has pled facts which would allow the Court to find the contractual language binding. CHR argues that Ghirardelli cannot be in a better position than it would have been had the contract been executed, and that is what Ghirardelli's declaratory judgment claim seeks. CHR's logic ultimately might be persuasive, but at this time, it is premature.

ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, **IT IS ORDERED** that plaintiff's motion to dismiss [Docket No. 32] is **GRANTED IN PART and DENIED IN PART** as follows:

1. Plaintiff's motion to dismiss the first cause of action of the amended counterclaim (for Unfair Competition) is **GRANTED.** This cause of action is **DISMISSED WITH PREJUDICE;**

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[2] The parties did not address whether Minnesota or California law applies to this dispute. Instead, the parties agree that the laws are similar. For the purposes of this motion, the Court need not address choice of law issues, because under either State's law, Ghirardelli has adequately pled a fraud cause of action.

2. In all other respects, Plaintiff's motion is **DENIED.**

DATED: July 19, 2004

at Minneapolis, Minnesota.

s/ John R. Tunheim

United States District Judge

Multiple Listing Serv. of N. Ill., Inc. v. Amerihall of Ill., LLC

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

July 21, 2004, Decided ; July 22, 2004, Docketed

No. 03 C 8934

Reporter

2004 U.S. Dist. LEXIS 14048 *; 59 Fed. R. Serv. 3d (Callaghan) 133; 2004-2 Trade Cas. (CCH) P74,499

MULTIPLE LISTING SERVICE OF, NORTHERN ILLINOIS, INC., an Illinois corporation, Plaintiff/Counter-Defendant, v. AMERIHALL OF ILLINOIS, LLC., an Illinois limited liability company, and DAVID HALL, Defendant/Counter-Plaintiffs.

Disposition: [*1] Motion to dismiss counterclaim was denied.

Core Terms

alleges, counterclaim, antitrust, motion to dismiss, monopolize, real estate, notice, subscriber, brokerage

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In ruling on a motion to dismiss, the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

The allegations of a complaint should not be dismissed for a failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege the "operative facts" upon which each claim is based. The plaintiff need not allege all of the facts involved in the claim and can plead conclusions. However, any conclusions pled must provide the defendant with at least minimal notice of the claim, and the plaintiff cannot satisfy federal pleading requirements merely by attaching bare legal conclusions to narrated facts which fail to outline the bases of his claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Criminal Law & Procedure > Sentencing > Fines

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN3[] **Monopolies & Monopolization, Actual Monopolization**

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4[] **Scope, Monopolization Offenses**

15 U.S.C.S. § 2 of the Sherman Act makes it unlawful to monopolize, to attempt to monopolize, or to conspire to monopolize.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN5[] **Private Actions, Standing**

Private parties are authorized to bring civil actions to enforce the Sherman Act pursuant to § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] **Private Actions, Standing**

To bring an action under *15 U.S.C.S. § 15* a private plaintiff must show more than injuries that might conceivably be traced to an antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN8[] **Private Actions, Remedies**

The purpose of the Sherman Act is to assure customers the benefits of price competition, and protect the economic freedom of participants in the relevant market. The reason for limiting the application of ***antitrust law*** to privately brought actions is to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage, and a plaintiff who wants something, such as less competition or higher prices, that would injure consumers, does not suffer antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN9[] **Private Actions, Standing**

A private plaintiff bringing an antitrust claim is required to show a direct link between the antitrust violation and the antitrust injury. The plaintiff in an antitrust action must show that: (1) it suffered an antitrust injury, and (2) the plaintiff is the proper plaintiff to maintain an antitrust action with respect to each of the markets.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

For a monopoly claim brought under *15 U.S.C.S. § 2* of the Sherman Act a plaintiff must show: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN11[] **Complaints, Requirements for Complaint**

The notice pleading standard for federal courts requires a plaintiff only to allege the "operative facts" rather than all the pertinent facts. The United States Court of Appeals for the Seventh Circuit has made it clear that there is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions listed in *Fed. R. Civ. P. 9*, and thus it is enough in pleading a conspiracy merely to indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN12[] **Complaints, Requirements for Complaint**

A plaintiff is not required under the notice pleading standard to plead sufficient facts to establish the legal elements of his claim. At the pleading stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint, and matching facts against legal elements comes later.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN13[] **Motions to Dismiss, Failure to State Claim**

The allegations of a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Counsel: For MULTIPLE LISTING SERVICE OF NORTHERN ILLINOIS, INC., an Illinois corporation, plaintiff: Thadford A. Felton, Keli M Videtto, Arnstein & Lehr, Chicago, IL.

For AMERIHALL OF ILLINOIS LLC, an Illinois limited liability company, DAVID HALL, defendants: Kurt A. Richter, Law Offices of Kurt A. Richter, Palatine, IL.

For AMERIHALL OF ILLINOIS LLC, DAVID HALL, counter-claimants: Kurt A. Richter, Law Offices of Kurt A. Richter, Palatine, IL.

For MULTIPLE LISTING SERVICE OF NORTHERN ILLINOIS, INC., counter-defendant: Thadford A. Felton, Keli M Videtto, Arnstein & Lehr, Chicago, IL.

Judges: Samuel Der-Yeghiayan, United States District Judge.

Opinion by: Samuel Der-Yeghiayan

Opinion

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Plaintiff/Counter-Defendant the Multiple Listing Service of Northern Illinois, Inc.'s ("MLS") motion to dismiss the counterclaim pursuant to *Federal Rules of Civil Procedure 12(b)(6)*. For the reason stated below we deny the motion to dismiss the counterclaim.

BACKGROUND

Defendant/Counter-Plaintiffs Amerihall of Illinois, **[*2]** LLC and Defendant David Hall ("Hall") (collectively "Amerihall") alleged that MLS maintains a multiple listing service that provides real estate listing information to licensed real estate brokers and sales agents in the Chicago and Northern Illinois geographic region. Amerihall also alleges that it provides a unique brokerage structure which allows it to provide brokerage services and support to its agents for a nominal fee while allowing its agents to keep almost of their commissions. Hall is the president and owner of Amerihall. Amerihall is a participant in MLS and Hall is a subscriber to MLS. As a participant and subscriber, Amerihall and Hall admit that they are bound by the MLS Rules and Regulations.

Amerihall alleged that MLS has a unique and monopolistic position in the real estate industry in the Northern Illinois market because it has no direct competitors to the services and information MLS provides to real estate professionals. According to Amerihall, since its inception Amerihall has attempted to enter this market but MLS has prevented them from doing so. Amerihall contends that MLS's promulgation of Rule 10.8, as amended, prohibits any MLS participant or subscriber **[*3]** from using the email addresses of other MLS participants and subscribers that are contained in MLS's copyrighted real estate information database and the rule further prohibits sending to such participants or subscribers unsolicited electronic mail messages containing job recruitment notices or other advertisements. Amerihall alleges that this rule is unreasonable and was implemented for no justifiable purpose other than to restrict Amerihall's efforts to conduct their business and compete with MLS.

As a result of these allegations, Amerihall as the Counter-Plaintiff brought a two count complaint against MLS in its counterclaim. Count I alleges that MLS violated the prohibitions on monopolization contained in Section 2 of the Sherman Act, *15 U.S.C. § 2*, when it enforced against Amerihall Section 10.8 of its Rules and Regulations. Count II requests a declaration that MLS has restrained trade as alleged in Count I by enforcing Rule 10.8 of its Rules and Regulations against Amerihall. MLS has moved to dismiss both Counts I and II of the counterclaim.

LEGAL STANDARD

HN1[] In ruling on a motion to dismiss, the court must draw all reasonable inferences that favor **[*4]** the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Thompson v. Illinois Dep't of Prof'l Regulation, 300 F.3d 750, 753 (7th Cir. 2002)*; *Perkins v. Silverstein, 939 F.2d 463, 466 (7th Cir. 1991)*. ***HN2***[] The allegations of a complaint should not be dismissed for a failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. Nonetheless, in order to withstand a motion to dismiss, a complaint must allege the "operative facts" upon which each claim is based. *Kyle v. Morton High School, 144 F.3d 448, 454-55 (7th Cir. 1998)*; *Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir. 1992)*. The plaintiff need not allege all of the facts involved in the claim and can plead conclusions. *Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002)*; *Kyle, 144 F.3d at 455*. However, any conclusions pled must "provide the **[*5]** defendant with at least minimal notice of the claim," *Id.,* and the plaintiff cannot satisfy federal pleading requirements merely "by attaching bare legal conclusions to narrated facts which fail to outline the bases of [his] claim." *Perkins, 939 F.2d at 466-67*

DISCUSSION

In Count I of the counterclaim, Amerihall alleges a violation of Section 2 of the Sherman Act, *15 U.S.C. § 2* which states as follows:

> ***HN3***[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Section 2 of the Sherman act ***HN4***[] "makes it unlawful to monopolize, to attempt to monopolize, or to conspire to monopolize." *Goldwasser v. Ameritech Corp., 222 F.3d 390, 396 (7th Cir. 2000).* **[*6]**

HN5[] Private parties are authorized to bring civil actions "to enforce the Sherman Act" pursuant to "§ 4 of the Clayton Act, *15 U.S.C. § 15*." *Sanner v. Board of Trade of City of Chicago, 62 F.3d 918, 926-27 (7th Cir. 1995)*. The Clayton Act provides that ***HN6***[] "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . ." *15 U.S.C. § 15*. However, ***HN7***[] to bring such an action a private plaintiff must show more than "injuries that might conceivably be traced to an anti-trust violation." *Sanner, 62 F.3d at 926-27*. ***HN8***[] The purpose of the Sherman Act was "to assure customers the benefits of price competition, and . . . protect[] the economic freedom of participants in the relevant market." *Serfecz v. Jewel Food Stores, 67 F.3d 591, 596-97 (7th Cir. 1995)*(quoting *Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897*). The reason for limiting the application of antritrust law to privately brought actions is to "filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all **[*7]** of which the antitrust laws are designed to encourage" and "[a] plaintiff who wants something, such as less competition or higher prices, that would injure consumers, does not suffer antitrust injury." *U.S. Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623, 627 (7th Cir. 2003)*.

Therefore, ***HN9***[] a private plaintiff bringing an antitrust claim is required to show "a direct link between the antitrust violation and the antitrust injury." *See* *Sanner, 62 F.3d at 926-27* (considering six factors to address causal connection). The plaintiff in an antitrust action must show that: 1) it "suffered an antitrust injury," and 2) the plaintiff is "the proper plaintiffs to maintain an antitrust action with respect to each of these markets." *Serfecz, 67 F.3d at 596*. ***HN10***[] For a monopoly claim brought under *Section 2 of the Sherman Act* a plaintiff must show: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Endsley v. City of Chicago, 230 F.3d 276, 282 (7th Cir. 2000)* **[*8]** (quoting *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 481, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992))*; *Goldwasser v. Ameritech Corp., 222 F.3d at 397*.

MLS attacks Count I of the counterclaim element by element arguing first that Amerihall has not alleged sufficient facts regarding element one and second that Amerihall has not alleged sufficient facts concerning element two. However, in making such arguments MLS fails to understand ***HN11***[] the notice pleading standard for federal courts which requires a plaintiff only to allege the "operative facts" rather than all the pertinent facts. *Kyle, 144 F.3d at 454-55*. The Seventh Circuit has made it clear that there "is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions . . . listed in *Rule 9* . . .[and thus] it is enough in pleading a conspiracy merely to indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with." *Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002)*. *See also* *Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794, 801 (7th Cir. 2000)* **[*9]** (stating that ***HN12***[] the plaintiff was not required under the notice pleading standard to "pleaded sufficient facts to establish the legal elements of his claim."); *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)*(stating that a "at this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint" and that "matching facts against legal elements comes later."). Amerihall provided MLS with notice of exactly how MLS is alleged to have excluded others from the market. Amerihall alleges that MLS used its customer rules regarding e-mails to prevent others from entering the same market.

In its motion to dismiss the counter-claim MLS attempts to argue the merits of its position and attempts to draw the court into an analysis that is far beyond the spectrum of a proper inquiry for a motion to dismiss. Thus, the motion to dismiss is premature at this juncture. There are sufficient allegations for the court to infer that MLS has a monopoly in a certain isolated market and that MLS utilized that position to exclude Amerihall's entrance into the market.

The only argument presented by MLS **[*10]** that is applicable for a motion to dismiss is that it cannot be considered a competitor of Amerihall because they do not provide the same types of services and are not in the same market. MLS argues that Amerihall alleges that it provides real estate brokerage services and that Amerihall concedes that MLS does not provide such services. Amerihall alleges that MLS provides real estate listing information and concedes that MLS is not in the real estate brokerage business. MLS thus argues that it cannot be a competitor of Amerihall since they operate in completely separate markets.

Even though Amerihall is not entirely clear as to exactly what market Amerihall is being excluded from by MLS, we are required to draw all inferences in MLS' favor at this juncture. *Thompson, 300 F.3d at 753*. We can infer from the allegations in the counterclaim that Amerihall contends that it is being excluded from entrance into the business of providing listing information rather than being excluded from the real estate brokerage business. Amerihall in fact makes this clear on page 5 of its answer to the instant motion when Amerihall describes the services provided by MLS and states: "This **[*11]** is the exact market Amerihall is attempting to enter, but has been and continues to be denied entry to by MLSNI and its monopolistic control and unjustifiable actions." (Ans 5). Therefore, MLS's argument is without merit as it incorrectly relies upon inferences made in its favor and fails to acknowledge that the allegations make out a claim. *See* *Conley, 355 U.S. at 45-46* (holding that ***HN13***[] the allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). We are not ruling at this juncture whether Amerihall has or has not met its burden of proving any of the aspects of the counterclaim. We merely hold that MLS's arguments are premature at this juncture.

CONCLUSION

Based on the foregoing analysis, we deny the motion to dismiss the counterclaim.

Samuel Der-Yeghiayan

United States District Court Judge

Dated: July 21, 2004

End of Document

Nat'l Credit Reporting Ass'n v. Experian Info. Solutions, Inc.

United States District Court for the Northern District of California

July 21, 2004, Decided

No. C 04-01661 WHA

Reporter

2004 U.S. Dist. LEXIS 17303 *; 2004-2 Trade Cas. (CCH) P74,567

NATIONAL CREDIT REPORTING ASSOCIATION, INC., Plaintiff, v. EXPERIAN INFORMATION SOLUTIONS, INC., EQUIFAX, INC., and TRANSUNION, LLC, and DOES 1 through 50, inclusive Defendants.

Disposition: Defendant's motion to remand was denied. Defendant's motion to transfer was granted.

Core Terms

anti trust law, federal law, removal, unfair, unlawful business practice, violations, Defendants', federal question, deceptive, borrowed, rested, plaintiff's claim, monopolization, practices, business practice, cause of action, predicated, anticompetitive, asserting, immunity

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Removal > General Overview

Environmental Law > Federal Versus State Law > Federal Preemption

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

HN1[] **Preliminary Considerations, Removal**

A defendant in a state court may remove an action to federal court so long as the action could have originally asserted federal-question jurisdiction. *28 U.S.C.S. § 1441(b)*. Federal question jurisdiction is governed by the "well-pleaded complaint" rule which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's well-pleaded complaint. As the master of his or her complaint, a plaintiff may by eschewing claims based on federal law, choose to have the cause be heard in state court. A plaintiff, however, may not defeat removal by omitting to plead necessary federal questions in a complaint. A federal court may exercise removal under the "artful pleading" doctrine even if a federal question does not appear on the face of the complaint. The artful pleading doctrine occurs in three circumstances: (1) where federal law completely preempts state law; (2)

where the claim is necessarily federal in character; or (3) where the right to relief depends on the resolution of a substantial, disputed federal question.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2[] Subject Matter Jurisdiction, Federal Questions

A claim raises a substantial federal question when its resolution requires reference to or interpretation of federal law.

Torts > Business Torts > Unfair Business Practices > General Overview

HN3[] Business Torts, Unfair Business Practices

Cal. Bus. & Prof. Code § 17200 essentially prohibits three different types of wrongful business practice: (1) unlawful business practices; (2) unfair business practices; or (3) fraudulent or deceptive business practices. Each type is a separate and distinct theory from which to assert a violation of § 17200. In other words, a practice may be prohibited as unfair or deceptive even if not unlawful and vice versa.

Torts > Business Torts > Unfair Business Practices > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

HN4[] Business Torts, Unfair Business Practices

To assert a claim for unlawful business practices, Cal. Bus. & Prof. Code § 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

HN5[] Jurisdiction, Exclusive Jurisdiction

Federal courts have exclusive jurisdiction over claims for monopolization and attempted monopolization because California's antitrust laws do not address such unilateral, monopolization conduct.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN6[] **Removal, Specific Cases Removed**

Immunity from removal does not exist under *Cal. Bus. & Prof. Code § 17200*. Even if *§ 17200* provides for a separate remedy for a violation of borrowed federal law, the "unlawful" prong of *§ 17200* necessarily requires a determination that the borrowed federal law was violated. When the borrowed law is a federal law, then the claim for unlawful business practices rests on resolution of the federal law. Such an unlawful claim may be removed because the federal law is essential to the claim.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN7[] **Removal, Specific Cases Removed**

The United States Court of Appeals for the Ninth Circuit consistently upholds removal where a state-law claim is predicated upon federal law. The rule that state law claims cannot be alchemized into federal causes of action by incidental reference has no application when relief is particularly predicated on a subject matter committed exclusively to federal jurisdiction.

Counsel: **[*1]** For National Credit Reporting Association Inc., Plaintiff: Dennis Stewart, Hulett Harper Stewart LLP, San Diego, CA. Edward M. Gergosian, Gergosian & Gralewski LLP, San Diego, CA. James Samuel Baum, Schrag & Baum, Berkeley, CA. Michael J. Flannery, The David Danis Law Firm, PC, St. Louis, MO. Robert J. Gralewski, Jr., Gergosian & Gralewski LLP, San Diego, CA. STEPHANIE L. DIERINGER, ESQ., Hulett Harper Stewart LLP, San Diego, CA. Thomas F. Schrag, Schrag & Baum, Berkeley CA.

For Experian Information Solutions Inc., Defendant: Eric Patrick Enson, JONES DAY, Los Angeles, CA. Jason C. Murray, Los Angeles, CA. Thomas R. Malcolm, Los Angeles, CA. Thomas Demitrack, Jones Day, North Point, Cleveland, OH.

For Equifax, Inc.: Howard Mark Ullman, Orrick, Herrington & Sutchliffe LLP, Old Federal Reserve Bank, San Francisco, CA. Jessie William Markham, Jr., Morrison & Foerster LLP, San Francisco, Ca. William A. Molinski, Orrick, Herrington & Sutcliffe LLP, Los Angeles, CA.

For Trans Union LLC: Gerald S. Ohn, Stroock Stroock & Lavan LLP, Los Angeles, CA. Julia B. Strickland, Stroock & Stroock & Lavan LLP, Los Angeles, CA. Stephen J. Newman, STROOCK & STROOCK & LAVAN LLP, Los Angeles, **[*2]** CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND AND GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE

INTRODUCTION

This order addresses whether the presence of an embedded federal issue within a state-created cause of action defeats plaintiff's motion for remand. Plaintiff contends that its claim under *Section 17200* of the California Business and Professions Code is immune from removal because *Section 17200* provides a separate and independent claim despite resting on violations of federal antitrust laws. This order disagrees. No such blanket immunity from removal exists. Because plaintiff alleged violations of federal antitrust laws in its complaint as the predicate for an "unlawful" practice, its *Section 17200* claim necessarily requires resolution of federal law. Accordingly, plaintiff's motion for remand is **DENIED**. In that connection, defendants' motion for transfer is **GRANTED** since plaintiff's sole opposition to transfer was its arguments for remand.

STATEMENT

Plaintiff is a non-profit trade organization of independent consumer credit reporting agencies, commonly known as "credit **[*3]** resellers." Plaintiff filed its complaint against defendants in the Superior Court for Alameda County on March 25, 2004. Therein, plaintiff alleged that each defendant had significant market power as one of the three dominant repositories of consumer credit information (Compl. PP 12-15). With monopolistic power, defendants supposedly engaged in numerous anticompetitive acts (Compl. PP 5-6, 12-15, 20-22, 43-47, 49, 51-55). Plaintiff asserted that such conduct violated both state and federal antitrust laws (Compl. P 56) (emphasis added):

> Defendants' wrongful conduct described above (i) *violates state and federal antitrust laws* and threatens incipient violations of those laws and violates the policy and spirit of those laws because the effects of Defendants' conduct are comparable to or the same as a violation of those laws, and (ii) significantly threatens to harm competition in the credit information industry.

Although the complaint asserted violations of state and federal antitrust laws, it did not assert a cause of action under any specific ***antitrust law***, state or federal. Instead, the complaint alleged a single cause of action for violations of *California Business and Professions Code Section 17200* **[*4]** . In its only cause of action, plaintiff alleged in relevant part (emphasis added):

> 59. *Section 17200* defines unfair competition to mean and include any "unlawful, unfair or fraudulent business act."
>
> 60. For the reasons stated in this complaint, Defendants' unfair, *unlawful and* deceptive business acts and practices described herein present a continuing threat to all California consumers.

Based on these allegations in the complaint, defendants removed the action asserting federal-question jurisdiction. In their notice of removal, defendants argued that plaintiff's complaint has only alleged claims for monopolization and attempted monopolization, which could be only redressed under *Section 2 of the Sherman Act*. Defendants also represented that, concurrently with this present action, twenty-four of plaintiff's members had filed a similar complaint but alleging violations of *Section 2 of the Sherman Act* in a separate action in a federal court in the Central District of California.

Now, defendants seek to transfer this action to the Central District of California. While defendants seek transfer of venue, plaintiff seeks remand, its only response to the transfer motion. **[*5]** Accordingly, both motions are considered herein.

ANALYSIS

1. LEGAL STANDARD FOR REMOVAL AND REMAND.

Defendants herein assert that original jurisdiction would have been proper under federal-question jurisdiction. ***HN1***[] A defendant in a state court may remove an action to federal court so long as the action could have originally asserted federal-question jurisdiction. *28 U.S.C. 1441(b)*. Federal-question jurisdiction is governed by the "well-pleaded complaint" rule which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's well-pleaded complaint. *See Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996)*. As the master of his or her complaint, a plaintiff may "by eschewing claims based on federal law, choose to have the cause be heard in state court." *Caterpillar, Inc. v. Williams, 482 U.S. 386, 399, 96 L. Ed. 2d 318, 107 S. Ct. 2425(1987)*.

A plaintiff, however, may not defeat removal by omitting to plead necessary federal questions in a complaint. *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 22, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).* **[*6]** A federal court may exercise removal under the "artful pleading" doctrine even if a federal question does not appear on the face of the complaint.

Arco Environmental Remediation, L.L.C. v. Dep't of Health & Environmental Quality of the State of Montana, 213 F.3d 1108, 1114 (9th Cir. 2000). The artful pleading doctrine occurs in three circumstances: (1) where federal law completely preempts state law; (2) where the claim is necessarily federal in character; or (3) where the right to relief depends on the resolution of a substantial, disputed federal question. *Ibid.*

2.PLAINTIFF'S *SECTION 17200* CLAIM.

Applying this standard to the facts of this case, the complaint asserts only one cause of action under *Section 17200*. Thus, on its face, the complaint does not assert any federal claims. Plaintiff's complaint, however, may still be removed under the artful pleading doctrine if it is predicated on a violation of federal antitrust laws. [1]

[*7] Defendants contend that plaintiff's complaint requires resolution of a substantial federal question. ***HN2***[] A claim raises a substantial federal question when its resolution requires reference to or interpretation of federal law. *Hendricks v. Dynegy Power Marketing, Inc., 160 F. Supp. 2d 1155, 1162 (S.D. Cal. 2001)*. As discussed below, plaintiff's *Section 17200* claim requires an interpretation of the *Sherman Act*. Thus, removal was proper under the artful pleading doctrine.

A. Unlawful Business Practices.

Section 17200 ***HN3***[] essentially prohibits three different types of wrongful business practice: (1) unlawful business practices; (2) unfair business practices; or (3) fraudulent or deceptive business practices. *See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *Committee on Children's Television v. General Foods Corp., 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783,*

[1] This order does not address whether the artful pleading doctrine applies under the first two circumstances where it has been applied. Neither parties have argued that federal antitrust laws completely preempt state equivalents nor have defendants argued that plaintiff's *Section 17200* claim is necessarily federal in character.

673 P.2d 660 (1983). Each type is a separate and distinct theory from which to assert a violation of *Section 17200*. "In other words, a practice [may be] prohibited as unfair' or deceptive' even if not unlawful' and vice versa." *Cel-Tech, 20 Cal. 4th at 180.* **[*8]**

While asserting only one claim for relief under *Section 17200*, plaintiff has alleged that defendants committed "unfair, unlawful *and* deceptive business actions and practices" (Compl. P 60) (emphasis added). Thus, it asserted that defendants committed all three different types of wrongful conduct. Plaintiff's allegations of unlawful business practices justifies removal of this case.

HN4[] To assert a claim for unlawful business practices, "*Section 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech, 20 Cal. 4th at 180* (internal quotation marks omitted). Herein, plaintiff has borrowed federal antitrust laws. Plaintiff has alleged that "defendants' wrongful conduct described above (i) violated state *and federal antitrust laws"* (Compl. P 56). At the hearing, plaintiff's counsel clarified that the phrase "federal antitrust laws" refers to the Sherman Act. As the master of its complaint, plaintiff could have avoided any issue of federal question and, instead, could have simply borrowed state antitrust laws. But it did not. Rather, plaintiff's claim for unlawful business **[*9]** practices necessarily rests on questions of federal ***antitrust law***.

On the face of its complaint, it also appears that plaintiff could not have avoided borrowing *Section 2 of the Sherman Act*. In the complaint, plaintiff alleged that each defendant used its significant market power to engage in anticompetitive practices. Defendants' anticompetitive conduct supposedly had "the effect of lessening competition and promoting the acquisition and maintenance of monopoly power of the Defendants in this market" (Compl. P 1; *see also id.* PP 4-6, 15, 22, 47, 57). The complaint was void of any allegations of an agreement or a conspiracy to act among defendants. Thus, the gravamen of plaintiff's complaint was that each defendant had unilaterally engaged in anticompetitive conduct to maintain or augment its monopoly. Thus, plaintiff seems to have asserted only claims for monopolization or attempted monopolization under *Section 2 of the Sherman Act*. ***HN5***[] Federal courts have exclusive jurisdiction over such claims because California's antitrust laws do not address such unilateral, monopolization conduct. *Dimidowich v. Bell & Howard, 803 F.2d 1473, 1478 (9th Cir. 1986)* ("No California **[*10]** statute deals expressly with monopolization or attempted monopolization").

Plaintiff contends that it has not raised a federal question because *Section 17200* provides, arguably, for an independent state-authorized remedy in addition to those authorized under the borrowed federal law. ***HN6***[] Immunity from remover, however, does not exist. Even if *Section 17200* provides for a separate remedy for a violation of the borrowed federal law, the "unlawful" prong of *Section 17200* necessarily requires a determination that the borrowed federal law was violated. *See* *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 374, 113 Cal. Rptr. 2d 175 (2001)* (dismissing claim for unlawful business practice after finding no violation of the underlying state law). When the borrowed law is a federal law, then the claim for unlawful business practices rests on resolution of the federal law. Such an unlawful claim may be removed because the federal law is essential to the plaintiff's claim. *See, e.g.,* *People of the State of Cal., ex rel Lockyer v. Dynegy, Inc., 375 F.3d 831, 841 (9th Cir. 2004)* (affirming removal of *Section 17200* claim because it was predicated on federal law).

Plaintiff **[*11]** contends that its immunity argument is supported by *Schwartz v. Visa Int'l Corp., No. C 00-03955 THE, 2001 U.S. Dist. LEXIS 105 (N.D. Cal. Jan. 8, 2001)*. *Schwartz*, however, is distinguishable. Unlike the present action, the *Schwartz* defendants conceded that the complaint provided no basis for removal. *2001 U.S. Dist. LEXIS 105, at *7*. Moreover, to the extent *Schwartz* appears to immunize removal of the *Section 17200* claim, it is inconsistent with Ninth Circuit law.

HN7[] The Ninth Circuit has consistently upheld removal where the state-law claim was predicated upon federal law. *See, e.g.,* *Dynegy, 375 F.3d 831, 841 (9th Cir. 2004)*; *Sparta Surgical Corp. v. National Assoc. of Sec. Dealers, Inc., 159 F.3d 1209, 1212-13 (9th Cir. 1998)* (affirming removal because the state-law claims were predicated upon NASD regulations issued pursuant to federal securities law); *Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1409 (9th Cir. 1998)* (holding that plaintiff's *Section 17200* claim was inherently federal because it sought refund of tax governed exclusively by federal law). In *Dynegy*, the Ninth Circuit held that **[*12]** an action alleging unfair competition under Section 17200 was inherently federal because plaintiff's claim rested entirely on alleged violations of federal tariff obligations under the Federal Power Act. Dynegy, 375 F.3d at 839. Though the plaintiff's complaint only asserted state-law claims, it cited the tariffs filed with Federal Energy Regulatory Commission, which was subject to the Federal Power Act. 375 F.3d at 835, 843 The tariffs filed directly implicated the federal regulatory regime. Thus, the Ninth Circuit reasoned that there must be a finding of a violation of the federal law before any state law liability on Section 17200 could exist. 375 F.3d at 841. Similarly in *Sparta*, the Ninth Circuit explained that plaintiff had challenged the conduct of the National Association of Security Dealers ("NASD") and thus "if NASD's action conformed to the rules, there can be no viable cause of action." 159 F.3d at 1212. Consequently, the Ninth Circuit reasoned that "the rule that state law claims cannot be alchemized into federal causes of action by incidental reference . . . has no application when relief is particularly predicated on a subject matter **[*13]** committed exclusively to federal jurisdiction." Id. at 1212-13.

As inDynegy andSparta, plaintiff herein has specifically referenced a violation of federal antitrust laws in the complaint despite asserting a single state-law claim. For a finding of "unlawful" business practices under Section 17200, there must first be resolution of federal antitrust laws, namely the Sherman Act which counsel admits he is asserting. Plaintiff's claim is merely a naked attempt to enforce the Sherman Act in the guise of a Section 17200 claim and remedy.

At the hearing, plaintiff also argued that its reference to federal antitrust laws was merely an incidental reference which is unnecessary to its Section 17200 claim. [2] In essence, plaintiff contends that its Section 17200 claim rests on its allegations of unfair and deceptive business practices. This order disagrees. As discussed above, plaintiff has asserted a violation of Section 17200 on unlawful business practices *in addition to* unfair and deceptive business practices. In the complaint, plaintiff recognized that Section 17200 sets forth three disjunctive theories upon which relief could be granted: "Section 17200 defines **[*14]** unfair competition to mean and include any unlawful, unfair *or* fraudulent business act" (Compl. P 59) (emphasis added). Yet, in the following paragraph, the complaint asserted that defendants committed all three types of wrongful conduct: "For the reasons stated in this complaint, defendants' unfair, unlawful *and* deceptive business acts and practices described herein present a continuing threat to all California consumers" (*id.* P 60) (emphasis added). The complaint alleged unlawful business practices which rested on federal law. Plaintiff cannot at this juncture re-write its complaint.

In that connection, the complaint herein is distinguishable from those considered **[*15]** in Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033 (9th Cir. 2003), and Hendricks v. Dynegy Power Marketing, Inc., 160 F. Supp. 2d 1155 (S.D. Cal. 2001). In *Lippitt*, the plaintiff asserted a Section 17200 claim, challenging the marketing practices associated with certain brokerage firms. 340 F.3d at 1036. The defendants contended that the Section 17200 claim rested on resolution of federal regulations governing brokerage firms. The Ninth Circuit, however, disagreed with the defendants. The *Lippitt* court construed the complaint to allege fraud and deceptive advertising practices rather than any violation of federal regulation. Id. at 1042-43. Thus, it noted "unlike the situation in *Sparta* . . ., a state court need not inquire into NYSE regulations, or even refer to federal law, in the case before us." Id. at 1045.

Similarly, in *Hendricks*, the district court determined that no claim rested on federal law. 160 F. Supp. 2d at 1156-57. The *Hendricks* plaintiff alleged that the defendants engaged in anticompetitive conduct by artificially inflating the prices of electricity. **[*16]** The plaintiff contended that such conduct violated California's Cartwright Act and Section 17200. Id. at 1156. The defendants argued that plaintiff's complaint essentially challenged the rates which were governed by the Federal Powers Act. The district court, however, disagreed and reasoned that liability under the Cartwright Act for combination in restraint of trade did not depend on resolution of the Federal Powers Act. Id. at 1163.

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[2] Also at the hearing, plaintiff raised for the first time that it would have no standing to assert a federal claim under the Sherman Act. This order does not address the standing issue since plaintiff did not brief the issue in its motion. Moreover, the issue is moot since defendants expressly conceded that plaintiff does have standing.

Unlike*Lippitt* and*Hendricks*, plaintiff herein specifically alleged that defendants committed unlawful business practices by violating federal antitrust laws in addition to any state antitrust laws. This distinction is crucial. Plaintiff has made a Sherman Act bed and must now lie in it.

CONCLUSION

In sum, plaintiff's complaint specifically referenced violation of federal antitrust laws for its claim of unlawful business practices. Accordingly, its *Section 17200* claim requires resolution of federal law. Accordingly, plaintiff's motion for remand is **DENIED**; defendants' motion to transfer venue is **GRANTED.** The **Clerk** shall transfer this action to the United States District Court for the **[*17]** Central District of California.

IT IS SO ORDERED.

Dated: July 21, 2004.

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

AG Acceptance Corp. v. Glinz

Supreme Court of North Dakota

July 26, 2004, Filed

No. 20030197

Reporter

2004 ND 154 *; 684 N.W.2d 632 **; 2004 N.D. LEXIS 283 ***

Ag Acceptance Corporation, as assignee of Ag Services of America, Inc., Plaintiff and Appellee v. Cecelia Glinz, and the Estate of Bruce Glinz, by and through Cecelia Glinz, as duly appointed representative of the Estate, Defendants and Appellants

Notice: [*1]**

Prior History: Appeal from the District Court of Stutsman County, Southeast Judicial District, the Honorable John T. Paulson, Judge.

Disposition: Affirmed.

Core Terms

revolving, products, parties, summary judgment, seller, buyer, trial court, loan of money, promissory note, antitrust, argues, terms, summary judgment motion, tying arrangement, retail seller, material fact, tying product, security agreement, economic power, market power, competitors, advances, assigned, restrain, prices

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Whether summary judgment was properly granted is a question of law which is reviewed de novo on the entire record. An appellate court decides if the information available to the trial court precluded the existence of a genuine issue of material fact and entitled the moving party to summary judgment as a mater of law. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

HN2[] **Summary Judgment, Opposing Materials**

A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. Factual assertions in a brief do not raise an issue of material fact satisfying *N.D. R. Civ. P. 56(e)*. Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion. The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Evidence > Inferences & Presumptions > General Overview

HN3[] **Summary Judgment, Evidentiary Considerations**

In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief. Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists.

Contracts Law > Types of Contracts > General Overview

HN4[] **Contracts Law, Types of Contracts**

See *N.D. Cent. Code § 51-14-01*.

Contracts Law > Types of Contracts > General Overview

HN5[] **Contracts Law, Types of Contracts**

See *N.D. Cent. Code § 47-14-01*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN6[] **Standards of Review, De Novo Review**

A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. *N.D. Cent. Code § 9-07-03*. When a contract has been reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible. *N.D. Cent. Code § 9-07-04*. Construction of a written contract to determine its legal effect is a question of law for the court to decide, and on appeal a reviewing court will independently examine and construe the contract to determine if the trial court erred in its interpretation. Extrinsic evidence is properly considered only if the language of the agreement is ambiguous and the parties' intentions cannot be determined from the writing alone. An unambiguous contract is particularly amenable to summary judgment.

Contracts Law > Types of Contracts > General Overview

HN7[] **Contracts Law, Types of Contracts**

Under the revolving charge agreement statute, the parties are designated as the "retail buyer" and "retail seller," and "credit" is extended. *N.D. Cent. Code § 51-14-01*.

Contracts Law > Types of Contracts > General Overview

HN8[] **Contracts Law, Types of Contracts**

The sine qua non of a revolving charge account is that it revolves: it has no specific date upon which the total amount is due. An agricultural operating loan evidenced by a promissory note specifying that all principal and interest shall be due on a date certain shortly after completion of that crop year is not a revolving charge agreement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To establish an antitrust violation through an illegal tying of products, a party must show possession of the seller of sufficient economic power with respect to the tying product to appreciably restrain a free market. The focus of the antitrust laws prohibiting tying is upon the effect on the relevant markets in which the two products are sold, not upon individual instances of a forced sale. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***. It is for this reason that courts have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Evidence > Inferences & Presumptions > General Overview

HN10[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In order to establish an antitrust violation based upon illegal tying, it must be shown that the seller possesses significant market power in the tying market. Having found sufficient evidence of a tying arrangement, a considers the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power to force a purchaser to do something that he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output. The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Antitrust Act is violated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In an antitrust case, cases do not require that a defendant have a monopoly or even a dominant position throughout the market for a tying product. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

There is nothing inherently illegal about tying the sale of one product or service to another. It is clear, however, that not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. A tying arrangement is not illegal if the seller lacks control or power in the market. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN14[] **Summary Judgment, Opposing Materials**

A party opposing a motion for summary judgment may not rely upon unsupported, conclusory allegations nor mere speculation, and a scintilla of evidence is not sufficient to support a claim. The resisting party must present, and draw the court's attention to, competent admissible evidence which raises a genuine issue of material fact.

Counsel: Jon R. Brakke, Vogel Law Firm, Fargo, N.D., for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, Fargo, N.D., for defendants and appellants.

Judges: Opinion of the Court by Neumann, Justice. William A. Neumann, Mary Muehlen Maring, Dale V. Sandstrom, Douglas L. Mattson, D.J., Gerald W. VandeWalle, C.J. The Honorable Douglas L. Mattson, D.J., sitting in place of Kapsner, J., disqualified.

Opinion by: William A. Neumann

Opinion

[634] Neumann, Justice.**

[*P1] Cecelia Glinz and the Estate of Bruce Glinz appealed from a summary judgment awarding Ag Acceptance Corporation ("Ag Acceptance") judgment in the amount of $ 238,874 on a promissory note. We affirm.

I

[*P2] Cecelia Glinz and her husband, Bruce Glinz, ran a farming operation. On August 15, 1997, the Glinzes signed a "Master Promissory Note" payable to Ag Services of America, Inc. ("Ag Services") to **[***2]** finance their 1998 crop. The note was in the amount of $ 750,000 with interest at 2.75 percent above the prime rate. All principal and interest was due on January 15, 1999. The note was secured by security agreements covering personal property, including farm products, equipment, government payments, and proceeds. In addition, because a portion of the proceeds were to be used to purchase agricultural supplies from Ag Services, the parties executed a document entitled "Customer Pricing Agreement, Program Fee Agreement, Release, and Disclaimer of Warranties" outlining the terms of any sales by Ag Services to the Glinzes.

[*P3] On October 20, 1997, Ag Services assigned its rights under the note to Ag Acceptance. On March 30, 1998, the Glinzes signed a supplement to the note increasing the principal amount of the note to $ 1,300,000. This supplement to the note referred to the prior assignment of the note to Ag Acceptance.

[*P4] On September 22, 1998, the Glinzes signed a Master Promissory Note in the amount of $ 1,300,000 payable to Ag Services to finance their 1999 crop. The interest rate was 2.75 percent above the prime rate and all principal and interest was due on January 15, 2000. The **[***3]** Glinzes again executed security agreements on **[**635]** personal property and a customer pricing agreement. On February 22, 1999, Ag Services assigned its rights under the note to Ag Acceptance.

[*P5] Bruce Glinz died in September 1999. Cecelia Glinz was named personal representative of his estate.

[*P6] In February 2000, Ag Acceptance brought this action against Cecelia Glinz and the Estate of Bruce Glinz alleging the notes were in default and the Glinzes owed $ 859,318.31, with interest accruing at the rate of $ 246.75 per day. Ag Acceptance sought immediate delivery of all collateral and a deficiency judgment. Cecelia and the Estate answered, alleging that the notes were not loans of money but constituted revolving charge agreements under *N.D.C.C. ch. 51-14* and that only the amounts owed at the time the notes were assigned to Ag Acceptance were due and owing. Cecelia Glinz claimed any funds advanced after the notes were assigned constituted unsecured loans on an open account to Bruce Glinz personally, and were not covered by the notes or security agreements.

[*P7] Ag Acceptance took possession of and sold the collateral. As a result, the 1997 note was paid in full, and Ag **[***4]** Acceptance sought a deficiency judgment in the amount of $ 232,579.93, plus $ 38.73 interest per diem, on the 1998 note. Both sides moved for summary judgment, and the trial court denied Glinzes' motion for summary judgment and granted Ag Acceptance's motion for summary judgment. Judgment in favor of Ag Acceptance in the amount of $ 238,874.08 was entered on May 1, 2003. Cecelia Glinz and the Estate of Bruce Glinz (collectively "Glinz") have appealed.

II

[*P8] This case comes to us in the posture of an appeal from a summary judgment. We outlined our standard of review of appeals from a summary judgment in *Zuger v. State, 2004 ND 16, PP7-8, 673 N.W.2d 615* (citations omitted):

> ***HN1***[] Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. "Whether summary judgment was properly granted is 'a question of law which we review de novo on the entire record.'" *Iglehart v. Iglehart, 2003 ND 154, P9, 670 N.W.2d 343* (quoting *Wahl v. Country Mut. Ins. Co., 2002 ND 42, P6, 640 N.W.2d 689*). **[***5]** On appeal, this Court decides if the information available to the trial court precluded the existence of a genuine issue of material fact and entitled the moving party to summary judgment as a mater of law. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial.
>
> ***HN2***[] A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e)." *Kemp v. City of Grand Forks, 523 N.W.2d 406, 408 (N.D. 1994)*. "Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion." *Id.*
>
> The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and **[**636]** line in depositions or other comparable documents containing testimony or evidence raising **[***6]** an issue of material fact.
>
> ***HN3***[] In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.
>
> *Iglehart, at P10* (quoting *Anderson v. Meyer Broad. Co., 2001 ND 125, P14, 630 N.W.2d 46* (citations omitted)). Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists.

III

[*P9] Ag Acceptance argues, and the trial court concluded, that the written agreements between the parties constitute a traditional loan of money secured by personal property. Glinz argues the agreement is a revolving **[***7]** charge account under *N.D.C.C. ch. 51-14* between the Glinzes and Ag Services, and that any sales made to the Glinzes after the notes were assigned by Ag Services to Ag Acceptance were made to Bruce Glinz personally on an open account. Glinz therefore argues any transactions occurring after February 19, 1999, were not made under the notes, are not covered by the security agreements, and therefore are owed by Bruce Glinz personally on an open account, with an interest rate of six percent. Glinz further argues that Ag Acceptance's failure to comply with statutory requirements for revolving charge agreements under *N.D.C.C. ch. 51-14* precludes the collection of certain fees and interest charges.

A

[*P10] Initially, the parties dispute which state's law governs their agreements. The promissory notes contain choice of law clauses providing the agreements are deemed to have been made in Iowa and that Iowa law is to govern their interpretation. Ag Acceptance argues *N.D.C.C. ch. 51-14* is therefore inapplicable, and the agreements must be construed under Iowa law. Glinz argues there are strong public policy reasons to apply North Dakota law in this case, and *N.D.C.C. ch. 51-14* should control. **[***8]** For purposes of this case we will assume, without deciding, that North Dakota law applies.

B

[*P11] The trial court concluded the parties' agreement was for a loan, not a revolving charge agreement under *N.D.C.C. ch. 51-14*. Glinz contends the agreement in this case falls within the definition of "revolving charge agreement" under the statute. "Revolving charge agreement" and other related relevant terms are defined in *N.D.C.C. § 51-14-01*:

> ***HN4***[] 1. "Credit service charge" means the amount, however expressed, which the retail buyer contracts to pay or pays the retail seller in excess of the amount of credit extended, representing the total charges by the retail seller incident to investigating and extending credit under a revolving charge agreement and for extending **[**637]** to the retail buyer the privilege of paying over a period of time therefor. 2. "Retail buyer" or "buyer" means a person who buys personal property from a retail seller, or to whom a retail seller otherwise extends credit, pursuant to a revolving charge agreement. 3. "Retail seller" or "seller" means a person who agrees to sell or sells goods or services pursuant to a revolving charge **[***9]** agreement and a state-chartered or national bank that extends credit by the advancement of moneys or the payment for goods or services under a revolving charge agreement. 4. "Revolving charge agreement" means a written instrument, defining the terms of credit extended from time to time pursuant thereto, pursuant to which the buyer's total unpaid balance thereunder, whenever incurred, is payable over a period of time and under the terms of which a credit service charge, other than the portion thereof consisting of late payment or other charges, is to be computed in relation to the buyer's unpaid balance from time to time.

A "loan of money" is defined in *N.D.C.C. § 47-14-01*:

> ***HN5***[] A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which the person borrowed.

[*P12] ***HN6***[] A contract must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting. *N.D.C.C. § 9-07-03*; *Binek v. Binek, 2004 ND 5, P13, 673 N.W.2d 594*. When a contract has been reduced to writing, the intention of the **[***10]** parties is to be ascertained from the writing alone if possible. *N.D.C.C. § 9-07-04*; *Binek, at P13*; *Kondrad ex rel. McPhail v. Bismarck Park District, 2003 ND 4, P6, 655 N.W.2d 411*. Construction of a written contract to determine its legal effect is a question of law for the court to decide, and on appeal this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation. *Lamb v. Riemers, 2003 ND 148, P6, 669 N.W.2d 113*; *Kondrad, at P6*. Extrinsic evidence is properly considered only if the language of the agreement is ambiguous and the parties' intentions cannot be determined from the writing alone. *Binek, at P13*; *Lamb, at P6*. An unambiguous contract is particularly amenable to summary judgment. *Airport Inn Enters., Inc. v. Ramage, 2004 ND 92, P10, 679 N.W.2d 269*; *Kondrad, at P6*.

[*P13] The parties in this case reduced their agreement to writing. The August 15, 1997, promissory note provides:

> FOR VALUE RECEIVED, the undersigned debtors jointly and severally, as principals, promise to pay to the order of Ag Services **[***11]** of America, Inc. . . . the principal sum of *Seven Hundred Fifty Thousand and No/100* - - - - - - - - - - - - Dollars ($ *750,000.00*) or, if less, the outstanding principal balance of all loans and advances made hereunder, together with accrued interest, said principal balance and accrued interest to be due and payable in full on or before *January 15, 1999*. The undersigned agree to pay interest on the principle balance outstanding hereunder from time to time at the rate equal to *Two Pt. Seven Five* percent (*2.75* %) in excess of the Prime Rate, and shall be adjusted as of each date of change thereof to reflect changes in the Prime Rate.

The note makes numerous further references to principal and interest. The September 22, 1998, **[**638]** note is identical except the face amount is increased to $ 1,300,000 and the note is due on January 15, 2000.

[*P14] The parties' March 30, 1998, Agreement to Supplement the Master Promissory Note identifies the Glinzes as "Debtor" and Ag Services and Ag Acceptance collectively as "Lender." The supplement provides "Debtor is desirous of increasing the maximum funds available under the Note" and increases the "principal amount under **[***12]** the Note" to $ 1,300,000.

[*P15] The language used by the parties indicates a loan of money, not a revolving charge agreement. The notes state that the Glinzes promise to pay "the outstanding principal balance of all *loans* and advances made hereunder, together with accrued interest." The notes use the terms "principal" and "interest," denoting a loan of money, rather than the corresponding terms "credit extended" and "credit service charge," indicative of a revolving charge agreement, found in *N.D.C.C. § 51-14-01*. The supplement to the first note designates the parties as debtor and lender, and provides for increasing the "funds" available under the note, further indicative of a loan of money. ***HN7***[] Under the revolving charge agreement statute, the parties are designated as the "retail buyer" and "retail seller," and "credit" is extended. *See* *N.D.C.C. § 51-14-01*. The language of the parties' written agreement unambiguously characterizes the agreement as a loan of money, not a revolving credit agreement.

[*P16] Glinz argues that Ag Services sold products to the Glinzes on credit under the notes, that Ag Services was **[***13]** therefore a "retail seller," and that the agreement constituted a revolving charge agreement. Although the parties anticipated that a portion of the proceeds of the notes would be used to purchase products from Ag Services, the language of the notes also provides for loans and advances of money. Glinz relies upon the "Customer Pricing Policy Agreement, Program Fee Agreement, Release, and Disclaimer of Warranties" to support her assertion that this was a revolving credit agreement. The language of that document, however, indicates that all products purchased will be treated as an advance against the note, and explicitly envisions cash advances to the Glinzes:

> 3. The undersigned agrees that all products purchased, cash advanced and insurance premium due Ag Services will be charged as an advance against the undersigned's Master Promissory Note payable to Ag Services or its assignee as of the date of shipment of products or the date of the cash advanced and shall be secured by and subject to the terms of the Agricultural Security Agreement and all other agreements or documents executed in connection therewith.

The parties clearly intended their agreement to cover more **[***14]** than an extension of credit to finance purchases under a revolving credit agreement.

[*P17] Furthermore, the written agreements in this case provided that the full amounts due under the notes must be paid by a specific date. ***HN8***[] The sine qua non of a revolving charge account is that it revolves: it has no specific date upon which the total amount is due. *See* H.R. Rep. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1971 (indicating revolving credit accounts are synonymous with open-ended credit). An agricultural operating loan evidenced by a promissory note specifying that all principal and interest shall be due on a date certain shortly after completion of that crop year is not a **[**639]** revolving charge agreement.

[*P18] We conclude the trial court did not err in concluding the parties' written agreement was a loan of money, not a revolving charge agreement under *N.D.C.C. ch. 51-14*.

IV

[*P19] Glinz contends that, if the transaction between the parties was a loan, the agreement violated the *Sherman Antitrust Act*, *15 U.S.C. §§ 1-7*, and the state antitrust act, *N.D.C.C. ch. 51-08.1*, because the agreement impermissibly tied the extension of credit **[***15]** to an agreement to purchase agricultural products from Ag Services.

A

[*P20] The trial court concluded it did not have jurisdiction over Glinz's claimed violation of the Sherman Antitrust Act because jurisdiction under the Act is vested exclusively in the federal courts. Glinz contends state courts may consider Sherman Act violations which are pleaded as a defense in a contract action. We find it unnecessary to determine whether the trial court properly declined to exercise jurisdiction because we conclude Glinz failed to present sufficient evidence of an antitrust violation to preclude summary judgment.

B

[*P21] In her brief on appeal, Glinz concedes that ***HN9***[] to establish an antitrust violation through an illegal tying of products she must show "possession of the seller of sufficient economic power with respect to the tying product to appreciably restrain a free market." The focus of the antitrust laws prohibiting tying is upon the effect on the relevant markets in which the two products are sold, not upon individual instances of a forced sale. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16, 18, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. As the Court explained in **[***16]** *Jefferson Parish, at 16*:

> If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of ***antitrust law***. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.

[*P22] Thus, ***HN10***[] in order to establish an antitrust violation based upon illegal tying, it must be shown that the seller possesses significant market power in the tying market:

> Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, 466 U.S., at 14, 104 S. Ct., at 1559*. It has been defined as "the ability of a single seller to raise price and restrict output." *Fortner [Enters., Inc. v. United States Steel Corp.], 394 U.S. [495,] 503, 22 L. Ed. 2d 495, 89 S. Ct. [1252,] 1259 [1969]*; *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L.E. 1264 (1956).* **[***17]** The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (footnote omitted). The Court in *Eastman Kodak* further noted:

> ***HN11***[] "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or **[**640]** might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated."

Id. at 464 n.9 (quoting *Jefferson Parish, 466 U.S. at 12*).

[*P23] In *United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*, the Court addressed allegations that sale of prefabricated houses had been illegally tied to an offer of credit.

Reversing a judgment of the Court of Appeals which concluded the creditor had sufficient economic power in the **[***18]** credit market to make the tying arrangement illegal, the Supreme Court stated:

> ***HN12***[] These decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Id.. at 620 (citation and footnote omitted); *see also Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 502-03, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. Glinz has not directed our attention to any evidence in the record showing Ag Services or Ag Acceptance had some advantage in the credit market not shared by their competitors.

[*P24] ***HN13***[] There is nothing inherently illegal about tying the sale of one product or service to another:

> It is clear, however, that not every refusal to sell two products separately can be said to restrain **[***19]** competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts.

Jefferson Parish, 466 U.S. at 11-12. A tying arrangement is not illegal if the seller lacks control or power in the market:

> Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 6-7, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958); *see also Jefferson Parish, 466 U.S. at 11-12*.

[*P25] Glinz has not drawn our attention **[***20]** to any evidence in the record which demonstrates Ag Services or Ag Acceptance had significant market power or an advantage not shared by its competitors in the relevant markets. Glinz argues it may be inferred that the tying of these products appreciably restrained a free market because Ag Services does business in 35 states and the prices Ag Services charged for the tied products were higher than Glinzes could have purchased the products **[**641]** for elsewhere. Neither of these facts creates an inference of market power in the tying market by Ag Services or Ag Acceptance. *See Fortner, 429 U.S. at 617-18* (fact that lender was a subsidiary of one of the nation's largest corporations and charged a higher price for the tied product than its competitors did not demonstrate the lender had economic power in the credit market). There is no evidence showing Ag Services or Ag Acceptance had a predominant share of the market or sufficient economic power to control prices. *See Eastman Kodak, 504 U.S. at 464*. Nor is there any evidence suggesting Glinz could not have obtained financing and products separately from other businesses. *See Jefferson Parish, 466 U.S. at 11-12.* **[***21]**

[*P26] ***HN14***[] A party opposing a motion for summary judgment may not rely upon unsupported, conclusory allegations nor mere speculation, and a scintilla of evidence is not sufficient to support a claim. *Zuger v. State, 2004 ND 16, P8, 673 N.W.2d 615*. The resisting party must present, and draw the court's attention to, competent admissible evidence which raises a genuine issue of material fact. *Id.* Because Glinz has failed to draw our attention to any evidence showing that Ag Services or Ag Acceptance had significant market power in the relevant markets, we conclude summary judgment on the antitrust issues was appropriate.

V

[*P27] We have considered the remaining issues raised by Glinz and find they were either not raised in the court below, are unnecessary to our decision, or are without merit. The judgment is affirmed.

[*P28] William A. Neumann

Mary Muehlen Maring

Dale V. Sandstrom

Douglas L. Mattson, D.J.

Gerald W. VandeWalle, C.J.

[*P29] The Honorable Douglas L. Mattson, D.J., sitting in place of Kapsner, J., disqualified.

[United States ex rel. Gutierrez v. Persons Holding Office as Pub. Officers Within the State Gov't of N.M.](#)

United States District Court for the District of New Mexico

July 26, 2004, Filed

No. CIV 03-920 MV/LFG

Reporter
2004 U.S. Dist. LEXIS 34165 *

UNITED STATES OF AMERICA, ex rel. Antonio Gutierrez, Plaintiff, vs. PERSONS HOLDING OFFICE AS PUBLIC OFFICERS WITHIN THE STATE GOVERNMENT OF THE STATE OF NEW MEXICO, THE LEGISLATIVE, EXECUTIVE AND JUDICIAL DEPARTMENTS OF UNITED STATES GOVERNMENT, WHO WERE ALSO LICENSED TO PRACTICE LAW UNDER RULES CREATED, PROMULGATED AND ENFORCED BY THE OFFICERS ASSIGNED DUTIES WITHIN THE NEW MEXICO SUPREME COURT, Defendants.

Subsequent History: Adopted by, Dismissed by *United States ex rel. Gutierrez, 2004 U.S. Dist. LEXIS 34216 (D.N.M., Sept. 7, 2004)*

Core Terms

false claim, license to practice, res judicata, public official, recommended, complaints, licensed, caption, dismissal with prejudice, parties

Counsel: **[*1]** Antonio Gutierrez, United States of America, ex rel, Plaintiff, Pro se, Santa Fe, NM.

For United States of America, Legislative, Executive and Judicial Department, who were also licensed to practice law under rules created, promulgated and enforced by the officers assigned duties within the New Mexico Supreme Court, Defendant: Jay D. Majors, LEAD ATTORNEY, US Department of Justice, Washington, DC.

Judges: Lorenzo F. Garcia, Chief United States Magistrate Judge.

Opinion by: Lorenzo F. Garcia

Opinion

MEMORANDUM OPINION RECOMMENDING DISMISSAL[1]

THIS MATTER comes before the Court on the United States' Suggestion of Dismissal of False Claims Act Complaint for Lack of Subject Matter Jurisdiction and for Failure to State a Claim [Doc. 5]. Relator Antonio Gutierrez

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[1] This matter was referred to the undersigned magistrate judge pursuant to the Court' s Order Designating United States Magistrate Judge [Doc. 2].

Within ten (10) days after a party is served with a copy of this analysis and recommended disposition, that party may, pursuant to *28 U.S.C. § 636(b)(1)*, file written objections to such analysis and recommendation. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the analysis and recommendation.

("Gutierrez") filed a Response [Doc. 7] on July 12, 2004.[2] No Reply by the United States is necessary. The Court has considered the United States' suggestion, as well Gutierrez' s Response in opposition, and determines that oral argument is not necessary. For the reasons hereafter stated, the Court recommends that the United States' Suggestion be granted and that Gutierrez' s lawsuit be dismissed with prejudice.

Background

This case has a convoluted procedural **[*2]** history, but resolution of the United States' Suggestion of Dismissal is relatively simple and turns on principles of *res judicata*.

Gutierrez filed his complaint in this matter on August 5, 2003. In it, he characterized his claim as a Qui Tam suit, and as jurisdictional grounds for the complaint cited the False Claims Act, *31 U.S.C. § 3729 et seq.* He named as defendants all " persons holding office as public officers within the state government of the State of New Mexico, the legislative, executive and judicial departments of United States government, who were also licensed to practice law under rules created, promulgated and enforced by the officers assigned duties within the New Mexico Supreme Court." [Complaint, Doc. 1, Caption].

Gutierrez claims that Defendants submitted false claims to the United States government, violated ***antitrust law***, and have otherwise engaged in unconstitutional acts by taking salaries as public officials while licensed as lawyers. Gutierrez further asserts that the State, through illegal " tying agreements" with the American Bar Association and the New Mexico State Supreme Court is denying all unlicensed lay citizens the right to engage in a profession of their choice, that is, **[*3]** the practice of law, based on nothing more than these citizens' failure to have a law degree or license to practice law. Gutierrez does not contend that he, as a *pro se* litigant, has ever been denied the right to represent his own interests in court. Instead, he contends that the illegal " tying agreements" deny him and similar situated untrained and unlicensed individuals the right to practice law in New Mexico and elsewhere.

In his certificate of service included with the complaint, Gutierrez stated that he served the complaint in this case on the United States (he does not give a date) by mailing it to the Office of the United States Attorney General " rather than the United States Attorney for the District of New Mexico on the ground the latter is a defendant." [Doc. 1, at 10].[3]

Aside from an order in February 2004 by the U.S. District Judge assigned to this case, referring the matter to the undersigned U.S. Magistrate Judge for a recommended disposition, no action was taken in the case until May 28, 2004. On that date, the United States filed an Ex Parte Status Report [Doc. 3]. In this Report, the United States, through attorney Jay D. Majors ("Majors") on behalf of Assistant Attorney **[*4]** General Peter D. Keisler of the Civil Division of the Department of Justice in Washington, D.C., stated as follows:

Majors confirmed that a copy of the complaint was indeed served on the United States, presumably to the Department of Justice in Washington, D.C., in August 2003. However, the copy was unsigned and did not have a case number or a file stamp from the Court. Based on a series of misunderstandings, to which the United States did not contribute, it appeared to the United States that Gutierrez had never filed a complaint in this matter.

On October 23, 2003, Majors wrote to Gutierrez, informing him that the Clerk' s Office told him it had no record of his complaint and that, unless Gutierrez informed them otherwise, the United States would consider the matter closed. Majors states that Gutierrez did not confirm that the complaint in this case had been filed, even though it had. Instead, on November 17, 2003, Gutierrez filed a second complaint, nearly identical to the complaint in this

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[2] Gutierrez purports to bring this *qui tam* lawsuit on behalf of the United States of America.

[3] The False Claims Act, § 3730(b)(2), requires that a Relator effect service of process on both the United States Attorney General and the United States Attorney in the district where the action was filed. Gutierrez failed to comply with this service of process requirement.

case, and thereby commenced a new action, United States ex rel. Gutierrez v. Persons Holding License to Practice Law, et al., Civ. No. 03-1320 MV/LFG.

Meanwhile the United States, unaware that the **[*5]** present case was " live," proceeded to litigate cause Civ. No. 03-1320. It requested that the seal be lifted in that case, and the request was granted by the Court in an order dated April 7, 2004. On March 16, 2004, the undersigned Magistrate Judge, to whom cause No. 03-1320 had also been referred, recommended that the United States' Suggestion of Dismissal be granted in that case, citing numerous legal deficiencies. The recommendation was adopted by the assigned District Judge in an order dated April 16, 2004, after consideration of Gutierrez' s objections and the United States' reply.

On June 16, 2004, Judgment was entered in Civ. No. 03-1320 in favor of defendants on all claims, and the case was dismissed with prejudice. The Court also rejected Gutierrez' s contention that it was improper for any judge in this district, or presumably anywhere else, to issue a decision in this case, since all judges are licensed attorneys and therefore " named defendants." The Court cited the " rule of necessity" under which a judge, even though he or she may have an interest in the outcome of litigation, has a duty to hear and decide a case if it cannot otherwise be heard. *United States v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980)*; *Williams v. United States 240 F.3d 1019 (Fed. Cir. 2001)*.

The District Judge cited **[*6]** the following grounds in her order of dismissal in Civ. No. 03-1320: The complaint fails to plead the essential elements for a false claim under *31 U.S.C. § 3729(a)(1)*;

The complaint fails to state a claim to the extent it contends that the State of New Mexico has been defrauded by licensed attorneys, because the False Claims Act extends only to frauds committed against the United States;

The complaint fails to satisfy the requirements of *Fed. R. Civ. P. 9(b)*, which requires that allegations of fraud be pled with particularity;

Gutierrez failed to comply with provisions of the False Claims Act requiring that the complaint be served on the Attorney General, as well as the United States Attorney in the district where the complaint is filed;

To the extent Gutierrez named as defendants elected or appointed State officers who hold their positions as a result of being licensed attorneys, he is attempting to sue State public officials in their official capacity - the equivalent of a suit against the State - and states are not " persons" subject to suit under the False Claims Act;

To the extent Gutierrez named as defendants elected or appointed federal authorities who hold law licenses, he is attempting to sue federal public officials **[*7]** in their official capacity - the equivalent of a suit against the federal government - and the United States has not consented to be sued and is therefore immune from suit;

The complaint fails to state a claim insofar as it invokes the Sherman Antitrust Act as courts and legislators are immune from liability for exercise of their authority to license attorneys and regulate the practice of law, and are not subject to antitrust liability with respect to such activities.

Gutierrez did not appeal the Court' s dismissal of the lawsuit. Indeed, Gutierrez stated in a pleading [Doc. 37], filed after the Order of Dismissal was entered, that he intended to pursue his claims by way of extraordinary writ in the United States Supreme Court.

The present litigation picked up again when the United States filed its Suggestion of Dismissal [Doc. 5] in this case, along with a Suggestion to Lift Seal. The Court agrees with the United States' position that the proceedings in Civ. No. 03-1320 are *res judicata* of the present case and therefore finds that this case must likewise be dismissed with prejudice.

Discussion

In its Suggestion, the United States urges several grounds for dismissal. The Court agrees with **[*8]** the first posited ground, that the complaint herein is barred by *res judicata*, a doctrine which is necessary to the fair and efficient operation of the court system. Under the principle of *res judicata*, a prior judgment on the merits in one lawsuit will bar consideration of another suit involving the same parties, or their privies, based on the same cause of action. *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)*. " The doctrine of *res judicata* bars relitigation of issues that were or could have been raised in the first action." *Ten Mile Indus. Park v. Western Plains Serv. Corp., 810 F.2d 1518, 1522-23 (10th Cir. 1987)*.[4]

In order for *res judicata* to apply, three elements must be present: (1) the first suit must have proceeded to a final judgment on the merits; (2) the parties must be identical or in privity; and (3) the suits must be based on the same cause of action. *Clark v. Haas Group, Inc., 953 F.2d 1235, 1236 (10th Cir. 1992)*. The Court finds that all three of these elements have been satisfied.

An examination of the complaints in these two cases reveals that they are, in almost every respect, identical. The United States characterizes these differences as " some inconsequential changes to the phrasing of the caption of the case and some immaterial revisions to the body of the Complaint, primarily in the ' Introduction' section." [Doc. 5, at 6]. This characterization **[*9]** is accurate.

The caption in cause Civ. No. 03-1320 names as Defendants, " Persons holding license to practice law, and persons holding public office in the State of New Mexico and the United States who were qualified to do so by holding license to practice under political authority of court rules produced by public officers with duties in the Supreme Court of the State of New Mexico."

The caption in the present case names as Defendants, " Persons holding office as public officers within the state government of the State of New Mexico, the legislative, executive and judicial departments of United States government, who were also licensed to practice law under rules created, promulgated and enforced by the officers assigned duties within the New Mexico Supreme Court."

Although the captions are worded a bit differently, the Court finds that the group of defendants in both cases is actually the same. In each complaint, Gutierrez purports to sue persons who hold license to practice law while serving as public officers of the State of New Mexico or the United States. In addition, the two complaints use identical language in their respective sections labeled " Parties," in which Gutierrez describes **[*10]** the defendants in detail. [Complaint in Civ. No. 03-1320, at ¶¶ 4-5; Complaint in Civ. No. 03-920, at ¶¶ 4-5].

A party may not avoid the effects of *res judicata* or collateral estoppel by simply naming a different defendant while bringing the same claim, *Parklane Hosiery Co., Inc. v. Shore, supra, 439 U.S. at 329*; nor by bringing the same claim under a different legal theory. *Clark v. Haas Group, Inc., supra.* The Court finds that, even though the captions of the two complaints are worded somewhat differently, Gutierrez intended to bring these two actions against the same defendants.

As Defendant points out, there are also some minor differences in the language of the introductory paragraphs of the two complaints. The complaint in the present action alleges in its Introduction that defendants:

> have defrauded the United States as addressed by *18 U.S.C. § 371* and upon accepting appointments or elective offices either in the New Mexico Government or the United States Government during relevant periods while authorized unconstitutionally and statutorily to practice law before some defendants in state and federal

[4] The related doctrine of collateral estoppel has a similar preclusive effect. That doctrine provides that, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *United States v. Mendoza, 464 U.S. 154, 158, 104 S. Ct. 568, 571, 78 L. Ed. 2d 379 (1984)*. A litigant who has been afforded a full and fair opportunity to litigate an issue will be collaterally estopped from re-litigating the same issue in a different lawsuit. *Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 328-30, 99 S. Ct. 645, 649-51, 58 L. Ed. 2d 552 (1979)*. *Res judicata* has been described as " claim preclusion" and collateral estoppel as " issue preclusion." *United States v. Mendoza, supra, 464 U.S. at 158 n.3*.

> courts under rules created, promulgated, interpreted, and enforced by other defendants assigned duties as justices of the New Mexico Supreme Court or as judges of state courts of general **[*11]** jurisdiction.

[Complaint, Doc. 1 at ¶ 1].

The Introduction to the complaint in Civ. No. 03-1320 includes additional allegations regarding antitrust violations but also encompasses the same charge as that raised in the earlier case: *i.e.*, that defendants have defrauded the State of New Mexico and the United States " while authorized unconstitutionally to practice law . . ." and that:

> [t]hose accepting appointments to or accepting elective offices in the New Mexico Government or the United States Government based upon the prior qualification of being licensed to practice law in the State of New Mexico during relevant periods did so deceptively . . . [and] the excluded People of New Mexico involuntarily came under control of rules unconstitutionally and politically created, published, promulgated, interpreted, and enforced by other defendants assigned duties as justices of the Supreme Court of New Mexico or as judges of state courts of general and appellate jurisdiction.

[Complaint, Civ. No. 03-1320, at ¶ 1].

The Introductions in both complaints go on to state, in identical language, that persons (such as Defendants) who knowingly submit false claims to the United States are liable for a civil **[*12]** penalty of up to $ 10 million for each claim submitted, plus three times the amount of damages sustained by the government; that persons (such as Gutierrez) having information regarding a false claim may bring an action to share in the recovery; and that Gutierrez, as relator, is seeking to recover his share of the penalties and damages. [Complaint, Civ. No. 03-1230, at ¶¶ 2-3; Complaint in Civ. No. 03-920, at ¶¶ 2-3].

As noted above, the next two paragraphs, 4-5, are identical in their descriptions of the parties to the respective suits. The jurisdictional statements (¶¶ 6-8 in both complaints) are substantially similar as well, the complaint in Civ. No. 03-1320 containing some additional statements which do not appear in the complaint in Civ. No. 03-920.

The remainder of the complaint in Civ. No. 03-920 is worded identically, with very minor changes, to that in Civ. No. 03-1320. *See*, in each complaint: ¶¶ 9-15 ("General Allegations"); ¶¶ 16-23 (" Count I: Substantive Violations of the False Claims Act"); ¶¶ 23-29 in Civ. No. 03-290 and ¶¶ 24-30 in Civ. No. 03-1320 (" Count II: False Claim Conspiracy").

The respective Prayers of the two complaints are worded somewhat differently, but **[*13]** similar relief is requested in both, including: an injunction directing defendants to " cease and desist from violating" certain federal statutes; a request that the Court enter judgment against defendants for treble damages and civil penalties under the False Claims Act; that Gutierrez be awarded all costs and expenses of the action; a request that the United States, the State of New Mexico and Gutierrez receive such other relief as the Court deems proper; and a demand that Defendants - that is, all persons employed by the state or federal governments who are also licensed attorneys - be removed from office and prevented from holding public office in the future. The complaint in Civ. No. 03-1320 includes additional requests for relief; however, all relief requested in the present case was also requested in Civ. No. 03-1320, and that relief has been denied.

The Court finds that Gutierrez is pursuing the same claims, against the same parties, in Civ. No. 03-920 as he attempted to bring in Civ. No. 03-1320. The claims in Civ. No. 03-1320 having been dismissed with prejudice to failure to state a claim, he cannot now raise them again.

Conclusion

The doctrines of collateral estoppel and ***[*14]*** *res judicata* are meant to promote the following laudable objectives: to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308, (1980)*.

Gutierrez had a full and fair opportunity to present his claims in Civ. No. 03-1320 and the Court ruled against him in that case, on the merits of the very issues he attempts to raise in this action. That case was dismissed with prejudice, *res judicata* applies, and the Court finds that, for the reasons exhaustively treated in the prior litigation, this action should likewise be dismissed.

The Court further finds that the "rule of necessity" requires resolution of this case by judges of this district, even though all such judges are within the category of defendants described in Plaintiffs caption as "persons holding office as public officers within the . . . judicial department[] of the United States government, who were also licensed to practice law . . .." *United States v. Will, supra.*

Recommended Disposition

The Court accepts the United States' Suggestion of Dismissal [Doc. 5] and recommends that the complaint be dismissed with prejudice.

/s/ Lorenzo F. Garcia

Lorenzo F. **[*15]** Garcia

Chief United States Magistrate Judge

Bronco Wine Co. v. Jolly

Supreme Court of California

August 5, 2004, Filed

S113136

Reporter
33 Cal. 4th 943 *; 95 P.3d 422 **; 17 Cal. Rptr. 3d 180 ***; 2004 Cal. LEXIS 7082 ****; 2004 Daily Journal DAR 9587; 2004 Cal. Daily Op. Service 7075

BRONCO WINE COMPANY et al., Petitioners, v. JERRY R. JOLLY, as Director, etc., et al., Respondents; NAPA VALLEY VINTNERS ASSOCIATION, Intervener.

Notice: As modified Oct. 13, 2004.

Subsequent History: Writ of mandamus denied, On remand at *Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 8027 (Cal., Aug. 25, 2004)*

Modified by *Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 9647 (Cal., Oct. 13, 2004)*

Rehearing denied by *Bronco Wine Co. v. Jolly, 2004 Cal. LEXIS 9765 (Cal., Oct. 13, 2004)*

US Supreme Court certiorari denied by *Bronco Wine Co. v. Jolly, 161 L. Ed. 2d 479, 125 S. Ct. 1646, 2005 U.S. LEXIS 2479 (U.S., 2005)*

Writ denied by, On remand at *Bronco Wine Co. v. Jolly, 2005 Cal. App. LEXIS 861 (Cal. App. 3d Dist., May 26, 2005)*

Prior History: **[****1]** Court of Appeal, Third Dist., No. C037254.

Bronco Wine Co. v. Espinoza, 104 Cal. App. 4th 598, 128 Cal. Rptr. 2d 320, 2002 Cal. App. LEXIS 5177 (Cal. App. 3d Dist., 2002)

Disposition: Judgment of the Court of Appeal reversed; remanded.

Core Terms

wine, labeling, regulations, food, preempt, federal regulation, federal law, grapes, pure food, state regulation, brand name, preemption, appellation, state law, consumers, italics, grandfather clause, brand, geographic, stringent, brand-name, Alcohol, FAA Act, misbranding, misleading, license, bottle, beverage, obstacle, stricter

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

HN1[] **Consumer Protection, Deceptive Labeling & Packaging**

See *Cal. Bus. & Prof. Code § 25241*.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

International Trade Law > General Overview

HN2[] **Consumer Protection, Deceptive Labeling & Packaging**

The Federal Alcohol Administration Act, or FAA Act, *27 U.S.C.S. § 201 et seq.*, enacted by Congress in 1935, bars misleading statements on wine labels, *27 U.S.C.S. § 205(e)*, and requires federal approval of each label (via a certificate of label approval) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, designed to implement *27 U.S.C.S. § 205(e)*, generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine was in fact grown in that area . *27 C.F.R. § 4.39(i)(1) (2003)*. But a "grandfather clause" appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. *§ 4.39(i)(2)(ii)*.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

HN3[] **Consumer Protection, Deceptive Labeling & Packaging**

See *27 C.F.R. § 4.39(i) (2003)*.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN4[] **Consumer Protection, Deceptive Labeling & Packaging**

Cal. Bus. & Prof. Code § 23090.5 divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing *Cal. Bus. & Prof. Code § 25241*.

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Federal Government > US Congress

International Trade Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > Federal Government > General Overview

HN5[] **Supremacy Clause, Federal Preemption**

Under the *supremacy clause of the United States Constitution*, U.S. Const. art. VI, *cl. 2*, Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court's task is to discern congressional intent. Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > General Overview

Evidence > Burdens of Proof > General Overview

HN6[] **Constitutional Law, Supremacy Clause**

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. An important corollary of this rule is that, when Congress legislates in a field traditionally occupied by the states, the court starts with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress. This venerable presumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Antitrust & Trade Law > Consumer Protection > Consumer Product Safety Act > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Governments > Police Powers

HN7[] **Consumer Protection, Deceptive Labeling & Packaging**

State police powers properly are employed both to protect consumers' health and to prevent the deception of consumers. A state has an interest in protecting its reputation as a reliable source of authentic, high-quality goods in all markets where its goods compete. A state wine labeling statute, designed to protect the health of consumers and the integrity of the wine industry, is a proper exercise of the police power.

Governments > State & Territorial Governments > Licenses

HN8[] **State & Territorial Governments, Licenses**

See *Cal. Const. art. XX, § 22*.

Banking Law > Consumer Protection > State Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Governments > Police Powers

HN9[] **Consumer Protection, State Law**

When Congress finally entered the specific field of wine label regulation in August 1935 by enacting the Federal Alcohol Administration Act, *27 U.S.C.S. § 201 et seq.*, Congress was legislating in a field "traditionally regulated by the States." Accordingly, a strong presumption against preemption applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN10[] **Consumer Protection, Deceptive Labeling & Packaging**

The history of the 1935 Federal Alcohol Administration Act, *27 U.S.C.S. § 201 et seq.*, discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > Elements

International Trade Law > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Transportation > Elements

HN11[] **Distribution & Sale, Elements**

The Federal Alcohol Administration Act (FAA Act), *27 U.S.C.S. § 201 et seq.*, makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury. *27 U.S.C.S. § 203(a)*, *(b)*. *27 U.S.C.S. § 205(e)* directs the Secretary of the Treasury to promulgate such regulations with respect to packaging, marking, branding, and labeling (1) as will prohibit deception of the consumer with respect to alcoholic beverage products; and (2) as will provide the consumer with adequate information as to the identity and quality of the products. To enforce these requirements, this section of the FAA Act also requires that any person who sells or ships wine in interstate or foreign commerce first obtain from the Secretary of the Treasury (or his or her designee) a certificate of label approval, or COLA, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury, through issuance of a COLA. Finally, the section further provides that no wine label may be removed or altered "except as authorized by Federal law" or except pursuant to federal regulations authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

Governments > Legislation > Interpretation

HN12[] **Legislation, Interpretation**

Statements by a single member of Congress can provide evidence of Congress' intent.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN13[] **Consumer Protection, Deceptive Labeling & Packaging**

27 C.F.R. § 4.25(b)(1)(i) and *(iii) (2003)* states that a wine is "entitled" to be described with an appellation of origin if at least 75 percent of the wine is derived from fruit grown in the appellation area indicated and it conforms to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HN14[] **Consumer Protection, Deceptive Labeling & Packaging**

"Composition" refers to the ingredients used to make a wine, *27 C.F.R. § 4.34 (2003)*, and generally consists simply of grapes. "Method of manufacture" refers to approved wine treatment materials and processes. *27 C.F.R. § 24.175 et seq. (2003)*. "Designation of wines" is a concept distinct from brand name or appellation; it refers to the class or type of wine rather than the source or origin of the wine. *27 C.F.R. §§ 4.32(a)(2)*, *4.34 (2003)*. For example, a wine may be designated by class as a grape wine, sparkling grape wine, or carbonated grape wine, *27 C.F.R. § 4.21 (2003)*, or by the grape varietal. *27 C.F.R. §§ 4.23*, *4.24*, *4.28 (2003)*. California long has enforced regulations that differ from the federal regulations with respect to method of manufacture.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

HN15[] **Agriculture & Food, Food Product Quality**

See *Cal. Health & Safety Code § 110525*.

Constitutional Law > Supremacy Clause > General Overview

HN16[] **Constitutional Law, Supremacy Clause**

An express definition of the pre-emptive reach of a statute supports a reasonable inference that Congress did not intend to pre-empt other matters.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Federal Government > Claims By & Against

Constitutional Law > Supremacy Clause > General Overview

HN17[] **Agency Rulemaking, Rule Application & Interpretation**

The United States Supreme Court has stated that it is even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in the Supremacy Clause jurisprudence. Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, they will make their intentions clear if they intend for their regulations to be exclusive.

Constitutional Law > Supremacy Clause > General Overview

HN18[] **Constitutional Law, Supremacy Clause**

What constitutes a sufficient obstacle for a finding of implied preemption is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. A court's inquiry in this regard requires it to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN19[] **Consumer Protection, Deceptive Labeling & Packaging**

Cal. Bus. & Prof. Code § 25241 is consistent with Congress's overall purpose in enacting *27 U.S.C.S. § 205(e)* -- that is, to insure that the purchaser should get what he thought he was getting, and that the representations both on labels and in advertising should be honest and straightforward and truthful. The state statute also is consistent with the recognition that the Federal Alcohol Administration Act, *27 U.S.C.S. § 201 et seq.*, was necessary in order to do something to supplement legislation by the States to carry out their own policies because the states alone cannot do the whole job. *Cal. Bus. & Prof. Code § 25241* does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > General Overview

HN20[] Constitutional Law, Supremacy Clause

The presumption against preemption reinforces the appropriateness of a narrow reading of assertedly preempting language.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

HN21[] Consumer Protection, Deceptive Labeling & Packaging

It is apparent from the Federal Alcohol Administration Act, *27 U.S.C.S. § 201 et seq.*, and from the corresponding regulations, that both Congress and the Bureau of Alcohol, Tobacco, and Firearms (BATF) well understand the distinction between a license or permit, on one hand, and a certificate of label approval (COLA), on the other. Congress requires wine importers, producers, and wholesalers to secure a "basic permit," *27 U.S.C.S. § 203(a)-(c)*, and the BATF has adopted extensive corresponding regulations concerning such permits, *27 C.F.R. §§ 1.20-1.59 (2003)*. By contrast, nowhere in the separate COLA procedures set forth in *27 U.S.C.S. § 205(e)*, or the extensive COLA regulations, *27 C.F.R. §§ 4.50-4.52*, 13.1-13.92 (2003), does Congress or the BATF even imply that a COLA constitutes a license or permit.

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Quality

International Trade Law > General Overview

HN22[] Consumer Protection, Deceptive Labeling & Packaging

The Bureau of Alcohol, Tobacco, and Firearms (BATF) has observed that a certificate of label approval (COLA) was never intended to convey any type of proprietary interest to the certificate holder and that a certificate is issued for BATF use only. The COLA is a statutorily mandated tool used to help the BATF in its enforcement of the labeling requirements of the Federal Alcohol Administration Act, *27 U.S.C.S. § 201 et seq.* *64 Fed. Reg. 2122, 2123 (Jan. 13, 1999)*. A COLA goes no further than evidencing compliance with federal regulatory standards imposed only for the purposes mentioned in the valid exercise of federal authority.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A bulk wine producer and a wine bottler filed an original petition for a writ of mandamus in the Court of Appeal, seeking to prohibit the Department of Alcoholic Beverage Control and its director from enforcing *Bus. & Prof. Code, § 25241*, the state wine labeling statute, with respect to three brand-name wines bottled and marketed by the wine company, on the ground that regulations designed to implement the Federal Alcohol Administration Act (FAA Act), *27 U.S.C. § 201 et seq.*, preempted the state statute. *Bus. & Prof. Code, § 25241*, requires that, when the word "Napa" (or the name of any federally recognized viticultural region within Napa County, such as Rutherford) appears on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. The wine company however, uses the three brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) exclusively to sell wines made from grapes grown outside Napa County. The brand names had been acquired from predecessor owners of wineries located in Napa County and the wine company's continued use of the brand-name labels had been approved by the federal agency charged with enforcing the federal labeling law. A “grandfather clause” appended to the federal regulations (*27 C.F.R. § 4.39(i)(2)(ii)*) exempted the three labels from the federal regulation, which would have similarly required that 75 percent of the grapes had in fact been grown in Napa County or one of its viticultural regions (*27 C.F.R. § 4.39(i)(1)*), because the brand name had been in use prior to July 7, 1986, and the front labels also disclosed the true geographic source of the grapes used to make the wines. The Court of Appeal, Third Dist., No. C037254, concluded that *Bus. & Prof. Code, § 25241*, is preempted by federal law.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the. The court concluded that the state labeling statute was neither expressly nor impliedly preempted by federal law. Extensive review of the history of state and federal regulation of beverage and wine labels revealed **[*944]** substantial state involvement and very little federal regulation prior to the adoption of the *FAA Act*, leading to the conclusion that the presumption against preemption applied. The intent of Congress in enacting the *FAA Act* was to preventing the deception or misleading of consumers related to the labeling of wine, and to supplement—but not supplant—existing state regulation of the industry. The wine company failed to demonstrate that the long history of concurrent state and federal regulation of wine labeling, including historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine, was no longer compatible with the overall purposes of the federal regulation of wine labeling. *Bus. & Prof. Code, § 25241*, by prohibiting, with respect to Napa County, what was not prohibited by the federal regulation's grandfather clause—the use of established geographical brand names for wines from a variety of appellation areas—did not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The congressional and regulatory acquiescence in California's long-standing regulations applicable to the labeling of wines produced in California demonstrated that the responsible federal regulatory agency operated on the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, by purchasing a brand name that had been used prior to 1986, the wine company had not acquired a federally recognized right of license exempting it from stricter state regulation. (Opinion by George, C. J., with Kennard, Baxter, Chin, Brown, and Moreno, JJ., and Swager, J.[*] concurring.)

Headnotes

CA(1)[] **(1)**

Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Brand Name and Label—Napa County and Napa Viticultural Regions—Appellation of Origin.

Bus. & Prof. Code, § 25241, subd. (b), provides in relevant part that no wine produced or marketed in California shall use a brand name or have a label bearing the word “Napa” (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made was grown in Napa County.

CA(2)[] **(2)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Wine—Geographic Brand Name—Viticultural Region—Appellation of Origin—Grandfather Clause.

[*] Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

The Federal Alcohol Administration **[*945]** Act, *27 U.S.C. § 201 et seq.*, bars misleading statements on wine labels (*27 U.S.C. § 205(e)*) and requires federal approval of each label via a certificate of label approval before that label may be used in interstate or foreign commerce. Title *27 C.F.R. § 4.39(i)(1)*, designed to implement *27 United States Code § 205(e)*, generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine was in fact grown in that area. But a “grandfather clause” appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle. (*27 C.F.R. § 4.39(i)(2)(ii)*.)

CA(3)[] **(3)**

Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption.

Under the supremacy clause of the *U.S. Const., art. VI, cl. 2*, Congress has the power to preempt state law concerning matters that lie within the authority of Congress. In determining whether federal law preempts state law, a court's task is to discern congressional intent. Congress's express intent in this regard is found when Congress explicitly states that it is preempting state authority. Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law; (ii) when compliance with both federal and state regulations is an impossibility; or (iii) when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

CA(4)[] **(4)**

Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption—Burden of Proof.

The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption.

CA(5)[] **(5)**

Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers—Federal Preemption—Field Traditionally Occupied by the States.

When Congress legislates in a field traditionally occupied by the states, a court starts with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress.

[*946] ***CA(6)***[] **(6)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Preemption.

Historic evidence demonstrates that when Congress finally entered the specific field of wine label regulation in August 1935 by enacting the Federal Alcohol Administration Act, *27 U.S.C. § 201 et seq.*, Congress was legislating in a field traditionally regulated by the States. Accordingly, a strong presumption against federal preemption of state law applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

CA(7)[] **(7)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—No Intent to Preempt State Regulation—Wine Labeling.

The history of the 1935 Federal Alcohol Administration Act discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

CA(8)[] **(8)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act.

The Federal Alcohol Administration Act (FAA Act), *27 U.S.C. § 201 et seq.*, makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury. (*27 U.S.C. § 203(a)* & *(b)*.) Title *27 U.S.C. § 205(e)*, directs the Secretary of the Treasury to promulgate such regulations with respect to packaging, marking, branding, and labeling (1) as will prohibit deception of the consumer with respect to alcoholic beverage products and (2) as will provide the consumer with adequate information as to the identity and quality of the products. To enforce these requirements, this section of the FAA Act also requires that any person who sells or ships wine in interstate or foreign commerce first obtain from the Secretary of the Treasury a certificate of label approval, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury, through issuance of such a certificate. Finally, the section further provides that no wine label may be removed or altered except as authorized by federal law or except pursuant to federal regulations authorizing relabeling for purposes of compliance with the requirements of this subsection or of state law.

CA(9)[] **(9)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—No Intent to Preempt State Regulation—Wine Labeling.

Nothing in the body of the Federal Alcohol Administration Act, *27 U.S.C. § 201 et seq.*, reveals congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police powers.

[*947] *CA(10)*[] **(10)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Regulation—Concurrent or Stricter State Regulation—Wine Labeling.

The federal agencies within the Department of the Treasury responsible for wine labeling regulation have long contemplated or at least acquiesced in concurrent and stricter state regulation.

CA(11)[] **(11)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Labeling Regulations—Wine Labels—Appellation of Origin.

Title *27 C.F.R. § 4.25(b)(1)(i), (iii)* states that a wine is entitled to be described with an appellation of origin if at least 75 percent of the wine is derived from fruit grown in the appellation area indicated and it conforms to the laws and regulations of the named appellation area governing the composition, method of manufacture, and designation of wines made in such place.

CA(12)[] **(12)**

Alcoholic Beverages § 3—State Department of Health Services—Wine Regulation.

Since mid-1939, the California Legislature has authorized state wine regulations that are stricter than federal wine regulations, and since 1970, the Legislature expressly has authorized state wine regulations to differ from or be inconsistent with federal wine regulations (*Health & Saf. Code, § 110525*).

CA(13)[] **(13)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption.

The history of the federal and Oregon wine labeling regulations in the mid-1970s through the present reveals no evidence of any intent to preempt more stringent state regulations. Instead, that history strongly indicates that the Bureau of Alcohol, Tobacco and Firearms has long contemplated that the states will enforce their own stricter labeling requirements, and that the agency did not and does not view its labeling regulations as preempting more stringent state regulations such as *Bus. & Prof. Code, § 25241*.

CA(14)[] **(14)**

Constitutional Law § 34—Distribution of Governmental Powers—Between Federal and State Governments—Conflicts Between Federal and State Powers and Their Resolution—Federal Preemption.

An express definition of the preemptive reach of a statute supports a reasonable inference that Congress did not intend to preempt other matters.

CA(15)[] **(15)**

Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Brand Name and Label—Napa County and Napa Viticultural Regions—Appellation of Origin—Not Obstacle to Purposes and Objectives of Federal Alcohol Administration Act.

Bus. & Prof. Code, § 25241, is consistent with **[*948]** Congress's overall purpose in enacting *27 U.S.C. § 205(e)*—that is, to ensure that the purchaser should get what he or she thought he or she was getting, and that the representations both on labels and in advertising should be honest and straightforward and truthful. The state statute also is consistent with the recognition that the Federal Alcohol Administration Act, *27 U.S.C. § 201 et seq.*, was necessary in order to do something to supplement legislation by the states to carry out their own policies because the states alone cannot do the whole job. *Bus. & Prof. Code, § 25241*, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

CA(16)[] **(16)**

Alcoholic Beverages § 4—Alcoholic Beverage Control Act—Wine Produced or Marketed in California—Geographical Brand Name and Label—Napa County and Napa Viticultural Regions—Not Preempted by the Grandfather Clause of Federal Regulations Which Exempted Certain Geographic Brand Names from Appellation of Origin Requirements.

Nothing in the history of the Federal Alcohol Administration Act, *27 U.S.C. § 201 et seq.*, or its enabling regulations, *27 C.F.R., §§ 4.20–4.39*, suggests that, although the Bureau of Alcohol, Tobacco and Firearms (BATF) may have determined that the grandfather clause of *27 C.F.R. § 4.39(i)(2)(ii)*, which exempted from federal regulation certain established but otherwise misleading geographic brand names, was appropriate so as to avoid destroying an entire class of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns. The more stringent requirement of *Bus. & Prof. Code, § 25241*, that no wine produced or marketed in California can use a brand name label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County, did not frustrate Congress's intent or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. A wine company that had acquired three brand names bearing the words "Napa" or "Rutherford" from predecessor owners of wineries in Napa County could not demonstrate that the grandfather clause of *27 C.F.R. § 4.39(i)(2)(ii)*, preempted *Bus. & Prof. Code, § 25241*, and, thus, could not establish its right to use, on wines made from grapes grown in areas far from Napa County and the Rutherford viticultural region, the geographical brand names it had acquired.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 15.]

[*949] *CA(17)*[] (17)

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—Bureau of Alcohol, Tobacco and Firearms—Enforcement of Bare Terms of Federal Wine Labeling Law.

The Bureau of Alcohol, Tobacco and Firearms (BATF) envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements, and generally views its role as being confined to ensuring compliance with the bare terms of federal labeling law. The BATF itself has confirmed this view of its enforcement authority and of any resulting certificate of label approval that it issues by noting, on its application form, that the BATF uses the form only for its own federal enforcement duties but that it may share the information supplied to state regulators to aid in the performance of their duties.

***CA(18)*[] (18)**

Alcoholic Beverages § 3—Federal Alcohol Administration Act—Federal Preemption—Bureau of Alcohol, Tobacco and Firearms—Certificate of Label Approval.

A federal certificate of label approval cannot properly be viewed as conferring a right on the holder to market wines in interstate or foreign commerce so long as the bare Bureau of Alcohol, Tobacco and Firearms (BATF) labeling regulations are satisfied. The BATF itself has observed that a certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder and that a certificate is issued for BATF use only. The certificate of label approval is a statutorily mandated tool used to help the BATF in its enforcement of the labeling requirements of the Federal Alcohol Administration Act, *27 U.S.C. § 201 et seq.* A certificate goes no further than evidencing compliance with federal regulatory standards imposed only for the purposes mentioned, in the valid exercise of federal authority.

Counsel: Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer; Ropes & Gray, Peter M. Brody and Kelly B. Kramer, for Petitioners.

Hinman & Carmichael, John A. Hinman, Beth Aboulafia and Barry Strike for 68 wineries, 47 winegrowers and 3 interested parties as Amici Curiae on behalf of Petitioners.

Bill Lockyer, Attorney General, David S. Chaney, Assistant Attorney General, Damon M. Connolly, Miguel A. Neri, Fiel Tigno and Terry Senne, Deputy Attorneys General, for Respondent.

[*950] Dickenson, Peatman & Fogarty, Richard P. Mendelson, Deborah E. Quick; Keker & Van Nest, John W. Keker, Henry C. Bunsow, James M. Emery, Ragesh K. Tangri, Daniel Purcell; Horvitz & Levy and Ellis Horvitz, for Intervener.

Pillsbury Winthrop, Kevin M. Fong and James M. Seff for Jordan Vineyard & Winery and North Coast Winegrowers Association et al., as Amici Curiae on behalf of Respondent and Intervener.

Judges: George, C. J., with Kennard, Baxter, Chin, Brown and Moreno, JJ., and Swager, J.P.T.* concurring. (*Associate Justice, Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.) **[****2]**

Opinion by: George

Opinion

[*183]** **[**424]** **GEORGE, C. J.**?This case concerns three brand-name labels (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) appearing on wine bottled and marketed by petitioners Bronco Wine Company and Barrel Ten Quarter Circle, Inc. (hereafter Bronco). These wines are made not from grapes grown in Napa County, or in the Rutherford viticultural (wine grape growing) region of Napa County, [1] but instead from grapes grown in areas far from Napa, such as Stanislaus County and the environs of the City of Lodi—areas where the cost of grapes, and often their perceived quality as well, is considerably lower. The challenged bottle labels have been approved by the federal agency charged by Congress with enforcing federal labeling law but violate a four-year-old California wine labeling statute, which requires that, when the word "Napa" (or any federally recognized viticultural **[**425]** region within Napa County) appears on a brand label, at least 75 percent of the grapes used to make that wine must be from Napa County. (*Bus. & Prof. Code, § 25241* (hereafter *section 25241*).) We granted review to consider the Court of Appeal's conclusion that federal **[****3]** law preempts the state law. We conclude that the state labeling statute is not preempted by federal law and hence that the judgment rendered by the Court of Appeal must be reversed.

I.

Bronco asserts that it specializes in "premium wines at affordable prices." Some of Bronco's wine is bottled at its facilities in Ceres (near Modesto, in Stanislaus County) and in Sonoma County; other Bronco wines are bottled by petitioner Barrel Ten Quarter Circle, Inc., at a recently completed facility in the City of Napa, in Napa County. The latter plant is capable of producing approximately 18 million 12-bottle cases per year—output that would be more than double the current annual production of Napa-grown wines.

[*951] Bronco sells wines under approximately 30 labels or brand names. A representative **[****4]** label for the three challenged brand names (Napa Ridge, Napa Creek Winery, and Rutherford Vintners) is set forth in the appendix. [2] **[****5]** As can be seen, with regard to the representative Napa Ridge label, the label lists (in smaller lettering and below the brand name) the "designation" of the wine (the varietal name White Merlot), followed underneath by the "appellation of origin"—the geographic source of the grapes (Lodi). The representative Napa

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[1] Rutherford is a federally recognized viticultural region located within Napa County. (*27 C.F.R. § 9.133 (2003)*; all further citations to the Code of Federal Regulations are to the 2003 edition unless otherwise indicated.)

[2] The labels set forth in Bronco's appendix to the petition for writ of mandate are divided into sections for each of the three brand names. The labels selected for description below and displayed in the appendix to our opinion are the first from each section.

Creek Winery label lists (in smaller lettering and below the brand name) the appellation of origin (Lodi), followed underneath by the varietal name (Chardonnay). **[***184]** The representative Rutherford Vintners label lists (in smaller lettering and below the brand name) the appellation of origin (Stanislaus County), followed underneath by the varietal name (Merlot). The "back label" of each states that the wine was "vinted and bottled" by the named winery in "Napa, CA" or in "Napa, California." [3] In addition, many of the Napa Ridge wines include the word "Napa" on bottleneck collars, and some include that word on branded corks.

Bronco acquired these three brand names, and the right to use these labels, from predecessor owners of wineries located in Napa County. The Napa Ridge brand, which Bronco acquired in January 2000 from Beringer Wine Estates for more than $ 40 million, had been in use since **[****6]** the early 1980s. The Napa Creek Winery brand, introduced in 1981, was acquired by Bronco in 1993. The Rutherford Vintners brand originated in the early 1970s, and was acquired by Bronco in 1994.

The prior owner of the Napa Ridge brand had used that name and label for wines made from grapes grown in California's Central Coast, North Coast, and Lodi appellation areas, as well as from Napa County. All of the wines previously marketed by the prior owner under the Napa Creek Winery brand and most wines previously marketed by the prior owner under the Rutherford Vintners brand had been made from Napa County grapes. Under Bronco's **[*952]** ownership, all three of these brands have been used almost exclusively to sell wines made from grapes grown outside Napa County.

The bill that became *section 25241* was introduced in the California Legislature in February 2000 (Assem. Bill No. 683 (1999– **[**426]** 2000 Reg. Sess.)). After receiving substantial public comment and holding hearings,[4] **[****8]** the Legislature found: "(a)(1) … [F]or more than a century, Napa Valley and Napa County have been widely recognized for producing grapes and wine of the highest quality. Both consumers and the wine industry understand the **[****7]** name Napa County and the viticultural area appellations of origin contained within Napa County (collectively 'Napa appellations') as denoting that the wine was created with the distinctive grapes grown in Napa County. [¶] (2) The Legislature finds, however, that certain producers are using Napa appellations on labels, on packaging materials, and in advertising for wines that are not made from grapes grown in Napa County, and that consumers are confused and deceived by these practices. [¶] (3) The Legislature further finds that legislation is necessary to eliminate these misleading practices. It is the **[***185]** intent of the Legislature to assure consumers that the wines produced or sold in the state with brand names, packaging materials, or advertising referring to Napa appellations in fact qualify for the Napa County appellation of origin." (*§ 25241, subd. (a)*, added by Stats. 2000, ch. 831, § 1.) [5]

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[3] The word "vinted" is used when wine is fermented at one address and thereafter subjected to "cellar treatment" (such as filtering) at a different address stated on the label. (See 27 C.F.R. § 4.35a(a)(3)(iii) & (v).) Each back label also contains a further statement concerning the appellation of origin. The Napa Ridge back label states: "This White Merlot, from the Lodi Region of Northern California, starts with an enticing aroma of strawberry and cherry … ." The Napa Creek Winery back label states: "From vineyards blessed by the warm days and cool nights of California's famed Lodi viticultural area, our Chardonnay is well structured with complex flavors from partial barrel fermentation. …" The Rutherford Vintners back label reads: "These grapes were harvested from the lush vineyards of Stanislaus County. …"

[4] The Legislature heard evidence of intent, or at least willingness, to expand dramatically the marketing of Napa-named brands, including the hope of fully utilizing the capacity of the new 18-million-case bottling plant in the City of Napa, to produce wine from grapes grown outside Napa County. (See transcript of Sen. Governmental Organization Com., hearings on Assem. Bill No. 683 (1999–2000 Reg. Sess.) (June 27, 2000), pp. 29 & 31 [responses to questions by Sen. Chesbro].)

[5] Bronco contests the Legislature's findings, asserting that labels such as those set out in the record are not in law or in fact deceptive because they display a correct appellation of origin. The Legislature's findings to the contrary, however, are supported both by testimony and survey results presented at the hearings disclosing consumer confusion relating to such labels. Moreover, as observed at the hearings, an uninformed consumer may not know that an unelaborated term (for example, Lodi) appearing on a label refers to a geographic location outside Napa County or even that the named location (in contrast to the brand name of the wine) signifies the place where the grapes used to make the wine actually were grown. Similarly, consumers in restaurants who order wine by the bottle or the glass from menus may be aware only of the brand name of the wine and generally will not have an opportunity to read the label of the bottle before placing an order.

CA(1)[] **(1)** The resulting legislation, *section 25241*, provides in relevant part that no wine produced or marketed in California shall use a brand **[****9]** name or have a label bearing the word "Napa" (or any federally recognized viticultural area within Napa County) unless at least 75 percent of the grapes from which the wine was made were grown in Napa County. (*Id., subd. (b)*.) [6]

[**10]** **[*953]** **[**427]** ***CA(2)***[] **(2)** The legislative history discloses that *section 25241* was designed to close what some legislators termed a "loophole" created by an exception in a federal wine labeling **[***186]** regulation. As discussed more fully below, federal law, ***HN2***[] the Federal Alcohol Administration Act, or FAA Act (*27 U.S.C. § 201 et seq.*), enacted by Congress in 1935, bars misleading statements on wine labels (*id*., *§ 205(e)*) and requires federal approval of each label via a certificate of label approval (hereafter sometimes COLA) before that label may be used in interstate or foreign commerce. A 1986 federal regulation, also described more fully below, designed to implement *27 United States Code section 205(e)*, generally prohibits the use of a label bearing a brand name that implies the wine was made from grapes grown in the area suggested by the brand, unless at least 75 percent of the grapes used to make the wine were in fact grown in that area (*27 C.F.R. § 4.39(i)(1)*). But a "grandfather clause" appended to the federal regulation exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, **[****11]** *and* the front label also discloses the true geographic source of the grapes used to make the wine **[*954]** contained in the bottle. (*Id*., *§ 4.39(i)(2)(ii)*.) [7] **[****12]** In other words, the state statute prohibits, with respect to Napa County, what the federal regulation's grandfather clause does not prohibit. [8]

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[6] *Section 25241* sets out in *subdivision (a)* the findings quoted above, and then ***HN1***[] provides:

"(b) No wine produced, bottled, labeled, offered for sale or sold in California shall use, in a brand name or otherwise, on any label, packaging material, or advertising, any of the names of viticultural significance listed in subdivision (c), unless that wine qualifies under Section 4.25a [now section 4.25—see 68 Federal Register 39454, 39455 (July 2, 2003)] of Title 27 of the Code of Federal Regulations for the appellation of origin Napa County and includes on the label, packaging material, and advertising that appellation or a viticultural area appellation of origin that is located entirely within Napa County, subject to compliance with Section 25240.

"Notwithstanding the above, this subdivision shall not grant any labeling, packaging, or advertising rights that are prohibited under federal law or regulations.

"(c) The following are names of viticultural significance for purposes of this section:

"(1) Napa.

"(2) Any viticultural area appellation of origin established pursuant to Part 9 (commencing with Section 9.1) of Title 27 of the Code of Federal Regulations that is located entirely within Napa County.

"(3) Any similar name to those in paragraph (1) or (2) that is likely to cause confusion as to the origin of the wine.

"(d) The appellation of origin required by this section shall meet the legibility and size-of-type requirements set forth in either Section 4.38 or Section 4.63 of Title 27 of the Code of Federal Regulations, whichever is applicable.

"(e) Notwithstanding subdivision (b), any name of viticultural significance may appear either as part of the address required by Sections 4.35 and 4.62 of Title 27 of the Code of Federal Regulations, if it is also the post office address of the bottling or producing winery or of the permittee responsible for the advertising, or as part of any factual, nonmisleading statement as to the history or location of the winery.

"(f) The department may suspend or revoke the license of any person who produces or bottles wine who violates this section. Following notice of violation to the person in possession of the wine and a hearing to be held within 15 days thereafter, if requested by any interested party within five days following the notice, the department may seize wine labeled or packaged in violation of this section regardless of where found, and may dispose of the wine upon order of the department. From the time of notice until the departmental determination, the wine shall not be sold or transferred.

"(g) This section applies only to wine which is produced, bottled, or labeled after January 1, 2001."

[7] *27 Code of Federal Regulations section 4.39(i)* ***HN3***[] provides:

[**13]** In late December 2000, shortly before *section 25241* was to become effective, Bronco filed an original petition for a writ **[***187]** of mandamus in the Court of Appeal, [9] seeking to prohibit respondents (the Department of Alcoholic Beverage Control and its then Interim **[**428]** Director, Manuel R. Espinoza, currently Jerry R. Jolly, Director) (hereafter the Department) from enforcing *section 25241* with respect to Bronco's wines, on the ground that the state **[*955]** statute to the extent it applies to wine destined for interstate or foreign commerce is preempted by the grandfather clause contained in the federal law. Bronco also claimed that the California statute violates the *First Amendment*, the commerce clause, and the *takings clause of the United States Constitution.* Intervener Napa Valley Vintners Association (NVVA) joined with the Department in defending the validity of the state enactment. The Court of Appeal issued an alternative writ and granted a stay of enforcement of *section 25241*. As noted above, that court ultimately concluded that *section 25241* is preempted by federal law, and to date that statute has not been enforced. We granted review to address the preemption issue only.

[**14]** II.

A.

CA(3)[] **(3)** The basic rules of preemption are not in dispute: ***HN5***[] Under the supremacy clause of the *United States Constitution (art. VI, cl. 2)*, Congress has the power to preempt state law concerning matters that lie within the authority of Congress. (*Crosby v. National Foreign Trade Council (2000) 530 U.S. 363, 372 [147 L. Ed. 2d 352,*

"(i) *Geographic brand names*. (1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

"(2) For brand names used in existing certificates of label approval issued prior to July 7, 1986:

"(i) The wine shall meet the appellation of origin requirements for the geographic area named; or

"(ii) The wine shall be labeled with an appellation of origin in accordance with *§ 4.34(b)* as to location and size of type of either:

"(A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or;

"(B) A state, county or a viticultural area, if the brand name bears a state name; or

"(iii) The wine shall be labeled with some other statement which the appropriate ATF [Bureau of Alcohol, Tobacco and Firearms] officer finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

"(3) A name has viticultural significance when it is the name of a state or county (or the foreign equivalents), when approved as a viticultural area in part 9 of this chapter, or by a foreign government, or when found to have viticultural significance by the appropriate ATF officer."

[8] Bronco asserts that the statute was drafted in such a manner as to protect other established Napa County wineries, and to target "only a single brand owner—Bronco" (and its three grandfathered brands). The record discloses, however, at least 32 other Napa-related "grandfathered" brands (none of which, it appears, *presently* produces any wine that would violate *section 25241*) that also would be covered by the statute, including the "Napa named" brands Napa Wine Cellars, Napa Wine Co., Napa Cellars, Napa Valley Winery, Napa Vintners, and "Napa viticultural appellation" brands Rutherford Hill, Stag's Leap Wine Cellars, Stags' Leap Winery, Spring Mountain, Mount Veeder Winery, St. Helena Vineyards, and Oakville Vineyards.

Bronco also complains that the statute is underinclusive, in that it does not restrict the use of non-Napa brand names, such as "Monterey Vineyards" or "Sonoma Creek," nor does it preclude the use of brand labels denoting a viticultural area within Napa, such as the brand "Stag's Leap Wine Cellars," for a Napa County wine made with grapes grown outside the Stags Leap District of the Napa Valley. (Cf. *Bus. & Prof. Code, § 25240* [requiring such labels to state a "Napa Valley" appellation in addition to the viticultural area within Napa Valley].) Any such underinclusiveness, however, is irrelevant to our present preemption inquiry.

[9] *Business and Professions Code section 23090.5* ***HN4***[] divests the superior court of jurisdiction to enjoin or restrain a decision of the Department of Alcoholic Beverage Control, the agency charged with enforcing *Business and Professions Code section 25241*.

120 S. Ct. 2288] (Crosby).) In determining whether federal law preempts state law, a court's task is to discern congressional intent. (English v. General Elec. Co. (1990) 496 U.S. 72, 78–79 [110 L. Ed. 2d 65, 110 S. Ct. 2270].) Congress's express intent in this regard will be found when Congress explicitly states that it is preempting state authority. (Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525 [51 L. Ed. 2d 604, 97 S. Ct. 1305] (Jones).) Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law (Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230 [91 L. Ed. 1447, 67 S. Ct. 1146] (Rice)); (ii) when compliance with both federal and state regulations is an impossibility **[****15]** (Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142–143 [10 L. Ed. 2d 248, 83 S. Ct. 1210] (Florida Avocado)); or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Hines v. Davidowitz (1941) 312 U.S. 52, 67 [85 L. Ed. 581, 61 S. Ct. 399] (Hines); see also Crosby, supra, 530 U.S. at p. 373; Barnett Bank of Marion Cty., N.A. v. Nelson (1996) 517 U.S. 25, 31 [134 L. Ed. 2d 237, 116 S. Ct. 1103] (Barnett Bank); Lawrence County v. Lead-Deadwood School Dist. (1985) 469 U.S. 256, 260 [83 L. Ed. 2d 635, 105 S. Ct. 695] (Lawrence County); Capital Cities Cable, Inc. v. Crisp (1984) 467 U.S. 691, 699 [81 L. Ed. 2d 580, 104 S. Ct. 2694]; see also Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal.4th 910, 923–924 [12 Cal. Rptr. 3d 262, 88 P.3d 1] (Dowhal).)

In the present case, it is clear that Congress has not expressly preempted state authority with respect to the regulation of wine generally, or with **[*956]** respect to wine labels in particular, and Bronco does not **[***188]** contend otherwise. Neither does Bronco contend that this is a case in which Congress has occupied the field and **[****16]** thus impliedly preempted the state statute here at issue. Nor does Bronco contend that implied preemption is shown because compliance with both federal and state regulations is impossible; as Bronco concedes, it can comply with the stricter state law and simultaneously comply with federal law. Instead, Bronco asserts that we should find implied preemption in this case because section 25241 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [10] (Cf. Dowhal, supra, 32 Cal.4th 910, 929, 935 [state law warnings concerning nicotine frustrate the purposes of the federal *Food, Drug & Cosmetic Act* and corresponding federal regulations].)

[429]** As we shall explain, we disagree that section 25241 is impliedly preempted by federal **[****17]** law. In reaching this conclusion we first address Bronco's assertion that a presumption against preemption does not apply in this matter. (See *post*, pt. II.B.1.) After extensively reviewing the history of state regulation of beverage and wine labels prior to Congress's adoption of the FAA Act in 1935—a history that reveals substantial state involvement and very little federal regulation—we conclude that a presumption against preemption does indeed apply in this case. Next, we address the intent of Congress in enacting the FAA Act in 1935. (See *post*, pt. II.C.1.) The legislative history of that enactment reveals congressional intent, among other things, (i) to prevent the deception or misleading of consumers related to the labeling of wine and other alcoholic beverages, and (ii) to supplement—but not supplant—existing state regulation of the industry. We next consider the intent of the responsible federal regulatory agency vis-à-vis state regulation of wine brand labeling, as reflected in regulations and comments set out in the Federal Register. (See *post*, pt. II.C.2.) As we explain, the record reveals that the federal regulatory agency has long operated on **[****18]** the understanding that states may and would continue to impose their own stricter wine labeling regulations. Finally, we address the substantive issue of implied preemption of the particular state legislation at issue and conclude that the California statute in question does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See *post*, pt. II.D.)

B.

HN6[] ***CA(4)***[] **(4)** The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (See, e.g., McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 422 [106 Cal. Rptr. 2d 271, 21 P.3d ***[*957]*** 1189], and cases cited.) ***CA(5)***[] **(5)** An important corollary of this rule, often noted and applied by the United States Supreme Court, is that "[*w*]*hen Congress legislates in a field traditionally occupied by*

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10 Bronco suggests, however, that the state properly may "enact an 'in-state' version of section 25241"—a regulation that would, presumably, apply only with respect to wine that is not sold in interstate commerce.

the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' ' " (California v. ARC America Corp. (1989) 490 U.S. 93, 101 [104 L. Ed. 2d 86, 109 S. Ct. 1661], italics added (*ARC America Corp.*), quoting Rice, supra, 331 U.S. 218, 230; **[****19]** see also, e.g., United States v. Locke (2000) 529 U.S. 89, 107–108 [146 L. Ed. 2d 69, 120 S. Ct. 1135] **[***189]** (Locke); Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 485 [135 L. Ed. 2d 700, 116 S. Ct. 2240] (Medtronic) [presumption applies both to the existence of preemption and the scope of preemption]; Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151, 157 [55 L. Ed. 2d 179, 98 S. Ct. 988] (Ray); Jones, supra, 430 U.S. 519, 525; Florida Avocado, supra, 373 U.S. 132, 146; Allen-Bradley Local v. Board (1942) 315 U.S. 740, 749 [86 L. Ed. 1154, 62 S.Ct. 820]; Napier v. Atlantic Coast Line R. Co. (1926) 272 U.S. 605, 611 [71 L. Ed. 432, 47 S. Ct. 207]; Savage v. Jones (1912) 225 U.S. 501, 533 [56 L. Ed. 1182, 32 S. Ct. 715] (*Savage*); Reid v. Colorado (1902) 187 U.S. 137, 148 [47 L. Ed. 108, 23 S. Ct. 92].) As explained in Jones, supra, 430 U.S. 519, 525, this venerable presumption "provides assurance that 'the federal-state balance,' … will not be disturbed unintentionally by Congress or unnecessarily by the courts." (Citation omitted; see Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 815 [135 Cal. Rptr. 2d 1, 69 P.3d 927] (Olszewski).) **[****20]**

The Department and the NVVA assert that the state regulation at issue in this case directly implicates the traditional police powers of the states to protect consumers from deception in the marketing of food and beverages and to safeguard the integrity—and worldwide market—of a vital California industry. (See, e.g., Florida Avocado, supra, 373 U.S. 132, 146 ***HN7***[] [state police powers properly are employed both to protect consumers' health and to "prevent the deception of consumers"]; Pike v. Bruce Church, Inc. (1970) 397 U.S. 137, 143 [25 L. Ed. 2d 174, 90 S. Ct. 844] [recognizing a state's interest in protecting its reputation as a reliable source of authentic, high-quality goods in all markets where its **[**430]** goods compete].) Indeed, we observed as much concerning the California wine industry more than 100 years ago. (Ex parte Kohler (1887) 74 Cal. 38, 42–43 [15 P. 436] [state wine labeling statute, designed to protect the health of consumers and the integrity of the wine industry, was a proper exercise of the police power].)

[*958] Bronco and amici curiae on its behalf, Abundance Vineyards et al, [11] **[****22]** assert, however, that no presumption **[****21]** against preemption applies in this case because there is no evidence that states traditionally have exercised their police powers to regulate the labeling of wine. [12] Specifically, Bronco argues **[***190]** that prior to the August 1935 enactment of the FAA Act, 27 United States Code section 201 et seq., federal regulation of wine labeling was "well-established," whereas the activity of the states in that enterprise was "limited." Bronco maintains that "although the states have played a limited role in regulating wine labeling over the past century, the federal government's presence in that field … would negate the application of any presumption against preemption in this case." Amici curiae assert, similarly and more emphatically, that prior to enactment of the FAA Act in August

[11] Counsel for amici curiae represent, among other entities, more than 68 wineries in Alabama, Arizona, Arkansas, California, Georgia, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and Washington, as well as 47 wine grape growers in California.

[12] Bronco, relying upon two Eleventh Circuit Court of Appeals decisions (Lewis v. Brunswick Corp. (11th Cir. 1997) 107 F.3d 1494, 1502, and Taylor v. General Motors Corp. (11th Cir. 1989) 875 F.2d 816, 826), and, to a lesser extent, two high court decisions (Geier v. American Honda Motor Co. (2002) 529 U.S. 861, 870–874 [146 L. Ed. 2d 914, 120 S. Ct. 1913] (Geier), and Engine Manufacturers Association v. South Coast Air Quality Management District (2004) 541 U.S. 246, 256 [158 L. Ed. 2d 529, 124 S. Ct. 1756, 1763] (Engine Manufacturers)), also asserts, as a preliminary matter, that the presumption against preemption is categorically inapplicable in implied preemption cases such as this, in which the question is whether state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The United States Supreme Court has not so held, however, and indeed has assumed otherwise. (Crosby, supra, 530 U.S. 363, 373–374 & fn. 8.) Geier, by contrast, did not even address the presumption-against-preemption doctrine, and in Engine Manufacturers the court simply found it unnecessary, because of its conclusion that the federal legislation *expressly* preempted the relevant state law, to address the presumption against preemption or even the legislative history of the federal statute. We discern no persuasive reason why the traditional presumption against preemption should be categorically inapplicable in the present circumstances, and until the high court directs otherwise, we reject Bronco's view on this point. (See, e.g., Philip Morris Inc. v. Harshbarger (1st Cir. 1997) 122 F.3d 58, 85–86 [applying a "strong presumption against preemption" concerning state health and safety regulations and finding those regulations not to frustrate congressional purposes].)

1935 "state and local authorities had exercised control over the *distribution* and *sale* of liquor" but that "it was the federal government that first comprehensively regulated the packaging and labeling" of wine.

[**23]** The Department and the NVVA, on the other hand, point to early California statutes addressing wine labeling, isolated statements in treatises and legal articles, and statements in congressional reports and debates suggesting an intent by Congress in 1935 that the *FAA Act*, including *27 United States Code section 205(e)* and the regulations that would be expected to flow therefrom, would supplement state regulation of wine labeling but not preempt it.

[*959] Prior to oral argument we solicited supplemental briefing from the parties, asking them to address the effect, if any, of numerous additional state statutes and regulations disclosed in the course of our review of this case. Having considered those materials and the parties' supplemental briefs, we conclude below that the historic record amply supports the conclusion that a presumption against preemption applies in this case because the protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, is a subject that traditionally has been regulated by the states. [13]

[**24]**

[431]** 1. *Regulation of wine labels prior to adoption of the FAA Act in August 1935*

Prior to the 20th century, federal legislation relating to wine and alcohol focused essentially upon revenue collection—specifically, enforcement of federal tax laws. **[***191]** (See Byse, *Alcoholic Beverage Control Before Repeal* (1940) 7 Law & Contemp. Probs. 543, 552, fns. 57 & 58 (*Alcoholic Beverage Control Before Repeal*).) By contrast, as disclosed below, widespread legislation enacted by states in the mid to late 19th century, and continuing through adoption of the *FAA Act in August 1935*, focused upon the substantive public problems of "adulteration" and "misbranding" (or "mislabeling") of wines and alcohol. This historic record supports the view that prior to adoption of the federal act in 1935, states vigorously exercised their police powers to regulate wine labeling.

a. *The emergence of state "pure food" and labeling statutes*

During the latter half of the 19th century, awareness gradually increased throughout the nation concerning a combination of related problems in the supply of food and beverages. Some food and beverage products were mere imitations or dilutions of what they purported **[****25]** to be; other products, subject to spoilage, were "adulterated" by a "soaring employment of chemical preservatives." (Young, Pure Food (1989) p. 126.) Many of these preservatives—such **[*960]** as salicylic acid, employed as a preservative in wine (*id*., at p. 105)—were used in excessive quantities dangerous to health. (*Id*., at pp. 110, 112, 126.) As a result, it was found that more than "73 per cent of the milk in Buffalo [New York] was watered, 69 of 171 samples of ground coffee collected in New York were adulterated, 71 percent of the olive oils examined in New York and Massachusetts were mixed with cotton seed oil which had been shipped from the United States and returned as 'olive oil'[, and] [f]orty-six percent of candy samples collected in Boston contained mineral pigments, chiefly lead chromate." (Hart, *A History of the Adulteration of Food Before 1906* (1952) 7 Food Drug Cosm. L.J. 5, 21); see also McCumber, *The Alarming Adulteration of Food and Drugs* (Jan. 5, 1905) The Independent, 28, 29–31 [listing common adulterations of various products].) Wines too were subject to abuses. Some were "made from cheap substances and then doctored **[****26]** up."

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[13] At oral argument, as in the Department's briefs, the NVVA maintained that the "relevant area" for purposes of determining whether the presumption against preemption is applicable should be viewed as consumer protection related to the labeling of foods and beverages in general or, more specifically, as consumer protection related to the labeling of wines. Bronco, although generally challenging the appropriateness of applying any presumption against preemption in this case (see *ante*, fn. 12), does not contest the definition of the relevant area for such an inquiry as proposed by the Department and the NVVA. For purposes of this opinion, and consistently with the high court's approach in such matters (see, e.g., *ARC America Corp., supra, 490 U.S. 93, 101* [in addressing whether federal ***antitrust law*** preempts state law, defining the relevant area as "state common-law and statutory remedies against monopolies and unfair business practices"]), we view the relevant area as being consumer protection related to food and beverage labeling, with special emphasis upon wine labeling.

(Regier, *The Struggle for Federal Food and Drugs Legislation* (1933) 1 Law & Contemp. Probs. 3, 8.) Others were mislabeled as to place of origin. (Carosso, The California Wine Industry: A Study of the Formative Years (1951) p. 25 (California Wine Industry); see also Fanshawe, Liquor Legislation in the United States and Canada (1892) p. 308.)

In response to the general threat to the food and beverage supply, many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages. (See, e.g., Dig. of Pure Food and Drug Laws, Sen. Rep. No. 3, 57th Cong., 1st Sess. (1901).) [14] The vast majority of the resulting general "pure food" statutes broadly covered liquors and wines, as well as the mislabeling of those products.

[**27]** For example, in 1879 Wisconsin enacted a general pure food, drugs, and liquors statute, making it illegal to manufacture or sell any **[**432]** food (defined to include "drink"), accompanied by "any label, mark or device whatever, so as and with intent to mislead **[***192]** or deceive as to the true name, nature, kind and quality thereof … ." (1879 Wis. Laws, ch. 248, § 3, p. 502.) A similar labeling law was enacted in North Dakota. (1903 N.D. Laws, ch. 6, §§ 1–2, pp. 9–10; 1905 N.D. Laws, ch. 11, §§ 1–2, pp. 19–20.) An Ohio statute, enacted in 1884, made it illegal to manufacture or sell any food (defined to include drink) "if by any means it is made to appear better or of greater value than it really is," or if it contained any impure substance not "distinctly labeled" as such. (1884 Ohio Laws, § 3, p. 67; 1890 Ohio Laws, § 3, p. 248.) Substantially similar labeling statutes were enacted in Indiana, Massachusetts, **[*961]** Michigan, Pennsylvania, and Washington. (1899 Ind. Acts, ch. 121, § 1, pp. 189–190; 1882 Mass. Acts, ch. 263, §§ 1–3, pp. 206–207; 1895 Mich. Pub. Acts, No. 193, § 3, p. 358; 1895 Pa. Laws, No. 233, § 3, p. 317; 1899 Wash. Laws, ch. 113, §§ 1–3, pp. 183–184.) A Maryland statute, enacted **[****28]** in 1890, required that food or drink "be so manufactured … or sold, or offered for sale under its true and appropriate name" and required that the purchaser be "fully informed by the seller of the true name and ingredients … of such article of food or drink … ." (1890 Md. Laws, ch. 604, § 1, p. 733.) Similar laws were enacted in Connecticut, North Carolina, and Tennessee. (1895 Conn. Pub. Acts, ch. 235, §§ 1, 2, p. 578; 1895 N.C. Sess. Laws, ch. 122, §§ 1, 2, 5, pp. 176–178; 1897 Tenn. Pub. Acts, ch. 45, §§ 1, 4, pp. 177–178.) Finally, a New York statute (1893 N.Y. Laws, ch. 338), subsequently amended in 1903 and 1905, prohibited "adulterated or misbranded food." The statute defined as "misbranded"—and illegal—any food or beverage "package … or label" that bore "any statement regarding the ingredients or the substances contained therein, which statement [is] false or misleading in any particular, or if the same is *falsely branded as to the state or territory in which it is manufactured or produced* … ." (1903 N.Y. Laws, ch. 524, § 1, p. 1192, italics added; 1905 N.Y. Laws, ch. 100, § 1, p. 141.) A substantially identical labeling law was enacted in **[****29]** South Dakota. (1905 S.D. Laws, ch. 114, §§ 6, 8 & 10, pp. 162–163.) [15]

b. *Early state wine labeling statutes*

As early as 1860, California enacted a statute to penalize the sale of "adulterated alcoholic or spirituous liquors, wines, cider, beer, or other liquid used as a beverage." **[****30]** (Stats. 1860, ch. 223, § 2, p. 186, currently *Pen. Code, § 382*.) But in the face of rampant deception in the labeling of wines—including the bottling of California wines under false foreign labels, and the bottling of inferior foreign wines under California labels (Cal. Wine Industry, *supra*, at p. 25) the California Legislature in 1866 passed a resolution asking Congress to enact nationwide legislation to curb the marketing of "spurious" and "imitation" wines and alcohols. (Sen. Conc. Res. No.

[14] Some state laws of this era regulated the production and labeling of specific items of food such as flour, butter, oleomargarine, and vinegar. (E.g., Hutt & Hutt, *A History of Government Regulation of Adulteration and Misbranding of Food* (1984) 39 Food Drug Cosm. L.J. 2, 42–44 [citing and describing early Virginia statutes].) During this same period, Congress enacted similar laws concerning specific food items such as tea, oleomargarine, and meats. (*Id*., at pp. 45–46.)

[15] Citing only the 1895 North Carolina law, Bronco asserts that "some" of these state laws were intended to apply only to food and beverages sold within a given state. The North Carolina provision, however, is the only such law of which we are aware to have intimated or specified such a limitation; none of the other laws cited above was so confined, and most instead broadly applied to foods and beverages that were "manufactured for sale"—wherever that sale would occur. But in any event, the relevant point is that the states (most of them broadly, although in the case of North Carolina, narrowly) exercised their traditional police powers by specifically regulating the labeling of food products and beverages, including wines.

36, Stats. 1866 (approved Apr. 2, 1866) p. 908.) After much effort during the ensuing two decades, this endeavor ultimately failed in 1886. (See Cal. Wine Industry, *supra*, at pp. 154–155.)

[*193]** **[*962]** Congress's inability to adopt a nationwide wine regulation and labeling statute induced the three primary wine-producing states—California, New York, and Ohio [16] **[****31]** —as well as other states with lesser wine industries (such as Arkansas, Colorado, and Oregon) [17] to enact, **[**433]** under their traditional police powers, specific and detailed statutes tailored to the problems of impurity and deception in the production and labeling of wines.

California—then, as now, by far the leading producer of wine in the nation, [18] **[****33]** and an acknowledged leader in quality as well [19]—apparently was the first state to adopt such a statute, in March 1887. (Stats. 1887, ch. 36, p. 46; see *Ex parte Kohler, supra, 74 Cal. 38, 42–43*.) The California statute defined as "pure wine" that which was made from only pure grapes. (Stats. 1887, ch. 36, § 1, p. 46.) The statute further defined "[d]ry wine" as that produced by "complete fermentation of saccharine contained in [grape] must"; "[s]weet wine" as that which contains "saccharine appreciable to the taste"; "[f]ortified wine" as "wine to which distilled spirits have been added"; and "[p]ure champagne, or sparkling wine" as that which "contains … effervescence produced only by natural fermentation of saccharine matter of [grape] must, or partially fermented wine in bottle." (*Id.*, § 1, p. 47.) The statute prevented the use **[****32]** or introduction of impure "substitutes for grapes" or coloring, or foreign fruit juices "not the pure product of grapes," and further barred the use of preservatives such as "salicylic acid, glycerin, alum, or other chemical antiseptics." (*Id.*, § 2, p. 47.) The statute also provided for inspection of wine samples and for the use of bottleneck seals and label certificates (*id.*, § 7, pp. 48–49), and required either the statement " 'Pure California wine' " (together with the maker's name) or the label certificate to be affixed to each bottle of pure wine. (*Id.*, § 8, p. 49.) [20] This court's decision in *Ex parte Kohler, supra, 74 Cal. 38*, rejected constitutional challenges to the act and concluded that, like legislation designed to ensure the marketing of **[*963]** pure milk and safe meats, the statute was a proper exercise of the state's police powers. (*Id., at pp. 41–42*.) [21]

[*194]** Colorado quickly followed in April 1887 with its own statute regulating the "manufacture or sale" of wine and other alcoholic **[****34]** beverages. [22] New York adopted its own wine labeling statute in June 1887. [23] **[****35]** Two **[**434]** years later Ohio adopted a law that expanded upon the three wine labeling statutes

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[16] As of 1890, those three states produced approximately 60, 10, and 8 percent, respectively, of the wine produced in the United States. (U.S. Dept. of Interior, Census Off., Rep. of Statistics of Agriculture in the U.S. at the 11th Census: 1890 (1895) p. 602.)

[17] See Pinney, A History of Wine in America (1989) pages 404–405, 420–422 (describing early winemaking in Arkansas and Oregon).

[18] As observed *ante*, footnote 16, by 1890 California produced most of the wine grown and made in the United States. Today, according to the Wine Institute, California produces more than 90 percent of the nation's wine. (See <*http://www.wineinstitute.org/communications/statistics/wine_production_key_facts.htm*> [as of Aug. 5, 2004].)

[19] See generally, California Wine Industry, *supra*, at pages 26 ("the French viticultural journal, *Revue Viticole*, in 1862, credited California with being the only wine-producing area of North America capable of competing with the product from Europe") and 133 (noting that 35 medals were awarded to California wines at the Paris Exposition Universelle in 1889).

[20] In addition—and belying Bronco's claims that this and similar statutes lacked detail—the statute contained various other provisions dealing comprehensively with the production and labeling of wine. (See Stats. 1887, ch. 36, §§ 3–6, pp. 47–49.)

[21] The *Ex parte Kohler* decision proceeded to construe the act's labeling requirements as prohibiting the sale of wines not meeting the definition of pure wines under the act, but as not subjecting to penalty a merchant who sells wine that is pure but lacks the required labels. (*Ex parte Kohler, supra, 74 Cal. at pp. 44–45*.)

[22] (1887 Colo. Sess. Laws, § 2, p. 18 et seq.) The legislation required that wine be "pure"—defined as made from "the juice of the grape"—and specified that "[n]o vinous … liquors shall be offered or exposed for sale in this State, unless the … package, containing such liquors, shall be plainly" marked with "the word 'pure' wine," and displaying "the name or brand of the particular kind of wine so offered or exposed." (*Id.*, §§ 3 & 4, pp. 18–19.)

described above. [24] Arkansas adopted a wine labeling statute in 1897, [25] and in 1905 Oregon adopted its own wine labeling statute. [26]

[*964] **[****36]** c. *Relevant federal law in the early 20th century: A failed wine statute; adoption of the Pure Food and Drugs Act of 1906; administrative "food standards"; and "Food Inspection Decisions"*

Far from supplanting these early efforts by the states, Congress in 1906 at first attempted but failed to enact a federal wine labeling statute similar to those adopted by the states. [27] As explained below, **[***195]** later in the same session Congress did enact a general pure food and beverage statute, but the resulting federal scheme produced no enforceable wine labeling regulation.

[**37]** Congress's 1906 federal Pure Food and Drugs Act (*Pub.L. No. 59-384 (June 30, 1906) 34 Stat. 768* (hereafter sometimes the 1906 Act)) borrowed substantially from the preceding state food and beverage legislation. Like the earlier New York statute described above (*ante*, pt. II.B.1.a.), the federal act defined as "misbranded"—and

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[23] (1887 N.Y. Laws, ch. 603, p. 814 et seq.) The New York law was designed to address its specific regional needs as reflected in the industry practices of New York winemakers who, like those in Europe and other areas of the United States but unlike those in California, often found it necessary to add sugar in the production of their wines. The law defined and made illegal adulterated wine, and thereafter defined and required the proper labeling of "pure wine," "half wine," and "made wine." (*Id*., §§ 1–4, pp. 814–816.)

As Bronco observes, the New York provision, as codified in 1889 (N.Y. Pub. Health Law, ch. 25, art. III, §§ 46–49 (Birdseye 1889)), referred, in its definition of adulterated wines, to those "offered for sale or manufactured with intent to sell within this state." (*Id*., § 46.) Bronco asserts this and similar phrasing in the statute's penalty provision (*id*., § 49) suggests the New York statute was intended to apply only to wines sold within the state. There is no evidence that the similar California law mentioned above, or the Ohio law mentioned below, was so confined or intended. But in any event, the relevant point is that New York—like the other states—exercised its traditional police powers by specifically regulating the labeling of wines.

[24] (1889 Ohio Laws, p. 96 et seq.; 1891 Ohio Laws, p. 231.) As amended in 1891, the Ohio law defined three versions of permitted wine: "pure wine," "wine," and "compound wine," and specifically allowed sugar to be added to the latter two products. The statute provided that each type of wine "shall be … labeled, designated and sold" as such and made it illegal to label or package, in a manner "calculated to mislead or deceive any person, or cause to be supposed that the contents thereof be pure wine," any product not meeting the definition of pure wine. (1891 Ohio Laws, §§ 2–4, pp. 231–233.)

[25] (1897 Ark. Acts, act 42, § 4, p. 108.) As subsequently amended (1899 Ark. Acts, act 80, pp. 137–138) and codified (Stats. of Ark., ch. 103, § 5101 (Kirby 1904)), the statute provided: "All wine sold in this State shall, before sale, be labeled so as to truly designate its kind and quality. Nothing but the pure fermented juice of the grape shall be labeled 'Natural Wine.' Wine to which sugar has been added before fermentation shall be labeled 'Sugared Wine.' The label shall also state if the wine be sweetened or unsweetened."

[26] (1905 Or. Laws, ch. 209, p. 347 et seq.) The Oregon law defined and barred "adulterated wine," allowed certain amounts of sugar to be used in the production of "pure wine," and defined and permitted "half wine" and "made wine," so long as those products were labeled as such. (*Id*., §§ 54–56, pp. 361–362.)

[27] See Hearing before the House Committee on Ways and Means, on House Resolution No. 12868, 59th Congress, 1st Session, pages 1–60 (Feb. 1, 1906) (February hearings); Second Hearing before the House Committee on Ways and Means, 59th Congress, 1st Session, pages 61–114 (Apr. 6 & 10, 1906) (April hearings). The proposed legislation would have defined wine as "pure," "carbonated," or "artificial," and required labeling as such. (Feb. hearings, *supra*, at pp. 5–7.) During a second committee hearing concerning the bill and a revised version of the bill, the committee made clear that in considering the proposed federal legislation it had consulted the related wine laws of France, Italy, Germany, Ohio, New York, "and other states." (Apr. hearings, *supra*, at pp. 62, 73, 101, 109–112.)

A recurring theme during the hearings was the harm posed to the wine industry by the sale of "sophisticated and fabricated wines." The proponents' stated concern was that if the sale of such products were "allowed or countenanced … in time honest wine will be driven from the market, … to the injury of the vineyardists … ." (Apr. hearings, *supra*, at p. 66; see also *id*., at pp. 73–74, 102.) That wine labeling legislation, however, died in committee.

illegal—any food or beverage "package … or label" that bore "any statement, design, or device regarding … the ingredients or the substances contained therein, which [is] false or misleading in any particular, and [] any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced." (*Pub.L. No. 59-384, § 8 (June 30, 1906) 34 Stat. 770*.)

Also like the previous general pure food and beverage laws of the states, the 1906 federal Act applied to food and "drink" (*Pub.L. No. 59-384, § 6 (June 30, 1906) 34 Stat. 769*), which in turn was construed to include wine. (See *United States v. Sweet Valley Wine Co. (N.D. Ohio 1913) 208 F. 85, 87 (Sweet Valley)*.) The 1906 Act directed **[**435]** three department secretaries—the Secretary of the Treasury, the Secretary of Agriculture, **[****38]** and the Secretary of Commerce and Labor—jointly to adopt regulations "for carrying out the provisions of this Act." (*Pub.L. No. 59-384, § 3 (June 30, 1906) 34 Stat. 768–769*.)

As commanded by Congress, in October 1906 the three department secretaries jointly adopted a set of regulations under the 1906 Act. (See U.S. **[*965]** Dept. of Agriculture, Circular No. 21, reprinted as amended through 1909 in Thornton, The Law of Pure Food and Drugs, National and State (1912) pp. 843–860 (Law of Pure Food and Drugs); see generally Hayes & Ruff, *The Administration of the Federal Food and Drugs Act* (1933) 1 Law & Contemp. Probs. 16, 20 (*Administration of the Federal Food and Drugs Act*).) One provision of those regulations governed the labeling of foods and beverages and prohibited, among other things, false or misleading statements concerning a product's "place [of] origin." (Circular No. 21, *supra*, Reg. 17(d), reprinted in Law of Pure Food and Drugs, *supra*, at p. 851.)

Implicitly acknowledging, as it must, that "[p]rior to the repeal of Prohibition, no agency of the Federal Government was provided with statutory authority to regulate the labeling … of alcoholic beverages **[****39]** specifically" (Russell, *Controls Over Labeling and Advertising of Alcoholic Beverages* (1940) 7 Law & Contemp. Probs. 645, 645 (*Controls Over Labeling*)), Bronco's supplemental brief points to (i) separate "food standards" (including wine standards) adopted solely by the Secretary of Agriculture **[***196]** in the two years prior to enactment of the 1906 federal Pure Food and Drugs Act, and (ii) two "Food Inspection Decisions" (hereafter sometimes F.I.D.), one issued solely by the Secretary of Agriculture and the other issued jointly by the three secretaries. (See Standards of Purity for Food Products (June 26, 1906) Circular No. 19, reprinted in Westervelt, American Pure Food and Drug Laws (1912) pp. 61, 78–79 (American Pure Food and Drug Laws); F.I.D. No. 109 (Aug. 21, 1909); & F.I.D. No. 120 (May 13, 1910), both reprinted in American Pure Food and Drug Laws, *supra*, at pp. 212–214.) As explained below, under federal law the cited food standards (including the wine standards) were merely advisory, and not legally binding, and with respect to the cited Food Inspection Decisions, the first was nonbinding and the second, even if binding, did not demonstrate federal control over the labeling **[****40]** of wines.

The cited food standards had been created at the behest of Congress, which in 1902 and 1903 directed the Secretary of Agriculture to undertake numerous projects, including one "to establish standards for purity of food products and determine what are regarded as adulterations therein, *for the guidance of the officials of the various States* and of the courts of justice … ." (*Pub.L. No. 57-1008 (Mar. 3, 1903) 32 Stat. 1147, 1158*, italics added; see also *Pub.L. No. 57-139 (June 3, 1902) 32 Stat. 286, 296*.) The resulting detailed food standards addressed more than 200 categories of food items, including salted meats, oatmeal, lemon and vanilla extracts, olive oil, coffee, and—in part II.F.a.3 of the secretary's food standards—what Bronco characterizes as "detailed and comprehensive" standards for wine, dry wine, fortified dry wine, sweet wine, fortified sweet wine, sparkling wine, modified wine (a **[*966]** low-alcohol product made by the addition of sugar), and raisin wine (a product made from pomace—dried, evaporated, or previously crushed grapes).

Contrary to Bronco's suggestions and representations, the Secretary of Agriculture's food standards (and hence the wine **[****41]** standards contained therein) were not enforceable under the 1906 federal Pure Food and Drugs Act (which, as noted, required that enforcing regulations be adopted by *all three* named secretaries), or indeed under *federal* law at all. (See *United States v. St. Louis Coffee & Spice Mills (E.D.Mo. 1909) 189 F. 191* [finding the food standards relating to vanilla extract unenforceable under the 1906 Act].) In view of the 1906 Act's "three secretaries" requirements for regulations and the resulting case law, the food standards proclaimed by the Secretary of Agriculture acting alone have been described by authoritative commentators as merely "advisory" and as being "for the guidance of officials and the trade but *not having the force and effect of* ***[**436]*** [*federal*] *law*." (Salthe, *State*

Food, Drug and Cosmetic Legislation and its Administration (1939) 6 Law & Contemp. Probs. 165, 167, italics added; see also Lee, *Legislative and Interpretative Regulations* (1940) 29 Geo. L.J. 1, 4–17 (*Interpretative Regulations*) [noting that despite many congressional attempts in the course of three decades to make the food standards enforceable, **[****42]** manufacturers " 'could take 'em or leave 'em' without legal consequences" under *federal* law]; *Alcoholic Beverage Control Before Repeal, supra,* 7 Law & Contemp. Probs. 544, 553; cf. *Administration of the Federal Food and Drugs Act, supra,* 1 Law & Contemp. Probs. 16, 32, fn. 71.) Indeed, even the treatise upon which Bronco relies concurred on this point, characterizing those same food standards as "not controlling" under federal law. (American Pure Food and Drug Laws, *supra*, at p. 60.) In view of this history, we must **[***197]** reject Bronco's suggestion that the cited food standards, and the wine standards contained therein, constituted enforceable federal regulations under the 1906 Act or were otherwise enforceable as a matter of federal law.

We reach similar conclusions with respect to the two Food Inspection Decisions cited by Bronco, issued in 1909 and 1910, respectively. The first Food Inspection Decision, approved by the Secretary of Agriculture acting alone, stated that Missouri and Ohio wines, which typically were produced by adding substantial amounts of sugar, "would properly be called a 'sugar wine' "—and that when made by the mixture of pomace, sugar, water, **[****43]** colorings and preservatives, such products should be called " 'imitation wine.' " (F.I.D. No. 109, reprinted in American Pure Food and Drug Laws, *supra*, at p. 212.) The second cited Food Inspection Decision, issued under the signatures of the three department secretaries, essentially retreated from and modified the first and stated that in light of (and apparently in deference to) the fairly lax Ohio wine statute (see *ante*, fn. 24), which had long permitted the use of sugar in wine production, such "sugared" wines properly **[*967]** could be called " 'Ohio Wine,' or 'Missouri Wine,' respectively, without further qualification." (F.I.D. No. 120, reprinted in American Pure Food and Drug Laws, *supra*, at p. 213.) Moreover, the decision stated, Ohio and Missouri imitation wines could be labeled as " 'Ohio Pomace Wine,' or 'Missouri Pomace Wine.' " (*Id*., at p. 214.)

These decisions reveal that the federal agency, far from exercising federal authority to control state practices by requiring adherence to the "detailed and comprehensive" wine provisions of the food standards cited by Bronco, instead completely ignored those federal standards and, in the second decision, actually **[****44]** *deferred* to the applicable state wine statute, which in turn codified long-standing and lenient regional winemaking practices.

In any event, contrary to Bronco's suggestion that these Food Inspection Decisions evinced federal control, the first cited decision, No. 109 (approved by the Secretary of Agriculture acting alone), did not constitute a regulation under the 1906 Act and was merely advisory. [28] Because the second cited Food Inspection Decision, No. 120, was signed by all three secretaries it arguably qualified as an enforceable federal regulation under the 1906 Pure Food and Drugs Act. (See American Pure Food and Drug Laws, *supra*, at p. 17.) As noted above, however, in substance this assumed regulation merely acquiesced in and adopted fairly lax state (Ohio) law. It does not, therefore, support Bronco's implicit **[**437]** argument that federal regulatory authorities during **[***198]** this period exercised power to control wine labels in a manner different from that of the states.

[**45]** For these reasons we reject Bronco's suggestion that the Secretary of Agriculture's food standards, including the detailed and comprehensive wine standards, constituted enforceable federal law, that Food Inspection Decision No. 109 constituted an enforceable federal wine labeling regulation, or that Food Inspection Decision No.

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[28] The very limited effect of such decisions was described by the issuing entity itself as follows: "*The opinions or decisions of this Department* … are … issued more in an advisory than in a mandatory spirit. It is clear that if the manufacturers, jobbers, and dealers interpret the rules and regulations in the same manner *as they are interpreted by this Department*, and follow that interpretation in their business transactions, no prosecution will lie against them. … [¶] It may often occur that the opinion of this Department is not that of the manufacturer, jobber, or dealer. In this case there is no obligation resting upon the manufacturer, jobber, or dealer to follow the line of procedure marked out or indicated by the opinion of this Department. Each one is entitled to his own opinion and interpretation and to assume the responsibility of acting in harmony therewith. …" (F.I.D. No. 44 (Dec. 1, 1906), reprinted in Gwinn, U.S. Dept. of Agriculture, Food and Drugs Act (1914) pp. 35–36, italics added; see also American Pure Food and Drug Laws, *supra*, at pp. 16–18; *Administration of the Federal Food and Drugs Act, supra,* 1 Law & Contemp. Probs. at pp. 20–21.)

120 evinced anything more than federal acquiescence in state law. Based upon the material cited to us, we conclude that whatever federal regulation of wine labeling existed between the first decade of the 20th century and the advent **[*968]** of Prohibition was achieved only indirectly, on a case-by-case basis, through prosecutions under the general misbranding provisions of the 1906 federal Pure Food and Drugs Act. [29] *That* relatively limited federal activity, however, neither erased nor eclipsed the previous quarter-century of state regulation described above. (*Ante*, pt. II.B.1.a. & b.)

[**46]** Moreover, at the same time federal activity in this area was commencing, state activity was continuing and at least keeping pace. By 1906, nearly all of the states had exercised their traditional police powers to enact pure food and beverage laws, almost all of which covered drinks, including wine. [30] Even more importantly, as explained below, within a few years of 1906 the Secretary of Agriculture's food standards (including the detailed and comprehensive wine standards)—although remaining merely advisory and unenforceable under *federal* law—specifically were adopted as part of the general food laws of most states (including California). The perhaps ironic result was that the Secretary of Agriculture's wine standards were to become enforceable substantive law in most states under *state* law, even while they remained unenforceable as a matter of federal law.

[**47]** d. *Relevant state law in the early 20th century: Adoption of California's place—name wine statute; California's Pure Foods Act and adoption of the food standards, including the wine standards; and corresponding labeling regulations*

Nothing in the 1906 federal Pure Food and Drugs Act implied that the existing and continuing state regulation of the misbranding of food and beverages was preempted by that federal legislation. Indeed, the act "disclose[d] very clearly that it [was] not intended to trench upon the powers of the states in any respect." (*Cleveland Macaroni Co. v. State Board of **[***199]** Health (N.D.Cal. 1919) 256 F. 376, 379*; see also *Savage, supra, 225 U.S. 501* [upholding, against a claim of preemption, Indiana food and drug labeling **[*969]** regulations]; see generally Fisher, *The Proposed Food and Drugs Act: A Legal Critique* (1933) 1 Law & Contemp. Probs. 74, 75 & fn. 4 (*Proposed Food and Drugs Act*) [noting case law holding that states were permitted to prescribe "additional standards" and that "[c]ompliance with federal standards does not secure the right to interstate transportation free from 'reasonable' regulation by the state"]. **[****48]**)

Soon after passage of the 1906 federal act, the California Legislature, in an apparent effort to combat the continuing problem of **[**438]** the labeling of California wines as foreign wines, adopted a statute requiring a "uniform wine nomenclature" that, for the first time, specifically regulated the use of place names on wine labels. The statute provided for "pure" California wines to be labeled with the "prefix 'Cal' or 'Cala' … as for example, 'Calclaret,' 'Calburgundy,' 'Calariesling,' etc., …" (Stats. 1907, ch. 104, § 1, pp. 127–128.) The statute further prohibited the use of any such label on wines other than pure California wines. It barred "labeling any vessel, bottle, … or package containing any liquid other than pure wine of California manufacture, … or any paper or brand in similitude or resemblance thereof, or any paper or brand of such form and appearance as to be calculated to mislead or deceive

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[29] In addition to the federal prosecution under the 1906 Act that resulted in the decision in *Sweet Valley, supra, 208 F. 85*, in which the federal district court held that the challenged "pomace wine" product in that case, labeled as German "Select Riesling" and "Hochheimer," was misbranded under both the 1906 Act and the Ohio wine statute—we are aware of one similar wine mislabeling prosecution under the 1906 Act (*Sixty Barrels of Wine (D.C.Mo. 1915) 225 F. 846*) and three similar federal prosecutions concerning bottled "Champagne." (*Duffy-Mott Co. v. United States (3d. Cir. 1923) 285 F. 737*; *Schraubstadter v. United States (9th Cir. 1912) 199 F. 568*; *United States v. Five Cases of Champagne (N.D.N.Y. 1913) 205 F. 817*.) One might ask why the *Duffy-Mott* case arose during Prohibition. The answer is that even during Prohibition, *pharmacists* were permitted to sell "prescription Champagne." (Byszewski, *What's in the Wine? A History of the FDA's Role* (2002) 57 Food & Drug J. 544, 554.)

[30] See Hearings before the House Committee on Interstate and Foreign Commerce on the Pure-Food Bills, 59th Congress, 1st Session (Feb. 13, 1906) page 308. Indeed, according to contemporaneous assessments, those states with adequate enforcement mechanisms (approximately 20 states) were, by 1906, applying their laws "very rigidly." (*Ibid*.)

any unwary person or cause him to suppose the contents thereof to be pure wine of California manufacture, origin or production … ." (*Id.*, § 2, p. 128.)

Following passage of the 1906 federal Pure Food and Drugs Act, states left in place or expanded (or in **[****49]** other instances enacted for the first time) their own statutes to address the problems of adulteration, misbranding, and mislabeling of food and beverages. (See generally American Pure Food and Drug Laws, *supra*, at pp. 260–1450; *Proposed Food and Drugs Act, supra,* 1 Law & Contemp. Probs. 74, 75 & fn. 4.) California, for its part, adopted such a general scheme in March 1907, addressing the problem of "adulterated, mislabeled or misbranded food, or liquor." (Stats. 1907, ch. 181, § 1, p. 208; 1907 Pure Foods Act or 1907 State Act.) That statute—like those of many other states—specifically adopted under *state* law the food standards (including the wine standards) that had been formulated by the Secretary of the United States Department of Agriculture, but which, as described above, were unenforceable under *federal* law. (Stats. 1907, ch. 181, § 3, p. 209.) Further going beyond anything set forth in the federal law, the state statute also made it illegal to, among other things, "*falsely brand*[]" any food or liquor concerning the "*county, … city, town,* [*or*] *state … in which it is manufactured, or produced*" (*id*., § 5, p. 210, italics added), [31] **[****50]** and provided that "[f]ood and liquor shall be deemed *mislabeled or misbranded* within the **[*970]** meaning of this act … [¶] … [¶] [i]f the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substance contained therein, which statement, design, or device shall be false or misleading in any particular." (Stats. 1907, ch. 181, § 6, p. 210, italics added.) [32]

[**51]** **[***200]** Accordingly, as of March 1907 and continuing through the next three decades, California (like many other states) [33] **[****52]** had adopted **[**439]** specific and enforceable wine standards that exceeded federal law. During this same period—and indeed, until repeal of the 1906 federal Pure Food and Drugs Act in 1938—the Secretary of Agriculture's food standards remained unenforceable under federal law despite periodic attempts to provide otherwise. (See *Interpretative Regulations, supra,* 29 Geo. L.J. 1, 6–17.) [34]

e. *California's post-Prohibition-repeal wine labeling regulations*

With the advent of Prohibition, which became effective on January 29, 1920 (*U.S. Const., 18th Amend.*), the California wine industry fell into a dormant phase, awakening upon repeal of Prohibition in December 1933 through

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[31] In this respect, the author of the 1912 treatise relied upon by Bronco observed that "the prohibitions in the California statute … against misstatements as to geographical source" were "more detailed" than those under federal law. (American Pure Food and Drug Laws, *supra*, at p. 339.)

[32] In early 1908, California's Department of Public Health adopted comprehensive regulations implementing the 1907 state Act, broadly regulating "for domestic commerce" the labeling of foods and beverages and specifically providing that "[*t*]*he label shall be free from any statement, design, or device regarding … place of origin, which is false or misleading in any particular.*" (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1909) reg. No. 16, p. 22, italics added.) Those regulations, as periodically amended, continued in force through at least 1935. (Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1928) reg. No. 13(d) & (e), p. 20 [providing as quoted above, and further providing that food or beverages shall not be "labeled or branded in such a manner as to deceive or mislead the consumer"]; Cal. Dept. of Pub. Health, Rules and Regs. for Enforcement of Cal. Pure Foods and Drugs Acts (1933) reg. No. 13(d) & (e), p. 18 [same].)

[33] See American Pure Food and Drug Laws, *supra*, listing, as of 1912, the following additional states that had adopted the Secretary of Agriculture's food (and wine) standards, or essentially identical standards: Alabama (at p. 270); Delaware (at p. 418); Florida (at p. 438); Georgia (at pp. 468–474); Idaho (at p. 499); Illinois (at pp. 524–525); Indiana (at p. 551); Kansas (at pp. 604–605); Kentucky (at pp. 634–635); Louisiana (at pp. 661–662); Maine (at pp. 680–681); Maryland (at pp. 705–706); Mississippi (at pp. 828–829); Missouri (at p. 851); Montana (at p. 880); Nevada (at p. 932); New Hampshire (at p. 952); New Jersey (at p. 980); North Carolina (at p. 1051); Oklahoma (at p. 1128); Rhode Island (at pp. 1207–1208); South Dakota (at p. 1241); Texas (at p. 1285); Utah (at p. 1306); Virginia (at pp. 1350–1351); Wisconsin (at pp. 1416–1417); and Wyoming (at p. 1441). (See also *Interpretative Regulations, supra,* 29 Geo. L.J. at p. 13 & fn. 27.)

[34] Effective through at least 1935, the state's 1907 Pure Foods Act continued to adopt—as *minimum* standards—the federal food standards (including the wine standards). (Stats. 1933, ch. 758, § 10, pp. 2001–2002.)

adoption of the *Twenty-first Amendment to the federal Constitution*. **[*971]** At least two years prior to adoption of the FAA Act in August 1935—and indeed before, and in anticipation of, the repeal of Prohibition—the California Legislature, exercising both its traditional police powers and its authority under newly enacted *article XX, section 22* of the state Constitution, [35] adopted as an interim measure the State Liquor Control Act (Stats. 1933, ch. 178, p. 625; *id*., ch. 658, p. 1697) and thereafter adopted the California Alcoholic Beverage Control Act (ABC Act), which **[****53]** went into effect on June **[***201]** 13, 1935. (Stats. 1935, ch. 330, p. 1123; see *Bus. & Prof. Code, § 23000 et seq.*) [36]

[**54]** Meanwhile, in late December 1934—*before* adoption of *any* federal regulation applicable to wine labels—California, acting through its Department of Public Health, Bureau of Food and Drug Inspections, and pursuant to its own 1907 Pure Foods Act (Stats. 1907, ch. 181, §§ 5 & 6, p. 210), adopted regulations concerning "Definitions and Standards—Wines." (Cal. Dept. of Pub. Health, Bur. of Food and Drug Inspection, Regs. adopted Dec. 31, 1934, amended April 13, 1935, as printed Jan. 18, 1936 (1934 Regulations).) A preamble set forth in broad terms the purpose and scope of the regulations. The stated goal was to protect both "the consuming public" and "the wine industry as a whole." (*Id.*, at p. 1.) [37] To this end, the regulations adopted specific chemical definitions for dry red wines, dry white wines, and sweet wines (*id*., at pp. 1–2), similar in substance to the standards incorporated into the state's 1907 Pure Foods Act, and which, as explained *ante*, part II.B.1.d, had by then been in place in California (and numerous other states) for nearly 30 years. The 1934 Regulations also established strict and detailed labeling requirements for sparkling and artificially **[****55]** carbonated wines (**[*972]** Regs., at p. 2) [38] **[****56]** and for still wines (*id*., at pp. 2–3). **[**440]** In the latter respect, the regulations addressed the decades-old problem of California wines being labeled with foreign place names such as "Burgundy." The state regulations allowed the unqualified use of that name and similar French place names "only [for] products from France," and provided that a wine would be "regarded as *misbranded*" (and hence in violation of the state's 1907 Act and ensuing regulations described *ante*, pt. II.B.1.d.) if the label read "Burgundy" (or any other foreign place name) and the wine was not produced there, unless the label also "displayed with prominence equal to that" of the foreign place name, "the name of the state or country where the wine is produced." (1934 Regs., at p. 2, italics added.) [39]

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[35] In 1932, anticipating ratification of the repeal of Prohibition, California voters passed a constitutional amendment, providing as follows: "***HN8***[] The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate *the manufacture*, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and *exportation from the State*, of alcoholic beverages. …" (*Cal. Const., art XX, § 22*, italics added.)

[36] At that same time, the Legislature repealed the 1907 "Cala" wine labeling statute. (See Stats. 1935, ch. 330, § 69, p. 1152; Caddow, *Permanent Wine Labeling Regulations* in Wines & Vines (Feb. 1936) 10.) The 1887 state "pure wine" labeling statute (Stats. 1887, ch. 36, p. 46) previously had been repealed in 1911. (Stats. 1911, ch. 587, § 1, p. 1110.) Of course, despite these repeals, the state's 1907 Pure Foods Act (Stats. 1907, ch. 181, p. 208 et seq.), which as noted above incorporated specific wine standards, and the regulations adopted under the 1907 Act (all described *ante*, pt. II.B.1.d.), remained in effect and prohibited the mislabeling of wine.

[37] Contrary to assertions in Bronco's supplemental briefs, there is no indication that the scope of the 1934 regulations was limited to wine sold to consumers in California and that the regulations did not address wines destined for interstate commerce.

[38] The regulation provided: "*Champagne* is a light white sparkling wine identical with champagne as made in the Champagne district in France in respect to composition and basic manufacturing principle. If the secondary fermentation is not within the bottle, there shall be stated in direct conjunction with the word 'Champagne' the words 'Secondary Fermentation in Bulk.' " (1934 Regs., at p. 2.) The regulations also provided specific labeling requirements for artificially carbonated wines: "The word 'carbonated' should be in the same color [and] style of type on the same colored background as the wine described." (*Ibid*.)

[39] The regulations also restricted the use, on wine labels, of statements of age and the word "old" (1934 Regs., at pp. 2–3), and further required that any product made from pomace be labeled "IMITATION WINE/ Made of Wine Pomace, Water and Sugar" (*id*., at p. 2).

Bronco insists that these various state regulations, viewed as a whole, “did not represent any innovation by California” **[***202]** and that “similar, albeit more detailed and comprehensive … standards already had been adopted nearly thirty years before by federal regulators.” As explained *ante*, part II.B.1.c, however, the historic record does not support Bronco's claim. The standards to which Bronco refers never were enforceable under federal law, but in fact, by 1907, they had become part of the substantive (and enforceable) law of California—and within a short time, of most other states as well. In other words, the touted innovation (enforceable wine labeling standards) was accomplished by California and other states, and not by the federal government.

f. *Initial (and short-lived) federal wine labeling regulations issued by* **[****57]** *the Federal Alcohol Control Administration*

As Bronco emphasizes, a few months after adoption of the 1934 California wine labeling regulations, federal wine labeling regulations (which, as explained below, proved to be short-lived and never became effective) were for the first time adopted in late March 1935 by the recently created Federal Alcohol Control Administration (FAC Administration), which had been established by executive order under the National Industrial Recovery Act (*15 U.S.C. § 703*). (See Harrison & Lane, After Repeal (1936) p. 24 (After Repeal).) The FAC Administration's regulations, like the numerous similar **[*973]** state food and beverage regulations that preceded them, were directed against, among other things, “misbranding”—the false or misleading labeling of alcoholic beverages. (See FAC Admin., Misbranding Regs., Series 7, Regs. Relating to the Labeling of Wine (Mar. 25, 1935) § 3(b)(3) (Misbranding Regulations) [a wine bottle is misbranded if its label “tends to create a misleading impression of the wine”]; see generally O'Neill, *Federal Activity in Alcoholic Beverage Control* (1940) 7 Law & Contemp. Probs. 570, 572; After Repeal, **[****58]** *supra*, at pp. 27–29.) Nowhere in these nascent federal regulations was there any suggestion that they preempted stricter state regulations. In any event, within two months of their adoption and prior to their effective date (see Misbranding Regs., *supra*, § 1(a)(3)), the federal regulations became unenforceable in late May 1935 after the United States Supreme Court invalidated as unconstitutional similar “fair competition” codes adopted under the National Industrial Recovery Act. (*Schechter Corp. v. United States (1935) 295 U.S. 495, 541–542 [79 L. Ed. 1570, 55 S. Ct. 837]*.)

g. *Continuing regulation by other states*

Despite the initial failure of federal regulation of wine labels, regulation by the states continued in and through 1935. In addition to California's then long-established general food and beverage regulations, and its then recent specific wine regulations, described *ante*, part II.B.1.d–e, the Ohio and Oregon wine labeling statutes, described above (*ante*, fns. 24 & 26), still were in effect [40] and most **[**441]** other states had food and beverage statutes, the majority of which regulated mislabeling or misbranding **[***203]** of beverages, including wine. As already explained, many **[****59]** of those statutes adopted specific and comprehensive wine standards that were enforceable only under state, and not federal, law—and as of 1935, many had been revised specifically to bar misrepresentations on labels concerning the place of manufacture or production. [41]

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[40] The original Ohio wine law (1889 Ohio Laws, p. 96 et seq.) was, by 1938, codified in Page's Ohio Revised Code Annotated (Anderson 1938) title II, chapter 1, sections 5795–5805. Oregon's 1905 wine labeling statute (1905 Or. Laws, ch. 209, §§ 54–56, pp. 361–362) was reenacted a decade later (1915 Or. Laws, ch. 343, §§ 41–43, pp. 570–571) and apparently still was effective through mid-1937, when Oregon adopted post-Prohibition-repeal wine labeling regulations. (See also Or. Liquor Control Admin. (1937) reg. 5(c) [specifically enforcing the California wine regulations discussed above] & 6 [setting forth labeling requirements].)

[41] For example, the food and beverage labeling statutes of Massachusetts, North Dakota, and Washington, described *ante*, part II.B.1.a, each remained in force in 1935, as revised, and each defined as “misbranded” any food or drink label bearing “any statement, design or device” that was “false or misleading in any particular,” or any item “falsely branded as to the state or country where it was manufactured or produced,” or very similar words to that effect. (See *1932 Mass. Gen. Laws, ch. 94, §§ 186*, 187; 1923 N.D. Laws, ch. 222, §§ 4, 6, pp. 289–291; Rev. Stats. of Wash. (Remington 1932) tit. 40, §§ 6145, 6147; see also Rev. Stats. of Wash., *supra*, § 6137 [adopting the federal food standards, including wine standards, as minimum standards].)

[**60]**

[*974] 2. *Propriety of imposing a presumption against preemption in this case*

CA(6)[] **(6)** In light of the history set forth above, we disagree with Bronco's assertion, advanced in its original brief in this court, that federal regulation of wine labeling prior to Congress's adoption of the FAA Act in August 1935 was "well established," and that "[b]y contrast, the states' regulation of wine labeling … ranged from limited to none." Nor do we agree with the accusation of amici curiae Abundance Vineyards et al. that the Department and the NVVA have "suggested, *misleadingly*, that the States, and not the Federal government, historically played the dominant role in the regulation of the alcoholic beverage industry before enactment of the FAA Act." (Italics added.) Based upon our review of the relevant history, we conclude that from the mid to late 19th century until shortly after the repeal of Prohibition, the states' exercise of their traditional police power to regulate the labeling of food—including wine and other alcoholic beverages—was both extensive and dominant. This historic evidence demonstrates that ***HN9***[] when, as described below, Congress finally entered the specific field of **[****61]** wine label regulation in August 1935 by enacting the FAA Act, under which the federal regulation here at issue was promulgated, Congress was legislating in a field "traditionally regulated by the States." (*ARC America Corp., supra, 490 U.S. 93, 101*, and cases cited.) [42] Accordingly, a strong presumption **[***204]** against preemption applies, and a court should not find that the traditional police powers of the states to regulate wine labels (in order to prevent the deception of consumers) are superseded unless it is clear and manifest that Congress intended to preempt state law.

[*975] [**62]** We turn now to consider whether, as Bronco claims, there was, at the time of the **[**442]** enactment of the *FAA Act* or thereafter, a clear and manifest intent on the part of Congress to preempt wine labeling regulation by the states such as is found in *section 25241*. We find no such intent. We thereafter consider whether, as Bronco claims, *section 25241* is *impliedly* preempted by federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines, supra, 312 U.S. 52, 67*.) As we explain, we find no such implied preemption.

C.

1. *Whether Congress, when it enacted the FAA Act in 1935, intended to preempt state wine labeling regulation*

CA(7)[] **(7)** As explained below, contrary to Bronco's assertions ***HN10***[] the history of the 1935 FAA Act discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling.

In late August 1935, Congress replaced the defunct FAC Administration with the Federal Alcohol Administration Act. (Pub.L. No. 74-401 (Aug. 29, 1935) 49 Stat. 977, presently *27 U.S.C. § 201 et seq.*) The essential aspects of the *FAA Act* exist **[****63]** today in substantially unamended form and remain the basis for federal regulation of wine labeling. (See Benson, *Regulation of American Wine Labeling: In Vino Veritas?* (1978) 11 U.C. Davis L.Rev. 115, 154 et seq. (*Regulation of American Wine Labeling*).)

In New York, Colorado, and Arkansas, the previous wine-specific labeling statutes described *ante*, part II.B.1.b, had given way, by 1935, to the states' respective general food and beverage mislabeling/misbranding regulations, all of which regulated both food and drink. (See N.Y. Agric. & Mkts. Law, ch. 1, art. 17, § 200 (Cahill 1930); Ann. Stats. of Colo., ch. 1, § 6 (Courtright 1930); Stats. of Ark., ch. 69, § 4823 (1919).) There is no indication, with respect to any of these changes in the various states' laws, that any diminution of state regulatory authority over the labeling of wines thereby was intended or effected.

[42] For the reasons set forth above, we also reject Bronco's related assertion, pressed in its supplemental briefs and at oral argument, that no presumption against preemption applies here because, Bronco claims, the states' regulatory activity was augmented in the early 20th century by a "significant federal presence." (See *Locke, supra, 529 U.S. 89, 108* [finding no presumption against preemption regarding regulation of maritime vessels].) As explained *ante*, part II.B.1, prior to adoption of the *FAA Act in 1935*, the federal role with respect to wine label regulation was neither dominant nor particularly significant in comparison with that of the states—and in any event, unlike the situation in *Locke*, federal activity in the field of wine label regulation certainly was not "manifest since the beginning of our Republic." (*Locke, supra, at p. 99*.)

HN11[] *CA(8)*[] **(8)** Substantively, the FAA Act in large measure emulated the main aspects of the invalidated FAC Administration. (After Repeal, *supra*, at p. 32; *Regulation of American Wine Labeling, supra,* 11 U.C. Davis L.Rev. 115, 165.) The *FAA Act* makes it illegal for any person to produce, sell, or ship wine in interstate or foreign commerce unless that person is licensed to do so by the Secretary of the Treasury. [43] (*27 U.S.C. § 203(a)* & *(b)*.) Title *27 United States Code section 205(e)*—the primary federal statutory provision **[*976]** for present purposes—directs the Secretary of the Treasury to promulgate such regulations "with respect to packaging, marking, branding, and *labeling* … (1) *as will prohibit deception of the consumer with respect to* [*alcoholic beverage*] *products … ;* [and] (2) *as will provide the consumer with adequate information as* **[****64]** *to the identity and quality of the products* … ." (Italics added.) To enforce these requirements, this section of the *FAA Act* also requires that any person who sells or ships **[***205]** wine in interstate or foreign commerce first obtain from the Secretary of the Treasury (or his or her designee) a certificate of label approval, or COLA, for each wine, and directs that no wine may be shipped or sold in interstate commerce unless it bears a label that has been reviewed and approved by the Secretary of the Treasury through issuance of a COLA. Finally, the section further provides that no wine label may be removed or altered "except as authorized by Federal law" or except pursuant to federal regulations "authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law." (*Ibid*.)

[**65]** Testifying in support of the legislation that became the *FAA Act*, Joseph H. Choate, former Chairman of the FAC Administration, explained that the goal was to continue the work of the recently invalidated FAC Administration. Adverting to the regulations mentioned above that recently had been adopted by the FAC Administration (*ante*, pt. II.B.1.f.), Mr. Choate explained that the purpose of those regulations—and of the new *FAA Act*—was to "to provide such regulations, not **[**443]** laid down in statute, so as to be inflexible, but laid down under the guidance of Congress, under general principles, by a body which could change them as changes were found necessary. [¶] *These regulations were intended to insure that the purchaser should get what he thought he was getting, that the representations both on labels and in advertising should be honest and straightforward and truthful. …* [*The consumer*] *should be told what was in the bottle, and all the important factors which were of interest to him about what was in the bottle*." (Hearings before House Com. on Ways and Means on H.R. No. 8539, 74th Cong., 1st Sess., p. 10 (1935), testimony of Joseph H. Choate, italics added.) **[****66]** Similarly, Representative Thomas Cullen of New York, the author of the bill that became the *FAA Act* (see 79 Cong. Rec. (1935) 11713 et seq.), promoting his legislation on the floor of the House, asserted that the proposed bill was necessary in order to "do something to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by dishonest labeling … ." (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714; see generally *Regulation of American Wine Labeling, supra,* 11 U.C. Davis L.Rev. 115, 165–167.)

CA(9)[] **(9)** As with the 1906 federal Pure Food and Drugs Act, and by contrast to other legislation passed only days prior to adoption of the FAA Act in August **[*977]** 1935, [44] nothing in the body of the *FAA Act* reveals

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[43] As originally enacted, the statute referred to the "Administrator" of the "Federal Alcohol Administration." That agency was abolished, and its functions were directed to be administered by the Secretary of the Treasury through the Bureau of Internal Revenue (now the Internal Revenue Service) in the Department of the Treasury. (See *27 U.S.C. § 201*, Transfer of Functions.) Thereafter, the Bureau of Alcohol, Tobacco and Firearms (BATF) was established in 1972 and given the pertinent functions of the Internal Revenue Service with regard to wine regulation. (*Ibid*.) Subsequently, the Homeland Security Act of 2002 (*6 U.S.C. § 101*) transferred responsibility for the regulation of interstate commerce in alcoholic beverages to a newly formed Alcohol and Tobacco Tax Trade Bureau within the Department of the Treasury. (68 Fed.Reg. 3744 (Jan. 24, 2003).) For convenience, and because the regulations here at issue were adopted by the BATF, we shall continue to refer in this case to the BATF as the responsible regulatory agency.

[44] In the Tobacco Inspection Act (Pub.L. No. 74-314 (Aug. 23, 1935) 49 Stat. 731)—enacted six days prior to adoption of the *FAA Act*—Congress used language making very clear its intent to adopt "uniform" national standards that would displace state regulation, thereby revealing that when the 74th Congress intended to make its regulation exclusive, it knew how to do so. As observed in *Florida Avocado, supra, 373 U.S. 132, 147*, with regard to the Tobacco Act, "Congress had declared 'uniform standards of classification and inspection' to be 'imperative for the protection of producers and others engaged in commerce and the public interest therein.' [Citation.] The legislative history was replete with references to a need for 'uniform' or 'official'

congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police **[***206]** powers. As already explained, at the time Congress adopted the *FAA Act in August 1935, the* states, led by California (see *ante*, pt. II.B.1.d. & e.), were continuing to exercise their traditional police powers in this area. (See *ante*, **[****67]** pt. II.B.1.g., describing the then extant statutes of various states.)

[**68]** Consistently with this history and contemporaneous practice, the bill's author, Representative Cullen, while promoting the bill embodying the *FAA Act* on the floor of the House, emphasized the cooperative, as opposed to preemptive, nature of the federal legislation. He asserted: "[W]e must do something to *supplement* legislation by the States to carry out their own policies. The liquor industry is too big and the constitutional and practical limitations on the States are so considerable that *they alone cannot do the whole job*." (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714, italics added; accord, H.R. Rep. No. 1542, 74th Cong., 1st Sess., pp. 2–3 (1935).) [45] **[****69]** Representative Cullen also assured the House that by enactment of the bill, "[n]o power is taken away from the States to provide such safeguards **[**444]** as they deem best for their own protection." (79 Cong. Rec., *supra*, 11174.) [46]

[*978] [**70]** Based upon this legislative history, and in light of the backdrop against which Congress acted—the prior decades of state legislation regulating the labeling or "misbranding" of wine as a general food and beverage product, or of wine specifically—we conclude that Bronco has failed to establish **[***207]** that Congress, at the time it enacted the *FAA Act*, acted with the "clear or manifest" purpose of preempting state statutes regulating wine labels.

2. *Post-1935 congressional and regulatory agency intent to preempt state wine label regulation*

CA(10)[] **(10)** Bronco further suggests that *subsequent* to the enactment of *27 United States Code section 205(e)* in August 1935 and the adoption, by agencies within the Department of the Treasury, of implementing regulations, both Congress and the federal regulators manifested intent that the federal wine labeling regulations would preempt

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standards, which could harmonize the grading and inspection of tobacco at all markets throughout the country. Under the statute a single set of standards was to be promulgated by the Secretary of Agriculture, 'and the standards so established would be the official standards of the United States for such purpose.' " No such language or comparable provision appears in the *FAA Act*, as adopted in 1935.

45 See also House of Representatives Report No. 1542 (74th Cong., 1st Sess.) pages 13–14 (July 17, 1935) (citing the *FAA Act*'s "relabeling" provision and noting that anticipated regulations would permit "appropriate additional labeling requirements imposed by a State pursuant to its own law not in conflict with the Federal requirements"). Bronco asserts that by this relabeling provision (see 27 C.F.R. § 4.30(b)(1)) and the cited comment, Congress had in mind only the authority of states, pursuant to the *Twenty-first Amendment*, to impose additional labeling requirements on alcoholic products imported for sale from other states, and did not contemplate that a state would be permitted to impose additional labeling requirements on wines destined for interstate commerce. We find no persuasive evidence of any such intent, however.

46 Although on occasion we have questioned reliance upon the views of individual legislators as a basis upon which to discern the intent of the state Legislature (e.g., *People v. Dennis (1998) 17 Cal.4th 468, 501, fn. 7 [71 Cal. Rptr. 2d 680, 950 P.2d 1035]*, and cases cited), in the present case Bronco does not challenge Representative Cullen's statements on that ground, and we recently observed in *Dowhal, supra, 32 Cal.4th 910*, that ***HN12***[] statements by a single member of Congress " 'can provide evidence of Congress' intent.' " (*Id., at p. 926, fn. 6*.) Moreover, in the present case there are strong reasons to rely upon the quoted statements. Representative Cullen was the author of the *FAA Act*, and was looked upon as an authority during the House debates, fielding many questions from his colleagues. (E.g., Remarks of Rep. Doughton, 79 Cong. Rec. (1935) 11713 [Rep. Doughton, author of a prior version of the bill, observing on the House floor that Rep. Cullen "is more familiar with the provisions of this bill than myself or perhaps any other member … . He has given much study to the bill and is better qualified to explain it than I am … ."]; *id*., pp. 11715–11718, 11727–11730, 11737, 11790, 11792–11793, 11797, 11799 [Rep. Cullen's various responses to questions, etc.].) In addition, Representative Cullen's comments essentially reiterated that which was set out in the House Report of the Ways and Means Committee, cited in the text above—and later incorporated into the Senate Report of the Committee on Finance on House Resolution No. 8870 (Fed. Alcohol Control Admin., Legis. History of Fed. Alcohol Admin. Act (Sept. 15, 1935) appen. IV, p. 166), and hence the cited comments did not amount merely to expressions of personal opinion. (*In re Marriage of Bouquet (1976) 16 Cal.3d 583, 590 [128 Cal. Rptr. 427, 546 P.2d 1371]*.)

more stringent state wine labeling regulations. Applying again, as we must, a presumption against preemption in this context, we inquire whether Congress or the regulatory arm established within the Department of the Treasury evinced a clear and manifest intent to preempt state wine labeling **[****71]** regulations such as California's *section 25241*. In so doing, we keep in mind the entire history of state regulation of wine labeling and the history and language of the *FAA Act* described above. As explained below, after reviewing (i) the early federal regulations and early state regulations that imposed standards higher than the federal regulations, (ii) subsequent federal regulations and pronouncements recognizing the applicability of state labeling law, and state wine regulations enacted in the mid-1970s (especially certain Oregon regulations, one of which is substantively similar to the challenged *section 25241*), and (iii) a 1988 amendment to the *FAA Act*, concerning health warnings on alcoholic beverages, we continue to find no evidence of any clear or manifest intent on the part of **[*979]** Congress or the responsible federal agency to preempt state wine labeling regulation such as *section 25241*. Indeed, the evidence demonstrates that the federal agency has long contemplated or at least acquiesced in concurrent and stricter state regulation.

a. *Federal and California regulations issued after passage of the FAA Act*

As noted above, prior to adoption of the *FAA Act*, California had in **[****72]** place, by December 1934, specific and detailed wine regulations restricting, among other things, the use of place names on wine labels. (See *ante*, pt. II.B.1.e.) In bulletins and reports issued in the years immediately thereafter, the California Department of Public Health touted its enforcement of those state regulations, **[**445]** which it described as requiring the “honest labeling of wines.”[47]

In late December 1935, four months **[****73]** after adoption of the *FAA Act*, and one year after California's adoption of its own post-Prohibition-repeal wine labeling regulations, valid federal wine labeling regulations were approved, and those regulations became effective on March 1, 1936. (U.S. Dept. Treas., Fed. Alcohol Admin., Regs. No. 4 Relating to Labeling and Advertising of Wine (Dec. 30, 1935) arts. I-VII, 1 Fed.Reg. 83 (Apr. 1, 1936) (hereafter Regulations No. 4); see, generally, *Controls Over Labeling*, *supra*, 7 Law & Contemp. Probs. 645, 652, fn. 25 et seq.)

[*208]** ***CA(11)***[] **(11)** The federal labeling regulations, as amended in 1938 (see 3 Fed.Reg. 2093 (Aug. 26, 1938)) and thereafter, presently are designated *27 Code of Federal Regulations, sections 4.20 through 4.39*. One key provision—Code of Federal Regulations *section 4.25(b)(1)(i) and (iii)*—***HN13***[] states that a wine is “entitled” to be described with an appellation of origin if “[a]t least 75 percent of the wine is derived from fruit … grown in the appellation area indicated” *and* “it conforms to the laws and regulations of the named appellation area governing the *composition*, *method of manufacture*, and *designation* of wines made **[****74]** in such place.” (Italics added.)[48]

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[47] See California Department of Public Health, Weekly Bulletin (Feb. 19, 1938) page 14; *id.*, at page 13 (describing enforcement of the California wine quality standards and noting their adoption by the beverage control authorities in Oregon, Virginia, and Arizona); see also Thirty-sixth Biennial Report of the California Department of Public Health (Sept. 1940) page 177; Thirty-fifth Biennial Report of the California Department of Public Health (Sept. 1938) page 142; Thirty-fourth Biennial Report of the California Department of Public Health (Sept. 1936) page 100.

[48] “***HN14***[] Composition” refers to the ingredients used to make a wine (*27 C.F.R. § 4.34*) and generally consists simply of grapes. “Method of manufacture” refers to approved wine treatment materials and processes. (*27 C.F.R. § 24.175 et seq.*) “Designation of wines” is a concept distinct from brand name or appellation; it refers to the class or type of wine rather than the source or origin of the wine. (*27 C.F.R. §§ 4.32(a)(2), 4.34*.) For example, a wine may be designated by class as a grape wine, sparkling grape wine, or carbonated grape wine (*27 C.F.R. § 4.21*), or by the grape varietal. (*27 C.F.R. §§ 4.23, 4.24, 4.28*.)

As Bronco concedes, California long has enforced regulations that differ from the federal regulations with respect to method of manufacture. (See, e.g., *Cal. Code Regs., tit. 17, §§ 17005* [providing, concerning “cellar treatment,” that “[i]n case of conflict between Federal and State laws or regulations the California law or regulation shall take precedence”], *17010* [adopting regulations more restrictive than those contained in federal regulations concerning the use of sugar in the production or cellar treatment of wine].) Bronco contrasts what it asserts are these and similar permissible and specifically sanctioned departures

[**75]** **[*980]** Soon after the adoption of this federal provision in 1938, a California statute was enacted, and two regulations were adopted, all three of which imposed *more stringent* California wine labeling requirements. First, in 1939, the Legislature amended the state ABC Act (*Bus. & Prof. Code, § 23000 et seq.*) to prohibit the use on wine labels of the phrase "California Central Coast counties dry wine," unless the wine was in fact made *entirely* from grapes grown in specified Central Coast counties. (Stats. 1939, ch. 1033, §§ 1–4, p. 2838; see *Bus. & Prof. Code, §§ 25236–25238*.) Second, by 1942, a regulation had been adopted imposing a similar 100 percent grape origin requirement for any wine labeled as " 'California' or any geographical subdivision thereof." (See Cal. Dept. of Pub. Health, Regs. Establishing Stds. of Identity, Quality, Purity and Sanitation and Governing the Labeling and Advertising of Wine in Calif. (May 23, 1942) art. I, § 2(aa) [49] **[****77]** (hereafter 1942 Regulations), **[**446]** presently found at *Cal. Code Regs., tit. 17, § 17015, subd. (a)(1)*.) Third, by 1942 a California **[****76]** regulation barred the sale of **[***209]** wines labeled with so-called coined (or semi-generic) brand names if the "brand designation resembles an established wine type name such as … Madeira, … Port, … Claret, [or] Burgundy, etc. …" (See 1942 Regs., art. II, § 8.) Under this and subsequent versions of the same regulation, a label such as "Burgundy brand" was long barred in California. [50]

[*981] The first two California labeling rules described above plainly imposed (and still impose) a more stringent standard than the 75 percent requirement set forth in the federal appellation of origin regulation. (Regs. No. 4, § 25, as revd., 3 Fed.Reg. 2093, 2096 (Aug. 26, 1938), presently found at *27 C.F.R. § 4.25(b)(1)(i)*.) The third provision described above prohibited name types that the federal regulations have permitted since 1941 upon a proper showing. (See *27 C.F.R § 4.33(b)*, as revd., 6 Fed.Reg. 2874 (June 13, 1941) [disallowing such a geographic name *unless* a federal officer finds the name, either qualified by word "brand" or otherwise, "conveys no erroneous impressions as to the … origin … of the product"].)

Although the **[****78]** parties dispute whether the first two state rules cited above are sanctioned by title 27 Code of Federal Regulations *section 4.25(b)(1)(iii)*—the federal provision that expressly authorizes state regulation concerning the "composition" (the grape ingredients) or "designation" of wine (the class or type of wine, as distinct from its source or origin)—the third California regulation, the coined brand-name provision, cannot be so distinguished. That state regulation plainly controlled, more strictly than the federal rules, not the mere composition or designation of wines, but the brand-name labeling of wines.

CA(12)[] **(12)** In any event, there is no indication that any question previously has arisen concerning the authority or enforceability of the California statute [51] or of either regulation. Indeed, since mid-1939, the California Legislature has authorized state wine regulations that are stricter than federal wine regulations, [52] **[****80]** and for nearly the

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from federal regulations with what it contends are impermissible deviations from federal *labeling* standards—especially federal regulations concerning the use of brand names on labels.

[49] This requirement may have gone into effect earlier than 1942. A predecessor to the regulations of 1942 had been adopted in April 1940. (See 1942 Regs., cover page ["These regulations supersede the Definitions and Standards—Wines, adopted December 1934, as amended, and Rules Governing California Vintage Wines, adopted April 6, 1940"].) The December 1934 regulations, as amended through January 18, 1936, have been described *ante*, part II.B.1.d. Despite the efforts of librarians throughout the state, we have been unable to locate the intervening *regulations*—if indeed there were any—or the 1940 Rules Governing California Vintage Wines.

Article III, section 12(1) of the 1942 Regulations also provided, consistently with many of the prior statutes and regulations described earlier, that wine labels "shall not contain [¶] (1) *any statement, design, device or representation which is false or misleading in any material particular*." (Italics added.)

[50] That California regulation, as adopted in the early 1940s, was in force until the mid-1980s. (See former Cal. Admin. Code, tit. 17, §§ 17001(a) & 17075(c)(2) (1978).) Oregon as well had a similar "coined" brand-name provision until the mid-1980s. (See Or. Admin. R. 845-10-285(3)(a) (1978).)

[51] The appellation "California Central Coast counties" has since fallen into disuse. (See *Regulation of American Wine Labeling, supra*, 11 U.C. Davis L.Rev. at p. 143.)

past 35 years, the Legislature expressly has authorized state wine regulations to "*differ* ***[***210]*** *from or be inconsistent with*" **[*982]** federal wine regulations (*Health & Saf. Code, § 110525*, italics added); [53] yet there is no **[****79]** indication the federal **[**447]** government has taken issue with this long-standing assertion of broad state authority. [54]

[**81]** The history of the early post-Prohibition-repeal California and federal wine labeling regulations reveals no evidence of any clear or manifest intent on the part of Congress, or the regulatory agency charged with executing the relevant law, to preempt state wine labeling regulation such as *section 25241*. This history suggests, instead, the opposite.

b. *Modification of federal regulations in the 1970s and 1980s, and adoption by Oregon of its more stringent wine labeling regulations*

Beginning in the mid-1970s, the BATF, which in 1972 had been delegated the task of creating and enforcing federal regulations (see *ante*, fn. 43), began to consider proposals to further define and regulate appellations of origin. In connection with that inquiry, the BATF also began to consider how better to regulate the use in brand names of terms of "geographic or viticultural significance." (42 Fed.Reg. 30517, 30518 (June 15, 1977).) [55] In 1978 the BATF adopted, but then postponed enforcement of, new brand-name rules, [56] **[****83]** **[***211]** and it also adopted new

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[52] See Statutes 1939, chapter 60 (establishing the Health & Safety Code), page 992 (enacting former *§ 26541*, requiring that certain state food and distilled spirits regulations not impose a standard higher than certain federal regulations—but *not* requiring such conformity with regard to state *wine* regulations); Statutes 1941, chapter 1042, section 3, page 2698 (enacting former *§ 26540.2*, authorizing the State Board of Health to promulgate wine regulations), and section 4, page 2699 (amending *§ 26541* to specify that the section's general prohibition on imposition of higher state standards concerning food and distilled spirits "*shall not apply to wine*"). (Italics added.) Former *section 26541*'s exemption of state wine regulations from the general rule against imposition of higher state standards relating to other foods and distilled spirits continued through various amendments of that former section, until that exemption ultimately was recast in 1970 as a positive right of state regulators to "differ from or be inconsistent with" corresponding federal wine regulations. (Stats. 1970, ch. 1573, § 5, p. 3255; see *post*, fn. 53 [quoting current *Health & Saf. Code, § 110525*]; cf. *44 Ops.Cal.Atty.Gen. 122, 125 (1964)* [discussing similar history of Health & Saf. Code, former § 26542].)

[53] In 1970, Health and Safety Code former *section 26515* was amended to specify: "Standards of identity and quality for wine adopted pursuant to this section *may differ from or be inconsistent with* the standards promulgated by [the federal regulators in the Department of the Treasury]." (Stats. 1970, ch. 1573, § 5, p. 3255, italics added.) The statute today provides the same. (*Health & Saf. Code, § 110525* ***HN15***[] ["Standards of identity and quality for wine adopted pursuant to this section may differ from or be inconsistent with the standards promulgated by the Secretary of the Treasury pursuant to the *Federal Alcohol Administration Act*"].)

[54] Indeed, other jurisdictions, since 1976, expressly have recognized and incorporated California's more stringent "100 percent rule" into their own state wine regulations (see 16 Tex. Admin. Code, § 45.45(b) & (c) (eff. Jan. 1976) ["all grape wine bearing labels showing 'California' as the origin of such wine shall be derived 100 % from grapes grown and wine from such grapes fermented within the State of California"]; *Wash. Admin. Code, § 314-24-003(5)* [same]), and the federal regulating body itself has recognized California's "100 percent rule" as a valid exercise of state regulatory power. (See 58 Fed.Reg. 65295, 65297 (Dec. 14, 1993) [acknowledging "California's authority to enforce its own labeling requirements within the area of its jurisdiction"].)

[55] Under the then existing federal regulations, use of geographic brand names was permitted if (i) the word ?brand" appeared after the brand name (*27 C.F.R. § 4.33(b) (1976)*) or (ii) at least 75 percent of the grapes originated in the appellation suggested by the brand name (*id.*, *§ 4.25 (1976)*).

[56] Although the BATF in 1978 adopted new rules regulating the use in brand names of terms of geographic or viticultural significance, it delayed implementation of those rules, first until 1983 and ultimately until 1986. (43 Fed.Reg. 37672, 37674, 37678 (Aug. 23, 1978).) The brand-name rules that were adopted in 1978 (but never became effective) would have provided: "A brand name of viticultural significance may not be used unless the bottling winery is located within the geographical area used in the brand name, and the wine meets the appellation of origin requirements for the area named" (meaning at least 75 percent of

regulations concerning appellations of origin— **[*983]** including a new subcategory within appellations of origin known as "viticultural areas." **[****82]** (43 Fed.Reg. 37672, 37674, 37678 (Aug. 23, 1978).) [57] The 1978 federal appellations of origin regulation expressly recognized the enforceability of state laws in relation to placing a "viticultural area" designation on a wine label, making the right to so label a wine contingent on compliance **[**448]** with, among other things, "*the laws and regulations of all of the States contained in the viticultural area*." (27 C.F.R. former § 4.25a(e)(3)(iv) (1978–1981); *id.,* former § 4.25a(e)(3)(v) (1981–1986), italics added.) [58]

Prior to and during this same period of federal regulatory action and consideration of geographic brand-name regulations (see *ante*, fn. 56), in 1977 the State of Oregon departed from the federal labeling **[****84]** regulations in substantial ways, imposing more stringent state rules concerning matters such as percentage content of Oregon appellation wines, [59] **[****85]** use of "semi-generic" **[*984]** place names, [60] percentage content of varietal wines, [61] use of the term "estate bottled," [62] **[****86]** **[***212]** and the use of geographic brand names. [63] In each of

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the grapes used to make the wine must be from that area). (43 Fed.Reg. 37672, 37678 (Aug. 23, 1978).) Alternatively, the 1978 regulation, as initially adopted, would have permitted use of a brand name of viticultural significance if "the brand name is qualified by the word 'brand' immediately following the brand name in the same size of type and as conspicuous as the brand name itself." (*Ibid*.)

As noted, implementation of the brand-name aspects of the rules repeatedly was delayed. (See 48 Fed.Reg. 2762 (Jan. 21, 1983); 50 Fed.Reg. 758 (Jan. 7, 1985).) Meanwhile, in 1984 the BATF retreated from its 1978 proposal concerning the use of brand names and proposed instead to address the issue by adopting either that plan, or one of three alternative plans. (49 Fed.Reg. 19330, 19331–19332 (May 7, 1984); see *post*, fn. 70 [describing the BATF's 1984 comments concerning proposed branding rules].) As explained below, based upon further review and the comments concerning its 1984 proposal, the BATF ultimately adopted, effective July 7, 1986, the regulation at issue in the present case. (51 Fed.Reg. 20480 (June 5, 1986).)

57 An "appellation of origin" was, and continues to be, defined as a political division or subdivision—for example, a state, or group of states, or a county, or group of counties—in which grapes used to make a wine are grown. (See *27 C.F.R. § 4.25(a)(1)(i)-(vi)*.) A "viticultural area," by contrast, is a special subcategory within an appellation of origin (see *27 C.F.R. § 4.25(a)(1)(vi)*) demarked not by political boundaries, but by geographic terms and characteristics.

58 The other requirements for "viticultural area appellation" labeling were (and remain) (i) that the area be recognized under part 9 of 27 Code of Federal Regulations; (ii) that the wine be made from at least 85 percent grapes grown in that viticultural area; and (iii) that the wine be fully "finished" within the state (or one of the states) of the viticultural area. (*27 C.F.R. § 4.25(e)(3)(i), (ii) & (iv)*.)

59 An administrative regulation of the Oregon Liquor Control Commission (former Or. Admin. R. 845-10-292(6)(c), eff. Mar. 1, 1977, currently Or. Admin. R. 845-010-0920(1) & (2) (2004)), requires: "(1) An appellation of origin must appear on every wine brand label in direct conjunction with, and in lettering as conspicuous as, the wine's class or type designation. The lettering must be at least two millimeters in height. [¶] (2) No person may sell or offer to sell a wine, claiming or implying a certain appellation of origin anywhere on its label, unless 100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin. …" The corresponding federal regulations, by contrast, impose only a 75 percent rule for appellations of origin (*27 C.F.R. § 4.25(b)(1)(i)*), an 85 percent rule for American viticultural areas (*27 C.F.R. § 4.25(e)(3)(ii)*), and a 95 percent rule for individual vineyard appellations (*27 C.F.R. § 4.39(m)*).

60 Compare Oregon Administrative Rule 845-10-292(5), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0930 (2004) (barring use of "semi-generic" place names [such as Burgundy, Chablis, and Chianti] on Oregon wine labels) with *27 Code of Federal Regulations section 4.24(b)(2)* (permitting those same names on federally approved labels).

61 Compare Oregon Administrative Rule 845-10-292(3)(a), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0915(1) (2004) (a varietal name [such as Chardonnay or Pinot Noir] may not be used on an Oregon wine label unless at least 90 percent of the wine's grapes are of that varietal) with *27 Code of Federal Regulations section 4.23(b)* (permitting use of a varietal name on federally approved labels if only 75 percent of the wine's grapes are of that varietal).

62 Compare Oregon Administrative Rule 845-10-292(4)(c), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0925 (2004) (barring use of the term "estate bottled" on Oregon wine labels unless, among other things, the wine's grapes

these respects, Oregon reserved the right to *disapprove* wine labels that had been granted a valid federal certificate of label approval. [64]

For present purposes, the most relevant of these various departures from federal wine labeling regulations concerns Oregon's geographic brand-name rule.

Effective March 1, 1977, Oregon Administrative Rule 845-10-292(6)(e) provided that appellation names—including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley—"*shall not be used in a brand name, in the name of a winery or in any other manner on a label unless 100 percent of the grapes* **[****87]** *used to produce the wine were grown within the boundaries of that appellation of origin.*" (Italics added.) The regulation included a grandfather clause permitting "use by a winery of a brand name which has been in use *by that winery* on its approved labels prior to *January 1, 1977*." (Or. Admin. R. 845-10-292(6)(e) (1977), **[**449]** italics added.) [65] **[****88]** Like the other Oregon labeling rules that specifically exceed the federal regulations, this Oregon geographic **[*985]** brand regulation remains in force today, more than a quarter-century after its adoption. (See Or. Admin. R. 845-010-0920(4)(f) (2004)). [66]

We find these Oregon regulations relevant to our current inquiry in three interrelated respects. [67] First, the state regulations— **[***213]** especially the strict **[****89]** geographic brand-name rule, and the estate-bottled rule—

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were grown within five miles of the winery) with [27 Code of Federal Regulations section 4.26](#) (permitting the term "estate bottled" on federally approved labels without requiring that the wine's grapes have been grown within five miles of the winery).

[63] See Oregon Administrative Rule 845-10-292(6)(e), effective March 1, 1977, currently Oregon Administrative Rule 845-010-0920(4)(f) (2004), discussed in the text, *post*.

[64] See Oregon Administrative Rule 845-10-290(2) (1977), currently Oregon Administrative Rule 845-010-0290(2) (2004) (providing that each wine label must (i) receive a federal COLA *and* (ii) comply with the more stringent Oregon rules concerning percentage contents for appellations of origin, semi-generic names, grape content of varietal wines, brand names, and use of the term "estate bottled").

[65] We note the narrowness of this grandfather provision compared with the federal grandfather clause that we consider in the present case. In addition to the earlier cutoff date (1977 under the state regulation, as compared with 1986 under the federal regulation), the phrasing of the provision suggests that the right of grandfathered use may not be transferred to another entity, as was done in the present case. (Cf. Comment, *On Vino Veritas Clarifying the Use of Geographic References on American Wine Labels* (2001) [89 Cal. L.Rev. 1881, 1912–1913](#).)

[66] As most recently amended, the regulation provides that appellation names—again including the names of Oregon counties, and the names of Oregon wine-producing regions Willamette Valley, Umpqua Valley, and Rogue Valley or "words that may be mistaken for an approved appellation of origin in a brand name [or] in a winery name, or in any other manner on a wine label" may not be used "unless the wine meets the requirements for use of that appellation of origin" (Or. Admin. R. 845-010-0920(4)(f) (2004)), that is, "100 percent of the grapes used in its production grew within the legal boundaries of that appellation of origin." (*Id*., 845-010-0920(2) (2004).) Like the original version of the regulation, the provision also retains a restrictive grandfather clause: "A winery may continue to use any brand name that *it has used* on its approved label since before *January 1, 1977*." (*Id*., 845-010-0920(4)(f) (2004), italics added.)

[67] We reject Bronco's preliminary argument, raised in its supplemental briefs, that Oregon Administrative Rule 845-010-0280 implicitly nullifies Oregon wine regulations discussed above, such as the estate-bottled provision and the geographic brand-name provision.

The cited rule addresses "Standards of Identity and Prohibited Practices Concerning Wine" and provides that Oregon regulations concerning those two topics, set forth in Oregon Administrative Rule "845-010-0905 [definitions] *and* 845-010-0940 [use of water, wine spirits and other sweetening agents]," shall prevail over any less stringent or restrictive federal law. (Or. Admin. R. 845-010-0280 (2004), italics added.) As Bronco observes, in an introductory sentence the regulation *also* states: "The Commission adopts, by reference, 27 CFR [parts] 4 [the federal wine labeling regulations] and 24[] [wineries and wine-making regulations] (1986). These regulations of the Bureau of Alcohol, Tobacco [] and Firearms of the United States Department of Treasury apply to all wine sold in Oregon by a Commission licensee." (*Ibid*.)

demonstrate that Oregon has long imposed labeling rules that are both (i) more stringent than the federal rules *and* (ii) go far beyond [27 Code of Federal Regulations section 4.25(b)(1)(iii)](#)'s authorization for states to regulate the "composition, method of manufacture, [or] designation of wines … ."

[**90]** Second, it is clear that the BATF has long been aware of these stricter Oregon rules and apparently views them as enforceable. The Oregon regulations had been in place for approximately 16 months at the time the BATF **[*986]** adopted its 1978 regulation concerning the use of "viticultural area" appellations on wine labels. That 1978 BATF regulation, as noted above, *expressly acknowledged and required compliance with* "*the laws and regulations of all the States contained in the viticultural area*." (27 C.F.R. former § 4.25a(e)(3)(iv) (1978–1981); *id*., former § 4.25a(e)(3)(v) (1981–1986), italics added.) By so providing, the BATF, as of 1978, acknowledged the propriety and enforceability of the more stringent labeling rules promulgated by the states.

Indeed, any doubt in this regard is dispelled by the BATF's action and comments seven years later (in late January 1986) when, in the course of repealing as a *federal* **[**450]** requirement 27 Code of Federal Regulations former section 4.25a(e)(3)(v)'s rule concerning compliance with state regulations relating to viticultural areas, the BATF expressly and repeatedly acknowledged both the existence and the *enforceability* of Oregon's "more **[****91]** stringent" wine labeling regulations. [68] **[****92]** The BATF explained **[***214]** that although it had decided, with regard to viticultural areas, to eliminate compliance with state laws *as a federal requirement*, the underlying substantive state law requirements relating to viticultural areas would remain, to be enforced solely by the respective states. The BATF observed: "*State laws and regulations of the* ***[*987]*** *state in which the wine was fermented or finished will, of course, continue to apply to the producing winery. These state laws and regulations are enforced by the state involved*." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), italics added.) [69]

Bronco reads this language as adopting generally the federal regulations concerning, for example, the use of the term "estate bottled" and geographic brand names for all Oregon wines sold in that state—and hence as implicitly repealing or at least superseding those Oregon rules insofar as in-state sales of Oregon wines are concerned. Bronco's interpretation of the Oregon rules is belied by Oregon Administrative Rule 845-010-0910(2) (2004), which plainly states that Oregon Administrative Rules "845-010-0905 *through* 845-010-0940 [i.e., including Oregon's estate-bottled and geographic brand-name provisions] apply to all grape wines *produced or bottled in Oregon* …"—that is, regardless where such wines are *sold*—and that "[*t*]*hese rules prevail in any conflict between … other rules in Chapter 845, Division 010*." (Italics added.)

[68] As the BATF explained, prior to adoption of its 1978 appellation rules, appellations of origin relating to American wines generally were characterized as regions or places delimited by political boundaries, such as states or counties. As observed *ante*, at footnote 57, the 1978 appellation rules expanded the concept of appellations of origin by additionally including under that term "viticultural areas"—that is, grape-growing regions—defined by geographic features, and not political lines. Because some of these viticultural areas straddled states, a problem eventually arose concerning the federal requirement, then set out in 27 Code of Federal Regulations former section 4.25a(e)(3)(v) (1981–1986), that in order to employ a viticultural area designation, a winery must "conform[] to the laws and regulations of all the States contained in the viticultural area." Specifically, the BATF noted (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986)), if a wine were to use the viticultural area designation "Columbia Valley" (a federally recognized viticultural area straddling Oregon and Washington), the winery producing the wine would be required to comply with Oregon's state regulations, even if the grapes were grown in the Washington part of the Columbia Valley and the wine was made and finished only in Washington. Moreover, the BATF observed, "regulations of Oregon and Washington differ greatly regarding the production *and labeling* of wine. *Oregon regulations are more stringent than Federal regulations*." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986), italics added.) The BATF observed that because former section "4.25a(e)(3)(v) required compliance with laws and regulations of all states within a multistate viticultural area, regardless of where the wine is fermented or finished, wine made from grapes originating and fermented in Washington, and finished and bottled within Washington was, nevertheless, subjected to Oregon law and regulations if the wine claimed a multistate viticultural area appellation such as Columbia Valley." (51 Fed.Reg. 3773, 3774 (Jan. 30, 1986).) And yet, the BATF determined, "[a] *Federal requirement* for compliance with State laws and regulations is both unnecessary and difficult for the Federal Government to enforce *due to the multitude of state and local laws and regulations*." (*Ibid*., italics added.) Accordingly, the BATF concluded, it did not "believe that Federal regulation should impose the State laws or regulations of one state upon transactions occurring in other states." (*Ibid*.)

[69] Underscoring this point, the BATF observed in the summary of its decision that although "the requirement to comply with State laws and regulations is removed as a Federal requirement," still, "[t]he State laws and regulations remain in effect and *will*

Third and finally, the Oregon geographic brand-name regulation, in particular, sheds light upon the BATF's apparent understanding of the grandfather clause at issue in this case. Almost 10 years after Oregon adopted its restrictive geographic brand-name labeling regulation, the BATF, after considering various options over the preceding decade (see *ante*, fn. 56, and *post*, fn. 70), amended *27 Code of Federal Regulations section 4.39(i)(1)* in the manner at issue in this case, to prohibit the use of labels with brand names implying that a wine was made with grapes grown in the area suggested by the brand name, unless at least 75 percent of the grapes used to make the wine were in fact from **[****93]** that area. But, as noted above, the new federal regulation also contained a grandfather clause that lies at the center of the controversy in this case, under which such otherwise misleading labels are not prohibited, so long as the label was in use prior to July 1986 *and* the label discloses the true appellation of origin of at least 75 percent of the grapes actually used to make the wine inside the bottle. (*Id*., *§ 4.39(i)(2)(ii)*.) [70]

[**94]** **[***215]** **[**451]** In view of the BATF's explicit acknowledgement, only four months prior to its adoption of the provision at issue in the present case, that the Oregon labeling regulations are proper and enforceable (see 51 Fed.Reg. 3773, 3774 (Jan. 30, 1986)), it is reasonable to assume that the BATF, when it adopted **[*988]** the grandfather clause, was aware of Oregon's "more stringent" geographic brand-name labeling rule. And yet the BATF said nothing in its new provision or in its discussion of that new rule to suggest that the new rule preempted Oregon's long-standing, closely related, and more stringent brand-name labeling rule.

CA(13)[] **(13)** Accordingly, contrary to Bronco's theory that the BATF itself viewed or views its wine labeling regulations as preempting more stringent state regulations, we conclude that the history of the federal and Oregon wine labeling regulations in the mid-1970s through the present reveals no evidence of any such intent. Instead, that history strongly indicates that the BATF has long contemplated that the states will enforce their own stricter labeling requirements, and that the agency did not and does not view its labeling regulations as preempting more stringent state **[****95]** regulations such as *section 25241*.

c. *Amendment of the FAA Act in 1988, and corresponding regulations, requiring health warning labels and expressly preempting state regulation of such labels*

In 1988, Congress amended the FAA Act to require that all wine labels (and the labels of other alcoholic beverages) contain a warning on the back label, as follows: "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." (*27 U.S.C. § 215(a)*.) Congress gave the BATF authority to issue appropriate regulations to enforce Congress's will (*27 U.S.C. § 215(b) & (d)*), and, stressing the perceived need in this particular area for Congress to "exercise the full reach of the Federal Government's constitutional powers in order to establish a comprehensive Federal program" (*27 U.S.C. § 213*), further provided expressly for federal preemption of such health warnings on alcoholic beverage labels: "No statement relating to alcoholic **[****96]** beverages and health, other than the statement required by *section 215* of this title, shall be required under State law to be placed on any container of an alcoholic beverage … ." (*27 U.S.C. § 216*.) The BATF responded by adopting implementing regulations (see *27*

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continue to be enforced by the agencies of the states involved in winemaking." (51 Fed.Reg. 3773 (Jan. 30, 1986), italics added.)

[70] See *27 Code of Federal Regulations section 4.39(i)*, quoted in full *ante*, at footnote 7. As Bronco observes, in a notice of proposed rulemaking issued in 1984—two years prior to the BATF's adoption of the present brand-name provision and its grandfather clause—the BATF stated that it did not wish to adopt a regulation that "may be too restrictive." (49 Fed.Reg. 19330, 19331 (May 7, 1984).) After outlining four possible regulatory responses to the brand-name problem, the BATF stated, in reference to a possible rule strictly regulating the use of terms of viticultural significance in brand names, its "belie[f that] the wine industry should be allowed flexibility in selecting brand names under which to market their products *without having a whole class of brand names become totally unusable*." (*Id*., at pp. 19331–19332, italics added.) As explained *post*, part II.D.1, Bronco suggests that this language supports a conclusion that two years later, when the BATF adopted *27 Code of Federal Regulations section 4.39(i)(2)(ii)* and concluded that the new rule "will provide the industry with sufficient flexibility in designing their labels, while at the same time providing consumers with protection from any misleading impressions that might arise from the use of geographic brand names" (51 Fed.Reg. 20480, 20482 (June 5, 1986)), the BATF, in so acting, engaged in a "careful balancing of federal policy objectives" and intended to *allow* the kind of brand-name labeling here at issue.

C.F.R. § 16.20 et seq.) as well as a provision expressly reaffirming the preemptive effect of that regulation. (27 C.R.F. § 16.32.)

CA(14)[] **(14)** As the United States Supreme Court has observed, "**HN16**[] 'an express definition of the pre-emptive reach of a statute … supports a reasonable inference … that Congress did not intend to pre-empt **[***216]** other matters.' " (Lorillard Tobacco Co. v. Reilly (2001) 533 U.S. 525, 541 [150 L. Ed. 2d 532, 121 S. Ct. 2404], quoting Freightliner Corp. v. Myrick (1995) 514 U.S. 280, **[*989]** 288 [131 L. Ed. 2d 385, 115 S. Ct. 1483]; accord, *Bass River Associates v. Mayor, Tp. Com'r (3d Cir. 1984) 743 F.2d 159, 162* ["It is of some interest and no small significance that a provision in the same title does provide for federal preemption of state and local laws or regulations … ."].)

This inference and these observations are especially apt here, in light of the history **[**452]** described above, which strongly **[****97]** suggests (i) no intent on the part of Congress, in 1935 or thereafter, to preempt any *other* category of state wine label laws, and (ii) the BATF's acknowledgement of, and apparent acquiescence in, the more stringent wine labeling laws of the states, and specifically those of Oregon. Indeed if Congress, as Bronco asserts, by enactment of the FAA Act in 1935, already had generally preempted state regulation of wine labels, there would have been no need for any express preemption clause or preemption regulation with respect to the 1988 health warnings for wine labels.

Once again, this history reveals no evidence of any clear or manifest intent on the part of Congress or the BATF to preempt state wine labeling regulation such as section 25241. Instead, the history supports an opposite inference that neither Congress nor the BATF intended to preempt state wine labeling laws such as section 25241.

D.

Having concluded that Bronco has failed to carry its burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the BATF, to preempt the traditional exercise of state police power such as the wine labeling regulation found **[****98]** in section 25241, we proceed under the presumption that no such preemption was intended. We bear this presumption in mind when we consider below Bronco's assertion that section 25241, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.

1. *Does section 25241, by prohibiting, with respect to Napa County, what the federal grandfather clause does not prohibit, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?*

In support of its assertion that section 25241 frustrates the full purposes and objectives of federal law, Bronco cites various cases in which courts have made such (or similar) findings in other contexts. (Geier, supra, 529 U.S. 861, 881 [state tort action based upon failure to equip automobile with airbags would frustrate federal highway safety standards permitting car **[*990]** makers to employ passive restraint devices other than airbags]; Barnett Bank, supra, 517 U.S. 25, 31 [state statute barring national bank from selling insurance would obstruct federal statute that permitted, but did not require, national banks to sell **[****99]** insurance]; Lawrence County, supra, 469 U.S. 256, 260–268 [state law requiring certain method of distribution of federal funds held to obstruct federal statute that was designed to provide local governments freedom to spend those federal funds "as they saw fit"]; McDermott v. Wisconsin (1913) 228 U.S. 115, 129 [57 L. Ed. 754, 33 S. Ct. 431] [state statute that required removal of certain labels on syrup was preempted by federal statute under which such labels had been approved]; Dowhal, supra, 32 Cal.4th 910, **[***217]** 929, 935 [state law warnings concerning nicotine frustrated the purposes of the federal Food, Drug & Cosmetic Act].)

The Department and the NVVA, by contrast, distinguish each of these cases and rely instead primarily upon Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 68–70 [154 L. Ed. 2d 466, 123 S. Ct. 518], in which the high court declined to find preemption of a state tort action seeking to impose standards for boat propeller guards, even in the face of a decision by federal authorities not to impose any general or universal propeller guard requirements. (See also, e.g., California Coastal Comm'n v. Granite Rock Co. (1987) 480 U.S. 572, 582–584 [94 L. Ed. 2d 577, 107 S. Ct. 1419] (Granite Rock Co.) **[****100]** [federal approval of mining project was not frustrated by California's stricter environmental requirements; indeed, the federal regulations assumed the applicability of the state regulations]; *Hillsborough County v. Automated Medical Labs. (1985) 471 U.S. 707, 720–721 [85 L. Ed. 2d 714, 105 S. Ct. 2371] (Hillsborough County)* [stricter local regulations concerning plasma donors posed no serious obstacle to related federal regulations]; cf. *Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 132 [57 L. Ed. 2d 91, 98 S. Ct. 2207] (Exxon)* [no preemption **[**453]** of state discriminatory pricing regulations barring conduct that triggered a limited defense under federal law].)

Bronco asserts that *section 25241* frustrates the purposes of Congress, or at least of the BATF's regulation establishing a grandfather clause (*27 C.F.R. § 4.39(i)(2)(ii)*), in "four interrelated ways." Bronco argues: (i) *Section 25241* prohibits precisely what the regulation establishing the grandfather clause "expressly and unambiguously authorizes"; (ii) the regulation establishing the grandfather clause "embodies a specific determination by federal regulators that the use of established **[****101]** geographical brand names for wines from a variety of appellation areas would not be misleading if the labels also featured the true appellation of origin"; (iii) the regulation establishing the grandfather clause "reflects a careful balancing of federal policy objectives" and a determination by the BATF that the regulations should not render a "whole class" of established brand names "totally unusable" (see *ante*, fn. 70); and (iv) the BATF, in adopting its rule and regulation establishing a grandfather **[*991]** clause, expressly rejected as "too restrictive" a general rule that would have confined the use of established geographic brand names to wines made from the region referred to in the brand name.

In reply, the Department and the NVVA assert that *section 25241* is in aid of, and consistent with, Congress's general and overriding purpose in adopting 27 United States Code *section 205(e)* in 1935—namely, the prevention of consumer deception relating to wine labeling. The Department and the NVVA claim that Bronco has failed to identify any congressional purpose with which *section 25241* interferes. In this respect, the NVVA argues, "[t]he assertion that the grandfather clause represents **[****102]** a 'deliberate federal policy determination' or 'regulatory balance' assumes that Congress or [the] BATF identified some affirmative reason that the government of the United States wanted Bronco to be able to sell wine made from non-Napa grapes under labels saying 'Napa.' " The Department asserts there is no support for the proposition that federal regulators have concluded that in all cases, the presence of a true appellation of origin dispels the effects of misrepresentations reflected in a brand name.

Both the Department and the NVVA acknowledge that in 1984 the BATF, in discussing various options for addressing **[***218]** the problems posed by geographic brand names, asserted that it did not believe it appropriate to issue regulations that "may be too restrictive" or render "totally unusable" a "whole class" of brand-name labels. (49 Fed. Red. 19330, 19331 (May 7, 1984) see *ante*, fn. 70.) But, the Department and the NVAA argue, those statements suggest at most that the BATF did not believe it prudent to impose a *national*, or total, ban on the use of existing brand-name labels that suggested an origin of wine different from the actual origin of the grapes used in making the wine. The Department and the NVVA argue that the circumstance **[****103]** that the BATF did not see fit "totally" to eliminate a "whole class" of existing labels on a national basis without regard to the policies of a particular state does not provide evidence establishing that *section 25241* frustrates any significant federal purpose. In this respect, the NVVA asserts that when, as here, the objectives of the state legislature are identical to the overriding purpose of section 205(e) of the FAA Act (protecting consumers from misleading wine labels), "in the absence of preemptive intent, the fact that [the] BATF may have balanced federal policies and arrived at a particular result does not prevent California from considering its own local policies and needs and passing its own [more stringent] laws." Finally, the Department and the NVVA observe that the BATF apparently never contemplated, much less rejected, any area-specific exemption from the federal grandfather clause, such as is found in *section 25241*'s special Napa County labeling rule. The NVVA concludes, "There is no evidence that [the] BATF considered the limited consumer protection provided by the grandfather clause to be sufficient to protect consumers in all cases, or intended to prevent **[****104]** states from **[*992]** preventing the kind of abuses which Bronco and other opportunistic winemakers could perpetuate under the grandfather clause."

[454]** In view of Bronco's repeated suggestions that we should be influenced in our assessment by the circumstance that the federal regulations at issue are part of a comprehensive scheme, in resolving these conflicting views concerning whether *section 25241* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress we bear in mind the high court's admonition in *Hillsborough County,* supra, 471 U.S. 707, 717: "HN17[] We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. See **[****105]** Jones[, supra], 430 U.S. [519] at 525. [¶] Moreover, *because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive*." (Italics added.)

In addition, we are guided by the high court's observation in Crosby, supra, 530 U.S. 363, 373, that HN18[] what constitutes a "sufficient obstacle [for a finding of implied preemption] *is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose* ***[***219]*** *and intended effects*." (Italics added.) The high court also has explained that our inquiry in this regard "requires us to consider the relationship between state and federal laws *as they are interpreted and applied, not merely as they are written*." (Jones, supra, 430 U.S. 519, 526, italics added.)

We question Bronco's characterization of the state statute as prohibiting "precisely what [the regulation establishing the grandfather clause] *authorizes*." **[****106]** (Italics added.) As the NVVA asserted at oral argument and as we observed in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 183 [83 Cal. Rptr. 2d 548, 973 P.2d 527], "[t]here is a difference between (1) not making an activity unlawful, and (2) making that activity lawful." In our view it is more accurate to characterize the state statute as prohibiting—with respect to Napa County—what the federal regulation's grandfather clause *does not prohibit*.

CA(15)[] **(15)** In any event, Bronco's repeated emphasis upon an alleged federal "authorization" presents a myopic and oversimplified analysis. The crucial **[*993]** question is, instead, whether the state rule would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Turning to *that* question, we agree with the Department and the NVVA that section 25241 HN19[] is consistent with Congress's overall purpose in enacting 27 United States Code section 205(e)—that is, to "insure that the purchaser should get what he thought he was getting, [and] that the representations both on labels and in advertising should be honest and straightforward and truthful." **[****107]** (Hearings before House Com. on Ways and Means on H.R. No. 8539, Fed. Alcohol Control Act, (1935), testimony of Joseph H. Choate, former Chairman of FAC Admin., 74th Cong., 1st Sess., at p. 10; H.R. Rep. No. 1542, 74th Cong., 1st Sess., p. 3 (1935) [highlighting deceptive labeling practices]; 79 Cong. Rec. (1935) 11714 [same].) The state statute also is consistent with the recognition that the FAA Act was necessary in order to "do something to supplement legislation by the States to carry out their own policies" because the states "alone cannot do the whole job." (Remarks of Rep. Cullen on H.R. No. 8539, 74th Cong., 1st Sess., 79 Cong. Rec. (1935) 11714.) For the reasons set forth above by the Department and the NVVA, we find that section 25241 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[455]** In reaching this determination, we also are persuaded by the apparent congressional and regulatory acquiescence in California's long-standing regulations applicable to the labeling of wines produced in California. This acquiescence militates against concluding that California's section 25241, enacted in 2000, constitutes **[****108]** a "sufficient obstacle" supporting a finding of implied preemption based upon a theory of frustration of federal purpose. Indeed, any doubt that we may have had in this regard is dispelled by the related history of Oregon's corresponding geographic brand-name labeling regulation, which, as explained above, since 1977 has imposed a rule far stricter than the federal rule that existed in the mid-1970s and, like the California statute now under review, also established a regulation far more stringent than that set forth, effective in 1986, under the federal grandfather clause. In other words, like the California statute, the Oregon brand-name regulation prohibits for certain Oregon names what the federal grandfather does not prohibit.

As explained above, the BATF long has been aware of these stricter state law brand-name labeling regulations, and, far **[***220]** from suggesting that their enforcement would frustrate any federal purpose, [71] the BATF expressly has stated its understanding that such labeling regulation will be enforced by the states. In this setting, the BATF's failure to question the enforcement of these **[*994]** more stringent state regulations—while instead acknowledging generally **[****109]** the propriety of such regulations—suggests that the BATF, the expert body charged with the enforcement of *27 United States Code section 205(e)*, does not view these state regulations as being preempted by federal law, and also does not view them as posing an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (See, e.g., *Hillsborough County, supra, 471 U.S. 707, 721* [because "the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma"]; accord, *Granite Rock Co., supra, 480 U.S. 572, 582–583* ["If, as Granite Rock claims, it is the federal intent that Granite Rock conduct its mining unhindered by state environmental regulation, one would expect to find the expression of this intent in these Forest Service regulations"].)

[**110]** ***CA(16)***[] **(16)** We find nothing in the history of the underlying federal statute or the federal regulations suggesting that, although the BATF may have determined that as a *general matter* its grandfather clause was appropriate so as to avoid destroying an "entire class" of brand-name labels, states would or should be precluded from adopting more stringent brand-name labeling requirements as necessary to address local concerns. (See *Olszewski, supra, 30 Cal.4th 798, 815* ***HN20***[] [the presumption against preemption " 'reinforces the appropriateness of a narrow reading of' " assertedly preempting language]; accord, *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 518 [120 L. Ed. 2d 407, 112 S. Ct. 2608]*; *Medtronic, supra, 518 U.S. 470, 485*; cf. *Exxon, supra, 437 U.S. 117, 132* ["it is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion"].) For the reasons set forth above, we conclude that the state labeling rule in question does not frustrate Congress's intent or stand as an obstacle to the **[****111]** accomplishment and execution of the full purposes and objectives of Congress. [72]

[*995]

[456]** 2. *Does section 25241, by imposing additional conditions not required for the issuance of a federal COLA, stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?*

Bronco also asserts that *section 25241* is impliedly preempted because, it is claimed, the statute imposes additional conditions **[****112]** not required by federal COLAs **[***221]** and thereby nullifies an asserted "right" or federal "license" to market wine in interstate and foreign commerce. In support, Bronco relies upon numerous cases holding, on the facts presented, that a state may not, by its own regulations, impair rights granted under a federal license or permit. (E.g., *Gibbons v. Ogden (1824) 22 U.S. 1 [6 L. Ed. 23]* [federal steamboat license preempted New York statute barring passage between New Jersey and New York]; *Ray, supra, 435 U.S. 151, 164–165* [federal permit authorizing a vessel to carry cargo in United States waters prevails over the contrary state judgment]; *Sperry v. Florida (1963) 373 U.S. 379, 385 [10 L. Ed. 2d 428, 83 S. Ct. 1322]* [state statute barring unauthorized practice of law could not be applied to nonlawyers licensed under federal law to prosecute patents]; *Leslie Miller, Inc. v. Arkansas (1956) 352 U.S. 187, 188–190 [1 L. Ed. 2d 231, 77 S. Ct. 257]* [state licensing law could not be applied so as to effectively allow state to declare "irresponsible" a contractor certified by the federal

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[71] We note that the BATF has not been reluctant to commit its thoughts to public view through publication of proposed rules and related comments in the Federal Register.

[72] For similar reasons, we find unpersuasive the related arguments of amici curiae on behalf of Bronco that *section 25241* stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because the statute assertedly (i) "impairs the long-standing national policy favoring uniform and consistent federal wine labeling regulations," (ii) "impairs the consistent federal policy permitting continued use of established brands," and (iii) "will frustrate the United States' ability to protect established brands and trademarks in ongoing trade negotiations."

government as "responsible"]; *Castle v. Hayes Freight Lines, Inc. (1954) 348 U.S. 61, 64 [99 L. Ed. 68, 75 S. Ct. 191]* **[****113]** [state could not bar federally licensed truck driver from its roads for repeated violations of state traffic laws]; *First Iowa Coop. v. Power Comm'n (1946) 328 U.S. 152, 164–167 [90 L. Ed. 1143, 66 S. Ct. 906]* [federal permit issued for interstate utility project precluded state attempt to proscribe project].)

The Department and the NVVA, asserting that these cases are distinguishable, rely upon other high court cases holding that, in certain circumstances, possession of a federal license does not confer immunity "from the operation of the normal incidents of local police power." (*Huron Cement Co. v. Detroit (1960) 362 U.S. 440, 447 [4 L. Ed. 2d 852, 80 S. Ct. 813]* [upholding enforcement of city's smoke abatement ordinance against federally licensed vessels]; see also *Florida Avocado, supra, 373 U.S. 132, 141* [upholding California's right to enforce regulations prohibiting the sale of certain federally approved Florida avocados]; *Medtronic, supra, 518 U.S. 470, 492–494* [federal approval of medical device did not preempt state action claiming the approved device was defectively designed]; *Granite Rock Co., supra, 480 U.S. 572, 582–583* **[****114]** [federal approval of mining project did not preempt California's stricter environmental requirements]; *Pacific Gas & Elec. v. Energy Resources Comm'n (1983) 461 U.S. 190, 222–223 [75 L. Ed. 2d 752, 103 S. Ct. 1713]* [federal nuclear power plant license did not preempt stricter state licensing requirements].)

[*996] These licensing cases in essence present the same issue discussed above, namely, whether the state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. But as both the Department and the NVVA observe, it is quite doubtful that a federal COLA issued pursuant to *27 United States Code section 205(e)* and the corresponding wine label certificate regulations (*27 C.F.R. § 4.50 et seq.*) are equivalent to the licenses or permits at issue in the cases upon which Bronco relies, and Bronco does not provide any convincing authority suggesting that a COLA constitutes a license or permit as understood in those cases. Indeed, ***HN21***[] it is apparent from the *FAA Act* itself, and from the corresponding regulations, that both Congress and the BATF well understand the distinction between a license or permit, on one **[****115]** hand, and a COLA, on the other. Congress requires wine importers, producers, and wholesalers to secure a "basic permit" (*27 U.S.C. § 203(a)–(c)*; see also *id*., *§ 204* **[***222]** [setting forth permit procedures]), and the BATF has adopted extensive corresponding regulations concerning such permits (*27 C.F.R. §§ 1.20–1.59*). By contrast, nowhere in the separate COLA procedures set forth in *27 United States Code section 205(e)*, or the extensive COLA regulations (*27 C.F.R. §§ 4.50–4.52, 13.1–13.92*), **[**457]** does Congress or the BATF even *imply* that a COLA constitutes a license or permit. Quite the contrary.

CA(17)[] **(17)** As explained above, it is evident that the BATF envisions that states will enforce their own labeling laws to the extent they impose more stringent requirements, and that BATF generally views its role as being confined to ensuring compliance with the bare terms of *federal* labeling law. (See, e.g., 51 Fed.Reg. 3773, 3774, discussed *ante*, at pt. II.C.2.b.) As the NVVA observes, the BATF itself has confirmed this view of its enforcement authority and of any resulting COLA that it issues by noting, on its COLA application form, that **[****116]** the BATF uses the form only for its own federal enforcement duties but that it may share the information supplied to *state regulators* "to aid in the performance of their duties." (Dept. of Treas., Alcohol and Tobacco Tax Trade Bur., Application for and Certification/Exemption of Label/Bottle Approval, TTB F 5100.31 (4/2004), p. 3 <*http://www.ttb.gov/forms/5000.htm* # alcohol> [as of Aug. 5, 2004].)

CA(18)[] **(18)** Nor, contrary to the assertions of Bronco and suggestions by the Court of Appeal below, can a COLA properly be viewed as conferring a "right" on the holder to market wines in interstate or foreign commerce so long as the bare BATF labeling regulations are satisfied. ***HN22***[] The BATF itself has observed that a "certificate of label approval was never intended to convey any type of proprietary interest to the certificate holder" and that a certificate " 'is issued for [B]ATF use only … .' The certificate of label approval is a statutorily mandated tool used to help the [B]ATF in its enforcement of the labeling requirements of the *FAA Act*." (64 Fed.Reg. 2122, 2123 (Jan. 13, 1999).) As the New Jersey Supreme Court observed in a related context, a **[*997]** COLA "goes no further than **[****117]** evidencing compliance with [federal regulatory] standards imposed only for the purposes mentioned in the valid exercise of federal authority." (*Boller Beverages, Inc. v. Davis (1962) 38 N.J. 138 [183 A.2d 64, 69]*.)

III.

Bronco has failed to carry its burden of demonstrating federal preemption of a long-established and legitimate exercise of state police power with respect to the subject regulated by *section 25241*. As we have seen, there is no express preemption in the present context, and Bronco's assertions of implied preemption are contradicted by the long history we have described of concurrent state and federal regulation of wine labels including, historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine. Nor has Bronco succeeded in providing any persuasive indication that this long-standing concurrent regulatory scheme no longer is compatible with Congress's overall purposes which have been to support the states' efforts to protect consumers from misleading labeling, not to permit the type of labeling at issue here. Finally, Bronco has not established that, by purchasing a brand name **[****118]** that had been used prior to 1986, it acquired a federally recognized right or license exempting it from stricter state regulation.

California is recognized as a preeminent producer of wine, and the geographic source of its wines reflecting the attributes of distinctive locales, particularly the **[***223]** Napa Valley—forms a very significant basis upon which consumers worldwide evaluate expected quality when making a purchase. We do not find it surprising that Congress, in its effort to provide minimum standards for wine labels, would not foreclose a state with particular expertise and interest from providing stricter protection for consumers in order to ensure the integrity of its wine industry.

For the reasons set forth above, we reverse the judgment of the Court of Appeal and remand the case to that court to enable it to address Bronco's remaining claims.

Kennard, J., Baxter, J., Chin J., Brown, J., Moreno, J., and Swager, J.,[*] concurred.

Petitioner's petition for a rehearing was denied October 13, 2004, and the opinion was modified to read as printed above. Werdegar, J., did not participate therein.
[*998]

APPENDIX

GET ATTACHMENT 1 of 1 **[****119]**

End of Document

[*] Associate Justice of the Court of Appeal, First Appellate District, Division One, assigned by the Chief Justice persuant to article VI, section 6 of the California Constitution.

Consol. Credit Agency v. Equifax, Inc.

United States District Court for the Central District of California, Western Division

August 5, 2004, Decided; August 5, 2004, Filed

Case No. CV 03-01229 CAS (CWx)

Reporter
2004 U.S. Dist. LEXIS 31061 *; 2004 WL 5644363

CONSOLIDATED CREDIT AGENCY, a California general partnership, Plaintiff, vs. EQUIFAX, INC., a Georgia corporation; EQUIFAX CREDIT INFORMATION SERVICES, INC., a Georgia corporation; EQUIFAX INFORMATION SERVICES, LLC, a Georgia limited liability company; and DOES 1 through 15, inclusive, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Consol. Credit Agency v. Equifax, Inc., 2005 U.S. Dist. LEXIS 46851 (C.D. Cal., Jan. 26, 2005)*

Core Terms

prices, terminated, antitrust, price-fixing, Deposition, resellers, end-users, credit report, argues, contends, customers, conspiracy, scheduling order, Broker, markets, summary judgment, Sherman Act, leave to amend, Cartwright Act, motion to modify, damages, selling, implied covenant of good faith, contractual relationship, summary judgment motion, misrepresentation, automobile dealer, disruption, modified, amend

Counsel: **[*1]** Consolidated Credit Agency, a California general partnership, Plaintiff: James R Noblin, LEAD ATTORNEY, Blecher & Collins, Los Angeles, CA; Jana S Johnston, John Gregory Derrick, LEAD ATTORNEYS, Mullen and Henzell, Santa Barbara, CA; Jeffrey T Briggs, LEAD ATTORNEY, Briggs & Briggs, Los Angeles, CA.

For Equifax Inc, a Georgia corporation, Defendant: Brian H Newman, LEAD ATTORNEY, Buchalter Nemer PC, Los Angeles, CA; Christopher B McDavid, Frank D Rorie, Jr, William A Molinski, LEAD ATTORNEYS, Orrick Herrington and Sutcliffe, Los Angeles, CA; Garret G Rasmussen, LEAD ATTORNEY, Orrick Herrington and Sutcliffe, Washington Harbor, Washington, DC; Jesse W Markham, Jr, LEAD ATTORNEY, Morrison and Foerster, San Francisco, CA; Juthymas Harntha, LEAD ATTORNEY, Orrick Herrington & Sutcliffe, San Francisco, CA.

For Equifax Credit Information Services Inc, a Georgia corporation, Equifax Information Services LLC, a Georgia limited liability company, Defendants: Brian H Newman, LEAD ATTORNEY, Buchalter Nemer PC, Los Angeles, CA; Christopher B McDavid, Frank D Rorie, Jr, William A Molinski, LEAD ATTORNEYS, Orrick Herrington and Sutcliffe, Los Angeles, CA; Jesse W Markham, Jr, LEAD ATTORNEY, Morrison **[*2]** and Foerster, San Francisco, CA; Juthymas Harntha, LEAD ATTORNEY, Orrick Herrington & Sutcliffe, San Francisco, CA.

Judges: CHRISTINA A. SNYDER, United States District Judge.

Opinion by: CHRISTINA A. SNYDER

Opinion

ORDER GRANTING SUMMARY JUDGMENT IN PART, DENYING SUMMARY JUDGMENT IN PART, AND DENYING LEAVE TO MODIFY SCHEDULING ORDER AND TO AMEND COMPLAINT

I. INTRODUCTION

Plaintiff Consolidated Credit Agency ("CCA") brings this action against defendants Equifax, Inc., Equifax Credit Information Services, Inc., and Equifax Information Services, LLC (collectively "Equifax") alleging that Equifax has terminated its contractual relationship with CCA because CCA refused to enter into an agreement to fix the prices that CCA would charge to its customers for consumer credit reports it purchased from Equifax. Complaint at P 41. CCA alleges that Equifax sells such reports to resellers like CCA and to end-users who are CCA's customers and is thus both a provider of such reports to CCA and a competitor of CCA. Id. at P 22. CCA alleges that Equifax entered into an agreement with two other resellers and customers of Equifax, Automatic Data Processing, Inc. ("ADP") and First American CREDCO, Inc. ("CREDCO") to fix the prices they **[*3]** each charge to their end-user customers for Equifax-generated credit reports. Id. at P 26. CCA claims that when it cut the prices it charged to its customers for Equifax-generated credit reports below the price its competitors had agreed to charge, ADP complained to Equifax, and Equifax thereupon threatened CCA with termination unless CCA raised its prices. See CCA's Response to Defendants' Statement of Uncontroverted Facts and Conclusions of Law ("RSUF") Al, citing J. Briggs Decl., Ex. A (Esquinas Deposition) RT 47:6-12. When CCA refused to raise the prices it charged to its customers, Equifax terminated CCA as an authorized reseller of Equifax-generated credit reports. Id. at P 41. Thereafter, Equifax, ADP and CREDCO continued to sell their credit reports to end-users at agreed upon prices. Id. at P 26.

CCA filed this action in Los Angeles Superior Court, alleging claims for violations of the California Cartwright Act, *Cal. Bus. & Prof. Code §§ 16700 et seq.*, violations of the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200*, breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract and misrepresentation.

On **[*4]** February 21, 2003, the instant action was removed to this Court based on diversity of citizenship. [1]

Equifax brings this motion for summary judgment on the grounds that: (1) there is no admissible evidence that any price-fixing agreement was ever reached; (2) CCA lacks standing to sue defendants for any alleged price-fixing agreement and cannot establish "antitrust injury" flowing from such alleged agreement; (3) the contract between Equifax and CCA was terminable at will and Equifax did not breach its express terms or the implied covenant of good faith and fair dealing when **[*5]** it terminated CCA; and (4) CCA has failed to present any evidence that Equifax knew of CCA's contracts with its customers, and therefore CCA's tortious interference with contract claim fails. [2]

In addition to responding to defendants' motion for summary judgment on the merits, CCA seeks leave to amend its complaint to add a claim for monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*.

The Court has read and considered the parties' submissions and heard oral argument regarding these motions. For the reasons discussed below, the Court rules as follows: Equifax's motion for summary judgment is DENIED as to the first five claims for relief because genuine issues of fact exist as to whether an agreement to fix the prices of credit reports charged to end-users was entered into and whether CCA was terminated for refusing to participate in

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[1] CCA is a California general partnership; its members, Jeffrey Briggs, Matthew Briggs, and Robert Edwards are all citizens of California. See Notice of Removal PP 5-8. CCA's principal place of business is California. Notice of Removal P 4. Defendants are two Georgia corporations and a Georgia limited liability company, each with principal places of business in Georgia. Notice of Removal PP 9-12. The sole member of defendant Equifax Information Services, LLC is Equifax, Inc., a Georgia corporation with its principal place of business in Georgia. Notice of Removal P 12. Subject matter jurisdiction is not in dispute.

[2] As explained below, CCA does not challenge the dismissal of its claim for misrepresentation. See, infra, at 36.

that agreement. For that reason, CCA's Cartwright Act and Unfair Competition Law claims cannot be dismissed at this stage of the proceedings. For the same reason, CCA's claim for wrongful termination of its contractual relationship **[*6]** with Equifax cannot be summarily adjudicated regardless of whether the contract is terminable at will. Likewise, genuine issues of fact exist as to whether Equifax knowingly disrupted CCA's contractual relationships with CCA's customers by having Equifax representatives instruct CCA's customers how to break their agreements with CCA. Because CCA raises no material issues of disputed fact and does not oppose Equifax's motion for summary adjudication of CCA's claim for misrepresentation, the Court GRANTS Equifax's motion as it pertains to CCA's misrepresentation claim.

For the reasons set forth below, CCA's motion for leave to amend the scheduling order and to add a claim for violation of *Section 2* of the Sherman Act is DENIED.

II. THE PARTIES' FILINGS

Equifax filed the motion for summary judgment ("Mot.") that is presently before the Court on March 1, 2004. On March 8, 2004, CCA filed a request for denial of summary judgment, or continuance, to allow discovery to be taken in opposition to the motion. On March 17, 2004, the Court granted the request and continued Equifax's motion for summary judgment to May 3, 2004. On April 13, 2004, CCA filed a motion to modify the scheduling order and **[*7]** for leave to amend its complaint ("CCA's Motion"). That motion is also before the Court.

The Court held a hearing on May 3, 2004, and permitted CCA and Equifax to file supplemental briefs as to whether CCA possesses antitrust standing, and to point to whatever evidence may exist as to the actual prices or price levels at which credit reports were sold. Equifax and CCA filed supplemental briefs on May 10, 2004.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. See *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts pertaining to the elements that the moving party has contested. See *Fed. R. Civ. P. 56(c)*. **[*8]** The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*. See also *Celotex Corp., 477 U.S. at 324*. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id. at 322*. See also *Abromson v. American Pacific Corp., 114 F.3d 898, 902 (9th Cir. 1997)*.

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. See *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 & n.3 (9th Cir. 1987)*.

When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co., 121 F.3d 1332, 1335 (9th Cir. 1997)*. **[*9]** Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. See *Matsushita, 475 U.S. at 587*.

IV. LEGAL STANDARD FOR LEAVE TO AMEND THE COMPLAINT AND TO MODIFY THE PRETRIAL SCHEDULING ORDER PURSUANT TO *FED. R. CIV. P. 15(a)* AND *16(b)*

Fed. R. Civ. P. 15(a) provides that "leave [to amend] shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)* "is to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)*, citing *DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)*. The factors "commonly used to determine the propriety of a motion for leave to amend" are "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs, Ltd., 833 F. 2d at 186*, citing *Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984)*. "These factors, however, are not of equal weight in that delay, by itself, is insufficient to justify denial of leave to amend." Id., citing *United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981)*.

Fed. R. Civ. P. 16(b) provides that a scheduling order **[*10]** "shall not be modified except by leave of court and upon a showing of good cause." In determining whether good cause exists, courts may consider the importance of the amendment, potential prejudice to the opposing party, and the explanation for the failure to timely move for leave to amend. See *Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)*. "The pretrial schedule may be modified 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002)*, quoting *Mammoth Recreations, Inc., 975 F.2d at 609* ("If the party seeking the modification was not diligent, the inquiry should end and the motion to modify should not be granted.") (internal citations omitted).

V. FACTUAL BACKGROUND

A. Market Structure

Equifax, Experian Information Solutions, Inc. ("Experian") and TransUnion LLC ("TransUnion") are the primary repositories of credit information and providers of credit reports to retailers in the United States. M. Briggs Decl. P 4. Retailers are the typical end-users of such reports and related services. Automobile dealerships, unlike certain other categories of end-users **[*11]** of consumer credit reports, typically purchase a single credit report per customer before processing a loan application. M. Briggs Decl. PP 3, 4. Consequently, in the credit reporting industry, the automobile dealership market is referred to as a "single-file market." Id. Curtis Knievel, CCA's Director of Sales, estimates that ninety percent of single-file credit reports purchased by automobile dealers in Alabama, Georgia, North Carolina and South Carolina were Equifax credit reports (as opposed to Experian or Transunion reports), and eighty percent of single-file credit reports in Florida, Oregon, Tennessee and Washington were generated by Equifax. [3] Knievel Decl., Ex. A.

Equifax sells its credit information services and credit reports directly to end-users, as well as through distributors. Equifax sells reports to two types of resellers: brokers and credit reporting agencies ("CRAs"). Lovvorn Declaration P 3. Brokers resell Equifax credit files to end-users but do not undertake any consumer disclosure obligations, and are not required to verify information contained in a credit report. Id. CRAs undertake obligations pursuant to the

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[3] Equifax objects to this evidence, contending that "CCA cannot simply manufacture evidence on something as quantitative as nationwide market-share based on the 'personal experience' of its sales director.'" Equifax's Evid. Objections at 1. Likewise, Equifax objects to Knievel's statement that "[in] 2000 & 2001, I estimate the percentage of single file credit reports sold to auto dealers by Equifax direct vs. by Equifax through resellers was 50%." Knievel Decl. P 12. Knievel cites as a basis for his estimates of market **[*12]** share the knowledge he gained from his personal experience as CCA's Director of Sales over a four-year period, and the fact that "a very important part of my job is to know which credit bureau(s) are used by automobile dealers, as well as the pricing for credit reports by our competitors." Knievel Decl. P 6. Equifax's objection is overruled on the ground that the Knievel declaration is proper lay opinion testimony. See *Fed. R. Evid. 701* and *702*, cf. *Kumho Tire Co., 526 U.S. at 149*. While Knievel's estimate of market share may not be as reliable as expert testimony, such considerations apply to the weight if any, to be accorded the evidence by the jury, rather than admissibility.

Fair Credit Reporting Act ("FCRA"), *15 U.S.C. § 1681, et seq.*, **[*13]** and may add information to credit report files not provided by credit bureaus like Equifax. Id.

CCA served as an Equifax broker from April 1, 2000, until its termination by Equifax on November 14, 2001. Equifax simultaneously terminated two other resellers: National Credit Center ("NCC") and Consortium Group ("Consortium.)

CCA contends that ADP, an Equifax reseller, complained to Equifax about the discounting price-discounting practices of CCA, NCC and Consortium. CCA further argues that it was contacted by an Equifax sales representative who stated words to the effect of:

> "What are you doing in these markets? You cannot go into these markets and sell to end-users at a reduced price. Your sales in these markets is disrupting the pricing that is in place between Equifax and the national resellers in those areas, and you simply can't do it." [4]

See J. Briggs Decl., Ex. E (J. Briggs Deposition) RT 76:14-77:7. CCA further contends that ADP and another Equifax reseller, CREDCO, continue to purchase and resell Equifax reports at agreed upon price levels. See, e.g., M. Briggs Decl. P 9. CCA claims that Equifax conspired with ADP and CREDCO to fix the prices at which credit reports are sold to **[*14]** end-users, and that CCA, NCC and Consortium Group were terminated because they were selling credit reports at discounted prices.

According to CCA, the relevant geographic market at issue in this action includes nine states: Florida, Georgia, South Carolina, Alabama, North Carolina, Tennessee, Virginia, Oregon and Washington. J. Briggs Decl., Ex. B (G. Sackett Deposition) RT 10:13-14:12. CCA contends that the majority of lenders to automobile dealership end-users only accept Equifax reports -- as opposed to TransUnion or Experian reports -- because the dealerships' lenders require Equifax reports and that efforts by CCA to sell non-Equifax reports to these end-users were unsuccessful. M. Briggs Decl. PP 3-6, 10, J. Briggs Decl., Ex. B (Grayson Sackett Deposition) RT 10:13-14:12. [5]

CCA sets forth evidence that, of the resellers competing in the relevant market, ADP and CREDCO charged prices similar to those charged by Equifax. Opp. at 3, citing Knievel Decl. PP 2-7. In particular, CCA asserts that Equifax charged end-users in the market at issue $ 2.75 per report and above, ADP's pricing was $ 3.20 to $ 3.25 per report, and CREDCO's pricing was $ 2.90 per report and above. See CCA's Supp. Brief at 10, citing M. Briggs Decl. PP 14, 19, 21; Knievel Decl.; and J. Briggs Decl. P 30, Ex. U.

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[4] Equifax objects to Jeffrey Briggs' testimony regarding what Equifax sales representative Kathy Weismann said to him as inadmissible hearsay. The Court overrules Equifax's objection on the ground that Weismann's statements are admissions of a party.

[5] Equifax objects to this evidence as inadmissible speculation on the ground that "none of these witnesses have ever seen any lender policies requiring Equifax reports **[*15]** and have never even spoken to lenders about these alleged requirements ... but base this statement on the fact that certain unnamed car dealers" told the witnesses that lenders required Equifax reports. Equifax's Evid. Objections at 2. Matthew Briggs states that the basis for his conclusion that lenders require Equifax reports is his "interaction and dealing with well over a thousand automobile dealers over the last four years, including review of invoices, review of systems which deliver credit reports, and conversations with general managers, sales managers, and finance managers." M. Briggs Decl. P 10.

The Court concludes that this evidence is admissible. Matthew Briggs provides adequate foundation for his testimony based on his experience and his conversations with multiple customers that lenders to his customers require Equifax reports. The Court concludes that this testimony is "rationally based on [Matthew Briggs'] perception[s]," "helpful to a ... determination of a fact in issue," and "not based on scientific technical, or other specialized knowledge within the scope of *Rule 702*." See *Fed. R. Evid. 701*. The testimony at issue is not dependent on "specialized observations, the specialized **[*16]** translation of those observations into theory ... or the application of such a theory in a particular case." Consequently, the testimony does not fall within the scope of *Fed. R. Evid. 702*. Cf. *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Accordingly, Equifax's objections are overruled.

According to CCA, the prices charged by NCC, Consortium and CCA prior to their termination as Equifax resellers were significantly lower that those of Equifax, ADP and CREDCO. Consortium sold credit reports to end-users for $ 1.75 per report, while CCA and NCC priced credit reports at $ 1.90 to $ 2.50 per report. See **[*17]** CCA's Supp. Brief at 10, citing Knievel Decl., M. Briggs Decl. P 19.

Knievel states that, "the only competitors in the sale of Equifax reports and related products to automobile dealers in [the market at issue] were: Equifax (direct), ADP, CREDCO, NCC, Consortium and CCA" and that "[o]nly on a very rare occasion would I encounter an automobile dealer in these markets that was purchasing Equifax products from someone other than one of these 6 competitors." [6] Knievel Decl. P 14.

B. CCA's Entry Into the Market

CCA began negotiating to become a reseller of Equifax credit reports in early 2000. On February 1, 2000, Jeffrey Briggs sent a letter on behalf of CCA to **[*18]** a sales representative at Equifax, regarding pricing terms proposed by Equifax. Weismann Decl., Ex. C. The letter states in relevant part:

> The pricing which you have proposed is **significantly** [emphasis in original] higher (nearly double) the pricing [sic] offered to the CRA with which they are presently affiliated … [CCA is] optimistic that Equifax will agree to a volume pricing structure which will enable CAA [sic] to move forward with its enterprise and have a reasonable opportunity to make it profitable. Accordingly, we propose the following pricing schedule:
> 1 to 1000 reports: $ 2.95
> 1001 to 5000 reports: $ 2.50
> 5001 to 10,000 reports: $ 1.85
> 10,001 to 25,000 reports: $ 1.55
> 25,001 to 50,000 reports: $ 1.40
> $ 50,001 plus reports: $ 1.35
> Beacon [7]: $ .25
> Safescan: $ .10

In addition, the letter stated,

> Your pricing proposal indicates that the prices may 'change at Equifax's discretion.' Obviously it would be foolhardy for my clients to invest … significant capital, resources, time and energy … only to have the prices increase … Accordingly, we request confirmation that the pricing will remain in place for 2 years.

Weismann Decl., Ex. C.

On March 22, 2000, Kathy Weismann of Equifax sent an e-mail to CCA stating in full:

> I received your letter. The rates on Beacon and Safescan for the different levels were a little off.
> 20,000-100,000 report [sic] cost $ 1.90, Beacon .50, Safescan .15
> 100,000-250,000 report cost $ 1.80, Beacon .40, Safescan .10
> 250,000-500,000 report cost $ 1.70, Beacon .25, Safescan .08
> I will clarify your question on the cites in owned vs. affiliate sales points and about the cities that aren't included at all.

Weismann Decl., Ex D.

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[6] Equifax objects to the admissibility of this evidence, arguing that no foundation has been laid to show that this testimony, and similar declaration testimony from Matthew Briggs, are based on personal knowledge. Evid. Objection at 3. The Court concludes that the declarations of Jeffrey Briggs and Matthew Brings are admissible for the purpose of establishing that the declarants only encountered the aforementioned resellers in the market. See *Fed. R. Evid. 602* and *Fed. R. Evid. 703*. Accordingly, Equifax's objections are overruled.

[7] The term "Beacon" refers to Equifax's credit-scoring service, **[*19]** while the term "Safescan" refers to an Equifax anti-fraud service designed to confirm a credit applicant's identity. See, e.g., Compl. P 31.

On April 1, 2000, CCA entered into an agreement (the "Agreement") with Equifax entitled "Agreement for Resale of Credit Reporting Files: Brokers." Weismann Decl., Ex. E. The Agreement contains a "Term and Termination" provision, stating in relevant part:

> This Agreement remains in force and effect until either party gives written notice of cancellation at least ten days prior to the cancellation date. However, if Broker is delinquent in the payment of charges or violates the terms of this Agreement, Equifax may, at its election, discontinue **[*20]** providing services to Broker and cancel this Agreement immediately by written notice to Broker. If this Agreement is terminated for any reason, the provisions of the foregoing paragraphs will remain in full force and effect as to all Equifax Credit Information which Broker has requested or received from Equifax prior to the cancellation date.

Weismann Decl., Ex. E. The Agreement also provides that:

> Broker will pay Equifax promptly for all Equifax Credit Information requested by Broker on behalf of Qualified Subscribers, or otherwise, according to the rate schedule of cash prices now or subsequently established by Equifax, and will pay any applicable taxes, and charges for any special telephone services or other services rendered by Equifax.

Id. Finally, the Agreement also contains an integration clause captioned "Entire Agreement," providing in full:

> This Agreement constitutes the entire Agreement between the parties and supersedes and cancels any and all prior agreement between the parties relating to its subject matter. No changes in this Agreement may be made except in writing signed by both parties.

Id.

CCA contends that the Agreement entered into on April 1, 2000, incorporated the separate **[*21]** schedule of prices confirmed by the March 22, 2000 e-mail from Kathy Weismann. Opp. at 18. In particular, CCA argues that the clause of the agreement stating, "Broker will pay… according to the rate schedule of cash prices now or subsequently established by Equifax" references the prices quoted by Kathy Weismann on March 22, 2000. CCA also argues in the alternative that pursuant to Georgia law, the implied covenant of good faith modifies and becomes part of the provisions of a contract, and therefore if a genuine issue of fact exists at to whether CCA's termination violated the Cartwright Act, a question of fact necessarily exists as to whether Equifax breached the implied covenant of good faith and fair dealing. See Opp. at 16. Equifax argues that the integration clause of the Agreement precludes CCA's interpretation of the contract, and that the March 22, 2000 e-mail was "nothing more than a quote of then-current Equifax prices from the date quoted." [8] Mot. at 17.

C. Equifax's Termination of CCA As a Reseller

According to CCA, Equifax began pressuring CCA to raise its prices once Equifax discovered that CCA was selling credit reports at prices below those charged by Equifax to end-users. Opp. at 3, citing J. Briggs Decl., Ex. E (Deposition of J. Briggs) RT 76:14-77:7, J. Briggs Decl., Ex. G (Deposition of M. Briggs) RT 118:17-119:4. CCA asserts that resellers Consortium and NCC also were subject to similar pressure to stop selling credit reports at prices lower than those charged by Equifax in the market area at issue. Opp. at 4, citing J. Briggs Decl. Exs. A, D and L (Depositions of R. Esquinas, J. Kaltenbach, J. Sackett).

CCA presents evidence indicating that ADP contacted Equifax and complained about Consortium's competitive sales practices in the market at issue. In particular, John Kaltenbach, an Equifax **[*23]** executive, told Robert Esquinas, a principal at Consortium, that ADP had contacted Equifax to discuss the activities of the discount resellers. See RSUF A-l, citing J. Briggs Decl., Ex. A (Esquinas Deposition) RT 47:6-12. Kaltenbach stated that

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[8] Equifax also argues that even if the separate schedule of prices contained in the March 22, 2000 e-mail was made part of the agreement, Equifax was free to change those prices pursuant to the language in the April 1, 2000 **[*22]** agreement that "Broker will pay Equifax promptly … according to the rate schedule of cash prices now or subsequently established by Equifax." Plaintiff responds that the March 22, 2000 e-mail gives rise to a genuine issue of material fact as to whether the pricing schedule established by the earlier e-mail was to remain in place for two years.

ADP had complained to Equifax that Consortium "shouldn't be marketing to their dealers [automobile dealership end-users]." Id.

In October 2001, Equifax announced that it was eliminating volume discounts extended to CCA, NCC and Consortium, and would require these three resellers to pay $ 2.75 per report. See Loworn Decl. P 9, J. Briggs Decl., Ex. M (Deposition of C. Frankle) RT 23:6-25:4. NCC executives were told by Equifax that two other resellers, ADP and CREDCO, would not be subjected to this price increase, because they were not selling below the prices being charged by Equifax. Briggs Decl. Ex. D (Deposition of J. Sackett) RT 20:3-6. [9]

On October 29, 2001, CCA sent a letter to Equifax objecting to the price increases, stating that Equifax's actions violated its promises to CCA and violated the Sherman Act, and asserting that "[b]ased on the announced price increase, CCA's only option is litigation which, if necessary, will be pursued vigorously." Lovvorn Decl., **[*25]** Ex. B (Letter from Jeffrey Briggs, dated October 29, 2001).

On November 14, 2001, Equifax sent a letter to CCA stating in relevant part, "Equifax hereby provides you with notice of its cancellation of the Agreement pursuant to Section 20 thereof." Declaration of Lee D. Lovvorn, Ex. C. At the same time that Equifax terminated CCA, two other resellers, NCC and Consortium, were also terminated. J. Briggs Decl., Ex. I (Deposition of L. Lovvorn) RT 80:17-22. Equifax resellers ADP and CREDCO were not terminated, and continue to distribute Equifax credit reports to end-users.

During the period before and after CCA was terminated, the price that CREDCO charged consumers for Equifax reports remained approximately at $ 2.90 per report. See Knievel Decl. P 11, see also Equifax's Supp. Brief at 7 ("In fact, CREDCO testified that its price to automobile dealers has not changed since 1999 …"). Likewise, ADP sold Equifax credit reports to customers at prices higher than those charged by CCA. See, e.g., M. Briggs Decl. PP 2, 16, see also Equifax's Evid. Objections at 5 ("It is true that ADP charged … for example … $ 3.20 in Florida, Georgia and a few other Southeast states …") Equifax also sold credit **[*26]** reports directly to end-users at prices higher than CCA, before and after CCA was terminated. See Knievel Decl. P 13 (stating that CCA's price per report is "typically 10[%] to 30% less than the price charged by Equifax [directly to end-users] …"), see also M. Briggs Decl. P 21 (stating that Equifax provided price quotes ranging from $ 2.95 to $ 3.10 per report in the market at issue after CCA's termination). [10]

VI. DISCUSSION

A. Equifax's Motion for Summary Judgment

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[9] Equifax contends that its decision to terminate its relationship with CCA was not the result of a price-fixing conspiracy, but rather a decision to overhaul its distribution strategy. According to Equifax, in mid-2001, it undertook a review of its pricing strategies regarding its various distribution channels. **[*24]** Equifax contends that during the fiscal year beginning April 1, 2000, CCA sold 209,322 credit reports, while resellers such as ADP and CREDCO sold over a million Equifax credit reports. Weismann Decl. P 8, Lovvorn Decl. P 13. Equifax asserts that CCA and other brokers were using volume discounts from Equifax to induce customers who were purchasing Equifax reports directly from Equifax to buy through brokers instead. Lovvorn Decl. P 7. Therefore, Equifax unilaterally implemented a pricing strategy in which it charged brokers a flat fee of $ 2.75 per report, with exceptions for "a limited number of large-volume brokers that offered added value to Equifax, such as expanding Equifax's market base." Lovvorn Decl. P 9. According to Equifax, "CCA was one of at least sixty brokers who received notice of the discontinuation of volume discounts." Lovvorn Decl. P 10.

[10] Equifax objects to this evidence as speculative, lacking foundation, and as violative of the best evidence rule. Matthew Briggs states that "after Equifax terminated CCA, in order to document the information I knew to be true from personal experience, I directed my staff to obtain simultaneous price quotes for a single-file credit report directly from Equifax for end users in the price inflated market …" Equifax price quotes are attached to the Declaration of Matthew Briggs as Exhibits F-J. The objections to the Briggs Declaration on the grounds of speculation and lack of foundation are overruled. Because the written price quotes are themselves admissible evidence, Equifax's objection that Briggs' summary of the price quote is inadmissible pursuant to the *Fed. R. Evid. 1002* **[*27]** (the "best evidence rule") is also overruled.

(i) CCA's Cartwright Act Claim

(a) Antitrust Injury and Antitrust Standing

Equifax argues that CCA has presented no evidence of antitrust injury and does not have standing to bring a claim pursuant to the Cartwright Act.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, the Supreme Court held that in order to recover antitrust treble damages a plaintiff "must prove more than injury causally linked to an illegal presence in the market" -- instead, a plaintiff "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' unlawful." *Brunswick, 429 U.S. at 489*. [11] The Court further explained that "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation" and that "[i]t should, in short, be the type of loss that the claimed violations would be likely to cause." Id. (internal citations omitted).

The plaintiffs in Brunswick alleged that through the acquisition of bowling alleys which would otherwise "have gone out business," plaintiffs were denied "an anticipated increase in market shares." *Brunswick., 429 U.S. at 484*. The Supreme Court concluded that plaintiffs had not suffered an antitrust injury, reasoning that:

> If the acquisitions [at issue] … were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet [the plaintiffs] injury -- the loss of income that would have accrued had the acquired centers gone bankrupt -bears no relationship to the size of either the acquiring company or its competitors. [Plaintiffs] would have suffered the identical "loss" -- but no compensable injury -- had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" **[*29]** parents.

Brunswick, 429 U.S. at 487.

The doctrine of antitrust injury reflects the "general principle that treble-damages recoveries should be linked to the procompetition policy of the antitrust laws." *Blue Shield of Virginia v. McCready, 457 U.S. 465, 482, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. Therefore, even if a plaintiff's injury is "causally related to an antitrust violation," unless that injury is "attributable to an anti-competitive aspect of the practice under scrutiny," a plaintiff may not recovery antitrust damages. *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. However, "[c]ompetitors may be able to prove antitrust injury before they are driven from the market and competition is thereby lessened." [12] *McCready, 457 U.S. at 482*.

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[11] In its motion papers, Equifax relies on case law interpreting and applying the Sherman Act, as does plaintiff. These **[*28]** authorities maybe persuasive, but are not necessarily controlling in a Cartwright Act case. See, e.g., *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 985 (9th Cir. 2000)* ("[F]ederal antitrust precedents [interpreting the Sherman Act] are properly included in a Cartwright Act analysis, but their role is limited: they are 'often helpful' but not necessarily decisive.").

[12] In McCready, the Court concluded that subscribers to a group health insurance plan suffered antitrust injury pursuant to an anticompetitive scheme in which they were unlawfully "compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by foregoing treatment by the practitioner of their choice." *McCready, 457 U.S. at 483*. The Court explained that such injury would have been either: (1) "borne in the first instance **[*30]** by the competitors of the conspirators, and inevitably -- though indirectly -- by the customers of the competitors in the form of suppressed competition in the psychotherapy market;" or (2) "as it happened … borne directly by the customers of the competitors" in the form of increase in the cost of psychologists' services. *McCready, 457 U.S. at 483*. The Supreme Court further elaborated that while "McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *McCready, 457 U.S. at 484*.

In Atlantic Richfield, the Supreme Court rejected the "suggestion that no antitrust injury need be shown where a per se violation [of the antitrust laws] is involved." [13] *Atlantic Richfield, 495 U.S. at 341*. The Supreme Court emphasized that "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." *Id. at 344*.

"A showing of antitrust injury is necessary, but not always sufficient" in order for a plaintiff to recover antitrust damages, because "a party may have suffered antitrust injury but may not be a proper plaintiff." *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110, n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. "[T]he Court must make a further determination [as to] whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, n. 31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. "The label 'antitrust standing' **[*32]** has traditionally been applied to some elements of this inquiry." Id. "[T]he focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine." Id. "Antitrust standing involves a case-by-case analysis of the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1997)*, citing Associated General. Some of the factors relevant to the antitrust standing inquiry include: (1) the nature of the plaintiff's alleged injury; (2) the directness of the injury; (3) the speculative nature of the harm; (4) the risk of duplicative recovery; and (5) complexity in apportioning damages. See *Amarel, 102 F.3d at 1507*, citing *Associated General, 459 U.S. at 535*. See also *American Ad Mgmt., Inc. v. General Tel. Co., 190 F.3d 1051, 1054-55 (9th Cir. 1999)*.

A plaintiff must demonstrate both antitrust injury and antitrust standing in order to recover damages under the California Cartwright Act. See *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000)*, citing *Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723, 187 Cal. Rptr. 797 (1982)*. The Cartwright Act's **[*33]** antitrust injury requirement is less stringent than that imposed by federal ***antitrust law***. The Cartwright Act expressly provides that:

> Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore … to recover three times the damages sustained by him or her … This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

Cal. Bus. & Prof. Code § 16750(a). "The last clause was added by the California legislature following the Supreme Court's decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which limited the ability of indirect purchasers to recover damages under the Sherman and Clayton Acts." *Knevelbaard Dairies, 232 F.3d at 991*.

The California Court of Appeal has characterized California's legislative response to Illinois Brick as relaxing the antitrust injury requirement. See *Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 1234, 18 Cal. Rptr. 2d 308 (1993)* (stating that, "the more restrictive definition of **[*34]** 'antitrust injury' under federal law does not apply" under the Cartwright Act). See also *Knevelbaard Dairies, 232 F.3d at 991* ("The extent to which antitrust injury is recognized under the Cartwright Act is enlarged, by statute, in comparison to federal law.") The court in Cellular Plus held that because the plaintiffs' sales agents of defendant U.S. West "were directly involved in U.S. West's chain of distribution," "the alleged price fixing by [defendants] would directly and inherently reduce the amount of sales [by plaintiffs]" making the sales agents proper plaintiffs. *Cellular Plus, 14 Cal. App. 4th at 1235*.

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[13] In the context of a vertical, maximum resale price restraint, the Court reasoned that, while dealers and manufacturers may suffer antitrust injury, "[a] competitor is not injured by the *anticompetitive* effects **[*31]** of vertical maximum price-fixing, and does not have any incentive to vindicate the legitimate interests of a rival's dealer" because "the competitor would *benefit* from such a situation." *Atlantic Richfield., 495 U.S. at 345*. (emphasis in original). "Instead, a competitor will be motivated to bring suit only when the vertical restraint promotes interbrand competition between the competitor and the dealer subject to the restraint" such that "a competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a *procompetitive* impact on the market." Id. (emphasis in original).

Equifax argues that CCA did not suffer an antitrust injury because as a seller of Equifax credit reports, CCA, like the plaintiffs in Atlantic Richfield, would stand to benefit from any price-fixing conspiracy. Mot. at 13. According to Equifax, CCA would effectively be able to charge higher prices to its customers under the umbrella of defendant's alleged price-fixing scheme. Id. CCA responds that Equifax's argument is a non sequitur because plaintiff is not complaining about the effect of the alleged price-fixing conspiracy on its ability to charge higher prices, but rather **[*35]** that it was terminated as a means of enforcing a price-fixing agreement. See Opp. at 10. The Court concludes that because CCA's injury is "attributable to an anti-competitive aspect of the practice under scrutiny," -- namely the alleged price-fixing agreement -- the injury in question may properly be characterized as antitrust injury. *Atlantic Richfield, 495 U.S. at 334*.

Secondly, Equifax argues that in order to demonstrate antitrust standing, CCA must show that its termination caused harm to competition, and that its termination was the result of a price-fixing agreement. Equifax's Mot. at 14, Supp. Brief at 2, citing Phillip E. Areeda and Herbert Hovenkamp, ***Antitrust Law*** P 459a (2003) (hereinafter "Areeda"). CCA responds that the Ninth Circuit has held that "[c]ompetitors … may have standing to challenge practices used to enforce a price-fixing conspiracy." CCA's Supp. Brief at 1, quoting *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)*. [14] CCA argues that it was terminated because it was undercutting prices charged by ADP, CREDCO and Equifax, thereby undermining the effectiveness of the alleged price-fixing agreement. CCA's Supp. Brief at 8. CCA argues **[*36]** that there is a triable issue of fact as to whether CCA's termination as a broker was accomplished as a means of enforcing the alleged price-fixing agreement. See Opp. at 10-11, citing J. Briggs Decl., Ex. D (Sackett Deposition) 4:10-13, 25:6-26:2.

The Ninth Circuit has concluded that a plaintiff who is penalized for failing to join a price-fixing conspiracy possesses antitrust standing. In Big Bear, the plaintiff alleged that members of a resort association "engaged in a price-fixing conspiracy, agreeing on uniform rates and charges for lodge accommodations, ski packages and resort services." *Big Bear, 182 F.3d at 1100-1101*, cited by Areeda P 348 at 401, n. 70. The plaintiff alleged that the defendant Resort Association terminated plaintiff's membership in the Association when it refused to join the alleged conspiracy. See also Areeda P 1623 at 241-242 ("A manufacturer's **[*37]** price-fixing agreements are linked to the plaintiff's termination by the economic fact that high resale prices cannot be maintained if significant intrabrand competition exists at lower prices. One might, therefore, suppose that an implied term of minimum resale price maintenance agreements is that nonconformists will be terminated …").

Likewise, application of the multi-factor approach employed in Associated General and American Ad Management yields the same result. Plaintiff's injury was of "of the type the antitrust laws were intended to prevent," because plaintiff alleges that it was terminated in order to maintain the effectiveness of a price-fixing conspiracy. See *American Ad Management, 190 F.3d at 1055*, citing *Associated General, 459 U.S. at 538*, and *Atlantic Richfield, 495 U.S. at 334*. CCA's alleged injury, is therefore "the direct result of … allegedly anticompetitive conduct." *American Ad Management, 190 F.3d at 1058*, citing *Associated General, 459 U.S. at 540*. Because the harm alleged by CCA arises from CCA's termination as a reseller, such harm is not speculative. Cf. *American Ad Management, 190 F.3d at 1059* ("In Associated General, the Supreme Court found the damages claim **[*38]** in question to be speculative because (1) the alleged injury was indirect; and (2) the alleged effects may have been produced by independent factors.") (internal citations omitted). In addition, there is little risk of duplicative recovery in that such concerns typically arise in "suits by indirect purchasers to recover damages … which were the result of an antitrust violation higher up the distribution chain," whereas in this action, CCA is a reseller, seeking damages as a result of its termination. See *American Ad Management, 190 F.3d at 1059*. Finally, the Court concludes that there would be little complexity in apportioning damages, in that CCA is the sole plaintiff in this action. Therefore, all of the *Associated General* factors support the conclusion that CCA can demonstrate antitrust standing.

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[14] CCA argues that it is settled law that a competitor driven out of the market by anticompetitive acts of another competitor has antitrust standing. CCA's Supp. Brief at 1, citing *Amarel v. Gover Connell, 102 F.3d 1494, 1508 (9th Cir. 1996)*, and *Glenn Holly Entertainment Inc. v. Tektronix Inc., 352 F.3d 367, 372 (9th Cir. 2002)*

Therefore, the Court concludes that by virtue of the evidence put forth by CCA regarding the price-fixing conspiracy and its enforcement mechanisms, CCA has a raised a genuine issue of material fact as to whether it has suffered antitrust injury and has antitrust standing to sue under the Cartwright Act.

(b) Sufficiency of Evidence to Raise a Question of Fact as to the Existence of an Agreement **[*39]** to Fix Prices

Equifax contends that "it is settled law that an antitrust plaintiff advancing an inference of conspiracy bears the burden of adducing evidence that tends to eliminate the possibility of unilateral conduct." Reply at 2-3, citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Equifax asserts that a plaintiff alleging an illegal vertical price-fixing agreement must have evidence sufficient to prove an agreement to fix specific prices or price levels. Reply at 10, citing *Business Electronics Corp v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

Plaintiffs respond that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot," Opp. at 5, citing *Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*.

The Cartwright Act, codified at *Cal. Bus. & Prof. Code § 16700 et seq.*, requires a plaintiff to prove the existence of a "trust," defined in part as "a combination of capital, skill or act by two or more persons" for the prohibited purposes enumerated by *Cal. Bus. & Prof. Code § 16720*, which include **[*40]** fixing the price of a product. "Under both California and federal law, agreements fixing or tampering with prices are illegal per se." *Knevelbaard Dairies, 232 F.3d at 986*

The California Supreme Court has noted that a plaintiff bringing a Cartwright Act claim "must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows." *Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826, 868, 107 Cal. Rptr. 2d 841, 24 P.3d 493*, citing *Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal. 4th 26, 48, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998)*. However, an inference implying unlawful conspiracy must be reasonable, and "the inference is reasonable if, and only if, it implies unlawful conspiracy more likely than permissible competition." Id.

While denying it conspired with any other firm as to the prices to be charged to end-users, Equifax strenuously argues that plaintiffs' claim is properly analyzed as involving an alleged vertical price-fixing arrangement as opposed to a horizontal agreement among actual or potential competitors. [15] Equifax's practice of selling credit reports directly to end-users, and simultaneously distributing its reports through resellers to end-users, is characterized **[*41]** as "dual distribution." There is some uncertainty under the law as to how dual distribution agreements should be treated. See, e.g., *Dimidowich v. Bell, 803 F.2d 1473, 1482 (9th Cir. 1985)*. In Dimidowich, the court determined that in the context of a nonprice restraint, the relationship between a dual distributor and its customer-competitor should be characterized as vertical, and subject to rule of reason analysis. *Dimidowich, 803 F.2d at 1482* (criticizing *Guild Wineries v. J. Sosnick & Son, 102 Cal. App. 3d 627, 162 Cal. Rptr. 87 (1980)*, in which the California Court of Appeal applied the rule of per se illegality to a dual distributorship arrangement). [16]

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[15] In particular, Equifax argues that its decision to eliminate volume pricing to brokers in October 2001 was "the result of a careful analysis of the costs and benefits of its reseller distribution channels and an attempt to impose greater consistency in those channels. Reply at 12. In particular, Equifax asserts that its decision to eliminate volume pricing was driven by the "perception that certain brokers, such as CCA and NCC, instead of expanding Equifax's customer base in markets or areas underserved by Equifax, were instead simply using their **[*42]** volume discounts to take customers that had already been cultivated by Equifax's direct sales efforts." Id. Equifax therefore argues that its actions were intended to make Equifax a more effective competitor against TransUnion and Experian.

[16] In Dimidowich, the Ninth Circuit determined that in the context of a dual distribution relationship, nonprice restraints were to be treated as vertical restraints, subject to rule of reason analysis. However, in so ruling, the court cautioned that: "[o]nly when there is a possibility that the restraint in the market in which there is a horizontal relationship will [have] significant procompetitive

However, because CCA seeks to prove the existence of a price-fixing conspiracy, the issue of whether the relationship between CCA and Equifax should be characterized as primarily vertical or primarily horizontal does not affect whether per se analysis applies. If the relationship between CCA and Equifax is characterized as horizontal, it is clear that per se analysis would apply. See *Knevelbaard Dairies, 232 F. 3d at 986* ("Foremost in the category of per se violations is horizontal price-fixing among **[*44]** competitors …"), citing *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Likewise, if the Court were to characterize the relationship between CCA and Equifax as primarily vertical, per se analysis would also be applicable because CCA is claiming that Equifax entered into a minimum resale price-fixing conspiracy. See *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 369, 113 Cal. Rptr. 2d 175 (2001)* ("An agreement between a manufacturer or supplier and distributors and retailers to maintain minimum resale prices is per se unlawful under both the Cartwright Act and the Sherman Act"), citing *Business Electronics Corp., 485 U.S. at 726*. Therefore, per se analysis applies whether or not a price-fixing agreement between Equifax and its resellers were to be characterized as vertical or horizontal. [17]

In sum, if CCA can marshall sufficient evidence giving rise to a reasonable inference of a price-fixing conspiracy, Equifax's motion for summary judgment must be denied as to the Cartwright Act claim.

(c) Impact of a Rational Economic **[*45]** Motive to Conspire on the Legal Standard for Summary Judgment

Equifax argues that a plaintiff opposing summary judgment faces a greater burden when an alleged conspiracy simply makes no economic sense or when a defendant is able to offer a plausible and justifiable explanation for its conduct that is consistent with proper business practices. Reply at 11 and 13, citing Matsushita and *O.S.C. Corp. v. Apple Computer, 792 F.2d 1464, 1467 (9th Cir. 1986)*.

In Matsushita, the Supreme Court observed that:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of *Rule 56(e)*. Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence.

Matsushita, 475 U.S. at 596-597. [18] Defendants contend that the alleged conspiracy makes no economic sense. They further contend that because there is only ambiguous evidence of a conspiracy to fix prices, that it would be unreasonable as a matter of law for a trier of fact to infer the existence of a conspiracy in light of its economic irrationality. However, *Matsushita* is a *Section 2* predatory pricing case that on its facts, **[*46]** sheds little light here. As explained below, if there is sufficient evidence of an agreement to fix prices, then it does not matter whether or not the conspiracy makes economic sense or what motivated the parties to enter into the price-fixing agreement.

(d) Existence of a Rational Economic Motive to Conspire

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effects in the other market, as is the case when the markets are for the service and distribution of the same product, is rule of reason analysis appropriate." *Dimidowich, 803 F.2d at 1481*. Nonetheless, the Ninth Circuit's reasoning in Dimidowich and *Krehl v. Baskin-Robbins Ice Cream Co., 664 F. 2d 1348 (9th Cir. 1982)*, suggests that a restraint which would otherwise be viewed as vertical is not transformed into a horizontal restraint by virtue of the existence of a dual distribution arrangement. See Areeda P 1605(c) at 74 ("[I]f preventing free riding, **[*43]** assuring specialization or efficiency of scale, or precluding use of untrained subdealers justifies a conventional vertical restraint, it does so under dual distribution as well. In general, a manufacturer's presence at the dealer level merely changes the identity of one of the dealerships without altering, price, output, or other significant economic variables.") See also *Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751, 753 (7th Cir. 1989)* ("Dual distribution therefore does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition").

[17] See also Areeda P 1605d at 77 ("Of course, resale price maintenance is unlawful per se, but the existence vel non of dual distribution rarely has any bearing on that determination.").

[18] See also Areeda P 308 at 98, cautioning that Matsushita "should not be read, however, to suggest that given evidence must be treated precisely the same way in all cases. On the contrary as the Court stated, the 'range of permissible conclusions' that a fact finder might draw becomes larger as the alleged conspiracy becomes more economically plausible."

Equifax contends that the alleged conspiracy is irrational in that "[i]t makes no economic sense that Equifax would require resellers to set prices for Equifax reports at artificially high levels, so as to make its rivals' prices more attractive." Mot. at 12.

CCA responds that the alleged price fixing conspiracy is rational. Opp. at 9-10. CCA rebuts Equifax's arguments that higher prices would make rivals' prices more attractive by pointing to evidence that "lending institutions -- for historical reasons -- require Equifax reports **[*47]** in the single-file markets at issue." Opp. at 10, citing M. Briggs Decl., C. Knievel Decl., J. Briggs Decl., Ex. A (Esquinas Deposition) RT 23:5-26:2, 28:22-29:16.

The Court concludes that CCA has presented evidence indicating that efforts by CCA and NCC to sell non-Equifax reports to end-users were unsuccessful, and that end-users told NCC representatives that many lenders only accepted Equifax reports. See M. Briggs Decl. PP 3-6, J. Briggs Decl., Ex. B (Grayson Sackett Deposition) RT 10:13-14:12. Assuming that lenders do require or favor Equifax reports, rather than TransUnion or Experian reports, a horizontal conspiracy to set prices at artificially high levels could make economic sense. Accordingly, Equifax has not shown there is an absence of evidence of motive to illegally conspire to fix prices, and thus the alleged absence of such motive does not restrict the "range of permissible conclusions that might be drawn from ambiguous evidence." *Matsushita, 475 U.S. at 596-597*.

(e) Evidence Supporting the Existence of a Price-Fixing Conspiracy

CCA alleges that "the brokers and affiliated companies that currently sell Equifax products in the specified markets have agreed with Equifax to **[*48]** fix prices in the specified markets," and that "[a]s a result, the end-user customer in the specified markets pays fixed, inflated prices and is not provided some or all of the products, services, solutions and support offered by Plaintiff." Compl. P 52. In particular, CCA asserts that "Equifax terminated all brokers who competed with Equifax in the specified markets, except those brokers who agreed with Equifax to fix report prices." Compl. P 26. In addition, CCA contends that "the brokers who agreed to fix prices with Equifax, and thus were not terminated, are the brokers which continue to sell Equifax products in the specified markets, including ADP and First American CREDCO." Id.

CCA contends that the following evidence supports a reasonable inference that Equifax agreed to fix prices with ADP and CREDCO and that the agreement was in effect at the time that CCA was terminated, and that CCA was terminated in furtherance of that agreement:

> (1) John Kaltenbach, an Equifax executive, told Robert Esquinas, a principal in Consortium, that ADP had contacted Equifax to discuss the activities of the discount resellers. RSUF A-l, citing J. Briggs Decl., Ex. A (Esquinas Deposition) RT 47:6-12. **[*49]** Kaltenbach stated that ADP had complained to Equifax that Consortium "shouldn't be marketing to our dealers [automobile dealership end-users]." [19]

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[19] Equifax contends that CCA's evidence "is almost entirely inadmissible" and objects to much of the declarations and deposition testimony relied upon by CCA. See Equifax's Evid. Objs. at 1. In particular, Equifax argues that deposition testimony from third-party resellers, such as Consortium, describing statements by Equifax representatives about discussions between Equifax and ADP is inadmissible hearsay. Equifax's Evid. Objs. at 4. Equifax further argues that for this hearsay to be admissible pursuant to *Fed. R. Evid. 801(d)(2)(E)*, CCA has to prove by a preponderance of the evidence that a conspiracy exists. Equifax's Evid. Objs. at 3, citing *United States v. Bowman, 215 F.3d 951, 960-961 (9th Cir. 2000)*.

Fed. R. Evid. 801(d)(2)(E) provides that a statement is nonhearsay if it is made "by a coconspirator of a party during the course of and in furtherance of the conspiracy." The existence of a conspiracy and the participation of the declarant in the conspiracy are preliminary questions of fact that must be resolved by the judge alone. *Bourjaily v. United States, 483 U.S. 171, 175-176, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)*. "The court is not bound by the rules of evidence in assessing **[*52]** a proffered coconspirator statement," but the court may not consider evidence which would be barred on the grounds of privilege. 5 Jack Weinstein & Margaret Berger, Weinstein's Federal Evidence § 801.34[6][a] (Joseph McLaughlin, editor, Matthew Bender 2d ed. 2004). In addition, "[t]he Ninth Circuit has stated that evidence of the co-conspirator's statements may be [conditionally] admitted, subject to subsequent 'connecting up' through evidence establishing that there was a conspiracy, and the order of

(2) An Equifax executive asked NCC to sell at a higher price, thereby inviting "NCC to enter into a price-fixing agreement." RSUF A-1, citing J. Briggs Decl., Ex. B (G. Sackett Deposition) RT 4:16-24, 17:22-18:1. Equifax executives informed NCC that Equifax was increasing the price it charged NCC as a result of NCC's entry into the Southeastern U.S. markets. RSUF A-1, citing J. Briggs Decl., Ex. B (G. Sackett Deposition) RT 21:10-24.
(3) NCC principal Grayson Sackett had a conversation with Equifax executive John Harvey, in which Harvey stated that Equifax was going to "basically have an agreement with resellers that resellers were not allowed to beat Equifax's price at an existing dealer," but that one or two days later Equifax abandoned the idea. [20] RSUF A-1, citing J. Briggs Decl. Ex. B (G. Sackett Deposition) RT 67:4-18.

(4) CCA was contacted by an Equifax sales representative who stated words to the effect of: "What are you doing in these markets? You cannot go into these markets and sell to end-users at a reduced price. Your sales in **[*50]** these markets is disrupting the pricing that is in place between Equifax and the national resellers in those areas, and you simply can't do it." [21] RSUF A1, citing J. Briggs Decl., Ex. E (J. Briggs Deposition) RT 76:14-77:7.
(5) CCA was told by an Equifax manager that its Florida pricing "was way too low" in "this kind of market;" that CCA was "not playing ball" and that "you are not going to be around if you continue to go in [to Florida] and offer these kinds of rates." RSUF A1, citing J. Briggs Decl., Ex. G (M. Briggs Deposition) RT 118:17-119:4, 120:9-19.

(6) Equifax provided Certified, a reseller outside the market at issue, with credit reports at a rate of $ 1.65 to $ 1.85, after Equifax had notified CCA that its volume tiered pricing was being replaced with a flat rate of $ 2.75. [22] Supp. J. Briggs Decl., Ex. C. Kathy Weismann, an Equifax representative sent an e-mail to Certified, stating:

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proof is a matter for the trial judge's discretion." 5 Weinstein & Berger, supra § 801.34[6][c], citing *United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981)*.

Therefore, on a motion for summary judgement the Court may conditionally consider hearsay evidence, subject to a subsequent determination as to whether plaintiffs can prove the existence of the conspiracy as well as the participation of the declarant in the conspiracy.

In addition, the Court concludes that the statement by Equifax executive Kaltenbach is admissible as an admission by a party. See *Fed. R. Evid. 801(d)(2)(D)*. A statement is not hearsay if that statement was made "by the party's agent or servant concerning a matter **[*53]** within the scope of the agency of employment, made during the existence of the relationship." Id. Therefore Equifax's objections on the grounds of hearsay, speculation, lack of personal knowledge, and lack of foundation are overruled.

[20] Equifax objects to the deposition testimony of Grayson Sackett on the grounds that it is hearsay, speculative and lacks foundation. The Court overrules this objection on the ground that Equifax executive John Harvey's statements constitute an admission of a party pursuant to *Fed. R. Evid. 801(d)(2)(D)*.

[21] Equifax objects to Jeffrey Briggs' testimony regarding what Equifax sales representative Kathy Weismann said to him as inadmissible hearsay. The Court overrules Equifax's objection on the ground that Weismann's statements are admissions of a party.

[22] Equifax objects to the Supplemental Briggs declaration as untimely pursuant to *Local Rule 7-9*. However, the Court, in its discretion, will accept this late-filed declaration. Equifax also objects to CCA's evidence of Equifax's pricing to a reseller outside the market at issue on the ground that such evidence violates *Fed. R. Evid. 1002* (the best evidence rule). The Court concludes that information regarding **[*54]** Equifax's pricing to Certified "was under the control of the party against whom offered," [i.e. Equifax] pursuant to *Fed. R. Evid. 1004(3)*, and is therefore admissible unless Equifax chooses to produce the original documents. See *Fed. R. Evid. 1004(3)*. In addition, because the Supplemental Briggs declaration summarizes Equifax's pricing to a reseller outside the market at issue (as opposed to pricing to end-users), the Court concludes that the evidence Equifax seeks to introduce "is not closely related to a controlling issue" such that pursuant to *Fed. R. Evid. 1004(4)*, the best evidence rule does not apply. See *Fed. R. Evid. 1004(4)* (evidence summarizing a written document is admissible if the written document concerns collateral matters). Accordingly, Equifax's objection is overruled.

"[Y]ou are only allowed to sell single files at $ 2.75 to the auto industry right now." [23] Supp. J. Briggs. Decl., Ex. D. Id.

(7) Circumstantial evidence that CCA, NCC, and Consortium, which were selling at lower prices than Equifax, were terminated, while ADP and CREDCO, selling at prices similar **[*51]** to Equifax, were not terminated.

Equifax contends that CCA's evidence provides an insufficient basis to reasonably infer that an illegal agreement existed and is based upon facts which "at best … suggest unilateral conduct" not violative of the Cartwright Act. Mot. at 9. In particular, Equifax characterizes testimony by Matthew Briggs of CCA that an Equifax sales representative told him "if we didn't play ball and keep our rates high that we weren't going to be in business," as unilateral conduct on the part of Equifax, rather than a proposal to enter into an illegal agreement. Mot. at 9, citing Molinski Decl., Ex. A (Deposition of Matthew Briggs) RT 108:24-109:6. In support of this contention, Equifax cites the deposition testimony of Jeffrey Briggs, stating "I don't honestly remember if Ms. Weismann [the Equifax sales representative] said there is a pricing arrangement or pricing agreement in place. I don't recall her specifically saying that." Molinksi Decl., Ex. B (J. Briggs Deposition) RT 79:7-12.

Second, Equifax asserts that CCA has failed to adduce any evidence of the resale prices or price **[*56]** levels that were allegedly fixed. Mot. at 10. Equifax contends that both CCA principals have admitted that they had no personal knowledge of an agreement to fix prices at specific levels between Equifax and ADP or Equifax and CREDCO. Mot. at 11, citing Molinski Decl. A (M. Briggs Deposition) RT 69:19-69:22, 77:9-81:5, 150:20-152:9, 144:5-12.

CCA contends that evidence exists supporting a reasonable inferences of price-fixing agreements between Equifax and ADP, as well as between Equifax and CREDCO. Opp. at 6. In particular, CCA contends that Equifax invited NCC to enter into a price-fixing agreement on separate occasions." [24]

Equifax replies that a supplier's announcement of a resale pricing policy and its refusal to deal with distributors who do not comply with that policy, coupled with a distributor's voluntary acquiescence in the policy, does not constitute an illegal agreement as a matter of law. Reply at 7, citing *Chavez v. Whirlpool Corp., 93 Cal. App. 4th at 372*. **[*57]** Equifax contends that in order to infer an illegal agreement from the testimony presented by CCA, the Court would have to infer that Equifax had similar conversations with ADP and other resellers, who entered into an agreement, rather than acquiescing to an announced policy. Reply at 7. Likewise, Equifax contends that alleged threats made to CCA that it would not "be around" if it failed to comply with the resale price policy announced by Equifax constitute permissible unilateral conduct. Reply at 8, citing *United States v. Colgate, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*, *Chavez, 93 Cal. App. 4th at 373*.

Assuming that CCA must set forth "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" as is required by *Monsanto*, the Court concludes that CCA has met its burden. While CCA's evidence presents a close case, the Court concludes that CCA has provided additional evidence supporting a reasonable inference that a price-fixing conspiracy was entered into and acted upon. Among other things, CCA has offered evidence that Equifax informed a principal of NCC that Equifax was going to pursue an agreement in which resellers would be barred **[*58]** from charging lower prices than Equifax was charging end-users. J. Briggs Decl., Ex. B (G. Sackett Deposition) RT 67:4-18. While Equifax announced two days later that it was abandoning its plans to pursue this agreement, the trier of fact may disbelieve Equifax's statement that it abandoned its plans in light of the other evidence presented by plaintiffs. Equifax executives informed NCC's principals that its pricing from Equifax to NCC would increase as a result of NCC's practice of

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[23] Equifax contends that the e-mail to Certified is "taken out of context" by CCA and that "Ms. Weismann was informing Certified that if Certified sold as a broker into the automotive channel, it would be charged by Equifax the same $ 2.75 that other such brokers, including CCA was charged." See Equifax's Reply to Supp. Decl. of J. Briggs at 1. Equifax also argues that the "e-mail describes at best -- **[*55]** and like all of CCA's other evidence -- only a unilateral direction given to Certified, not any form of agreement." Id.

[24] Equifax argues that this evidence, interpreted in a light most favorable to CCA, can only imply that "a potential unilateral price policy [was] being considered at Equifax and that no specific agreement, or even policy was ever proposed." Reply at 6.

selling reports in the market at issue. J. Briggs Decl., Ex. B (G. Sackett Deposition) RT 21:10-24. In addition, an Equifax executive told Jeffrey Briggs that CCA could not "go into these markets [the market area at issue] and sell to end-users at a reduced price" because CCA's sales were "disrupting the pricing that is in place by Equifax and ADP." J. Briggs Decl., Ex. E (J. Briggs Deposition) RT 76:14-77:7. Equifax representative Kathy Weismann sent an e-mail to Certified, a California-based reseller, stating that it was "only allowed to sell single files at $ 2.75 to the auto industry right now." Supp. J. Briggs Decl., Ex. C.

Finally, of the resellers that were terminated by Equifax, CCA and NCC priced **[*59]** single file reports from $ 1.90 to $ 2.50, and Consortium priced its reports at $ 1.75. Knievel Decl. P 13, M. Briggs Decl. P 19. By contrast, Equifax priced its reports at $ 2.75 and above, ADP priced it reports at $ 3.20 to $ 3.25, and CREDCO priced its reports at $ 2.90 and above. Knievel Decl. PP 3-6, 11, J. Briggs Decl. P 25, Ex. P.

The Court concludes that CCA's evidence is sufficient to raise a genuine issue of material fact as to the existence of a price-fixing agreement. [25] See, e.g., *James Jeans, 849 F.2d at 1157* (stating that in accordance with the approach employed by Monsanto, Matsushita and Business Electronics, "a court should be less concerned about subjective notions of motive and more concerned about the economic effects of challenged conduct."). [26] Because a price-fixing agreement is per se unlawful, no further inquiry is required regarding the reasonableness of the agreement. See *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 435, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990)*:

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[25] Equifax relies on *O.S.C. v. Apple Computer, Inc., 792 F.2d 1464, 1468-1469 (1986)*, in support of the contention that CCA has failed to set forth sufficient evidence to support an inference of a conspiracy. In Apple Computer, the Ninth Circuit concluded that "Apple's only concern with prices pertained to its dealers' capacity to withstand erosion of profit margins caused by having to carry 'free riding' mail order dealers." *Apple Computer, 792 F.2d at 1468*. In Apple Computer, the Ninth Circuit noted that while it was undisputed that Apple "received voluminous complaints from its dealers," there was "no evidence that Apple coerced dealers on advertising or pricing decisions" and there was "no evidence that price discounting was a formal topic of discussion at meetings attended by Apple **[*61]** representatives." *Apple Computer, 792 F.2d at 1468-1469*.

Equifax also relies upon the unpublished memorandum opinion in *Glacier Optical, Inc. v. Optique Du Monde, 1995 U.S. App. LEXIS 1108, 1995 WL 21565 (9th Cir. 1995)*. Putting aside the fact that this unpublished opinion cannot be relied upon by the Court or the parties pursuant to *Ninth Circuit Rule 36-3*, the case is distinguishable from the evidence presented here. Equifax argues that in Glacier, the plaintiff had set forth evidence of price fixing which consisted of (1) distributors' complaints to defendant about plaintiff's sales to discounters; (2) threats to terminate distributors who sold to discounters; (3) defendant's monitoring and investigation of possible sales to discounters; (4) meetings with distributors to discuss discounting; and (5) the unexplained termination of the plaintiff; and that the Ninth Circuit concluded that such evidence was insufficient to support an inference of price-fixing. See Equifax's Supp. Brief, Ex. B ("9th Circuit Case Comparison Chart"). The court in Glacier Optical reasoned that defendant had "proffered a legitimate business explanation" to explain its efforts to prevent sales to discount retailers -- namely, protecting **[*62]** the image of the designer eyeglasses that defendant was seeking to distribute -- and therefore the evidence did not support an inference of price-fixing. *Glacier Optical, 1995 U.S. App. LEXIS 1108, 1995 WL 21565 at * 5*. In addition, Glacier Optical noted that one of the alleged co-conspirators "actually cut prices significantly soon after its meetings with [defendant]." *Id.* By contrast, in this action, there is no evidence that price-discounting by CCA and other resellers harmed Equifax's image or, more importantly, that ADP or CREDCO reduced prices, either in response to CCA's pricing, or after CCA was terminated. In any event, the unpublished opinion in Glacier Optical may not be relied upon here.

Finally, *National Information Services, Inc., v. TRW Inc., 1992 U.S. Dist. LEXIS 22497, 1992 WL 715632 (D. Ore. 1992)*, is inapplicable to the Court's analysis of CCA's Cartwright Act claim, because in National Information Services, plaintiffs alleged a Section 1 claim based upon an alleged conspiracy to impose non-price restraints, which the court analyzed under a rule of reason analysis.

[26] In James Jeans, the Ninth Circuit summarized plaintiffs' evidence as consisting of complaints about price cutting coupled with the manufacturer's assurance **[*63]** that it would 'take care of things,' as well as the termination of a price cutting distributor without justification. Unlike the present case, there were no statements by the manufacturer in *James Jeans* that price cutters were "disrupting the pricing that is in place," or proposed agreements on pricing. See J. Briggs Decl., Ex. E (J. Briggs Deposition) RT 76:14-77:7. Rather, in James Jeans the evidence that the plaintiffs introduced at trial was consistent only with the defendant "putting pressure on a retailer to adhere to its pricing policy." *James Jeans, 849 F.2d at 1159*.

> Price-fixing agreements may or may not be aimed at the complete elimination of price competition … Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry **[*60]** into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

See also *Arizona v. Maricopa Co. Medical Society, 457 U.S. 332, 351, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*, quoting *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*(internal citations omitted). Accordingly, Equifax's motion for summary judgment as to CCA's Cartwright Act claim must be denied.

(ii) Unfair Competition Law

Equifax contends that CCA's Unfair Competition Law claim pursuant to *Cal. Bus. & Prof. Code § 17200* must fail for the same reasons as CCA's Cartwright Act claim. Mot. at 14-16. Equifax also contends that CCA's complaint seeks actual and treble damages which are unavailable under *§ 17200*.

CCA responds that because genuine issues of material fact exist as to whether Equifax violated the Cartwright Act, genuine issues of material fact necessarily preclude summary judgment on its unfair competition claim. [27] Opp. at 14. As to the requested remedies, CCA argues that it requests injunctive relief **[*64]** and restitution as part of its prayer for such other and further relief as the Court deems proper. Opp. at 15.

The Court concludes that because a genuine issue of material fact precludes summary judgment on the Cartwright Act claim, summary judgment on the Unfair Competition Law claim is inappropriate.

(iii) CCA's Breach of Contract Claim and Breach of Implied Covenant of Good Faith and Fair Dealing Claims

Equifax also argues that CCA's breach of contract claim fails either under Georgia or California law. [28] Mot. at 16-21. In particular Equifax contends that: (1) pursuant to **[*65]** the plain language of the Agreement, Equifax was not obligated to maintain prices quoted to CCA prior to the execution of the Agreement; (2) the Agreement between the parties did not require uniform pricing; (3) the plain language of the Agreement allowed Equifax to terminate the Agreement at its election on ten-days' notice; (4) even if the Court were required to look beyond the express language of the Agreement, the admission of parol evidence would yield the same result; and (5) undisputed evidence of CCA's conduct illustrates an understanding of the contract inconsistent with its allegations in this action. Mot. at 16-21.

As to CCA's breach of implied covenant of good faith and fair dealing claim, Equifax argues that its Agreement with CCA "expressly allows Equifax to terminate [CCA] as it did." Mot. at 24. Equifax argues that the implied covenant of good faith and fair dealing may not be read to prohibit it from doing that which is expressly permitted by its Agreement with CCA. Id.

CCA responds that under Georgia law, the implied covenant of good **[*66]** faith modifies and becomes part of the provisions of every contract, and that a claim for breach of the implied covenant of good faith and dealing is not recognized as an independent cause of action. Opp. at 16, citing *Stuart Enters. Int'l, Inc. v. Peykan, Inc., 252 Ga. App. 231, 234, 555 S.E.2d 881 (Ga. Ct. App. 2003)*. Therefore, CCA argues that summary judgment on the breach

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[27] In addition, CCA argues that it is not necessary for a business practice to be unlawful in order for it to be actionable under *§ 17200*. Opp. at 13, citing *Consumers Union of United States, Inc. v. Fisher Development, Inc., 208 Cal. App. 3d 1433, 1438, 257 Cal. Rptr. 151 (1989)*. CCA contends that summary judgment cannot be granted as to the unfair competition claim if "there is a triable issue as to whether the conduct alleged violated the spirit of the antitrust laws in general or significantly threatens or harms competition." Opp. at 15, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

[28] The Agreement provides that "[t]his Agreement will be governed by and construed in accordance with the laws of the state of Georgia."

of contract claim cannot be granted if there is a material issue of fact as to CCA's claim for breach of the implied covenant of good faith and dealing. Opp. at 16.

CCA contends that even if Equifax was entitled to cancel the contract for any reason, or no reason at all, it could not terminate the contract in furtherance of an illegal price-fixing agreement. Opp. at 16-17. Further, CCA argues that the contract is silent on the issue of whether or not cause is required to terminate, and as such, the implied covenant of good faith supplies a requirement of good cause. [29] Opp. at 17.

In light of the Court's conclusion regarding the Cartwright Act claim, summary judgment on the breach of contract claim is inappropriate.

(iv) Tortious Interference with Contract Claim

As to the tortious inference with contract claim, Equifax contends that no evidence exists of the actual breach or disruption of any **[*68]** contractual relationships between CCA and CCA's customers, or that Equifax knew of any contracts between CCA and its customers. Mot. at 22-24. Equifax further argues that CCA identified nine customer relationships in which CCA allegedly interfered, but has failed to produce contracts for eight of these customers, as required by order of the Magistrate Judge. Reply at 23.

CCA responds that is irrelevant whether Equifax's conduct resulted in a breach of contract by CCA or its customers, because disruption of a contractual relationship can give rise to a claim for tortious interference. Opp. at 20, citing *Della Penna v. Toyota Motor Sales, U.S.A., 11 Cal. 4th 376, 392, 45 Cal. Rptr. 2d 436, 902 P.2d 740 (1995)*. CCA contends that Equifax improperly "switch[ed] out the codes of some end-user automobile users who were CCA customers, causing them to deal with Equifax direct[ly]." Opp. at 19, citing J. Briggs Decl., Ex. E (J. Briggs Deposition) RT 51:16-52:20. CCA also argues that Equifax sales representatives advised CCA customers "about stories they could make up in order to try to get out of contractual obligations to CCA" and used a site inspection process improperly by "surreptitiously switching customers' codes from CCA." **[*69]** Opp. at 19-20.

A claim for intentional interference with contractual relations requires a plaintiff to demonstrate: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Quelamine Co. v. Stewart Title Guaranty Co., 19 Cal. 4th at 55*. Jeffrey Briggs testified that:

> [W]ith respect to [end-users] that did [have a term contract] … Equifax would have a representative go to these dealers and do a variety of improper things. One things, as I recall, was without even telling the dealers, switching the codes back to Equifax. Another thing was that I recall is Equifax representatives instructing the dealers how to break their agreement with Consolidated by presenting a story, for lack of a better word, that there were misrepresentations that were made by our sales representatives during the sales process and that's why they were breaking their term agreement with us.

J. Briggs Decl., Ex. E (J. Briggs Deposition) 51:24 - 52:18. While Equifax contends **[*70]** that no evidence exists regarding Equifax's knowledge of any contractual relationship between CCA and its customers, the above-

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[29] CCA further argues that the written contract dated April 1, 2000, did not set pricing terms. Opp. at 18. CCA maintains that paragraph 1.7 of the contract referred to schedules of prices "now or subsequently established by Equifax." See J. Briggs Decl., **[*67]** Ex. J. CCA asserts that it insisted pricing be established at the time of contract, and in accordance with CCA's demand, pricing was confirmed by Equifax on March 22, 2000, a week before the contract was signed. J. Briggs Decl., Ex. K (e-mail from Kathy Weismann of Equifax to J. Briggs), J. Briggs Decl. Ex. E (Deposition of J. Briggs) 121:5-122:7. CCA contends that it was told that the rates it paid were the same as the rates that other resellers selling the same volume of credit reports were paid. Opp. at 18. Finally, CCA argues that the integration clause in the April 1, 2000 document cannot restrict the rate schedule agreed upon on March 22, 2000, because the rate schedule was referenced in the April 1 document. Opp. at 19. Therefore, CCA argues that Equifax breached the terms of its contract with CCA by failing to maintain uniform pricing among the resellers. Opp. at 18.

excerpted testimony provides evidence that Equifax knew of the existence of contractual relationships between CCA and end-users and took steps to interefere with those relationships. Accordingly, a genuine issue of material fact exists as to whether Equifax intentionally disrupted valid contracts between CCA and end-users.

(v) CCA's Claim for Misrepresentation

Equifax argues that CCA's misrepresentation claim fails because CCA has produced no evidence supporting justifiable reliance upon Equifax's alleged misrepresentations that CCA's prices would be maintained at a uniform level. Mot. at 24-25. CCA fails to oppose Equifax's motion is in its opposition, and states that "CCA does not respond to the facts asserted by Equifax with respect to the misrepresentation cause of action, on the basis that this cause of action is being dismissed by CCA." RSUF at 49. Accordingly, the Court grants Equifax's motion for summary judgment as to CCA's misrepresentation claim.

B. Plaintiff's Motion to Modify Scheduling Conference Order and for Leave to Amend Complaint

On April 13, **[*71]** 2004, CCA filed a motion for leave to amend the complaint and to modify the scheduling order. CCA seeks to add a claim for violations of *Section 2* of the Sherman Act. See CCA's Proposed First Amendment Complaint ("Proposed FAC").

CCA argues that good cause exists to modify the Court's scheduling order pursuant to *Fed. R. Civ. P. 16(b)*. In particular, CCA contends that since it filed its complaint in Superior Court, it could not bring a federal antitrust claim because that Court has no jurisdiction over a Sherman Act claim. CCA's Mot. at 5. CCA maintains that it has been actively involved in a discovery dispute with Equifax and therefore was unable to proceed with third party witness depositions until February 26, 2004, five months after the deadline to add claims, as established by the scheduling order. CCA's Mot. at 6. CCA argues that deposition testimony obtained from the principals of Consortium and NCC strongly support a claim for violations of *Section 2* of the Sherman Act. CCA's Mot at 6-10. In particular, CCA points to deposition testimony by Jevin Sackett that Equifax has monopoly power in the specified market because lenders in that market require Equifax reports. CCA's Mot. **[*72]** at 8, citing Briggs Decl, Ex. 5 (J. Sackett Deposition). CCA further argues that because the proposed Sherman Act claim will not require additional discovery, and will not in any way cause delay of the proceedings, Equifax will not be prejudiced. Id. at 12-13.

Equifax responds that CCA "twice threatened to bring Sherman Act claims against Equifax" in two separate letters written in late 2001 after Equifax terminated CCA's broker agreement, such that CCA has not acted diligently in seeking leave to amend the complaint to add a proposed Sherman Act *Section 2* claim. [30] Opp. to CCA's Mot. at 1. Equifax argues that it filed a notice of removal of CCA's action on February 21, 2003, at which time CCA could have amended its complaint to include Sherman Act claims. Opp. to CCA's Mot. at 5. Equifax argues that information CCA gained through the depositions of NCC and Consortium is not new because CCA "has known for years the same 'facts' upon which it bases its proposed *Section 2* claim." Id. at 12.

Equifax also argues that leave to amend the complaint would cause Equifax undue prejudice and would be futile. Id. at 13-22. Equifax contends that it will be unduly prejudiced because it will have to reopen discovery regarding issues not relevant to CCA's existing Cartwright Act claim. [31] Id. at 15. Equifax argues that CCA's delay in seeking leave to amend justifies the denial of the motion. Id. at 17-18. In addition, Equifax argues that CCA's amendment is

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[30] CCA responds that Equifax mischaracterizes its letters, in that CCA was referring to a Sherman Act *Section 1* claim, and "did not consider or discuss a claim under *Section 2* until information was discovered **[*73]** in recent depositions that supported the claim." Reply at 1. Equifax disputes this by stating the 2001 letter claimed that Equifax's conduct was illegal under the essential facilities doctrine, which would be relevant only as to a *Section 2* claim, thereby demonstrating that CCA considered bringing a *Section 2* claim against Equifax as early as 2001. Supp. Opp. at 1.

[31] In particular, Equifax asserts that CCA's proposed *Section 2* Sherman Act claim would necessitate discovery regarding issues such as market definition, monopoly power, predatory conduct and specific intent which are not relevant to CCA's existing Cartwright Act claim. Therefore, Equifax contends that it will have to notice additional depositions, and conduct discovery regarding the market shares maintained by TransUnion and Experian. Opp. to CCA's Mot. at 16.

offered in bad faith, because CCA has already taken discovery on the Sherman Act claims while withholding the filing of that claim to prejudice Equifax. Id. at 18. Equifax reasons that CCA's proposed *Section 2* claim is futile because "CCA's proposed Sherman Act claim has already been squarely rejected on identical facts in this same industry as alleged against Equifax's **[*74]** competitor, TRW (now Experian)." Id. at 19, citing National Information Services. [32]

Fed. R. Civ. P. 16(b) provides that a scheduling order "shall not be modified except by leave of court and upon a showing of good cause." In determining whether good cause exists, courts may consider the importance of the amendment, potential prejudice to the opposing party, and the explanation for the failure to timely move for leave to amend. *Mammoth Recreations, Inc., 975 F.2d at 609*. If a party seeking modification of a pretrial scheduling order "was not diligent, the inquiry should end and the motion to modify should not be granted." *Zivkovic, 302 F.3d at 1087* (internal citations omitted).

On August 4, 2003, the Court issued a scheduling order setting September 28, 2003, as the last day for motions to add claims or parties.

On March 2, 2004, CCA filed a motion to modify the pretrial scheduling order to add a *Section 2* claim. However, on March 4, 2004, CCA withdrew the motion.

CCA again filed a motion to modify the scheduling order to add a *Section 2* claim on April 13, 2004, over five months after the last date to add claims pursuant to the pretrial scheduling order.

The Court concludes **[*76]** that Equifax would be unduly prejudiced should CCA's motion to modify the scheduling order be granted. In particular, the addition of a *Section 2* claim would necessitate extending the discovery cutoff to allow Equifax to depose expert witnesses on issues such as national market share, market power and predatory conduct.

In addition, the Court concludes that CCA cannot show that it exercised diligence in seeking to add this claim. See *Zivkovic, 302 F.3d at 1087*. It is true that the parties have been engaged in an extensive discovery dispute, and CCA did not have an opportunity to depose witnesses until February 2004. However, on September 15, 2001, Jeffrey Briggs sent a letter to Equifax stating that, "[f]rom a legal standpoint, we believe that there are several federal laws which are important to the pricing relationship between Equifax and CCA," explaining in a footnote that "[t]hese statutes include the Sherman Act (as it relates to vertical restraints of trade and the essential facilities doctrine), as well as the Robinson-Patman Act." See April 19, 2004 Molinski Decl., Ex. G (under seal). Jeffrey Briggs sent a second letter to Equifax on October 29, 2001, stating "Equifax' [sic] **[*77]** actions violate (1) its promises to CCA and (2) federal law (including the Sherman Act and the Robinson-Patman Act)." See April 19, 2004 Molinski Decl., Ex. F. Briggs' reference to the essential facilities doctrine, which applies to a *Section 2* claim, indicates that CCA contemplated bringing a *Section 2* claim against Equifax as early as 2001, and therefore was not diligent in waiting until April 13, 2004, over five months after the last date to add claims pursuant to the pretrial scheduling order, in order to file the present motion to add a *Section 2* claim. [33] The fact that CCA may have gained

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[32] The court in National Information Services concluded that:

> High market shares, standing alone, do not prove monopoly power ... Plaintiffs have not presented any evidence that TransUnion or Equifax cannot compete with TRW in regions where TRW holds a "dominant" share.

*National Information Services, 1992 U.S. Dist. LEXIS 22497, 1992 WL 715632 at *10*. CCA replies that the court's conclusion in National Information Services is distinguishable, because CCA has offered evidence that lenders in the market at issue in this case require end-users to purchase Equifax reports: Reply at 10. National Information Services does not, however, demonstrate that an amendment would be futile. The **[*75]** Court notes that the market facts existing more than ten years ago may not be dispositive in this case.

[33] Indeed, CCA's expert, Professor Comanor, relies on the essential facilities doctrine to support CCA's proposed *Section 2* claim. See April 20, 2004 **[*78]** Comanor Decl. at 8 ("The concept of an essential facility has bearing on antitrust cases

additional evidence in support of such a claim after the last date to add claims pursuant to the scheduling order does not excuse CCA's lack of diligence in failing to timely move for leave to amend the complaint. Accordingly, CCA's motion to modify the scheduling order pursuant to *Fed. R. Civ. P. 16(b)*, such that CCA may file a motion for a leave to the amend the complaint, must be denied on the ground that CCA has failed to exercise diligence.

Even if CCA's motion for leave to **[*79]** amend the complaint were timely, the Court concludes that despite the liberal standard for allowing amendments set forth in *Fed. R. Civ. P. 15(a)*, leave to amend must be denied. The factors "commonly used to determine the propriety of a motion for leave to amend" are "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs, Ltd., 833 F.2d at 186*, citing *Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984)*. While the Court does not conclude that CCA's proposed *Section 2* claim is futile, the evidence of undue delay and prejudice to Equifax, discussed above in connection with CCA's motion to modify the scheduling order pursuant to *Fed. R. Civ. P. 16(b)*, militates against granting CCA's motion for leave to amend pursuant to *Fed. R. Civ. P. 15(a)*.

Therefore, the Court denies CCA's motion to modify the scheduling conference order and for leave to amend the complaint.

VII. CONCLUSION

Equifax's motion for summary judgment is hereby DENIED as to CCA's claims for violations of the Cartwright Act, unfair competition, breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference. **[*80]** Equifax's motion is GRANTED as to CCA's claim for misrepresentation. CCA's motion to modify the scheduling order and for leave to amend the complaint is DENIED.

IT IS SO ORDERED.

Dated: August 5, 2004

/s/ Christina A. Snyder

CHRISTINA A. SNYDER

United States District Judge

End of Document

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whenever market power is enhanced when the facility is withheld … Because CCA and other resellers cannot continue in business within these states without access to Equifax credit reports, this access represents an essential facility."). While courts of appeal and district courts have traced the essential facilities doctrine to the Supreme Court's decision in *United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*(analyzing a combination of trunkline railroads that gained control of terminal facilities in St. Louis), the Supreme Court has never expressly adopted the essential facilities doctrine as a theory for *Section 2* liability. See, e.g., *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 428, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)*(Breyer, J., concurring in part and dissenting in part) (referring to the essential facilities doctrine as "an antitrust doctrine that this Court has never adopted"), see also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611, n.44, 105 S. Ct. 2847, 86 L. Ed. 2d 467* ("[W]e find it unnecessary to consider the possible relevance of the 'essential facilities' doctrine.").

Hull v. D & J Sports, Inc.

United States District Court for the Northern District of California

August 6, 2004, Decided

No. C 03-05697 WHA

Reporter

2004 U.S. Dist. LEXIS 15798 *; 2004 WL 1771572

MARTIN PHILIP HULL, an individual, and ZOOMERS, a California partnership, Plaintiffs, v. D & J SPORTS, INC., a Texas corporation, Defendant.

Disposition: [*1] Defendant's motion to dismiss second claim granted. Defendant's motion to dismiss third claim denied.

Core Terms

allegations, patents, unfair business practice, motion to dismiss, plaintiffs', deceived, fraudulent business practice, unfair, amended complaint, defense motion, member of the public, infringement

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests for legal sufficiency of the claims alleged in the complaint.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Dismissal under *Fed. R. Civ. P. 12(b)(6)* may be based either on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] **Motions to Dismiss, Failure to State Claim**

The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN4[] **Motions to Dismiss, Failure to State Claim**

When evaluating a motion to dismiss for failure to state a claim, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

Under *Cal. Bus. & Prof. Code § 17200*, the plaintiff must assert any unlawful, unfair or fraudulent business act or practice.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17200 establishes three theories for finding illegal conduct: (1) unlawful, (2) unfair, or (3) fraudulent. Since *§ 17200* is written in the disjunctive, a plaintiff may allege solely one of the three theories to properly plead a claim under *§ 17200*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

To allege a fraudulent business practice under *Cal. Bus. & Prof. Code § 17200*, a plaintiff must allege that members of the public are likely to be deceived. Allegations of actual deception, reasonable reliance, and damage are unnecessary.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN8[] **Pleadings, Amendment of Pleadings**

The United States Court of Appeals for the Ninth Circuit has long held that claims in the original complaint that are not re-alleged in the amended complaint are no longer before the court.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

An unfair business practice occurs when a practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17200 has three distinct theories under which a claim of unfair competition may proceed.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

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

HN11[] **Regulated Practices, Trade Practices & Unfair Competition**

In order to successfully dismiss a *Cal. Bus. & Prof. Code § 17200* claim, a defendant must argue separately against all three theories using the relevant standards.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN12[] **Regulated Practices, Trade Practices & Unfair Competition**

Cal. Bus. & Prof. Code § 17000 is known as the Unfair Practices Act.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN13[] **Regulated Practices, Trade Practices & Unfair Competition**

The Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000*, condemns specific conduct. It proscribes specific conduct such as price discrimination, sales below cost, locality discrimination, secret rebates, and use of loss leader sales.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN14[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

The Unfair Practices Act, *Cal. Bus. & Prof. Code § 17000*, is an offshoot of ***antitrust law***.

Counsel: For Martin Philip Hull, an individual, Zoomers, a California corporation, Plaintiffs: Douglas A. Chaikin, Peninsula IP Group, Corral de Tierra, CA. Yano Lee Rubinstein, Esq., Summers Rubinstein, Palm Desert, CA. Derek A. Eletich, Law Office of Derek A. Eletich, Menlo Park, CA.

For D&J Sports, Inc., a Texas corporation, Defendant: James B. Hicks, Ervin, Cohen & Jessup LLP, Beverly Hills, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND VACATING HEARING

INTRODUCTION

After plaintiffs' trade-dress claim was dismissed, plaintiffs filed an amended complaint on June 9, 2004, alleging a claim of patent infringement and two claims under *Sections 17000and 17200* of the California Business and Professions Code. Defendant now moves to dismiss the *Section 17000and 17200* claims under *Rule 12(b)(6)*. Defendant's motion is **GRANTED IN PART** and **DENIED IN PART.** Plaintiffs' complaint is void of any allegation **[*2]** from which inferences can be drawn that it engaged in anti-competitive conduct under *Section 17000*. Plaintiffs, however, did allege sufficient facts to support a claim under *Section 17200*.

STATEMENT

The amended complaint alleges that plaintiff Martin Philip Hull is the inventor of two patents (Amd. Compl. P8-9). Both patents are related to training fin devices that assist in training and conditioning swimmers. Plaintiff Zoomers is the assignee of both patents. In the first claim, plaintiffs contend that defendant has infringed these two patents. In the second and third claims, plaintiffs allege that defendant's purported infringement of their patents constitute unfair competition. The second and third claims are based on *California Business & Professional Code Sections 17000and 17200*, respectively. According to plaintiffs, the alleged infringement by defendant of "plaintiffs Hull and Zoomers' '385 and '328 patents and imitation of plaintiffs' Hull and Zoomers training fin device constitutes unfair competition under California state law" (Amd. Compl. P22, 26). They also reallege and incorporate by reference the allegations made under the first claim **[*3]** of patent infringement.

Defendant filed this instant motion on July 9, 2004. This order notes that defendant did not file a reply brief. In the instant motion, defendant argues that plaintiffs' complaint fails to state a claim under *Section 17000and 17200*. More specifically, it contends that plaintiffs have failed to allege any facts to support an inference that defendant has attempted to palm off its goods as plaintiffs' or that members of the public are likely to be deceived (Br. 3).

ANALYSIS

1. LEGAL STANDARD.

HN1[] A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* tests for legal sufficiency of the claims alleged in the complaint. *See* *Parks Sch. of Business v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. *HN2*[] Dismissal under *FRCP 12(b)(6)* may be based either on the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. Hence, *HN3*[] the issue on a motion to dismiss for failure to state a claim is not whether the claimant **[*4]** will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. *HN4*[] When evaluating such a motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996)*.

2. *CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17000 AND 17200*.

Defendant moves to dismiss plaintiffs' claim that relies on *Section 17200* because they fail to allege that members of the public are likely to be deceived. *HN5*[] Under *Section 17200*, the plaintiff must assert "any unlawful, unfair or fraudulent business act or practice." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Thus, *Section 17200* *HN6*[] establishes **[*5]** three theories for finding illegal conduct: (1) unlawful, (2) unfair, or (3) fraudulent. *See ibid.* Since *Section 17200* is written in the disjunctive, the plaintiff may allege solely one of the three theories to properly plead a claim under *Section 17200*. This order notes that defendant has not moved to dismiss under the theory of unlawful business practices. Thus, the two issues that remain are whether plaintiffs' claim may go forward under the theory of fraudulent or unfair business practices. [*]

HN7[] To allege a fraudulent business practice, a plaintiff must allege that "members of the public are likely to be deceived. Allegations of actual deception, reasonable reliance, and damage are unnecessary." *Comm. on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660 (1983)*. **[*6]** Defendant argues that plaintiffs fail to allege that members of the public are likely to be deceived in their complaint. This order agrees. Conceivably, the allegations supporting the trade-dress claim in the original complaint could have served to fulfill the pleading requirement of the fraudulent business practices theory, since both claims require alleging that the public is likely to be deceived. Those allegations, however, are not made in the amended complaint. *HN8*[] "The Ninth Circuit has long held that claims in the original complaint that are not realleged in the amended complaint are no longer before the court." *Forsyth v. Humana, Inc., 99 F.3d 1504, 1511 (9th Cir. 1996)*. The amended complaint does not allege that members of the public are likely to be deceived. Nor do the exhibits attached to the amended complaint adequately fulfill the pleading requirement. The exhibits are comprised of plaintiff's two patents and defendant's website advertisement of the allegedly-infringing product. Based on a comparison of the exhibits, no reasonable inference can be made that a person would be deceived by defendant's product. Plaintiffs have not made sufficient allegations **[*7]** under fraudulent business practices. Thus, plaintiffs cannot go forward under the theory of fraudulent business practices under *Section 17200*.

As for the unfair business practices theory under *Section 17200*, defendant fails to successfully argue that this theory must be dismissed. Defendant does not argue the unfair business practices theory as a distinct and separate theory apart from fraudulent business practices, as required. It fails to make a distinction between the different standards required to allege fraudulent business practices and unfair business practices. Defendant correctly identifies the standard for unfair business practices when it cites *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 58 Cal. Rptr. 2d 89 (1996)*. There, the court held that *HN9*[] an unfair business practice occurs when a

[*] In opposition, plaintiff makes an argument based on *Section 17500*. The Court is perplexed as to the relevance of this section, as it was never alleged in the complaint nor cited by defendant in its motion. The Court disregards this section.

practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id. at 647*. But instead of arguing for dismissal of the unfair business practice theory under this standard, defendant then applies the "likely to be deceived" standard of fraudulent business practices for the **[*8]** unfair business practices theory as well. This is in error.

Section 17200 ***HN10***[] has three distinct theories under which a claim of unfair competition may proceed. ***HN11***[] In order to successfully dismiss a *Section 17200* claim, defendant must argue separately against all three theories using the relevant standards. Defendant has failed to do this. Thus, plaintiffs are allowed to go forward with their *Section 17200* claim under the unfair and unlawful business practices theories. Defendant's motion to dismiss the *Section 17200* claim is **DENIED.**

Defendant also moves to dismiss the *Section 17000* claim. *Section 17000* ***HN12***[] is known as the *Unfair Practices Act*. The Unfair Practices Act ***HN13***[] condemns specific conduct. *Cel-Tech, 20 Cal. 4th at 183*. It proscribes specific conduct such as price discrimination, sales below cost, locality discrimination, secret rebates, and use of loss leader sales. *Uneedus v. California Shoppers, Inc., 86 Cal. App. 3d 932, 937, 150 Cal. Rptr. 596 (1978)*. The stated purpose of the Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition. *Id. at 940*. Essentially, the Act ***HN14***[] is an offshoot of ***antitrust law***. This order **[*9]** holds that plaintiffs fail to allege facts to support a *Section 17000* claim. *Section 17000* is not applicable here because plaintiffs do not allege that defendant engages in anti-competitive conduct. Rather, plaintiffs' main allegations in the complaint relate to the patent-infringement claim, and do not relate at all to the prohibited conduct of the Act as listed above. Defendant's motion to dismiss the *Section 17000* claim is **GRANTED.**

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss the second claim, *Section 17000*, is **GRANTED.** Defendant's motion to dismiss the third claim, *Section 17200*, is **DENIED.** Plaintiffs request leave to amend should their motion to dismiss be denied. Automatic leave will not be granted. Plaintiffs are hereby given until August 16th to file, if they choose, a detailed amendment and supporting memorandum and motion seeking leave to amend. The amendment and motion must fully set forth why a *Section 17000* **[*10]** claim is purposely pled.

The hearing is also hereby **VACATED.**

IT IS SO ORDERED.

Dated: August 6, 2004.

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Thales Avionics, Inc. v. Matsushita Avionics Sys. Corp

United States District Court for the Central District of California

August 6, 2004, Decided; August 6, 2004, Filed

Case No SACV 04-454-JVS(MLGx)

Reporter
2004 U.S. Dist. LEXIS 32433 *

Thales Avionics, Inc v Matsushita Avionics Systems Corp

Subsequent History: Later proceeding at *Thales Avionics Inc. v. Matsushita Avionics Sys. Corp., 2006 U.S. Dist. LEXIS 97119 (C.D. Cal., Mar. 8, 2006)*

Core Terms

allegations, costs, variable, Airlines, cause of action, anti trust law, fraudulent, pricing, sales, interstate, predatory, contends, leagues, argues, professional sports, sales below cost, monopolization, customers, bribery

Counsel: **[*1]** ATTORNEYS FOR PLAINTIFFS: Not Present.

ATTORNEYS FOR DEFENDANTS: Not Present.

Judges: HONORABLE JAMES V. SELNA, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES V. SELNA

Opinion

CIVIL MINUTES — GENERAL

PROCEEDINGS(In Chambers): Order Denying Defendant's motion to dismiss the third and fourth causes of action, Granting Motion to strike the first, second third and fourth causes of action and demand for restitution and disgorgement, Denying Motion for a more definite statement (F1d 6-7-04)

Minute Order re Defendants Motion to Dismiss Third and Fourth Causes of Action, Motion to Strike the First, Second, Third and Fourth Cause of Action and Demand for Restitution and Disgorgement and Motion for a More Definite Statement

I. Factual Background

Plaintiff Thales Avionics, Inc ("Thales") brings suit against Defendant Matsushita Avionics Systems Corporation ("MAS") alleging monopolization and attempted monopolization of the worldwide in-flight entertainment ("IFE") systems market by selling its IFE systems at prices below average variable costs and other conduct

The following factual description assumes, as the Court must, that all well-pled factual allegations are true

IFE systems consist of communications equipment and software **[*2]** applications that are installed on airplanes for the purpose of providing passengers with audio and video entertainment IFE systems are generally installed on planes flown on longer routes, typically twin-aisle planes, which are also referred to as "widebodies" IFE systems may also be installed in single-aisle or "narrowbody" planes with greater than 120 seats[1]

For the purposes of analyzing the viability of Thales' antitrust claims, the Court also accepts Thales' market definition the worldwide sale of IFE systems

The IFE systems market is comprised of three major manufacturers MAS, Thales, and Rockwell Collins ("Rockwell") MAS is the leading manufacturer Based on data from 2000 and 2002, Thales contends that there has been a dramatic shift in market shares between 2000 and 2003

Competitor	**2000**	**2002**
MAS	43%	62%
Rockwell	45%	33%
Thales	9%	4%
Others		<5%

MAS's increase in share is the result of capturing in excess of 90% of new sales for future **[*3]** shipments in 2003

The customers in the relevant market are primarily major airlines that fly long routes with widebody aircraft Approximately one-third of the IFE systems business is from United States airlines

Thales alleges that the drastic change in the competitive landscape, in particular the simultaneous rise of MAS and fall of both Thales and Rockwell, was the result of MAS's predatory pricing practices Thales contends that MAS's conduct will result in monopolization of the IFE systems market and allow for recoupment of the costs MAS incurred during the execution of its predatory strategy Thales alleges that MAS's pricing strategies violate both federal and state ***antitrust law*** and more specifically, violate Sherman Act *§ 2*, *15 U S C § 2*, as well as the Cartwright Act's prohibition on predatory practices, *Cal Bus & Prof Code § 17043* Thales seeks injunctive relief[2]

II. MAS's Alleged Predatory Conduct

Thales contends that its own average variable costs **[*4]** are approximately 25% lower than MAS's on the relevant IFE systems because MAS use a more costly architecture than the standardized Ethernet system employed by Thales Further, Thales alleges that MAS sold numerous IFE systems below its average variable costs, including sales to Japan Airlines, Thai Airways, Alitalia, and Emirates Complaint, ¶¶ 26-27 Thales alleges that MAS will successfully recoup the costs of its predatory pricing strategy by becoming the sole supplier of IFE systems

In terms of non-pricing anticompetitive conduct, Thales alleges that MAS representatives have made false representations regarding Thales' product to several customers Complaint, ¶ 28

III. Standard of Review

[1] Thales' Complaint suggests that installation in narrowbody aircraft is increasingly common as passengers have developed greater expectations for in-flight entertainment About 79% of new sales opportunities in narrowbody airplanes are with United States based airlines

[2] MAS also moves to strike Thales' request for restitution and disgorgement included in its Complaint Thales concedes to the granting of MAS's motion on these grounds as it seeks only injunctive relief Thales' prayer for restitution and disgorgement is stricken from the Complaint

Federal Rule of Civil Procedure 8(a) provides that a complaint shall contain "a short and plain statement" of the pleader's claim showing that the pleader is entitled to relief A motion to dismiss should not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief *Conley v Gibson, 355 U S 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* In resolving a *Rule 12(b)(6)* motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pled factual allegations as true *Cahill v Liberty Mutual Ins Co, 80 F 3d 336, 337-38 (9th Cir 1996)*

IV. Thales' State Law Claims

A Jurisdiction **[*5]**

MAS first argues that Thales' California state law claims, Counts III and IV, must be dismissed for failure to state a claim because the Complaint is devoid of allegations that MAS's conduct occurred within the state or that Thales has suffered injury within the state Motion, at 2

"California law embodies a presumption against the extraterritorial application of its statutes" *Churchill Village, LLC v General Elec Co, 169 F. Supp. 2d 1119, 1126 (N D Cal 20000)*, aff'd, *361 F 3d 566 (9th Cir 2004)* California's Unfair Competition Law ("UCL") does not allow non-California residents to bring claims where the alleged misconduct or injuries did not occur in the state *Norwest Mortgage, Inc v Superior Court, 72 Cal App 4th 214, 222, 85 Cal. Rptr. 2d 18 (1999)*

MAS urges the Court to dismiss the case because Thales has failed to allege that any misconduct in the form of sales below cost, misrepresentations to customers, or otherwise, took place in California However, the Complaint is not without reference to California's relation to the action

First, the Complaint alleges that Thales maintains its IFE systems office in Irvine, California Complaint, ¶ 3

Second, the Complaint alleges that MAS controls a significant market share in the IFE systems market and that MAS does business in California Complaint, ¶¶ 2, 4

Third, Thales specifically alleges that the MAS decision-making body responsible for price **[*6]** quotations to commercial airlines is located in California Id

While Thales has therefore clearly pled that actionable conduct has occurred within the state, Thales has not pled the existence of any actual injury within the state In other words, Thales has not alleged the existence of any California IFE systems buyers, below cost sales in California, or actual Injury occurring within the state Thus, the question is whether the UCL applies to in-state conduct causing only out of state injury

MAS argues that the present dispute is controlled by *Norwest, 72 Cal App 4th at 225* & n 13 Norwest merely held that California statutory claims could not reach entirely out of state conduct causing out of state injuries As discussed, Thales has alleged that some portion of the conduct causing the alleged injuries took place in California To the contrary, Norwest bolsters Thales' position Plaintiffs in Norwest brought a Section 17200 action alleging that Norwest's "Forced Placement Insurance" program constituted an unfair business practice Norwest held that Category II plaintiffs, California non-residents complaining of injuries caused by conduct occurring in California, could proceed with Section 17200 claims *Id*, see also *Diamond Multimedia Systems, Inc v Superior Court, 19 Cal. 4th 1036, 1058-59, 80 Cal. Rptr. 2d 828, 968 P.2d 539 (1999)* Accordingly, Thales' **[*7]** allegations are sufficient to survive MAS's motion to dismiss

MAS's motion to dismiss Counts III and IV is denied

B. Preemption

In the alternative to its jurisdictional argument, MAS also argues that Counts III and IV are preempted by the *Commerce Clause of the United States Constitution* Motion, at 5

The *Commerce Clause* bars the exercise of state laws where the burden imposed on interstate commerce, and the ability of a national enterprise to function, outweighs any local benefits of applying state law See *Partee v San Diego Chargers Football Co, 34 Cal 3d 378, 383, 194 Cal. Rptr. 367, 668 P.2d 674 (1983)*, *Hebert v Los Angeles Raiders, Ltd, 23 Cal. App. 4th 414, 423, 29 Cal. Rptr. 2d 540 (1991)* MAS argues that application of California's antitrust laws to MAS's pricing would impose an impermissible burden on interstate commerce and is therefore preempted by the *Commerce Clause*

The crux of MAS's argument is that application of California's predatory pricing statutes to MAS's conduct in a worldwide market will result in conflicting rulings identifying the minimum price for MAS's IFE sales that will not expose MAS to antitrust hability The Court is not convinced

MAS appeals to language in a passage from *Flood v Kuhn, 443 F 2d 264 (2d Ctr 1971)*, aff'd, *407 U S 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1971)*, holding that state antitrust laws are not applicable to baseball because of the nature of that particular enterprise

> "[w]here the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply **[*8]** with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce" *Id,*

Partee, 34 Cal 3d at 383 (applying the logic of Flood to the player-team-league relationships in the National Football League) Other cases considering the application of state ***antitrust law*** to professional sports leagues have applied the reasoning in Flood and similarly held *Flood, 443 F.2d at 267* (collecting cases)

MAS is not a professional sports league Rather, MAS is a business conducting a great deal of interstate commerce in a worldwide market Unlike professional sports leagues, entitles such as MAS are not uncommon, and do not depend on a nationally uniform set of rules for operation Outside of the world of professional sports leagues, courts have consistently ruled that the application of state antitrust laws is not preempted by the *Commerce Clause*, nor federal ***antitrust law*** See eg, *William Inglis & Sons Baking Co v ITT Continental Baking Co, 668 F.2d 1014, 1048-50 (9th Cir 1982)*, *Knevelbaard Dairies v Kraft Foods, Inc, 232 F 3d 979, 993-94 (9th Cir 2000)* In Knevelbaard, for example, the Ninth Circuit ruled that despite potential interstate effects, California could apply its antitrust and unfair competition statutes **[*9]** consistent with the *Commerce Clause*

Here, MAS has not shown the nature of its own business is, like the professional sports leagues, dependent on the uniform application of antitrust laws Further, it appears that California has a strong interest in enforcing its own antitrust laws *City of Oakland v Oakland Raiders, 174 Cal App 3d 414, 421-22, 220 Cal. Rptr. 153 (1985)*

Accordingly, Thales' state antitrust claims are not preempted by the *Commerce Clause*

C. Pleading MAS's Costs

MAS also challenges the sufficiency of Thales' *Section 17043* claim on the ground that Thales has failed to include allegations of MAS's cost of doing business Motion, at 13 MAS contends that a *Section 17043* plaintiff must plead not only the defendant's sale price, but also the defendant's cost of doing business MAS appeals to both *Independent Journal Newspapers v United Western Newspapers, Inc, 15 Cal App 3d 583, 587, 93 Cal. Rptr. 299 (1971)*, and *G H I I v MTS, Inc, 147 Cal App 3d 256, 275, 195 Cal. Rptr. 211 (1983)*, in support of this proposition

Both are readily distinguishable from the case at bar for several reasons Most importantly, neither *Independent Journal* nor *G H I I* applied the liberal notice pleading standards embodied in the Federal Rules Moreover, Independent Journal held only that a newspaper publisher selling weekly and daily newspapers, with the knowledge and easy access to the cost figure for advertising space in newspapers generally, failing to include such information in support of its below cost sales claim does not **[*10]** state a cause of action *Independent Journal Newspapers, 15 Cal App 3d at 587* G H I I held that similar allegations to those in Independent Journal were sufficient to state a cause of action because the plaintiff was in a "demonstrably poorer position than the plaintiffs in Independent Journal to speculate on a 'supposed' cost figure " *G H I I, 147 Cal App 3d at 276*

MAS contends that Thales' *Section 17043* claim fails because it does not include allegations regarding MAS's fully allocated or average total costs MAS argues that because Thales' Complaint notices that there are only three major manufacturers, Thales, MAS and Rockwell Collins, Thales should be privy to a competitors' cost information and therefore is not in the "demonstrably poorer position" to speculate that Justified the reversal of the dismissal of plaintiffs *Section 17043* claim in G H I I However, this argument is misplaced The informational advantage noted by Independent Journal was not a function of the number of competitors, but its own experience in publishing weekly newspapers similar to the defendants which would provide the basis for knowledge of a cost figure for advertising There is nothing to suggest that Thales was in such a position To the contrary, Thales' Complaint makes Thales' belief that it uses a relatively **[*11]** cheaper architecture than MAS Complaint, ¶ 24

Therefore, even under California's pleading standards, one might synthesize a rule suggesting that those privy to information that would support an educated guess as to the defendant's fully allocated costs must include that information in their pleadings in order to state a cause of action Even under that rule, however, Thales has satisfied its burden Thales' Complaint avers that MAS's average variable costs are approximately 25% higher than Thales on competing IFE systems Complaint, ¶ 24 Thales also details a number of MAS sales, and the percentage by which those sales undercut Thales' average variable costs For example, Thales alleges that Japan Airlines purchased an MAS system for $2 14 million per system, which was 15% lower than Thales' average variable cost Complaint, ¶ 26(a) From these figures, it is not difficult to derive that Thales' average variable costs on the relevant IFE system are $2 52 million and, assuming that MAS's average variable costs are 25% higher, MAS's average variable costs would be $3 15 million Fully allocated or average total cost is by definition equal or greater to average variable costs It follows that **[*12]** if MAS's bids undercut their own average variable costs, the sales also were below average total costs While analyzing the magnitude by which the alleged price undercut average variable cost may require a few elementary calculations, it cannot be said that the pleading is factually deficient even under California's more stringent pleading requirements

Accordingly, the Court finds that Thales has adequately pled its *Section 17043* claim

V. Federal *Rule 9(b)*

MAS also argues that each of Thales' four counts include allegations that fall under the ambit of *Federal Rule of civil Procedure 9(b)*'s specificity requirements Motion, at 8 MAS seeks to strike these allegations from the Complaint pursuant to *Federal Rule of civil Procedure 12(f)*.

MAS points to Thales' allegations of fraudulent conduct in the Complaint

> "MAS pays high commission rates with the knowledge, intention and direction that the agents will use a substantial portion of the money received from MAS to give valuable gifts and cash to government personnel, airline personnel and their relatives in exchange for the selection of the MAS Relevant IFE systems for purchase by the airline customers "

Complaint, ¶ 28 Thales also includes allegations that MAS sent an email message in a bid to Royal Brunei Airlines stating that the Thales **[*13]** TopSeries system had been removed from line fit offerability at Airbus, and that MAS also told another potential buyer, All Nippon Airways, that Royal Brunei was unsatisfied with Thales' product Complaint, ¶¶ 28(a), (b)

Rule 9(b) states in pertinent part

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularly "

There can be no doubt as to the applicability of *Rule 9(b)* to both the state and federal causes of action *Vess v Ciba-Geigy Corp, 317 F 3d 1097, 1104-05 (9th Cir 2003)* It is also clear that *Rule 9(b)* applies to "averments of fraud" in all civil cases in federal district court even when fraud is not an essential element of the claim Where a plaintiff alleges a unified course of fraudulent conduct as the basis of a claim, the claim is said to be "grounded in fraud" or to "sound in fraud " In such a case, the entire pleading must satisfy the requirements of *Rule 9(b)* Id, see also *In re Stac Elecs Sec Litig, 89 F.3d 1399, 1404-05 (9th Ctr 1996)* On the other hand, where a plaintiff does not allege a unified course of fraudulent conduct, but rather alleges both fraudulent and non-fraudulent conduct as the basis for the claim, *Rule 9(b)* requires application only to those averments describing the former type of conduct *Vess, 317 F 3d at 1104* The purpose of requiring all averments of fraud to satisfy *Rule 9(b)* is to protect **[*14]** a defendant from the potential damage such allegations may cause to its reputation and goodwill See *In re Stac Elecs Litig, 89 F.3d at 1405*

Thales has alleged both fraudulent and non-fraudulent conduct as the basis for its claim Thales' Complaint asserts monopolization and attempted monopolization claims primarily based on the theory that MAS's sales below costs increased MAS's market power, and a larger course of conduct including commercial bribery and disparagement The crux of Thales' Complaint is MAS's alleged below cost sales MAS's opposing contention—that the thrust of Thales' Complaint are attempts to defraud Airlines into purchasing MAS IFE systems through misinformation, gifts and cash (Motion, at 9)—is misleading The alleged below-cost pricing scheme is not itself fraudulent, nor can it be fairly said to be part of a unified course of fraudulent conduct *Rule 9(b)* does not govern these allegations

MAS contends that other portions of MAS's conduct nevertheless do fall within *Rule 9(b)* MAS points to allegations of commercial bribery and disparagement Whether or not the particular allegations of bribery and disparagement require pleading fraud with particularly in this instance depends primarily on whether or not those allegations are **[*15]** fraud-based, not upon whether or not Thales has asserted these allegations as independent causes of action

After receiving supplemental briefing from the parties on the issue of whether commercial bribery and kickbacks fall under Rule 9's requirements, the Court concludes that they do See *Allwaste, Inc v Hecht, 65 F 3d 1523 (9th Cir 1995)* Thales' averments in Paragraph 28 do not satisfy Rule 9 The persons making and receiving the payments are not adequately identified Accordingly, MAS's motion to strike the allegations of commercial bribery is granted with leave to replead within ten days

With respect to the product disparagement allegations, Thales has alleged that MAS induced sales by knowingly misleading potential buyers into the belief that other customers were not satisfied with Thales' product Under California law, the "indispensable elements of a fraud claim include a false representation, knowledge of its falsity, intent to defraud, Justifiable reliance, and damages " *Moore v Brewster, 96 F 3d 1240, 1245 (9th Cir 1996)* (quoting *Bank of the West v Valley Nat'l Bank of Ariz, 41 F.3d 471, 477 (9th Cir 1994)* (quoting *Hackethal v Nat'l Cas Co, 189 Cal App 3d 1102, 234 Cal. Rptr. 853 (1987))* This averment is fraud based and must satisfy Rule 9

Rule 9(b) requires averments of fraud to identify "the who, what, when, where and how" of the misconduct charged *Cooper v Pickett, 137 F 3d 616, 627 (9th Cir 1997)* MAS objects to the allegations of misrepresentations to Royal Brunei Airlines and All Nippon Airways **[*16]** because Thales fails to allege the time, place and identities of the parties involved *Rule 9(b)* does not go so far as to require Thales to identify the name of each employee of Royal Brunet Airlines, All Nippon Airways, and MAS The Court finds the allegations sufficient in terms of identifying the parties involved However, the allegations do not completely satisfy the heightened pleading standards of *Rule 9(b)* because they fall to specify the time and place of the misrepresentations Accordingly, the Court partially grants MAS's motion to strike paragraphs 28(a) and 28(b) of the Complaint with leave ten days leave to replead

VI. Conclusion

MAS's motion to dismiss is denied

MAS's motion to strike is granted with leave to replead

MAS's motion for a more definite statement is dented in light of the grant to replead

Z-TEL Communs., Inc. v. SBC Communs., Inc.

United States District Court for the Eastern District of Texas, Texarkana Division

August 6, 2004, Decided ; August 6, 2004, Filed

5:03-CV-229

Reporter

331 F. Supp. 2d 513 *; 2004 U.S. Dist. LEXIS 15871 **; 2004-2 Trade Cas. (CCH) P74,534

Z-TEL COMMUNICATIONS, INC., Plaintiff v. SBC COMMUNICATIONS, INC, AMERITECH CORPORATION, PACIFIC TELESIS GROUP, ILLINOIS BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY INCORPORATED, MICHIGAN BELL TELEPHONE COMPANY, NEVADA BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, PACIFIC BELL TELEPHONE COMPANY, WISCONSIN BELL, INC., and SOUTHWESTERN BELL TELEPHONE, L.P., Defendants.

Subsequent History: Motion denied by *Z-TEL Communs., Inc. v. SBC Communs., Inc., 331 F. Supp. 2d 567, 2004 U.S. Dist. LEXIS 16649 (E.D. Tex., Aug. 6, 2004)*

Disposition: Defendant's motion to dismiss granted in part and denied in part.

Core Terms

customers, allegations, carrier, Telecommunications, monopolization, network, facilities, exclusionary, subsidiary, advertising, billing, enhanced, antitrust, motion to dismiss, defense motion, interconnection, damages, competitors, monopoly power, local service, monopolist, consumers, monopoly, anti trust law, reasons, rivals, cases, fails, reads, leveraging

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must take the well-pleaded factual allegations of the complaint as true. All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor. Given the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted. However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Regulated Practices, Private Actions**

A plaintiff need not plead its antitrust claims with particularity. An antitrust plaintiff need not include the particulars of its claim to survive a motion to dismiss.

Antitrust & Trade Law > Regulated Industries > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Antitrust & Trade Law, Regulated Industries**

Fed. R. Civ. P. 8(a), requiring a plaintiff to provide a short and plain statement of its claim showing that it is entitled to relief, applies with equal force in antitrust cases.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN4[] **Regulated Practices, Private Actions**

In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN5[] **Communications, Telecommunications Act**

To further its local-competition goal, the Telecommunications Act of 1996 imposes duties on incumbent local exchange carriers (ILECs) to provide access to their facilities and equipment to competing carriers. *47 U.S.C.S. § 251*. More particularly, in *§ 251(a)* and *(b)*, the 1996 Act imposes on every telecommunications carrier an affirmative duty to interconnect with other carriers, to follow stated rules regarding resale, and to provide nondiscriminatory access to telephone numbers and operator services, telephone poles, ducts, conduits, and rights-of-way. *§ 251(a)*, *(b)*. Under *§ 251(c)*, the ILEC bears additional duties, including the duty to negotiate interconnection agreements with any new carrier so requesting, to provide access to its network elements on an unbundled basis, to offer its retail telecommunications services for resale at wholesale rates, and to provide for collocation. *§ 251(c)*.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN6[] **Communications, Telecommunications Act**

47 U.S.C.S. § 252 governs negotiation and arbitration of interconnection agreements. Agreements voluntarily made may be entered into without regard to the specific duties imposed by *47 U.S.C.S. § 251(b)* and *(c)*. *47 U.S.C.S. § 252* identifies the procedure for agreements reached through mandatory arbitration, which are not exempted from the requirements outlined in *47 U.S.C.S. § 251*. In short, *47 U.S.C.S. §§ 251* and *252* of the Telecommunications Act of 1996 command incumbent local exchange carriers to interconnect with and assist new would-be competitors--obligations that telecommunications carriers did not previously have and would not have had under a free-market regime.

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > General Overview

HN7[] **Communications, Telecommunications Act**

In the Telecommunications Act of 1996, Congress required network sharing with rivals.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN8[] Monopolies & Monopolization, Actual Monopolization

A monopolization claim has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is understood as the power to control prices or exclude competition. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Monopolies & Monopolization, Attempts to Monopolize

The first step in any action brought under *15 U.S.C.S. § 2* of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] Regulated Practices, Market Definition

In ascertaining the relevant product market for purposes of a *15 U.S.C.S. § 2* claim, courts consider the extent to which the seller's product is "interchangeable in use" and the degree of cross-elasticity of demand between the product itself and substitutes for it.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] Relevant Market, Geographic Market Definition

For purposes of a *15 U.S.C.S. § 2* claim, a geographic market is defined as an "area of effective competition." This is the locale in which consumers of a product or service can turn to for alternative sources of supply.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] Monopolies & Monopolization, Actual Monopolization

There are two ways to establish the first element of a monopolization claim, that is, that the defendant holds monopoly power. The first is by presenting direct evidence showing the exercise of actual control over prices or the actual exclusion of competitors. The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] Actual Monopolization, Anticompetitive & Predatory Practices

Modern monopolization litigation has focused on four types of conduct. The first genre concerns predatory pricing. The second genre concerns product innovation. Deliberate efforts to create incompatibility with a rival's products without offering performance enhancements or cost reductions for the monopolist's products might be actionable. The third genre concerns refusals to deal, including denials of access to essential facilities. The fourth genre concerns monopoly leveraging. Power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

Exclusionary conduct is conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. Generally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that--examined without reference to its effects on competitors--is economically irrational. When there is no other possible explanation for an action, there is a strong inference that it was taken for the purpose of harming competitors rather than otherwise advancing the monopolist's business.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN15[] Monopolies & Monopolization, Actual Monopolization

In a Sherman Act, *15 U.S.C.S. § 2*, case, only a thorough analysis of each fact situation will reveal whether a monopolist's conduct is unreasonably anti-competitive and thus unlawful. Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. The United States Supreme Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts" disclosed by the record.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN16[] Actual Monopolization, Anticompetitive & Predatory Practices

"Anticompetitive conduct" can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN17[] Relevant Market, Geographic Market Definition

For purposes of a monopolization claim, where products are sold nationwide and transportation costs are insignificant, courts frequently define the geographic market as the entire nation. Although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN18[] Regulated Industries, Communications

See Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN19[] Regulated Industries, Communications

The Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, is an antitrust-specific saving clause providing that nothing in the Act or the amendments made by the Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. 110 Stat. 143, *47 U.S.C.S. § 152* note. This bars a finding of implied immunity. The saving clause preserves those claims that satisfy established antitrust standards. But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act modify, impair, or supersede the applicability of the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

HN20[] **Communications, Sherman Act**

Trinko does not admit to the proposition that the Telecommunications Act of 1996 displaces the Sherman Act, even when the two are covering precisely the same field.

Antitrust & Trade Law > Regulated Industries > Communications

HN21[] **Regulated Industries, Communications**

If an antitrust plaintiff's contention of voluntary (i.e., pre-statutory compulsion) telecommunications network sharing is substantiated, a viable cause of action may proceed in harmony with Trinko.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Regulated Industries > General Overview

HN22[] **Regulated Industries, Communications**

As a legal matter, Trinko instructs that antitrust liability is live and well in the context of regulated telecommunications.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The refusal to deal legal theory is hardly novel. The basic rule is that in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN24[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Essential facilities is not a novel legal theory. The essential facilities doctrine has a long and respected history as part of U.S. ***antitrust law***. Essential facilities is a species of refusal to deal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN25[] Actual Monopolization, Anticompetitive & Predatory Practices

The United States Supreme Court has acknowledged the "difficulty" manifest in its exclusionary conduct doctrine. The Court has stated that in part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur. The Court and other courts have been careful to avoid constructions of *15 U.S.C.S. § 2* which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by *15 U.S.C.S. § 1*, which inherently is fraught with anticompetitive risk.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN26[] Sherman Act, Claims

In Aspen Skiing, the United States Supreme Court defines exclusionary conduct as that which (1) tends to impair the opportunities of rivals, but also (2) either does not further meritorious competition or does so in an unnecessarily restrictive way. In Eastman Kodak Co., the Supreme Court articulates a somewhat different formulation of exclusionary conduct. The second element of a *15 U.S.C.S. § 2* claim is the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN27[] Actual Monopolization, Anticompetitive & Predatory Practices

A genre of formulations of exclusionary conduct stresses that a firm does not engage in monopolization if its conduct is motivated by "valid business reasons," a "normal business purpose," or "legitimate competitive reasons." It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN28[] Actual Monopolization, Anticompetitive & Predatory Practices

"Exclusionary" conduct is conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. Exclusionary comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way. To determine whether conduct is exclusionary, a court looks to the proffered business justification for the act.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN29[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier. The United States Court of Appeals for the Fifth Circuit has concluded that advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent. The court has qualified this statement: without evidence of how advertising can act as a barrier to a plaintiff's participation in an industry, the court cannot conclude that the plaintiff is likely to succeed on this theory of predation.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Inferences & Presumptions > General Overview

HN30[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was de minimis. In its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light possible. Advertising that emphasizes a product's strengths and minimizes its weaknesses does not, at least unless it amounts to deception, constitute anticompetitive conduct violative of *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Evidence > Inferences & Presumptions > General Overview

HN31[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the Ninth Circuit has adopted a de minimus presumption concerning a monopolization claim based on misleading advertising and has laid out a six-part test that a plaintiff must satisfy to rebut the presumption: the statements at issue must be (1) clearly false; (2) clearly material; (3) clearly likely to induce unreasonable reliance; (4) made to unsophisticated parties; (5) continued for long periods; and (6) not readily cured by rivals. The Seventh Circuit is clear that all of these factors must be met for the case to survive summary judgment. The United States Court of Appeals for the Second Circuit has discussed this test favorably, but it is unclear whether the Second Circuit thinks each requirement is mandatory.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Inferences & Presumptions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN32[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the Sixth Circuit has noted that to survive summary judgment on the second prong of a monopolization claim premised primarily on allegedly false speech or advertising, the plaintiff is required to rebut a presumption that the impact on competition was de minimis, by showing two additional facts: (1) the advertising was clearly false, and (2) it would be difficult or costly for the plaintiff to counter the false advertising.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN33[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Misrepresentations and organized deception by a dominant firm may have *15 U.S.C.S. § 2* implications when used against a nascent firm just as it is entering the market. Such a firm has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively. Of course, even honest advertising by a dominant firm can deter new entrants, but honest advertising is virtually always considered as competition on the merits.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN34[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Advertising creating barriers to entry in a market constitutes exclusionary conduct.

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

HN35[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss, the court is required to view all allegations in the light most favorable to the nonmovant.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN36[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Noerr-Pennington immunity does not stem solely from the *First Amendment*; rather, it is inextricably associated with interpretations of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN37[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr-Pennington doctrine confers immunity to private individuals seeking anticompetitive action from the government.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Governments > Local Governments > Employees & Officials

HN38[] Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN39[] Actual Monopolization, Anticompetitive & Predatory Practices

Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition.

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN40[] Introducing Competition, Duties of Incumbent Carriers & Resellers

There is no doubt that under *47 U.S.C.S. § 251(c)* of the Telecommunications Act of 1996, the incumbent local exchange carrier bears, inter alia, the duty to negotiate interconnection agreements with any new carrier so requesting, to provide access to its network elements on an unbundled basis, to offer its retail telecommunications services for resale at wholesale rates, and to provide for collocation.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

HN41[] Regulated Industries, Communications

The simple fact that one has duties under the Telecommunications Act of 1996 does not confer a grant of antitrust immunity relating thereto.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN42[] Actual Monopolization, Anticompetitive & Predatory Practices

Reputation is a very real capital asset to a business firm. Reputation is a basis for inducing others to engage in market or nonmarket transactions with a business. It cannot be said that, as a matter of law, a plaintiff's allegation that a defendant has harmed the plaintiff's reputation in the marketplace fails to come within the ambit of exclusionary conduct.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN43[] Regulated Practices, Private Actions

Courts should not tightly compartmentalize the varied factual components of an antitrust case.

Evidence > Admissibility > Procedural Matters > General Overview

HN44[] Admissibility, Procedural Matters

In the context of the adjudication of claims of insufficient evidence, aggregation is proper when a violation requires that a certain threshold be met and no claim standing alone is sufficient to meet the threshold. Aggregation is improper when cardinality is lacking or a plaintiff fails to prove an element essential to every claim.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN45[] Actual Monopolization, Anticompetitive & Predatory Practices

In a monopolization case conduct must always be analyzed "as a whole." A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increased plausibility to the claim. For example, a monopolist might accidentally file a single baseless infringement suit, but a pattern of such suits indicates willfulness.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN46[] Monopolies & Monopolization, Attempts to Monopolize

The basic rule is that in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN47[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The baseline rule regarding individual refusals to deal is that present law leaves the individual firm free to refuse to deal with others, unless the refusal is intended to support another illegal restraint or constitutes an attempt to monopolize.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Jury Trials

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN48[] **Actual Monopolization, Anticompetitive & Predatory Practices**

No general nor absolute duty is imposed on a monopolist to deal with or cooperate with actual or would-be competitors; any of its actions may be condemned if the jury finds that the monopolist "willfully" acquired, maintained, or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. Such means or purposes are contrasted with "valid" or "legitimate business reasons." The United States Supreme Court's logic is apparently that legitimate business reasons prevent the characterization of a defendant's behavior or purpose as anticompetitive or exclusionary.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN49[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Aspen Skiing is at or near the outer boundary of *15 U.S.C.S. § 2* liability. The bottom line is that criticism notwithstanding, Aspen Skiing's holding about unilateral refusals to deal is good law.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN50[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggests a willingness to forsake short-term profits to achieve an anticompetitive end.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN51[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The exception in Aspen Skiing concerning unilateral refusals to deal is a narrow one.

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN52[] **Motion Practice, Content & Form**

It is a basic tenet of civil procedure that reply briefing may only respond to the allegations raised in the nonmovant's response. Affidavits may appropriately be produced with a reply brief when they respond to new issues which have arisen during briefing. A defendant certainly cannot raise an argument for the first time on a response to notice of supplemental briefing. To hold otherwise would countenance litigation by ambush.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Burdens of Proof > General Overview

HN53[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An antitrust plaintiff bears a heavy doctrinal burden to capture Aspen Skiing's narrow exception.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN54[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Essential facilities refers to a particular embodiment of the refusal to deal legal theory. The logical foundation of the refusals to deal legal concept applies with persuasive force to the essential facilities concept. The so-called "essential facility" doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman Act, 15 U.S.C.S. § 2, liability.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN55[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The essential facilities doctrine protects a competitor from having to enter an additional market with large capital requirements in order to compete. The core concern of the doctrine is that a monopolist possess a resource that is "essential" in some sense for the business of someone else, but that the monopolist refuses to share. By controlling the essential facility, a monopolist can potentially extend its monopoly power from one stage of production to another, and from one market to another.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN56[] **Actual Monopolization, Anticompetitive & Predatory Practices**

On at least three occasions, the United States Supreme Court has declined to recognize the essential facilities theory. The absence of Supreme Court recognition notwithstanding, every federal circuit court has interpreted this general monopolization standard to impose an antitrust duty to deal with rivals when sharing is feasible and a monopolist has developed a product that is so superior that it is "essential" for rivals to compete and cannot practicably be duplicated.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN57[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An approach to the problem of a monopolist's refusal to deal is the so-called "bottleneck" theory. Under this approach, a monopolist who controls a facility or resource that is essential to competitive viability in the marketplace must grant access to it on reasonable terms to its competitors.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN58[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To prevail on an essential facilities claim a plaintiff must show: (1) the defendant is a monopolist; (2) the facility is essential; (3) the defendant has the type of control over the facility that is forbidden by the Sherman Act; (4) duplication of the facility is unreasonable or impractical; (5) the defendant denied the plaintiff use of the facility; and (6) providing access to the plaintiff was feasible.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN59[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The indispensable requirement for invoking the essential facilities doctrine is the unavailability of access to the "essential facilities"; where access exists the doctrine serves no purpose. Thus, it is said that essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN60[] **Regulated Industries, Communications**

The Telecommunications Act of 1996's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN61[] **Attempts to Monopolize, Elements**

To demonstrate attempted monopolization, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power. An attempted monopolization claim necessarily involves conduct which has not yet succeeded; otherwise, the plaintiff would bring an actual monopolization claim. Attempted monopolization under *15 U.S.C.S. § 2* is usually defined as an unsuccessful attempt to achieve monopolization.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Governments > Courts > Judicial Precedent

HN62[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States District Court for the Eastern District of Texas, Texarkana Division, does not agree with the assertion that a monopoly leveraging claim is inconsistent with United States Supreme Court precedent under *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN63[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A "tying" arrangement is one in which a seller of a product or service refuses to sell a product desired by a buyer unless the buyer also agrees to purchase a second product which is not desired. The desired product is the "tying product," and the second product is the "tied product."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN64[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement exists when a seller refuses to sell one product, "the tying product," unless the buyer also purchases a second product, "the tied product."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN65[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A plaintiff must establish each of the following five elements for an illegal "tying" arrangement to exist: (1) there were two separate and distinct products, as opposed to components of a single product; (2) the two products were tied together, or customers were coerced into buying the tied product; (3) the seller possessed substantial economic power over the tying product; (4) the tie has an anticompetitive effect on the tied market; and (5) the tie affected more than an insubstantial volume of commerce.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN66[] Tying Arrangements, Sherman Act Violations

Tie-ins may be illegal under *15 U.S.C.S. § 1* of the Sherman Act. The United States District Court for the Eastern District of Texas, Texarkana Division, declines to read Trinko so as to lessen antitrust liability in contexts other than those addressed in that opinion.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN67[] Federal Acts, Telecommunications Act

41 U.S.C.S. § 252 of the Telecommunications Act of 1996 establishes a remedial scheme for competitive local exchange carriers that believe they have been wronged by an incumbent local exchange carrier's failure to comply with the terms of an interconnection agreement.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

HN68[] Reviewability, Exhaustion of Remedies

Federal courts must wait for regulatory agencies to perform their task.

Communications Law > Federal Acts > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN69[] Communications Law, Federal Acts

Under the Telecommunications Act of 1996, state regulatory bodies are charged with making the initial "determination" of any disputes between parties regarding the interpretation and enforcement of interconnection agreements. *47 U.S.C.S. § 252(e)(6)*. The Act provides that an interconnection agreement, reached either by negotiation or arbitration, must be submitted to the state commission for approval. This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN70[] **Reviewability, Jurisdiction & Venue**

See *47 U.S.C.S. § 252(e)(6)*.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Energy & Utilities Law > Utility Companies > General Overview

HN71[] **Federal Acts, Telecommunications Act**

State regulatory agencies have the principal role in determining claims that arise under the Telecommunications Act of 1996. The Federal Communications Commission plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Communications Law > Federal Acts > Telecommunications Act > Jurisdiction

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN72[] **Reviewability, Exhaustion of Remedies**

Parties must first bring their claims of violations of *47 U.S.C.S. § 251* to the state public services commission before a federal court has jurisdiction over the matter.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Contracts Law > Breach > General Overview

HN73[] **Federal Acts, Telecommunications Act**

A plaintiff cannot call a *47 U.S.C.S. § 252* violation by another name (i.e., breach of contract) and avoid the controlling legal standards.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN74[] **Telephone Services, Local Exchange Carriers**

47 U.S.C.S. § 251 describes the interconnection duties required of incumbent local exchange carriers.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

HN75[] Formal Adjudicatory Procedure, Hearings

The Federal Communication Commission (FCC) rules state that when a party makes the election under 47 C.F.R. § 1.722 to request that the FCC bifurcate liability and damage questions, the damages proceeding is separate from and subsequent to the liability complaint. It does not follow that the damages proceeding is to be heard in federal court. This point is made clear in § 1.722(i)(1)(i), (ii).

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

HN76[] Presiding Officers, Administrative Law Judges

See 47 C.F.R. § 1.722(i)(1).

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN77[] Federal Acts, Telecommunications Act

See 47 U.S.C.S. § 208.

Administrative Law > Judicial Review > Reviewability > General Overview

Communications Law > Federal Acts > Federal Communications Act > Jurisdiction

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Remedies > Injunctions

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN78[] Judicial Review, Reviewability

47 U.S.C.S. § 208(b)(3) references appeals under 47 U.S.C.S. § 402. Section 402 is entitled, "Judicial review of Commission's orders and decisions." The first sentence reads, "Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act." In other words, as the title of § 402 suggests, the rule envisages ordinary appeals. It is fairly obvious that an appeal is very different from a fresh action for damages in a district court.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Communications Law > ... > Orders & Hearings > Complaints & Charges > Procedural Matters

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN79[] **Reviewability, Jurisdiction & Venue**

The language of *47 U.S.C.S. § 207* is unambiguous: A complainant can file a complaint either with the Federal Communications Commission (FCC) or in federal district court, but not in both. *Section 207* draws no distinction between formal and informal complaints, and the fact that the FCC has decided to provide both formal and informal complaint proceedings does not alter the clear language of the statute. In the Fifth Circuit, regardless of whether a plaintiff filed a formal or informal complaint, *§ 207* is controlling.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN80[] **Reviewability, Jurisdiction & Venue**

47 C.F.R. § 1.722 does not envisage bifurcated damages/liability proceedings between the Federal Communications Commission and federal district courts.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > ... > Orders & Hearings > Complaints & Charges > Procedural Matters

HN81[] **Reviewability, Jurisdiction & Venue**

47 U.S.C.S. § 207 bars action in federal district court once an aggrieved party files a complaint with the Federal Communications Commission. This result obtains upon the filing of both formal and informal complaints.

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN82[] **Federal Acts, Federal Communications Act**

See *47 U.S.C.S. § 202*.

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

HN83[] **Federal Acts, Federal Communications Act**

No Federal Communications Commission (FCC) decision has been cited in which the FCC has altered its view that billing and collection services provided by local exchange carriers to unaffiliated long-distance providers fall outside the scope of Title II of the Communications Act. Billing and collection services are subject to Title II, but only as to a carrier's own billing and collections.

Communications Law > Federal Acts > Federal Communications Act > Tariffs

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN84[] **Federal Communications Act, Tariffs**

Although carrier billing and collection for a communication service that it offers individually or as a joint offering with other carriers is an incidental part of a communication service, carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act. A plaintiff's reliance on the existence, or lack thereof, of a contractual relationship carries no weight in assessing this fundamental holding.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN85[] **Federal Acts, Telecommunications Act**

That a carrier's provision of services to itself can be used to judge service quality under *47 U.S.C.S. § 202(a)* is fairly undebatable. However, the focus on "quality" is only relevant as to the provision of service to other customers. Courts determining whether a carrier has unlawfully discriminated utilize a tripartite test analyzing: (1) whether the services are "like"; (2) if so, whether the carrier is offering the service to other customers at a "different" price or under "different" conditions than those offered to the petitioner; and (3) if such difference exists, whether that difference is unreasonable.

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN86[] **Federal Acts, Telecommunications Act**

The bottom line is that the focus of a *47 U.S.C.S. § 202* inquiry is on discrimination among customers.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Resale of Services

HN87[] **Federal Acts, Telecommunications Act**

See *47 U.S.C.S. § 222*.

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

HN88[] **Motions to Dismiss, Failure to State Claim**

Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN89[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

To state a claim under the RICO statute, *18 U.S.C.S. § 1962*, a plaintiff must allege (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Evidence > Admissibility > Circumstantial & Direct Evidence

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN90[] Admissibility, Circumstantial & Direct Evidence

Since intent to defraud is generally not susceptible to direct proof, it usually must be proven by circumstantial evidence.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN91[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9 requires that the circumstances constituting wire and mail fraud be stated with particularity. However, *Rule 9* should be read together with *Fed. R. Civ. P. 8*, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

HN92[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The "by reason of" language of RICO has been interpreted by the United States Supreme Court and to require a showing that the fraud was the "but for" cause and "proximate" cause of the injury. For a misrepresentation to cause an injury, there must be reliance. Knowledge of the truth defeats a claim of fraud because it eliminates the deceit as the "but for" cause of the damages.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN93[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *18 U.S.C.S. § 1962(b)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN94[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

In *18 U.S.C.S. § 1962(b)*, the words "acquire" and "maintain" are separated by the disjunctive word "or."

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN95[] Motions to Dismiss, Failure to State Claim

A complaint does not need to make a large number of allegations relating to the injury suffered. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss a court presumes that general allegations embrace those specific facts that are necessary to support the claim.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN96[] Pleadings, Rule Application & Interpretation

Relatively few allegations are needed to state an injury under RICO.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN97[] Racketeer Influenced & Corrupt Organizations Act, Elements

A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act, unless the enterprise's decision to operate though subsidiaries rather than divisions somehow facilitated its unlawful activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN98[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The doctrine of distinctiveness instructs a court to be hesitant to cut off RICO plaintiffs before they have an opportunity to adduce "enterprise" evidence.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Common Carriers

Communications Law > Federal Acts > Federal Communications Act > Tariffs

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > Public Utilities & Telecommunications Carriers

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > Federal Acts > Telecommunications Act > Tariffs

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > ... > Orders & Hearings > Complaints & Charges > Rates

Communications Law > ... > Telephone Services > Local Exchange Carriers > Tariffs

HN99[] Filed Rate Doctrine, Common Carriers

47 U.S.C.S. § 203(a) of the Telecommunications Act of 1996 requires local exchange carriers to file with the Federal Communications Commission (FCC) tariffs showing all charges and showing the classifications, practices, and regulations affecting such charges. Under the filed rate doctrine, once a carrier's rate is approved by the FCC, the terms of the federal tariff are considered to be "the law" and to therefore conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer. The filed rate doctrine precludes the plaintiff in an antitrust suit from claiming speculative damages involving a hypothetical lower rate that would have been charged in the absence of the anticompetitive conduct and the acceptability of those rates to the appropriate regulatory agency. However, the filed rate doctrine does not apply to cases not involving rates or rate setting. The filed rate doctrine is inapplicable in a breach of contract dispute.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

Contracts Law > ... > Sales of Goods > Breach, Excuse & Repudiation > General Overview

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

HN100[] **False Designation of Origin, Elements of False Designation of Origin**

For purposes of the Lanham Act, courts have noted that the terms "advertising" and "promotion" should be given their plain and ordinary meanings. The courts are also in agreement, however, that the Lanham Act's reach is broader than merely the classic advertising campaign. In order for representations to constitute "commercial advertising or promotion" under § 43(a)(1)(B) (*15 U.S.C.S. § 1125(a)(1)(B)*), they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with the plaintiff; (3) for the purpose of influencing consumers to buy the defendant's goods or services. While the representations need not be made in a "classical advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Advertising > General Overview

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Designation of Origin > Elements of False Designation of Origin

HN101[] **Consumer Protection, False Advertising**

The viability of any claim under § 43(a) (*15 U.S.C.S. § 1125(a)*) of the Lanham Act is a determination of whether the challenged statement is one of fact--actionable under § 43(a)--or one of general opinion--not actionable under § 43(a). Bald assertions of superiority or general statements of opinion cannot form the basis of Lanham Act liability. The statements at issue must be a specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact. A statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

Trademark Law > Likelihood of Confusion > Consumer Confusion > Surveys as Evidence of Confusion

Civil Procedure > Remedies > Damages > Monetary Damages

HN102[] **Consumer Protection, False Advertising**

Plaintiffs looking to recover monetary damages for false or misleading advertising that is not literally false must prove actual deception. Plaintiffs attempting to prove actual deception have to produce evidence of actual consumer reaction to the challenged advertising or surveys showing that a substantial number of consumers were actually misled by the advertisements. Actual consumer confusion often is demonstrated through the use of direct evidence, e.g., testimony from members of the buying public, as well as through circumstantial evidence, e.g., consumer surveys or consumer reaction tests.

Counsel: **[**1]** For Z-Tel Communications Inc, Plaintiff: Nicholas H Patton, Robert William Schroeder, III, Patton & Tidwell, Texarkana, TX. Layne Edwin Kruse, William Robert Pakalka, Fulbright & Jaworski, Houston, TX.

For SBC Communications Inc, Defendant: Damon Michael Young, John Michael Pickett, Young Pickett & Lee, Texarkana, TX. Aaron M Panner, Colin S Stretch, Eugene M Paige, Mark C Hansen, Michael K Kellogg, Neil M Gorsuch, Kellogg Huber Hansen Todd & Evans, Washington, DC. Martin E Grambow, SBC Telecommunications, William M. Schur, SBC Communications Inc - San Antonio, San Antonio, TX.

For Ameritech Corporation, Pacific Telesis Group, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, Nevada Bell Telephone Company, The Ohio Bell Telephone Companay, Pacific Bell Telephone Company, Wisconsin Bell Inc, Southwestern Bell Telephone LP, Defendants: Aaron M Panner, Colin S Stretch, Eugene M Paige, Mark C Hansen, Michael K Kellogg, Neil M Gorsuch, Kellogg Huber Hansen Todd & Evans, Washington, DC.

For Telution Inc, Movant: William David Carter, Sr, Mercy Carter Tidwell, L.L.P., Texarkana, TX.

Judges: DAVID FOLSOM, UNITED STATES **[**2]** DISTRICT JUDGE.

Opinion by: DAVID FOLSOM

Opinion

[*517] TABLE OF CONTENTS: ORDER ON DEFENDANTS' MOTION TO DISMISS

SECTION

ORDER

Before the Court is Defendants' Motion to Dismiss. (Doc. No. 7). A hearing was held on this motion April 8, 2004. After **[**3]** considering the motion and all subsequent briefing thereto, and the applicable law, the Court **grants in part and denies in part.**

Defendants' motion is **GRANTED** as to A) Plaintiffs Essential Facilities claim (Count No. 2), B) Breach of Contract claim (Count No. 11), and C) Telecommunications Act claims (Count Nos. 8, 9, and 10). Plaintiffs Essential Facilities Claim is **DISMISSED with prejudice.** By contrast, Plaintiff's "Breach of Contract" and Telecommunications Act claims are **DISMISSED without prejudice to repleading.**

The Court draws special attention to the Tying claim. (Count No. 5). As explained in Part XIII, E.4, *infra,* Defendants' motion is denied as to the Tying claim with a tying market defined as DSL service. Through its use of the disjunctive word "alternatively" Plaintiff's Complaint indicates that an alternative market for broadband internet access need not be considered. So as to avoid any confusion, Plaintiff's Tying claim involving a tying market for broadband internet access is **DISMISSED without prejudice to repleading.**

[*518] If Plaintiff chooses to replead any of the claims which are being dismissed without prejudice, it shall do so within **[**4]** thirty (30) days of the entry of this Order.

On all other claims, Defendants' motion is **DENIED.** Defendants urge dismissal of the state law claims if the federal causes of action fail. Not all of the federal causes of action having been found to fail, the state law claims receive no discussion in the Court's analysis.

I. INTRODUCTION

SBC Communications, Inc. (hereinafter referred to with its subsidiaries as "Defendant" or "Defendants") filed its Motion to Dismiss on November 24, 2003. (Doc. No. 7). Plaintiff filed its Response on January 6, 2004. (Doc. No. 22). On January 13, 2004, the Supreme Court handed down its decision in *Verizon Communications, Inc. v. Law Offices of Curtis V Trinko, LLP, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872 (2004)* (hereinafter, *"Trinko").* Justice Scalia delivered the Court's Opinion; Justice Stevens authored a concurrence joined by Justices Souter and Thomas. *Trinko* is a landmark case. In this order, the holding and implications of *Trinko* will be discussed at length. Briefly, the Court said that consumers could not make an antitrust claim against Verizon, the nation's largest regional bell operating company ("RBOC"), because **[**5]** it allegedly violated a requirement to share its network with rivals, as required by the 1996 Telecommunications Act. The linchpin of the *Trinko* opinion was the issue of anticompetitive intent.

There are obvious parallels between the issues the Supreme Court addressed in *Trinko* and the issues presented by the case at bar. Not surprisingly, in the briefs filed after the Supreme Court handed down its opinion, Defendants are emphatic that *Trinko* compels the conclusion that dismissal is warranted. Plaintiff is equally emphatic that *Trinko* bears only a facial similarity to the instant set of facts. At the April 8 hearing, arguments addressing the impact of *Trinko* occupied nearly all of the time allotted to the motion to dismiss.

II. 12(b)(6) STANDARD

HN1[] When considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must take the well-pleaded factual allegations of the complaint as true. "All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiffs favor." *Lewis v. Fresne, 252 F.3d 352, 357 (5th Cir. 2001)*. "Given the Federal Rules' **[**6]** simplified standard for pleading, [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)* (quotation omitted). Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted. *See* *Southern Christian Leadership Conference v. Supreme Court, 252 F.3d 781, 786 (5th Cir. 2001)*. "However, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" *Id.* (quoting *Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993))*.

HN2[] A plaintiff need not plead its antitrust claims with particularity. *See* *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 976 (7th Cir. 1995)* ("an antitrust plaintiff need not include 'the particulars of [its] claim' to survive a motion to dismiss") (citations omitted). *FED. R. CIV. P. 8(a)*, ***HN3***[] requiring plaintiff to provide a short and plain statement of **[**7]** its claim showing that it is entitled to relief, "applies with equal force in antitrust cases." *Delaware Health Care v. MCD Holding Co., 893 F. Supp. 1279, 1284 (D. Del. 1995)*. **[*519]** The Supreme Court has stated, ***HN4***[] "in antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)* (citations and internal quotations omitted).

III. THE TELECOMMUNICATIONS ACT OF 1996

HN5[] To further its local-competition goal, the Telecommunications Act imposes duties on incumbent local exchange carriers ("ILECs") to provide access to their facilities and equipment to competing carriers. *47 U.S.C. § 251*. More particularly, in *§ 251(a)and (b)*, the 1996 Act imposes on every telecommunications carrier an affirmative duty to interconnect with other carriers, to follow stated rules regarding resale, and to provide nondiscriminatory access to telephone numbers and operator services, telephone poles, ducts, conduits, and rights-of-way. **[**8]** *Id.* *§ 251(a), (b)*. Under *§ 251(c)*, the incumbent local exchange carrier bears additional duties, including the duty to negotiate interconnection agreements with any new carrier so requesting, to provide access to its network elements on an unbundled basis, to offer its retail telecommunications services for resale at wholesale rates, and to provide for collocation. *Id.* *§ 251(c)*.

Section 252 ***HN6***[] governs negotiation and arbitration of interconnection agreements. *Id.* *§ 252*. Agreements voluntarily made may be entered into without regard to the specific duties imposed by *§ 251(b)and (c)*. *Section 252* identifies the procedure for agreements reached through mandatory arbitration, which are not exempted from the requirements outlined in *§ 251*. In short, *§§ 251and 252* of the 1996 Act command incumbent local exchange carriers to interconnect with and assist new would-be competitors -- obligations that telecommunications carriers did not previously have and would not have had under a free-market regime.

IV. OVERVIEW OF PLAINTIFF'S COMPLAINT

A. Plaintiff's Business Model

1. Introduction

Founded in 1998, Z-TEL (hereinafter, "Plaintiff') **[**9]** is a Tampa, Florida based competitive local exchange carrier (hereinafter, "CLEC"). Plaintiffs business model has two main parts.

2. Basic Services

First, Plaintiff is engaged in the business of repackaging and reselling telecommunications services provided by incumbent local exchange carriers ("ILECs"), such as Defendant. To perform this aspect of its business, Plaintiff leases access to the essential portions of Defendant's network. The capital investment in this fixed asset is so immense that it is practically infeasible to duplicate. It naturally and logically follows that access to the network is essential if competition in the market for retail telecommunications services is to ensue. ***HN7***[] In the Telecommunications Act of 1996, Congress required network sharing with rivals.

At this point some terminology is in order. "Switches" at a central office route incoming calls based on the number dialed, taking the place of telephone operators who manually connected a caller with the recipient of the call. When a call is made to a customer not connected directly to the caller's central office, the call is transported from the caller's central office to the intended recipient's central **[**10]** office. "Transport" refers to the transmission facilities that make this connection possible, including hard assets such as telephone poles, conduits, ducts, and rights of way. **[*520]** If the central offices are not directly connected by transport, then the call is transported to one or more "tandem switches," which are generally contained in intermediary central offices that join central offices and allow a call to eventually be transported to the intended recipient's central office, where it is then connected to the recipient's local loop. "Operations support systems" are the services and equipment necessary to operate, maintain, and repair switches, transport facilities, and tandem switches.

3. Enhanced Services

Second, the seemingly more dynamic aspect of Plaintiff's business consists of its "enhanced services" such as voice mail that may be accessed over the Internet, "find me" call-forwarding, which directs calls to multiple numbers when the first number dialed is not answered, and a unified voice-recognition messaging service that allows subscribers, simply by using their voice, to make calls or retrieve contact information from the email program used on their personal computer. **[**11]** Plaintiff first explains that Defendant does not offer these services. Plaintiff further explains that Defendant is hostile to the provision of enhanced services by others because (unlike the basic services described in Part TV, A.2, *supra)* enhanced services represent a salient marketplace opportunity to earn supra-competitive profits.

4. Baseline Complaint

As will be explained immediately below, Plaintiff cannot provide most of these enhanced services without access to Defendant's Advanced Intelligent Network ("AIN"). Plaintiff asserts that access is technologically feasible and can be provided without affecting Defendant's ability to serve its own customers.

B. Plaintiff's Baseline Complaint

Plaintiff's baseline complaint is that Defendant has denied Plaintiff (and other competitors) access to the AIN. "To compete in the enhanced services market, Z-TEL needs to interconnect its software databases and network with SBC's AIN facilities, including SBC's AIN and signaling databases." (Doc. No. 1, p. 16). In addition, Plaintiff briefly summarizes the following instances of allegedly wrongful conduct. Plaintiff maintains that Defendant has:

> 1) Completely **[**12]** denied access to and interconnection with essential network facilities that are required to provide customers enhanced services;

2) Completely denied access to and interconnection with essential network facilities that are required to provide customers basic local service;
3) Barred customers who use its DSL internet service from switching to Plaintiff or any other competitor;
4) Refused to allow its essential facilities to be used for the provision of local toll calls, despite express state and federal regulatory orders to do so, thereby requiring Plaintiff to purchase unnecessary additional facilities from long-distance carriers at a cost above that which is economically feasible;
5) Deliberately failed to provide timely information about customers who terminate their service with Plaintiff
6) Deliberately supplied false bills to Plaintiff for items it has not ordered or received, or at rates expressly rejected by state agencies;
7) Embarked on a malicious public campaign of disparagement, misrepresenting the products and services that Plaintiff and other competitors provide to the public; and

(Id, p. 3-4).

[*521] 8) Abused government processes. **[**13]**

(Id., p. 33).

V. MONOPOLIZATION: PREVALENT LEGAL STANDARDS

A. *Grinnell's* Two-Pronged Test

HN8[] A monopolization claim has two elements: 1) the possession of monopoly power in the relevant market; and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. "Monopoly power is understood as 'the power to control prices or exclude competition,'" *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc., 200 F.3d 307, 315 (5th Cir. 2000)* *(quoting United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*, *reh'g denied, 2000 U.S. App. LEXIS 4258 (5th Cir. 2000)*. "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Trinko, at 879*.

B. Product Markets and Geographic Markets

HN9[] The first step in any action brought under *§ 2 of the Sherman Act* **[**14]** is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power. *See, e.g., Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)*; *see also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268-69 (2d Cir. 1979)*.

HN10[] In ascertaining the relevant product market, courts consider the extent to which the seller's product is "interchangeable in use" and the degree of "cross-elasticity of demand between the product itself and substitutes for it." *Apani Southwest, Inc. v. Coca-Cola Enters., 300 F.3d 620, 626 (5th Cir. 2002)*; *see also C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1245 (5th Cir. 1985)* *(citing Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*.

HN11[] A geographic market is defined as an "area of effective competition." *Apani, 300 F.3d at 626* *(citing Jim Walter Corp. v. Federal Trade Com., 625 F.2d 676, 682 (5th Cir. 1980).* **[**15]** This is the locale in which consumers of a product or service can turn to for alternative sources of supply. *Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)*.

C. Two Ways of Demonstrating That Defendant Holds Monopoly Power

HN12[] There are two ways to establish the first element, that is, that the defendant holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Id. (citing Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979))*. The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996)*; *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)*.

D. Exclusionary Conduct Defined: An Overview

The indeterminate nature and logic of "exclusionary conduct" will be discussed at length in Part VIII, C., *infra.* In this section and the next, the Court offers only a brief overview. **[**16]** ***HN13***[] Modern monopolization litigation has focused on four types of conduct. The first genre concerns predatory **[*522]** pricing. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (noting the "general implausibility of predatory pricing"). The second genre concerns product innovation. *See Northeastern Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76 (2d. Cir. 1981)* (holding that deliberate efforts to create incompatibility with a rival's products without offering performance enhancements or cost reductions for the monopolist's products might be actionable). The third genre concerns refusals to deal, including denials of access to essential facilities. *See Trinko.* The fourth genre concerns monopoly leveraging. *See Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 479 n. 29, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'") *(quoting Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)).* **[**17]**

HN14[] Exclusionary conduct is conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. *Taylor Publ'g Co. v. Jostens Inc., 216 F.3d 465, 475 (5th Cir. 2000)*. In *Stearns Airport Equip. Co. v. FMC Corp.,* the Fifth Circuit further explained:

> Generally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that--examined without reference to its effects on competitors--is economically irrational. When there is no other possible explanation for an action, there is a strong inference that it was taken for the purpose of harming competitors rather than otherwise advancing the monopolist's business.

170 F.3d 518, 523 (5th Cir. 1999).

HN15[] In a *Sherman Act § 2* case, only a thorough analysis of each fact situation will reveal whether the monopolist's conduct is unreasonably anti-competitive and thus unlawful. *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 467, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* ("Legal presumptions that rest on formalistic **[**18]** distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts' disclosed by the record.").

E. Anticompetitive Conduct Takes Numerous Forms

HN16[] "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1087 (D.C. Cir. 1998)* (reversing in part the district court's dismissal of complaint and holding that radio station's claim that defendants made misrepresentations to advertisers and the government in order to protect its monopoly stated *§ 2 Sherman Act* claim). *See also Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 784 (6th Cir. 2002) (quoting Caribbean Broad. Sys.).*

VI. THE FIRST PRONG OF GRINNELL IS SATISFIED

A. Plaintiff's Monopolization Claim

Plaintiffs Monopolization claim (Count One) reads as follows:

> SBC has monopoly power in both the basic local and enhanced **[**19]** services markets in each relevant geographic market **[*523]** and in the entirety of the SBC Region. Among other things, SBC owns and controls the only ubiquitous physical local telecommunications and enhanced services network within the SBC Region.

(Doc. No. 1, p. 36, P97)

> SBC has engaged in the anticompetitive conduct described above with the specific intent to maintain and extend its monopoly power and position in the basic local services and enhanced services markets. SBC's conduct has delayed and prevented Z-TEL's entry into these markets in one or more relevant geographic markets. SBC continues to dominate these markets through exclusionary conduct, to the detriment of consumers and competition.

(Id., P98).

B. Defendant Possesses Monopoly Power

1. Product Market

The relevant product market encompasses the exchange and sale of 1) basic local and 2) enhanced services telephony services.

2. Geographic Market

HN17[] Where products are sold nationwide and transportation costs are insignificant, courts frequently define the geographic market as the entire nation. *See Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)* **[**20]** ("Although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area."); *see also Apani Southwest, Inc. v. Coca-Cola Enters., 300 F.3d 620, 626 (5th Cir. 2002) (quoting Brown Shoe).* In the case at bar, the geographic market reaches the full scope of Defendant's service region. This service region includes many major population centers in the United States.

3. Defendant Offers No Resistance to Plaintiff's Allegation of Monopoly Power

Defendant's first argument in support of its motion to dismiss is captioned "Z-TEL Has Failed to Allege that Defendants Engaged in Exclusionary Conduct in Violation of *Section 2 of the Sherman Act*." (Doc. No. 7, p. 8). Since Defendant offers no resistance to Plaintiff's allegation of monopoly power, the Court finds the first element of *Grinnell* satisfied. The viability of Plaintiff's monopolization claim (Count One) therefore depends on the appropriate characterization of the allegedly anticompetitive conduct attributable to Defendant.

VII. THE INTERSECTION OF ANTITRUST LIABILITY AND TELECOMMUNICATIONS REGULATION: DEFENDANT'S MOST [21] SWEEPING ARGUMENT FOR DISMISSAL**

A. Defendant Attacks the Vitality of Antitrust Liability in This Area of Law

As an initial matter, the Court must address an issue at the intersection of antitrust liability and telecommunication regulation. Defendant relies on *Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176 (4th Cir. 2003)*, *pet'n for cert. denied by Cavalier Tel., LLC v. Verizon Va., Inc., 540 U.S. 1148, 157 L. Ed. 2d 1041, 124 S. Ct. 1144 (Jan. 20, 2004)* and *Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)* for the proposition that antitrust liability is highly circumspect in light of the regulatory framework enacted by Congress in the 1996 Telecommunications Act. (Doc. No. 7, p. 8-10). Defendant maintains that Plaintiffs allegations are "indistinguishable" from those found unavailing as a matter of law in these two cases. *Id. at 8*. In addition, on June 28, Defendant submitted a notice of supplemental authority **[*524]** (Doc. No. 155) bringing to the Court's attention a recent opinion from the Eleventh Circuit, *Covad Communications Co. v. Bellsouth Corp., 374 F.3d 1044, 2004 U.S. App. LEXIS 12861 (11th Cir. 2004).* **[**22]**

At the hearing, Plaintiff loudly resisted this argument by directing the Court to the 1996 Telecom Act's Savings Clause, Section 601(b)(1): **HN18**[] "Nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." *(See also* Doc. No. 22, p. 4).

B. Defendant's Argument

In its Motion to Dismiss, Defendant declares that all of Plaintiffs *§ 2* claims fail because Plaintiff fails to sufficiently allege exclusionary conduct.

> Allegations like those asserted by Z-TEL fail to state a claim under *Section 2* because the antitrust laws do not require firms, including lawful monopolists, to dismantle themselves for the benefit of competitors - which is exactly what Z-TEL demands.

(Doc. No. 7, p. 8).

On the opening page of its Reply, Defendant is emphatic, *"Trinko* definitely bars all of Z-TEL's antitrust claims related to disputes over access to defendants' local telephone networks." (Doc. No. 29, p. 1).

C. Plaintiff's Argument

In its Sur-Reply, Plaintiff explains:

> Of course, ***antitrust law*** has long recognized that a monopolist can violate 'established antitrust **[**23]** standards' in a variety of ways, including the refusal to deal and essential facilities doctrine that the plaintiff relied on in *Trinko.* But here Z-TEL has alleged numerous forms of exclusionary conduct, apart from these two doctrines.

(Doc. No. 37, p. 2).

Plaintiff directs the Court to Exhibit A of its Sur-Reply. Exhibit A is a summary comparison of the factual allegations at issue in *Trinko* and those facts alleged in the case at bar.

D. *Trinko* Addressed the Scope of its Holding

In *Trinko's* introductory paragraph, the Supreme Court explained, "In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under *§ 2 of the Sherman Act*, 26 Stat 209." *124 S. Ct. at 875*. In addition, the Court spoke at length about the antitrust Saving Clause:

> Section 601(b)(1) of the Telecommunications Act of 1996 (1996 Act), *Pub. L. No. 104-104, 110 Stat. 56*, **HN19**[] is an antitrust-specific saving clause providing that nothing in the Act or the amendments made by the Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust **[**24]** laws. 110 Stat. 143, *47 U.S.C.S. § 152*, note. This bars a finding of implied immunity. The saving clause preserves those claims that satisfy established antitrust standards. But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act modify, impair, or supersede the applicability of the antitrust laws.

Trinko, at 878 (citations omitted).

E. Defendant's Reliance on *Goldwasser* Is Misplaced

1. The First Section of *Goldwasser* Successfully Anticipated Arguments Found to be Availing in *Trinko*

In *Goldwasser,* a class action, the plaintiff consumers alleged that the defendant, **[*525]** a local telephone service provider, improperly used its monopoly power to engage in exclusionary practices which prevented competitors from entering the market. For analytical purposes, the Court will divide the structure of *Goldwasser* into two (2) sections. In the first part of the opinion, the Seventh Circuit held that, while the plaintiffs had standing to **[**25]** assert their antitrust claims, the plaintiffs failed to allege any wrongful conduct independent of defendant's alleged failure to comply with the requirements of the 1996 Act.

> Only if *Section 2* somehow incorporates the more particularized statutory duties the 1996 Act has imposed on ILECs like Ameritech would Ameritech's alleged failure to comply with the 1996 Act be, in itself, also an antitrust violation.

222 F.3d, at 396.

It is clear that in the first part of *Goldwasser,* the Seventh Circuit successfully anticipated the arguments which were adopted four years later by the Supreme Court in *Trinko.*

2. The Second Section of *Goldwasser* Is Dissonant With the Holding of *Trinko*

In the second part of *Goldwasser,* the Seventh Circuit was clear. "The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *222 F.3d 390, 401 (7th Cir. 2000)*. In *Trinko,* the Supreme Court held to the contrary. "The 1996 Act preserves claims that satisfy existing antitrust standards . . ." *Trinko, at 878*. Moreover, *Trinko* ***HN20***[] does **[**26]** not admit to the proposition that the 1996 Act displaces the *Sherman Act*, even when the two are covering precisely the same field. To the opposite, the principal holding of *Trinko* rests on the Supreme Court's conclusion that Verizon's conduct respecting network access did not usefully speak to its monopolistic aspirations.

> The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. **Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice.** The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing,* the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under *§ 251(c)(3)* tells us nothing about dreams of monopoly.

Trinko, at 879-880 (emphasis added) (citations omitted).

In the case at **[**27]** bar, Plaintiff seeks to show that Defendant voluntarily shared its network before the enactment of the 1996 Act. This argument will be more fully addressed in Part IX, D. 2., *infra.* For present purposes, the Court simply notes that, as a matter of logic, ***HN21***[] if an antitrust plaintiffs contention of voluntary (i.e., pre-statutory compulsion) network sharing is substantiated, a viable cause of action may proceed in harmony with *Trinko.* The second part of *Goldwasser* would preclude this possibility.

F. *Cavalier* is Distinguishable

1. *Cavalier* Anticipated Arguments Later Adopted in *Trinko*

In *Cavalier Tel., LLC v. Verizon Va., Inc., 330 F.3d 176 (4th Cir. 2003)*, the plaintiff, a competitive local exchange carrier, alleged that the defendant, an incumbent **[*526]** local exchange carrier, deliberately created problems in the implementation of the interconnection agreement to exclude the plaintiff as a competitor. *Id. at 179-181* (detailing seven major problematic areas alleged by the plaintiff). The Fourth Circuit determined that the district court properly granted the defendant's motion to dismiss. The Court's reasoning was that the **[**28]** conduct alleged would not, independent of the Telecommunications Act of 1996, violate duties imposed under the Sherman Act.

> Thus, when we focus on the conduct alleged by Cavalier in the complaint before us to determine whether it amounts to breaches of duties imposed for the first time and only by the Telecommunications Act, we conclude

> that the conduct alleged would not, independent of the Telecommunications Act, violate duties imposed under the Sherman Act.

Id. at 190.

In this respect, *Cavalier* perfectly anticipates the arguments adopted by the Supreme Court in *Trinko.* However, for the reasons explained immediately below, Cavalier is inapposite to the facts in the case at bar.

2. The Plaintiff in *Cavalier* Alleged Only Breaches of Duties That Did Not Exist Prior to the Enactment of the Telecommunications Act of 1996

In *Cavalier,* the court was clear, "Cavalier's complaint alleges only breaches of duties that did not exist prior to the enactment of the Telecommunications Act. . . ." *Id.* The reasoning articulated in the immediately foregoing section concerning *Goldwasser v. Ameritech Corp.* is equally applicable here. **[**29]** The Court will briefly review. If Plaintiff's contention of voluntary (i.e., pre-statutory compulsion) network sharing is substantiated, a viable antitrust claim could stand in harmony with *Trinko. Cavalier* is in harmony with *Trinko.* However, over a relevant range, *Cavalier* is inapposite to the case at bar since Plaintiff seeks to demonstrate violations of duties which did exist prior to the enactment of the 1996 Act.

G. *Covad* is Distinguishable

In *Covad Communications Co. v. Bellsouth Corp.,* the plaintiffs' claims were grouped into three forms of alleged anticompetitive conduct: refusal to deal, essential facilities, and price squeezing. The refusal to deal claim was dismissed because the relationship between the parties was mandated by the Telecommunications Act; it was not a voluntary agreement between customers. The essential facilities claim was dismissed because access to the telephone provider's infrastructure could be compelled under the Telecommunications Act. However, the price squeezing claim survived because it was based on traditional antitrust doctrine and was not specifically barred by judicial precedent outlining the relationship between **[**30]** the Telecommunications Act and the Sherman Act.

Speaking about the onus placed on ILECs by the 1996 Act, Judge Barkett explained:

> Trinko, however, treats the interconnection agreement between AT&T and Verizon as a mandatory accord between competitors, not a voluntary agreement between customers. Trinko, 124 S. Ct. at 880. That Verizon also supplies wholesale unbundled network elements at a cost-based rate to AT&T does not, in the Court's view, make the relationship a non-competitive one. Moreover, Trinko emphasizes the coercive effect of the FTCA on incumbent LECs such as Verizon who - but for the FTCA - would not be required to make their network elements (including OSS) available to **[*527]** third parties such as AT&T. In short, Covad's refusal-to-deal claims do not survive Trinko and must be dismissed.

374 F.3d 1044, 2004 U.S. App. LEXIS 12861, *12-13 (11th Cir. 2004).

Regarding the status of *Aspen's* refusal to deal doctrine after *Trinko,* Judge Barkett stated, "Trinko now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under Aspen." 2004 U.S. App. LEXIS 12861 at *12.

Unlike the plaintiff in **[**31]** Covad, Plaintiff in the case at bar adduces evidence that Defendant shared its network before it was legally required to do so. It follows that *Covad* is not perfectly apposite precisely because of this distinction in the pleadings.

H. Conclusion

HN22[] As a legal matter, *Trinko* instructs that antitrust liability is live and well in the context of regulated telecommunications. The issue to be decided by this Court is whether or not Plaintiff's complaint sufficiently alleges violations of doctrinally established antitrust standards.

VIII. MONOPOLIZATION: ANALYSIS OF PLAINTIFF'S ALLEGATIONS OF EXCLUSIONARY CONDUCT FALLING INTO CATEGORIES NOT ADDRESSED IN *TRINKO*

A. The Court Does Not Adopt Plaintiff's Nomenclature

1. An Area of Potential Confusion

As an initial matter, the Court will clear up an area of potential confusion.

Plaintiff explains:

> Z-Tel's Complaint, therefore, unlike Trinko's, alleges conduct constituting violations of 'established antitrust standards' sufficient to state a claim. It does so under the refusal to deal and essential facilities doctrines that were at issue in *Trinko* and under **general § 2 [**32] standard for exclusionary conduct.**

(Doe. No. 37, p. 3) (emphasis added).

2. The Refusal to Deal Legal Theory

The Court declines to adopt Plaintiff's nomenclature. The refusal to deal legal theory will be addressed at length in Part IX, *infra.* However, for present purposes, the Court notes that ***HN23***[] this theory is hardly novel. In *United States v. Colgate & Co.,* the Supreme Court stated the basic rule that "in the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)*.

3. The Essential Facilities Legal Theory

Essential facilities will be addressed at length in Part X, *infra.* For present purposes, the Court simply notes that ***HN24***[] essential facilities is also not a novel legal theory. The former chairman of the Federal Trade Commission, Professor Pitofsky, explains, "the essential facilities doctrine has a long and respected history as part of U.S. ***antitrust law***." Robert Pitofsky, et al., *The Essential Facilities* **[**33]** *Doctrine Under U.S.* ***Antitrust Law****,* 70 ANTITRUST L.J. 443, 445 (2002).

Essential facilities is a species of refusal to deal. As Professor Hovenkamp explains, the two are close cousins:

> But the defendant's duty to deal in the essential facility cases appears to have about the same scope as the defendant's duty to deal in the *Aspen* case, where the Court did not rely on the essential facility doctrine.

HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE 307 (2d ed. 1999) (hereinafter, "HOVENKAMP").

[*528] In Parts IX and X, *infra,* the Court will devote considerable attention to *Trinko* and its impact on the doctrines of 1) refusals to deal and 2) essential facilities. However, in its analysis, the Court does not elevate these two types of exclusionary conduct above the level of importance assigned to those types of exclusionary conduct Plaintiff refers to as "general." The discussion immediately below is devoted to an analysis of Plaintiff's allegations of exclusionary conduct falling into certain categories not addressed in *Trinko.* The distinction is simply for purposes of methodological convenience.

B. [34] Plaintiff Alleges Four Clusters of Exclusionary Conduct**

1. Product Disparagement Through Public Advertising

Plaintiff's allegations concerning defamation and disparagement are contained in paragraphs 89-91. (Doc. No. 1, p. 34). The crux of these allegations are that Defendant refers to itself "as a real phone company" while mockingly referring to Plaintiff in public advertising as a "flashy" imposter.

2. Abuse of Government Processes

Plaintiff's abuse of government process allegations are contained in paragraphs 85-88 of the Complaint. (Doc. No. 1, p. 33-34). The gestalt of these allegations is that Defendant seeks to force competitors to expend time and resources contesting Defendant's noncompliance with the orders of state utility commissions. Plaintiff claims that this conduct is not shielded by *Noerr-Pennington. Id.* at p. 34.

3. Provision of Faulty Line Loss Information

Plaintiff's allegations concerning the provision of faulty "line loss" information are presented in paragraphs 70-78 of its Complaint. (Doc. No. 1, p. 27-29). Plaintiff relies on Defendant's operational support systems to inform it when one of Plaintiff's customers switches service providers. **[**35]** Plaintiff alleges, "Customer records were mislabeled at rates in excess of 60% in some months and were not timely delivered under SBC's own standards at rates approaching 90% in several months." *Id.* at p. 28. "Between December 2000 and February 2002, Z-TEL complained to SBC about problems with the line loss notification more than 75 times." *Id.* Plaintiff quotes a Bank of America Securities report for the proposition that this conduct reflects a deliberate strategy on Defendant's part to increase the "churn rate" of its rivals. *Id.* at p. 27.

4. Allegations of 1) Increased Costs and 2) Harm to Reputation Through Defendant's Submission of False Bills

Plaintiff's allegations concerning Defendant's habitual refusal to provide 1) accurate billing for the leased network facilities and 2) call records are contained in paragraphs 79-84 of the Complaint. (Doc. No. 1, p. 30-32). "As a result, Z-TEL had literally hundreds of billing disputes with SBC and was forced to expend undue resources on deciphering SBC's bills." *Id.* at p. 30. Plaintiff quotes one of Defendant's former employees who states that he was instructed to prepare false bills. *Id.* at p. 32.

C. [36] Analysis**

1. The Second Prong of *Grinnell:* the Indeterminate Nature and Logic of Exclusionary Conduct

a. The Supreme Court Has Recognized the Difficulty in Differentiating 1) Robust Competition from 2) Conduct With Long-Term Anticompetitive Effects

On at least two occasions, ***HN25***[] the Supreme Court has acknowledged the "difficulty" **[*529]** manifest in its exclusionary conduct doctrine.

In *Copperweld Corp. v. Independence Tube Corp.,* the Court stated:

> In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

In *Spectrum Sports v. McQuillan,* the Court further explained:

> This Court and other courts have been careful to avoid constructions of *§ 2* which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term **[**37]** anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by *§ 1*, which 'inherently is fraught with anticompetitive risk.'

506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) *(citing Copperweld).*

b. The *Aspen* Formulation

HN26[] In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* the Supreme Court defined exclusionary conduct as that which 1) tends to impair the opportunities of rivals, but also 2) either does not further meritorious competition or does so in an unnecessarily restrictive way. *472 U.S. 585, 605 n.32, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)* (quoting III PHILLIP AREEDA & DONALD F. TURNER, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 78 (1978)).

c. The *Kodak* Formulation

In *Eastman Kodak Co. v. Image Technical Servs.,* the Supreme Court articulated a somewhat different formulation of exclusionary conduct. "The second element of a *§ 2* claim is the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *504 U.S. 451, 482-83, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (quoting United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948))*.

d. The [38] 'Business Purpose' Formulation**

HN27[] Another genre of formulations stresses that a firm does not engage in monopolization if its conduct is motivated by "valid business reasons," a "normal business purpose," or "legitimate competitive reasons." *See Kodak, 504 U.S. 451, 483, 119 L. Ed. 2d 265, 112 S. Ct. 2072* ("Liability turns, then, on whether 'valid business reasons' can explain Kodak's actions."); *Id.* at n. 32 ("It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal."); *Aspen, 472 U.S., at 608* ("[Defendant] did not persuade the jury that its conduct was justified by any normal business purpose.").

e. Fifth Circuit Doctrine

As mentioned in Part V. D., *supra,* the two hallmark Fifth Circuit cases defining exclusionary conduct are *Taylor Publ'g Co. v. Jostens Inc., 216 F.3d 465 (5th Cir. 2000)* and *Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999)*. In *Taylor,* the court spoke in greater detail than it did in *Stearns Airport.*

> **HN28**[] 'Exclusionary' conduct **[**39]** is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition **[*530]** on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.
>
> Exclusionary comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.
>
> To determine whether conduct is exclusionary, we look to the proffered business justification for the act.

216 F.3d, at 475 (citations omitted).

2. Product Disparagement

a. Defendant's Argument

> Z-Tel's claims of 'defamation and disparagement (Compl. P89-91) similarly fails to identify conduct that could form the basis for a claim under *Section 2*. In fact, any such misrepresentations are 'presumptively de minimis' absent 'cumulative proof that the representations were clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible to neutralization or other offset **[**40]** by rivals.' Z-TEL stumbles at the very first hurdle- it has failed even to identify an allegation that can be called false.

(Doc. No. 7, p. 16) (citations omitted).

b. Advertising That Creates Barriers to Entry May Constitute Exclusionary Conduct

In *Berkey Photo, Inc. v. Eastman Kodak Co.,* the court stated, ***HN29***[] "A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." *603 F.2d 263, 287 (2d Cir. 1979) (citing American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946))*. In *Phototron Corp. v. Eastman Kodak Co.,* the Fifth Circuit extrapolated this exact portion of the *Berkey* holding in reaching the conclusion that, "advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent." *842 F.2d 95, 100 (5th Cir. 1988)*. Immediately thereafter, the court qualified this statement: "without evidence of how advertising in the wholesale photofinishing industry can act as a barrier to Phototron's participation in the industry, **[**41]** we cannot conclude that Phototron is likely to succeed on this theory of predation." *Id. at 101*.

c. A Presumption That The Effect on Competition Through Advertising is *de Minimis*

i. Introduction

Several opinions ruling on motions for summary judgment frame the legal landscape. Obviously, this Court is not presently considering a motion for summary judgment. However, the following set of cases are overviewed for their doctrinal principles.

ii. Hallmark Cases From the Second, Sixth, and Ninth Circuits

In *National Assoc. of Pharmaceutical Mfrs., Inc. v. Ayerst Labs.,* the Second Circuit held that ***HN30***[] "[a] plaintiff asserting a monopolization claim based on misleading advertising must overcome a presumption that the effect on competition of such a practice was *de minimis." 323 F.3d 366, 370 (2d Cir. 1988)* (citing *Berkey, 603 F.2d, at 288 n.41*). In *Berkey,* the court held as follows with regard to advertising:

> In its advertising, a producer is ordinarily permitted, much like an advocate at law, to bathe his cause in the best light possible. Advertising that emphasizes a product's strengths and minimizes **[**42]** its weaknesses does not, at least **[*531]** unless it amounts to deception, constitute anticompetitive conduct violative of *§ 2*.

Id. at 287-88 (footnote omitted).

In *American Professional Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns,* ***HN31***[] the Ninth Circuit also adopted a *de minimus* presumption and laid out a six-part test that a plaintiff must satisfy to rebut the presumption: the statements at issue must be (1) clearly false; (2) clearly material; (3) clearly likely to induce unreasonable reliance; (4) made to unsophisticated parties; (5) continued for long periods; and (6) not readily cured by rivals. *108 F.3d 1147, 1152 (9th Cir. 1997)*. [1] In *American Professional,* the court was clear that all of these factors must be met for the case to survive summary judgment. In *Ayerst,* the Second Circuit also discussed this test favorably, but it is unclear whether the court thought each requirement was mandatory. *850 F.2d 904, 916-17*.

[43]** In *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Board of Podiatric Surgery, Inc.,* the Sixth Circuit rejected the claim of the plaintiff, a podiatrists' certification association, that the defendant's alleged false advertising could support a claim under *Section 2*. *323 F.3d 366, 369 (6th Cir. 2003)*. ***HN32***[] The court noted that to survive summary judgment on the second prong of a monopolization claim premised primarily on allegedly false speech or advertising, the plaintiff is required to rebut a presumption that the impact on competition was *de minimis,* by showing two additional facts: "(1) the advertising was clearly false, and (2) it would be difficult or costly for the plaintiff to counter the false advertising." *Id. at 371*. Concluding that the plaintiff had failed to meet either showing, the court affirmed the grant of summary judgment to the defendant. *Id. at 372*.

iii. *Aldridge v. Microsoft*

In *David L. Aidridge Co. v. Microsoft Corp.,* Judge Lake was presented with a motion for summary judgment. *995 F. Supp. 728 (S.D. Tex. 1998)* (Lake, J.). The product disparagement claim trained on **[**44]** messages found in the

[1] This test was first suggested in 3 PHILLIP AREEDA & DAVID TURNER, ***ANTITRUST LAW*** P 738a, at 278-79 (1978).

Microsoft Windows "help box." Relying heavily on *American Professional, Berkey,* and *Ayerst,* Judge Lake granted defendant's motion as to the product disparagement claim since the plaintiff failed to show that "any of the four messages continued for extended periods or that they were not readily susceptible to explanation or neutralization. . . ." *Id. at 751*.

d. Organized Deception By A Dominant Firm May Have Anticompetitive Conduct Implications When Used Against A Nascent Firm

Professors Areeda and Hovenkamp explain:

> ***HN33***[] Misrepresentations and organized deception by a dominant firm may have *§ 2* implications when used against a nascent firm just as it is entering the market. Such a firm has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively. Of course, even honest advertising by a dominant firm can deter new entrants, but we virtually always consider honest advertising as competition on the merits.

IIIA AREEDA AND HOVENKAMP, ***ANTITRUST LAW***, § 782a.

[*532] e. Plaintiff Fits Areeda and Hovenkamp's Description of "A Nascent Firm"

The analysis offered **[**45]** by Professors Areeda and Hovenkamp in the immediately preceding section is an especially good fit to describe Plaintiffs market situation. In *Phototron Corp. v. Eastman Kodak Co.,* the Fifth Circuit was clear that ***HN34***[] advertising creating barriers to entry in a market constitutes exclusionary conduct. *842 F.2d 95, 100 (5th Cir. 1988)*. ***HN35***[] On a motion to dismiss, the Court is required to view all allegations in the light most favorable to the nonmovant. At this point, the Court cannot say that Plaintiffs product disparagement claim involving false advertising fails as a matter of law.

3. Abuse of Government Processes

a. Defendant's Argument

> Z-Tel concedes that such litigation efforts were directed at reducing Defendant's regulatory burdens under the 1996 Act (specifically Defendants' obligation to provide 'shared transport,' *see* Compl. P 85). And because Defendants have no antitrust duty to unbundle their networks for the benefit of competitors, it violates no duty by attempting to forestall the imposition of such regulatory obligations.

(Doc. No. 7, p. 16).

b. Noerr-Pennington

i. Overview of the Doctrine

HN36[] *Noerr-Pennington* **[**46]** immunity does not stem solely from the *First Amendment*; rather, it is inextricably associated with interpretations of the Sherman Act. *See Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983)*.

HN37[] The *Noerr-Pennington* doctrine confers immunity to private individuals seeking anticompetitive action from the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)* and *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. *See also California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)* (extending *Noerr-Pennington* protection to petitioning activities aimed at state and federal agencies and courts); *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)* (granting *Noerr-Pennington* immunity for efforts to influence local governments). ***HN38***[] *Noerr-Pennington* immunity applies to any concerted effort to sway public officials regardless of the private citizen's intent. *See Pennington, 381 U.S. at 670*.

ii. Defendant [47] Fails to Raise this Argument**

Plaintiff declares, "this pattern of abusive conduct falls outside any petitioning privilege under the *Noerr-Pennington* doctrine. However, Defendant's Motion to Dismiss does not raise the *Noerr-Pennington* affirmative defense. Accordingly, the Court will not address it.

c. An Increasingly Dangerous Threat to Competition

Judge Bork has stated, ***HN39***[] "predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition." ROBERT H. BORK, THE ANTITRUST PARADOX 347 (1993).

d. Defendant's Argument Is Misplaced

First, Defendant claims that is has no antitrust duty to unbundle it network for the benefit of its competitors. Putting aside for the moment Plaintiffs essential facilities claim, ***HN40***[] there is no doubt that under **[*533]** *§ 251(c) of the 1996 Act*, the incumbent local exchange carrier bears, *inter alia,* the duty to negotiate interconnection agreements with any new carrier so requesting, to provide access to its network elements on an unbundled basis, to offer its retail telecommunications services for resale at wholesale rates, and to provide for collocation.

[48]** Second, even if Defendant is correct that no antitrust liability may attach for failing to allow interconnection, it is an entirely different matter if Defendant has "initiated and maintained baseless regulatory proceedings" relating to its 1996 Act duties. (Doc. No. 1, p. 34). *Trinko* was clear: ***HN41***[] the simple fact that one has duties under the 1996 Act does not confer a grant of antitrust immunity relating thereto.

e. Defendant Does Not Prevail on this Point

The Court does not accept Defendant's assertion that Plaintiff's allegations concerning the initiation of baseless regulatory proceedings fail as a matter of law.

4. Line Loss Information

a. Defendant's Argument

> Z-TEL complains that it lacks accurate line-loss information, but such information relates only to customers that Z-TEL has *already* lost (through no alleged fault of Defendants); Z-TEL does not explain how tardy access to such information affects competition.

(Doc. No. 7, p. 15) (italics in original).

b. Defendant's Misstates Plaintiff's Complaint

In contrast to Defendant's characterization, Plaintiff explains in some detail how competition is allegedly harmed by Defendant's **[**49]** conduct concerning the provision of faulty line loss information.

> First, accurate and timely information on disconnections by customers is necessary for Z-Tel to audit the charges of SBC for the essential facilities that Z-TEL leases because many of these charges are measured on a per-customer basis. Such audits are necessary to ensure that SBC does not charge Z-TEL for facilities used to serve customers who are no longer Z-TEL customers.
>
> A second negative consequence to Z-Tel of erroneous and untimely provision of line loss notification relates to customers complaints.
>
> Such complaints cause Z-Tel to incur costs in responding to these complaints and damage Z-Tel's reputation with former, present, and prospective customers.

(Doc. No. 1, p. 28).

C. Reputation is A Capital Asset

HN42[] Reputation is a very real capital asset to a business firm. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 230 (1998) ("Reputation is a basis for inducing others to engage in market or nonmarket transactions with you.").

The crux of this allegation is that Defendant has harmed Plaintiff's reputation in the marketplace. The Court cannot say that, as a matter of law, Plaintiff's allegation **[**50]** of this sort of activity fails to come within the ambit of exclusionary conduct, as that term was defined in Part VIII, C.1, *supra.*

5. False Billing

a. Defendant's Argument

> Z-Tel's claim that Defendant's bills are inaccurate *(see* Compl. PP 79-84) is unconnected to any alleged effect on competition. *See also* *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1355 (5th Cir. 1980)* ("The concept of 'exclusionary' practice would become totally unmanageable unless the judges are willing . . . to ignore those **[*534]** practices that seem unlikely to have made a substantial impact upon the achievement, maintenance, or expansion of monopoly power.").

(Doc. No. 7, p. 16).

b. Defendant's Argument is Conclusory

Plaintiff complains, "Z-TEL had literally hundreds of billing disputes with SBC and was forced to expend undue resources on deciphering SBC's bills." (Doc. No. 1, p. 30). Viewed in isolation, Plaintiffs allegation of false billing might not predicate a monopolization claim. However, as explained more fully in Part VIII D., *infra,* in *Continental Ore,* the Supreme Court instructed that ***HN43***[] courts should not tightly **[**51]** compartmentalize the varied factual components of an antitrust case. *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. The gestalt of Plaintiff's story is that Defendant undertook a concerted scheme of conduct to disrupt Plaintiff's viability as a competitor. Viewed in combination with Plaintiff's other allegations, the allegation of false billing does not fail to state a claim as a matter of law.

D. Aggregation of Separate Instances of Allegedly Exclusionary Conduct

1. *Continental Ore*

Plaintiff cites *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)* for the proposition that the law rejects a tight compartmentalization of the varied factual components of an antitrust case. (Doc. No. 37. p. 8). Professor Hovenkamp advises, "the Supreme Court's *Continental Ore* language that proof should not be tightly compartmentalized has been cited numerous times by antitrust plaintiffs, sometime properly, sometime improperly." II AREEDA AND HOVENKAMP, ***ANTITRUST LAW***, § 310c, p. 140-41. In the discussion immediately below, the Court will explain why **[**52]** it aligns with the former rather than the latter.

2. The Broader Context: Claims of Insufficient Evidence

This Court first addresses the legal principles which control ***HN44***[] in the broader context of the adjudication of claims of insufficient evidence. In this context, aggregation is proper when the violation "requires that a certain threshold be met and no claim standing alone is sufficient to meet the threshold." *Id.* at 141. Aggregation is improper when cardinality is lacking or a plaintiff fails to prove an element essential to every claim. *Id.*

3. The Narrower Context: Exclusionary Conduct

This Court now turns to the prevalent legal principles governing aggregation of conduct in the narrower context of exclusionary conduct. Professor Hovenkamp explains:

> ***HN45***[] In a monopolization case conduct must always be analyzed 'as a whole.' A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as *de minimis* or an error in judgment, but the pattern gives increased plausibility to the claim. For example, a monopolist might accidentally file a single baseless **[**53]** infringement suit, but a pattern of such suits indicates wilfulness.

Id. at 147.

In *United States v. Microsoft,* the Court concluded that several monopolistic acts considered individually violated *Section 2*. In addition,

> Microsoft's campaign to protect the applications barrier from erosion by network-centric middleware can be broken down into discrete categories of activity, **[*535]** several of which on their own independently satisfy the second element of a *§ 2* monopoly maintenance claim. But only when the separate categories of conduct are viewed, as they should be, as a single, well-coordinated course of action does the full extent of the violence that Microsoft has done to the competitive process reveal itself.

87 F. Supp. 2d 30, 33 (D.D.C. 2000) (citing Continental Ore) (rev'd on other grounds by United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34 (D.C. Cir. 2001)).

4. Conclusion: Plaintiff Alleges a Patterned Course of Action Which the Court Views in the Aggregate

The Court views Plaintiff's allegations of the provision of I) product disparagement, 2) abuse of government processes, 3) provision of faulty line **[**54]** loss information, and 4) false billing as a patterned course of action. Viewed as a whole, these allegations negate Defendant's contention that Plaintiff's Monopolization claim fails as a matter of law. The Court hastens to add that it passes no judgment on the ultimate validity of these accusations. Defendant is free to question the weight and credibility of the evidence offered in support thereof in a future motion for summary judgment.

E. Conclusion: Plaintiff's Monopolization Claim concerning Conduct Not at Issue in *Trinko* Survives the Motion to Dismiss

Defendant's Motion to Dismiss Plaintiff's Monopolization claim (Count No. 1) is **DENIED** with respect to Plaintiff's allegations of 1) product disparagement, 2) abuse of government processes, 3) provision of faulty line loss information, and 4) false billing.

IX. MONOPOLIZATION: REFUSALS TO DEAL

A. General Legal Principles

1. The Freedom To Organize Business Affairs is Limited By Monopolistic Aspirations

In *United States v. Colgate & Co.,* the Supreme Court stated ***HN46***[] the basic rule that "in the absence of any purpose to create or maintain a monopoly, the act does not restrict the long **[**55]** recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)*; *see also Reeves, Inc. v. Stake, 447 U.S. 429, 439, 65 L. Ed. 2d 244, 100 S. Ct. 2271 (1980) (citing Colgate).*

Judge Bork has succinctly stated ***HN47***[] the baseline rule regarding individual refusals to deal:

> Present law leaves the individual firm free to refuse to deal with others, unless the refusal is intended to support another illegal restraint or constitutes an attempt to monopolize.

ROBERT H. BORK, THE ANTITRUST PARADOX 344 (1993).

2. *Aspen Skiing*

a. The Fundamental Holding of *Aspen*

The hallmark case in the doctrine of unilateral refusals to deal is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. Professors Areeda and Hovenkamp summarize the holding of this case:

> In sum, ***HN48***[] no general nor absolute duty was imposed on a monopolist to deal with or cooperate with actual or would-be competitors, any of its actions might be condemned if the jury finds **[*536]** that the monopolist **[**56]** 'willfully' acquired, maintained, or used monopoly power 'by anticompetitive or exclusionary means *or* for anticompetitive or exclusionary purposes.' Such means or purposes were contrasted with 'valid' or 'legitimate business reasons.' The **Court's logic was apparently that legitimate business reasons prevent the characterization of the defendant's behavior or purpose as anticompetitive or exclusionary.**

IIIA AREEDA & HOVENKAMP, ***ANTITRUST LAW*** 186 (2d ed.) (1998) (emphasis added).

b. Criticism of *Aspen Skiing*

Aspen has been the subject of much scholarly criticism. Professor Hovenkamp explains, "the difficult question for those supporting *Aspen* is finding a way of applying its principle, without losing control, of it." HOVENKAMP 295. Professor Graglia makes the point, "one may be generally skeptical of the validity of a rule that makes it illegal to terminate what one is not legally required to begin." Lino A. Graglia, *The Burger Court and Economic Rights, 33 TULSA L.J. 41, 62 (1997)*.

In *Trinko,* the Court explained, *"Aspen Skiing **HN49***[] is at or near the outer boundary of *§ 2* liability." *Trinko, at 879 (2004)*. The bottom line **[**57]** is that criticism notwithstanding, the Supreme Court reaffirmed that *Aspen Skiing's* holding about unilateral refusals to deal is good law.

B. Defendant's Refusal to Deal Argument Trains on Voluntary Engagement

Discussing *Trinko's* treatment of *Aspen* Skiing, Defendant explains:

> The defendant in *Aspen* had 'voluntarily engaged in a [prior] course of dealing with rivals' and refused to provide the precise 'product that it *already sold at retail'* to its rival at full retail price.
>
> By contrast here, defendants do not voluntarily provide DSL service on a stand-alone basis and have not set a retail price for providing DSL service over lines controlled by CLEC's (whose permission they must obtain before offering the service). Mandating such an arrangement would require 'considerable expense and effort' including designing and implementing 'new systems' - for ordering, provisioning, billing, and maintenance- to accommodate Z-TEL'S demand. *Id. Trinko* makes clear that ***antitrust law*** imposes no such duty.

(Doc. No. 29, p. 5).

C. Plaintiffs Response

Plaintiff reads *Trinko* as establishing two circumstances which must exist **[**58]** in order for a refusal to deal claim to be properly made out:

> Interpreting *Aspen, Trinko* identified two circumstances that shed light and thus are sufficient to state a refusal to deal claim: (1) when the defendant's prior conduct involved voluntary provision of the product ('voluntariness') and (2) when the defendant has made the product available to non-competitors, but not competitors ('discrimination').

(Doc. No. 37, p. 4) *(citing Trinko,* p. 879-80).

D. Analysis

1. In *Trinko,* Plaintiff's "Discrimination" Terminology is Not Stated As Such

Defendant's "voluntariness" argument is well taken. Discussing *Aspen,* the *Trinko* Court wrote, ***HN50***[] "the unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, at 880*.

However, the Supreme Court did use the term "discrimination" in the sense Plaintiff uses the word at present:

> **[*537]** In *Otter Tail Power Co. v. United States,* the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused **[**59]** to provide the same service to certain other customers. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.

Trinko, at 880 (citations omitted).

In other words, Plaintiff is correct that *Trinko* addressed the concept of "discrimination" in the context of a refusal to deal with one set of customers versus a different set of customers. But the Supreme Court did not use the word "discrimination." To avoid any confusion, this Court clarifies that it interprets Plaintiff's use of the word "discrimination" to refer to the portion of *Trinko* quoted immediately above.

2. Evidence That Defendant Voluntarily Shared its Network Before the Enactment of the 1996 Act

Plaintiff brings forth some evidence that, prior to the enactment of the 1996 Act, Defendant voluntarily offered to share its network. (Doc. No. 37, p. 4-6). Viewed in an unfavorable light to plaintiff, this "voluntary" sharing was driven less by the profit motive than it was driven by a desire to satisfy regulators looking at the proposed merger of SBC and Ameritech. However, on a motion to dismiss, a district court must view all allegations **[**60]** in the light most favorable to the non-movant. Viewed in the most favorable light, this Court cannot say that Plaintiff has failed to allege that Defendant has ceased a profitable business practice in which it voluntarily engaged prior to onset of statutory compulsion.

3. Evidence That Defendant Discriminatorily Offers Access at Present

Plaintiff asserts that Defendant offers access to local service providers in areas Defendant does not serve. Particularly, Plaintiff alleges that Defendant offers access to Valor Telecom, the local service provider in Texarkana. (Doc. No. 37, p. 6). Plaintiff also alleges that Defendant allows its non-competitor, Intrado, interconnection for purposes of 911 emergency calls. Viewed in the light most favorable to the non-movant, the Court cannot conclude that Plaintiff has failed to allege a discriminatory business practice, as that term was addressed by the Supreme Court in *Trinko* and *Otter Tail.*

4. Stein v. Pacific Bell

a. Introduction

On March 23, 2004, Defendant filed a Notice of Supplemental Authority bringing to the Court's attention an unpublished order from the Northern District of California, *Stein v. Pacific* **[**61]** *Bell.* In *Stein,* Judge Illston granted the defendant's motion for summary judgment as to plaintiff's refusal to deal, essential facilities, and monopoly leveraging claims. Defendant first notes that Judge Illston ruled on a motion for summary judgment. By contrast, this Court is obviously presented with a motion to dismiss. Defendant maintains that this distinction is immaterial because Judge Illston reached her conclusion without reaching the issue of evidentiary sufficiency.

Second, Defendant is emphatic that *Stein* and the case at bar are strongly correlative. For the reasons explained immediately below, the Court disagrees.

b. Differently Situated Plaintiffs

In *Stein,* the plaintiff brought suit on behalf of himself and others similarly situated consumers of DSL service. In the **[*538]** opening paragraph, Judge Illston explained, "Stein claims that this anticompetitive conduct has denied consumers a competitive choice in DSL service providers." *Stein,* p. 2. In the case at bar, Plaintiff does not claim to be a consumer in the conventional sense. Defendant's own legal posture illustrates this point; the gestalt of Defendant's refusal to deal argument is that it conducts **[**62]** business with Plaintiff only because of the telecommunications laws' fiat.

c. The Fundamental Holding of *Stein*

As explained in Part IX, D. 2 and 3, *supra,* Plaintiff's core argument that its refusal to deal claims fits within the *Aspen Skiing* exception (re-enunciated in *Trinko)* is that Defendant shared its network before it was statutorily required to do so. In *Stein,* the analogous voluntary behavior was described as follows: "defendants in the instant case voluntarily agreed to provide competitors with loop qualification information." *Stein,* p. 10. Judge Illston found the plaintiff's argument to be availing for the following reason: "This Court disagrees, but also finds that defendants were statutorily obligated to provide the loop qualification information under *§ 251(c)(3) of the Telecommunications Act*." *Id.* p. 10-11. Therefore, the fundamental holding of *Stein* is that the plaintiff made allegations analytically identical to those made by the plaintiff in *Trinko,* insofar as those allegations concerned a failure to perform a duty only recently prescribed by law.

d. The *Stein* Court's Commentary in Dicta is Highly Distinguishable [63] From the Allegations in the Case at Bar**

> Even assuming *arguendo* that defendants voluntarily obligated themselves to provide competitors with loop qualification information, this case does not fit within the very narrow confines of the refusal to deal doctrine . . .

Stein, p. 13.

> In *Aspen Skiing,* the formerly dominant partner terminated the joint venture, whereas in the case at hand, defendants simply failed to comply exactly with the requirements of a regulatory scheme.

Id. p. 14.

This Court first notes that Judge Illston's "arguendo" analysis follows her statement of *Stein's* fundamental holding. Nevertheless, the portion of her order quoted immediately above conclusively demonstrates that the plaintiff in *Stein* rested its argument on the failure to comport with recently enacted regulatory duties. By contrast, in the case at bar, Plaintiff alleges termination of a voluntary course of dealing undertaken before the imposition of statutory compulsion.

e. Conclusion

This Court agrees with Judge Illston (and the academic commentary overviewed in Part IX, A.2. b, *supra)* that ***HN51***[] the exception in *Aspen Skiing* is a narrow **[**64]** one. To be sure, Plaintiff must perform a difficult doctrinal task. However, unlike the allegations in *Stein,* Plaintiff has alleged that Defendant discontinued a voluntary course of dealing which it initiated free from any legal responsibility to commence.

5. Defendant Belatedly Raises an Argument Which Misreads *Trinko*

a. The Belated Argument

On July 21, 2004, Defendant filed a Reply to Z-Tel's Response to Defendants' Notice of Supplemental Authority. (Doc. No. 177). Speaking about Plaintiff's allegations of pre-compulsory network sharing, Defendant stated:

> *Trinko* expressly held that 'the other boundary of § 2 liability' under *Aspen* ***[*539]*** *Skiing* requires proof that the defendant terminated a preexisting voluntary business arrangement *with the plaintiff* (not other companies) . . .

Id. at p. 2-3 (italics in original).

This Court first notes that this argument was not raised in the original motion to dismiss. That motion relied almost exclusively on *Goldwasser* and *Cavalier.* (Doc. No. 7, p. 8-11). Nor was this argument raised in Defendant's *post-Trinko* reply. (Doc. No, 29, p. 1-2).

HN52[] It is a basic tenet of civil procedure **[**65]** that reply briefing may only respond to the allegations raised in the nonmovant's response. *See Hartley v. Wisconsin Bell, 930 F. Supp. 349, 352 (E.D. Wis. 1996)*; *see also Graning v. Sherburne Cty., 172 F.3d 611, 614 n. 2 (8th Cir. 1999)* ("Affidavits may appropriately be produced with a reply brief when they respond to **new** issues which have arisen during briefing.") (emphasis added). A defendant certainly cannot raise an argument for the first time on a response to notice of supplemental briefing. To hold otherwise would countenance litigation by ambush. The discussion which follows immediately below is offered only by way of commentary.

b. Defendant Misreads *Trinko*

In Defendant's belatedly raised argument, the words "with the plaintiff" are not in quotations marks. Defendant cites to pages 879-80 of the *Trinko* opinion. It is of vital importance to this Court's analysis that the text on those two pages do not support Defendant's contention that a cessation of voluntary business activity must have been with a § 2 plaintiff in order to satisfy the standard of *Aspen Skiing.*

For example, "The leading case for § 2 liability **[**66]** based on refusal to cooperate with a **rival,** and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing." Id. at 879* (emphasis added). The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. *Id. at 880* (emphasis added). "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.* (emphasis added).

The bottom line is that the Supreme Court's repeated use of the generic terms "rival" in both the singular and the plural negatives Defendant's contention that only termination of a cooperative venture with a § 2 plaintiff, rather than other market participants, suffices.

E. Conclusion

HN53[] Plaintiff bears a heavy doctrinal burden to capture *Aspen Skiing's* narrow exception. However, because Plaintiff avers to pre-compulsory sharing of the network constituting a cooperative venture with rivals, the Court cannot conclude that Plaintiff has alleged no set of facts which would come within the ambit **[**67]** of that exception. Accordingly, Defendant's Motion to Dismiss Plaintiff's Monopolization claim (Count No. 1) is **DENIED** with respect to Plaintiff's refusal to deal allegation.

As the Court concluded in Part VIII. E., *supra,* Defendant's Motion to Dismiss Plaintiff's Monopolization claim (Count No. 1) was denied with respect to Plaintiff's allegations of exclusionary conduct not at issue in *Trinko.* For these reasons, Defendant's Motion to Dismiss Plaintiff's Monopolization claim (Count No. 1) is **DENIED** in its entirety.

X. ESSENTIAL FACILITIES

A. General Legal Principles

1. Essential Facilities is A Species of the Refusal to Deal Legal Theory

HN54[] Essential facilities refers to a particular embodiment of the refusal to deal **[*540]** legal theory. Professor Hovenkamp explains that the logical foundation of the refusals to deal legal concept applies with persuasive force to the essential facilities concept.

> The so-called 'essential facility' doctrine is one of the most troublesome, incoherent and unmanageable of bases for Sherman *§ 2* liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine **[**68]** tuning of the general doctrine of the monopolist's refusal to deal to fill in the resulting gaps.

HOVENKAMP, p. 305.

2. The Focus is on Markets With Large Capital Requirements

HN55[] The doctrine protects a competitor from having to enter an additional market with large capital requirements in order to compete. *Fishman v. Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986)*. Professors Areeda and Hovenkamp explain, "the core concern of the doctrine is that a monopolist possess a resource that is 'essential' in some sense for the business of someone else, but that the monopolist refuses to share." IIIA AREEDA & HOVENKAMP, P 772a (2d ed. 2002). By controlling the "essential facility, a monopolist can potentially extend its monopoly power "from one stage of production to another, and from one market to another." *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir. 1983)*.

3. Doctrinal Support

HN56[] On at least three occasions, the Supreme Court has declined to recognize the essential facilities theory. "We have never recognized such a doctrine, *see Aspen Skiing Co., 472 U.S. 585 at 611, n. 44, 86 L. Ed. 2d 467*,; **[**69]** *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 428, 142 L. Ed. 2d 834, 119 S. Ct. 721* (opinion of Breyer, J.), and we find no need either to recognize it or to repudiate it here." *Trinko, at 881*.

Professor Elhauge explains that, the absence of Supreme Court recognition notwithstanding, "every federal circuit court has interpreted this general monopolization standard to impose an antitrust duty to deal with rivals when sharing is feasible and a monopolist has developed a product that is so superior that it is 'essential' for rivals to compete and cannot practicably be duplicated." Einer Elhauge, *Defining Better Monopolization Standards, 56 STAN. L. REV. 253, 261 (2003)* (citing cases).

In *Mid-Texas Communications Sys. v. AT&T,* the Fifth Circuit recognized the essential facilities doctrine:

> ***HN57***[] The second approach to the problem of a monopolist's refusal to deal is the so-called "bottleneck" theory. Under this approach, a monopolist who controls a "facility or resource that is essential to competitive viability in the marketplace must grant access to it on reasonable terms to (its) competitors."

615 F.2d 1372, 1387 n.12 (5th Cir.), **[**70]** *cert. denied, 449 U.S. 912, 66 L. Ed. 2d 140, 101 S. Ct. 286 (1980)* (citations omitted).

4. Elements of an Essential Facilities Claim

HN58[] To prevail on an essential facilities claim a plaintiff must show:

> 1) the defendant is a monopolist;
>
> 2) the facility is essential;
>
> 3) the defendant has the type of control over the facility that is forbidden by the Sherman Act;
>
> 4) duplication of the facility is unreasonable or impractical;
>
> 5) the defendant denied the plaintiff use of the facility; and
>
> 6) providing access to the plaintiff was feasible.

[*541] *David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728, 752 (S.D. Tex. 1998)* (citing cases).

B. The Fundamental Holding of *Trinko*

> It suffices for present purposes to note that ***HN59***[] the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists the doctrine serves no purpose. Thus, it is said that 'essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.' P. AREEDA & H. HOVENKAMP, ***ANTITRUST LAW***, p 150, P 773e **[**71]** (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: ***HN60***[] The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's 'essential facilities' argument is distinct from its general *§ 2* argument, we reject it.

Trinko, at 881.

C. Plaintiff Attempts to Distinguish *Trinko's* Fundamental Holding

> Z-Tel has also asserted claims under the essential facilities doctrine. *Trinko* emphasizes the importance of the 'unavailability of *access'* to the essential facility and notes that the theory cannot apply if 'a state or federal agency has effective power to compel sharing and to regulate its scope and terms.' *Trinko, 124 S. Ct. at 881*. This limitation has no bearing on Z-Tel's claims. SBC ignores that Z-Tel's AIN allegations relate to the enhanced services market, a market that the unbundled access provisions of the Telecom Act do not purport to regulate. Likewise, Z-Tel's allegations make plain that there was no effective power to compel access to shared transport; despite repeated orders **[**72]** of state and federal agencies over a period of several years, SBC still refused to provide it.

(Doc. No. 37, p. 7) (emphasis in original).

D. Analysis

1. In Plaintiff's Value-Added Process, Network Access Precedes the Creation of Enhanced Services

Plaintiff's Complaint is unambiguous: "these enhanced services are software-based systems that rely in part on the infrastructure necessary to provide basic local service but which also include additional programs and equipment." (Doc. No. 1, p. 12). Plaintiff may be correct that the Telecom Act does not purport to regulate enhanced services. If so, this fact likely reflects the fact that enhances services did not exist, as such, in 1996. In any event, since network access is largely indispensable to (and therefore precedes the creation of) enhanced services, Plaintiff's attempt to differentiate *Trinko* is unavailing.

2. "Effective Power" is an Argument Better Addressed to the Legislature

Moreover, the strength of the "effective power" wielded by the relevant regulatory agencies is not of immediate concern to this Court. This argument is better addressed to the appropriate legislative bodies.

[73] E. Conclusion**

Defendant's Motion to Dismiss Plaintiff's Essential Facilities claim (Count No. 2) is **GRANTED.** Plaintiffs Second Cause of Action is **DISMISSED with prejudice.**

XI. ATTEMPTED MONOPOLIZATION

A. Legal Standards

HN61[] To demonstrate attempted monopolization, a plaintiff must prove 1) that the **[*542]** defendant has engaged in predatory or anticompetitive conduct with 2) a specific intent to monopolize, and 3) a dangerous probability of achieving monopoly power. *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; *see also* *Taylor Publ'g Co. v. Jostens Inc., 216 F.3d 465, 474 (5th Cir. 2000)* *(citing Spectrum Sports).* An attempted monopolization claim necessarily involves conduct which has not yet succeeded; otherwise, the plaintiff would bring an actual monopolization claim. *Taylor Publ'g, 216 F.3d at 474*; *see also* *Multiflex v. Samuel Moore & Co., 709 F.2d 980, 990 (5th Cir. 1983)* ("Attempted monopolization under *section 2* is usually defined as an unsuccessful attempt to achieve monopolization.").

B. Defendant Does Not Particularize an Argument Trained [74] on Attempted Monopolization**

In neither 1) the Motion to Dismiss (Doc. No. 7) or 2) Defendant's Reply in Support of its Motion to Dismiss (Doc. No. 29) does Defendant particularly address attempted monopolization. It follows that Defendant's argument concerning attempted monopolization is limited to the legal sufficiency of Plaintiff's allegations concerning anticompetitive conduct. Plaintiff's allegations of exclusionary conduct were discussed at length in Parts VIII and IX, *supra.* Defendant's arguments were found to be unavailing.

Since Defendant raises no arguments concerning a specific intent to monopolize and/or a dangerous probability of achieving monopoly power, the Court does not devote any analysis thereto.

C. Conclusion

Defendant's Motion to Dismiss Plaintiff's Attempted Monopolization claim (Count No. 3) is **DENIED.**

XII. MONOPOLY LEVERAGING

A. Defendant's Argument

> The [Trinko] Court also expressly rejected the "monopoly leveraging" theory Z-Tel espouses in this case as inconsistent with Supreme Court precedent under *Section 2*.

(Doc. No. 29, p. 1-2).

B. *Trinko* Rejected A Claim of Monopoly Leveraging [75] Only Once It Abjured the Plaintiff's Refusal to Deal Argument**

> The Court of Appeals also thought that respondent's complaint might state a claim under a 'monopoly leveraging' theory (a theory barely discussed by respondent, see Brief for Respondent 24, n 10). We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.

Trinko, at 883.

C. Monopoly Leveraging is Not Inconsistent With Supreme Court Precedent

Professor Hovenkamp explains this somewhat murky area of antitrust jurisprudence:

> In a footnote in its 1992 *Kodak* decision, the Supreme Court seemed to breathe new life into the leverage theory:
>
> > The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits **[**76] [*543]** his dominant position in one market to expand his empire into the next.'
>
> That statement seemed calculated to resurrect a dubious theory whose main effect had been to preserve the Sherman Act as a small business protection statute. However, less than a year later, in *Spectrum Sports,* the Court seemed to reject the theory altogether.
>
> > *§ 2* [of the Sherman Act] makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that *§ 2* might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unlawful' or 'predatory tactics.'
>
> The statements in *Kodak* and *Spectrum Sports* were both dicta, and neither case involved a leverage claim as such.

HOVENKAMP, 318.

For these reasons, ***HN62***[] this Court does not agree Defendant's assertion that a monopoly leveraging claim is inconsistent with Supreme Court precedent under *§ 2*.

D. Defendant Limited its Argument to the Specific Analysis Presented in *Trinko*

Defendant chose to limit its argument concerning monopoly leveraging to the particular analysis presented in **[**77]** *Trinko.* In that case, the absence of legally cognizable anticompetitive conduct animated the Court's decision. In the case at bar, the Court finds that most of Plaintiffs allegations of anticompetitive conduct do not fail as a matter of law at the motion to dismiss stage. Under the logic of *Trinko,* Plaintiffs monopoly leveraging claim will not fail. Since Defendant presents no other arguments concerning monopoly leveraging, the Court does not proceed further.

E. Conclusion

Defendant's Motion to Dismiss Plaintiffs Monopoly Leveraging claim (Count No. 4) is **DENIED.**

XIII. TYING

A. Plaintiff's Tying Claim

In relevant part, Plaintiffs Tying claim reads as follows:

> SBC requires customers of its DSL service to agree to purchase basic local service only from SBC and not from any competitive carrier in a deliberate effort to preserve and maintain its monopoly in the basic local and enhanced services market. If an SBC DSL subscriber attempts to change carriers from SBC to Z-Tel, SBC will either terminate the customer's DSL access, or will deny Z-Tel the ability to provide basic local service to that customer.
>
> The relevant tying market **[**78]** is the market for DSL service or, alternatively, the market for broadband internet access. The relevant tied markets are the basic local services market and the enhanced services market.
>
> SBC's tying scheme imposes prohibitively higher switching costs on customers in order for SBC to maintain or expand its monopoly power in the basic local and enhanced services. Were it not for SBC's illegal tying arrangement, some customers would purchase basic local and enhanced services from carriers other than SBC.
>
> In addition, SBC has tied its basic local service to its enhanced services, and its enhanced services to its basic local service.
>
> SBC will not sell basic local service to customers unless they agree not to buy enhanced services from Z-Tel and other competing carriers (and, indeed, SBC makes such purchases impossible by refusing **[*544]** to provide access to AIN and Z-Tel and other competing carriers). SBC, likewise, will not sell enhanced services to customers unless they agree to purchase their basic local service from SBC.

(Doc. No. 1, p. 41-42).

B. Legal Standards

1. Definition

HN63[] A 'tying" arrangement is one in which a seller of a product or service refuses **[**79]** to sell a product desired by a buyer unless the buyer also agrees to purchase a second product which is not desired. *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 461, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*; *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch., 89 F.3d 233, 236 n.2 (5th Cir. 1996)*, *cert. denied, 519 U.S. 1116, 136 L. Ed. 2d 846, 117 S. Ct. 960 (1997)*. The desired product is the "tying product," and the second product is the "tied product." *Id.*

Professor Leslie explains, ***HN64***[] "[a] tying arrangement exists when a seller refuses to sell one product, 'the tying product,' unless the buyer also purchases a second product, 'the tied product.'" Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement, 60 OHIO ST. L.J. 1773, 1773 (1999)*.

2. Elements of the Claim

HN65[] Plaintiff must establish each of the following five elements for an illegal "tying" arrangement to exist: (1) there were two separate and distinct products, as opposed to components of a single product; (2) the two products were tied together, or customers were coerced into buying the tied **[**80]** product; (3) the seller possessed substantial economic power over the tying product; (4) the tie has an anticompetitive effect on the tied market; and (5) the tie affected more than an insubstantial volume of commerce. *United Farmers Agents, 89 F.3d at 236 n.2 (citing Kodak, 504 U.S. at 461-62* and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11-28, 80 L. Ed. 2d 2,* 104 S. Ct. 1551(1984)); Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981), *cert. denied, 454 U.S. 860, 70 L. Ed. 2d 158, 102 S. Ct. 315 (1981)*.

C. Defendant's Argument Is Threefold

1. Defendant Asserts That it Cannot be Held Liable for Declining to Offer Service Over A Line that Plaintiff Exclusively Controls

a. Arguments Presented in the Motion and Reply

> When Z-Tel wishes to provide voice service, it does so by leasing (among other things) the local loop over which Defendants have been providing *both* voice *and* DSL service. *See* Compl. P 29. Pursuant to FCC regulations, Defendant no longer have any right to provide any service - voice or data - over that line, **[**81]** because they are required to give up control of the *actual copper wire,* not some part or all of the usable bandwidth within it. *Local Competition Order, 11 F.C.C.R. at 15693, P 385*. Thus, Z-Tel gains 'exclusive control over network facilities dedicated to particular end users,' a policy choice that the FCC determined would 'provide[] such carriers the maximum flexibility to offer new services to such end users.' *Id.;* 47 C.F.R. § 51.319(a)(1).

(Doc. No. 7, p. 18) (italics in original).

Defendant further develops this argument in its Reply:

> Z-Tel's 'tying' claim- that is, its claim that defendants violate the antitrust laws by failing to. offer DSL service to Z-Tel's voice customers- fails because SBC's ILECs have no right to use the **[*545]** lines that Z-Tel leases to offer any service to Z-Tel's customers. Z-Tel does not and cannot in good faith contest that defendants require Z-Tel's permission to provide DSL service over the lines that Z-Tel leases.

(Doc. No. 29, p. 3).

b. *Levine v. Bellsouth*

Defendant directs the Court's attention to *Levine v. Bellsouth Corp.,* No. 03-20274-CIV. This unpublished **[**82]** order, which Defendant attaches as Exhibit A to its original motion, dismissed a tying claim similar to the one presented in the case at bar.

In *Levine,* the district court was presented with the defendant's motion to dismiss, *inter alia,* the plaintiffs tying claim. In the plaintiffs view, the defendant's provision of DSL service (the tying product) on the condition that the customer also bought local service (the tied product) predicated a legally cognizable claim. The defendant took the position that "in cases where a CLEC leases a loop for providing service, BellSouth is 'required to surrender the entire loop to the CLEC.'" *Id.* at p. 12. In other words, the defendant argued that it was physically impossible for it to effectuate the alleged tie.

The court described the plaintiff's response as follows:

> Plaintiff argues there is no basis for suggesting that a CLEC would prevent BellSouth from providing DSL service to a CLEC customer, that BellSouth's practices are based on its own internal decisions and not restrictions imposed by CLECs or regulators, and that BellSouth 'almost always has more than one loop connecting a customer's premises to BellSouth's network. **[**83]** '

Id.

The court rejected the plaintiffs argument:

> Plaintiff has not, however, alleged sufficient facts to support its conclusions regarding feasability. Its arguments disputing BellSouth's contentions are not supported by sufficient allegations that a CLEC would not prevent

> BellSouth from providing DSL service to a CLEC customer, nor are there sufficient allegations supporting Plaintiffs argument that BellSouth could provide DSL service over the same or a standalone loop.

Id. at p. 13.

2. In its Reply, Defendant Adds A New Argument That *Trinko* Bars Z-Tel's Claims

In its Reply, Defendant offers several doctrinal and prudential arguments for reading *Trinko* so as to warrant dismissal of Plaintiffs tying claim.

> Defendants do not voluntarily provide DSL service on a stand-alone basis and have not set a retail price for providing DSL service over lines controlled by CLECs (whose permission they must obtain before offering the service). Mandating such an arrangement would require 'considerable expense and effort' including designing and implementing 'new systems' - for ordering, provisioning, billing, and maintenance - to accommodate **[**84]** Z-Tel's demand. *Id. Trinko* makes clear that ***antitrust law*** imposes no such duty.

(Doc. No. 29, p. 5).

3. Defendant Maintains that Plaintiff's Claim is Inconsistent With A Controlling FCC Review Order

> The FCC carefully considered the position (espoused by Z-Tel here) and rejected it. The FCC, in fact, went further: in a closely related context, it made clear that the type of duty Z-Tel seeks to impose would undermine competitors' incentives to innovate and thereby hurt consumers. In light of the **[*546]** FCC's ruling, Z-Tel's claim cannot proceed.

(Doc. No. 7, p. 19; *see also* Doc. No. 29, p. 4-7 (making similar arguments)).

D. Plaintiff's Response

1. The Feasability on the Part of Defendant to Provide Both DSL and Local Services

a. Defendant Could Sell DSL to Plaintiff's Basic Local Customers If it So Desired

Plaintiff begins by stating its version of *Levine's* fundamental holding concerning tying arrangements:

> [The consumers'] arguments disputing BellSouth's contentions are not supported by sufficient allegations that a CLEC would not prevent BellSouth from providing DSL service to a CLEC customer.

(Doc. **[**85]** No. 22, p. 14) *(quoting Levine,* p. 13)

Plaintiff then seeks to distinguish *Levine:*

> The lack of such allegations is not a problem in this case. Rather than seeking to take advantage of potentially greater profits from sales of DSL to non-SBC customers, SBC forgoes that profit to preserve its basic local service monopoly. When SBC customers with DSL call Z-Tel and seek to switch to Z-Tel's basic local service, Z-Tel is not able to provide the service: SBC will either refuse to allow Z-Tel to provide basic local service to the customer or it will allow the switch, but will cut off the customer's DSL service. Comp. P 50.

Id. at p. 14-15.

b. Plaintiff Further Develops its "Potentially Greater Profits" Allegation in its Sur-Reply

In its Sur-Reply, Plaintiff further develops its allegation concerning Defendant's alleged abnegation of profits.

> SBC has refused to provide DSL service to its own DSL customers when they switch to Z-Tel for basic local service. SBC refuses these DSL profits merely to make it more difficult for Z-Tel to compete in the basic local services market. When SBC refuses to provide DSL service to lines leased by Z-Tel, **[**86]** SBC contents itself with only the wholesale revenue it receives from Z-Tel, when it could instead receive both that wholesale

> revenue *and* the retail DSL revenues from the customer. In other words, SBC could make *more* money on the sale of DSL to non-SBC basic local exchange customers than it can from its own customers because it can collect both wholesale and retail profits.

(Doc. No. 37, p. 9) (emphasis in original).

> **c. In the Sur-Reply, Plaintiff Also Includes An Argument That Defendant Provides DSL Service to Some of its Customers Through A Separate Subsidiary**
> SBC repeats its meritless argument that it cannot provide DSL to Z-Tel's customers because the line has been leased to Z-Tel. SBC, however, provides DSL not through the SBC entity that owns the lines, but through a separate subsidiary.

Id.

2. FCC Review Order

> SBC was required, as a condition of its merger with Ameritech, to form a subsidiary competitive DSL provider, and the very paragraph of the Triennial Review Order SBC cites specifically authorized 'partnering with a second competitive LEC [such as SBC's affiliate] that will offer xDSL service.' Triennial **[**87]** Review Order P 270.

(Doc. No. 22, p. 16)

Note that "xDSL" is as written in Plaintiffs brief. It is unclear if "x DSL" differs **[*547]** from ordinary DSL. The Court operates on the assumption that any difference is immaterial.

E. Analysis

1. Plaintiff Alleges A Cognizable Claim Concerning the Feasabiity of Defendant's Provision of DSL to Z-Tel's Local Service Customers

The crux of Defendant's argument is that once Plaintiff elects to use a line for voice service, FCC regulations remove from Defendant any right to provide service - voice or data - over that line. This is so because Defendant is required to give up control of the actual copper wire. For this reason, Defendant maintains that it has no choice but to cut-off its DSL customers who wish to switch to Plaintiff for basic local services.

Plaintiff's response concerning Defendant's alleged decision to forgo profits assumes the answer to the question. It is fairly tautological that Defendant can only forgo profits if profit opportunities exist. Without more, Defendant would prevail. However, Plaintiff alleges that Defendant furnishes DSL through "a separate subsidiary." If this separate subsidiary is the vehicle **[**88]** by which Defendant seizes these profit opportunities, then such opportunities must exist. For this reason, Defendant's first argument to dismiss Plaintiff's Tying claim fails.

2. Defendant's Reliance on *Trinko* Is Misplaced

The impact of *Trinko* in the context of *§ 2* violations was addressed at length in Parts VII-X, *supra.* To briefly review, *Trinko's* second sentence reads as follows: "In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under *§ 2 of the Sherman Act*, 26 Stat 209." *Trinko, at 875*. In other words, *Trinko* was a *§ 2* case at heart. It is with that thought in mind that this Court notes that the words "tying" or "tie" do not readily appear in *Trinko's* text. ***HN66***[] Tie-ins may be illegal under *§ 1 of the Sherman Act*. [2] The Court declines to read *Trinko* so as to lessen antitrust liability in contexts other

[2] For sake of completeness, the Court also notes that tie-ins may be illegal under *Section 3 of the Clayton Act*. However, the *Clayton Act* only applies to goods. In this case, the focus is obviously on services, not goods.

than those addressed in that opinion. For this reason, Defendant's second argument to dismiss Plaintiff's Tying claim fails.

[89] 3. Review Order**

The crux of Defendant's argument concerning the *Triennial Review Order* reads as follows:

> In its *Triennial Review Order,* the FCC has already examined possible competitive benefits of requiring ILECs to provide retail DSL service over lines leased by CLECs and determined not only that such a regulatory requirement would bring no benefit but also that it would discourage investment and innovation and thus *harm* consumers.

(Doc. No. 29, p. 6).

As explained in Part XIII, E. 1, *supra,* Plaintiff alleges that Defendant furnishes DSL through "a separate subsidiary." Provision of DSL service through such a separate subsidiary is the obverse of "ILECs to providing retail DSL service over lines leased by CLECs." For this reason, Defendant's third argument to dismiss Plaintiff's Tying claim fails.

4. A Potential Issue of Confusion: the Market for DSL Versus Broadband Services

In its Complaint, Plaintiff is clear, "the relevant tying market is the market for **[*548]** DSL service or, alternatively, the market for broadband internet access." (Doc. No. 1, p. 41). In its Opposition to Defendant's Motion to Dismiss, Plaintiff emphatically declares, **[**90]** "SBC challenges only the DSL allegations." (Doc. No. 22, p. 13). In other words, Plaintiff maintains that Defendant does not contest the tying claim as concerns the tying market for broadband internet services.

The Court does not agree. The word "alternatively" is disjunctive. The Court has analyzed Plaintiff's Tying claim on the basis of a tying market for DSL service. Plaintiff's Complaint indicates that an alternative market for broadband internet access need not be considered. So as to avoid any confusion, Plaintiff's Tying claim involving a tying market for broadband internet access is **DISMISSED without prejudice to repleading.**

F. Conclusion

Defendant's Motion to Dismiss Plaintiff's Tying Claim (Count No. 5) is **DENIED**, except insofar as Plaintiff seeks to pursue a Tying claim involving a tying market for broadband internet access. Since Plaintiff's complaint uses the disjunctive word "alternatively," the Tying claim involving a tying market for broadband internet access is **DISMISSED without prejudice to repleading.**

XIV. SUBJECT MATTER JURISDICTION AND THE BREACH OF CONTRACT CLAIM

A. Defendant's Argument Regarding Plaintiff's Breach [91] of Contract Claim**

1. Introduction

Defendant seeks dismissal of Plaintiff's breach of contract claim (Count No. 11) on the grounds that it "fall[s] outside of the Court's subject matter jurisdiction." (Doc. No. 7, p. 22). Particularly, Defendant advances the argument that the Telecommunications Act requires these claims be addressed by "appropriate regulatory agencies." *Id.*

If Defendant successfully pierces the breach of contract claim, it feels that the other claims arising out of the alleged breaches of the interconnection agreement ineluctably fail as a matter of course. *See* Doc. No. 7, p. 24 ("These allegations - and all of the causes of action that depend on them - thus implicate the expertise of the expert state commissions no less than Z-Tel's breach of contract claim."). For this reason, the Court addresses the breach of contract claim first. The contract at issue is the interconnection agreement. (Doc. No. 1, p. 50).

2. Defendant's Argument is Twofold

a. *Southwestern Bell Tel. Co. v. PUC*

Section 252 of the Telecommunications Act ***HN67***[] establishes a remedial scheme for CLECs that believe they have been wronged by an ILEC's failure **[**92]** to comply with the terms of an interconnection agreement. Defendant cites *Southwestern Bell Tel. Co. v. PUC* for the proposition that "'a dispute… seeking interpretation and enforcement of the agreement,… falls within a state's responsibilities under *Section 252*.' *208 F.3d 475, 480-81 (5th Cir. 2000)*." (Doc. No. 7, p. 23).

b. Doctrinal Support From Federal District Courts

Defendant relies on six (6) district court decisions for its conclusion that "Z-Tel's contract claims must be addressed to the appropriate state commissions in the first instance, not in federal court." *Id.* n. 15.

B. Plaintiff's Response

Plaintiff's response seeks to characterize Defendant's argument as follows: "SBC makes the remarkable claim that **[*549]** *§ 252(e)(6)* divests federal courts of jurisdiction granted by *28 U.S.C. §§ 1331* and*1367*." (Doc. No. 22, p. 17). First, Plaintiff offers a reading of *Southwestern Bell* different from that offered by Defendant.

> SBC cannot rely on *Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475 (5th Cir. 2000)*, for its mistaken claim that jurisdiction over breach of contract claims **[**93]** based on interconnection agreements is vested *exclusively* in state commissions. The Fifth Circuit did not rule that contract claims under interconnection agreements *must* be presented to a state commission before such claims may be asserted in federal district court, but only that such claims *may* be presented to the commission first.

Id. at 17-18.

Second, Plaintiff cites three Supreme Court cases, *Ben. Nat'l Bank v. Anderson, 539 U.S. 1, 156 L. Ed. 2d 1, 123 S. Ct. 2058 (2003)*, *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp., 453 U.S. 473, 478, 69 L. Ed. 2d 784, 101 S. Ct. 2870 (1981)*, and *Russello v. United States, 464 U.S. 16, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)* for the proposition "that a grant of exclusive jurisdiction must be explicitly stated in the statute; it will not be inferred." *Id.* at p. 18.

C. Defendant's Response

First, Defendant notes that "Z-Tel does not discuss or even acknowledge any of six federal cases identified in Defendants' opening brief squarely holding that claims alleging breach of the 1996 Act interconnection agreements must be addressed to state commissions in the first instance, not to federal **[**94]** courts." (Doc. No. 29, p. 7).

Second, Defendant is emphatic that its argument is not that federal district courts have been stripped of the federal question jurisdiction. Rather, "the 1996 Act 'strips federal district courts of their federal question jurisdiction as to questions that have not been presented first to a state PSC'; federal court review is confined to *review* of state-commission determinations." *Id.* (italics in original).

D. Plaintiff's Sur-Reply Argument Adds a New Case, But Nothing New

Plaintiff's Sur-Reply quotes *United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1329 n. 45 (D.D.C. 1978)* for the proposition that "[a] referral under [primary jurisdiction] doctrine does not oust a court of jurisdiction; it merely serves as means for requesting a regulatory agency to make preliminary factual and legal determinations while reserving to the court the authority to decide the ultimate questions."

E. Analysis

1. Plaintiff's Reliance on *AT&T* is Misplaced

As an initial matter, the Court notes that Plaintiff's reliance on *United States v. American Tel. & Tel. Co.* is misplaced. The quoted portion **[**95]** of the *AT&T* order explains that ***HN68***[] federal courts must wait for regulatory agencies to perform their task. This is precisely the point Defendant seeks to make.

2. The Telecommunications Act Assigns Enforcement Authority to State Commissions

HN69[] Under the Telecommunications Act, state regulatory bodies are charged with making the initial "determination" of any disputes between parties regarding the interpretation and enforcement of interconnection agreements. *47 U.S.C. § 252(e)(6)*; *see also* *Southwestern Bell Tel. Co. v. Connect Communications. Corp., 225 F.3d 942, 946 (8th Cir. 2000)* ("The Act provides that an interconnection agreement, reached either by negotiation or arbitration, must be submitted to the **[*550]** state commission for approval … this grant of power to state commissions necessarily includes the power to enforce the interconnection agreement.").

3. Once A Party Has Been "Aggrieved" By A State Commission, it May File Suit in Federal Court

A section of the Telecommunications Act entitled, "Review of State commission actions" reads as follows:

> ***HN70***[] In any case in which a State commission makes a determination under this **[**96]** section, **any party aggrieved** by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of *section 251* [*47 USCS § 251*] and this section.

47 U.S.C. § 252(e)(6) (emphasis added).

4. Plaintiff Misreads The Fifth Circuit's Holding in *Southwestern Bell*

Contrary to Plaintiff's characterization of the opinion, in *Southwestern Bell Tel. Co. v. PUC,* the Fifth Circuit held that ***HN71***[] state regulatory agencies have the principal role in determining claims that arise under the Act. "We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *208 F.3d 475, 480 (5th Cir. 2000)*.

5. Substantial Doctrine Correlates With *Southwestern Bell*

Other courts have followed the Fifth Circuit's lead. *See* *Intermedia Comm., Inc. v. BellSouth Telecomm., Inc., 173 F. Supp. 2d 1282, 1287 (M.D. Fla. 2000)* (holding that ***HN72***[] parties "must first bring their claims of violations of *§ 251* to the state **[**97]** PSC before a federal court has jurisdiction over the matter"). In *Contact Communications. v. Qwest Corp.,* the district court was presented with an action for breach of two interconnection agreements brought pursuant to diversity jurisdiction. *246 F. Supp. 2d 1184 (D. Wyo. 2003)*. In dismissing the claim, the court also explained, "it is clear to this Court that absent a prior determination of the issue by the state PSC, no federal court jurisdiction exists." *Id. at 1189* *(citing Southwestern Bell Tel. Co. v. PUC* and *Intermedia Communications).*

6. Conclusion

In the section of its complaint detailing its various causes of action, Plaintiff does not allege a violation of *§ 252* by name. However, the contract at issue in Plaintiff's Breach of Contract action is the interconnection agreement about which *§ 252* speaks. ***HN73***[] Plaintiff cannot call a *§ 252* violation by another name (ie., breach of contract) and avoid the controlling legal standards. For these reasons, Defendant's Motion to Dismiss Plaintiff's Breach of Contract claim (Count No. 11) is **GRANTED without prejudice.** If Plaintiff chooses to replead, it must show that a determination **[**98]** has been made by the state regulatory agency. Furthermore, Plaintiff must show that it has been "aggrieved" by this determination as required by *47 U.S.C. § 252(e)(6)*.

XV. SUBJECT MATTER JURISDICTION AND THE *§ 251* CLAIM

A. Arguments of the Parties

1. Defendant's Argument

Section 251 ***HN74***[] describes the interconnection duties required of ILECs. First, Defendant argues that this particular complaint was previously adjudicated by the FCC and is now on appeal in the D.C. Circuit. (Doc. No. 7, p. 36). Furthermore, Defendant maintains that this is **[*551]** relevant because the plain text of *Section 207* states that parties may file a complaint with the FCC or in federal district court, but not both. *Id.*

Second, Defendant argues that general principles of claim preclusion bar Plaintiff's claim. *Id.* at 37.

2. Plaintiff's Response

Plaintiff responds that Defendant's reliance on *Section 207* is misplaced; *Section 207* controls claims for damages, whereas Plaintiff's FCC claim was brought pursuant to *Section 208*, which controls complaints to the FCC in general. In Plaintiffs view, a claim brought pursuant to *Section 208* avoids the exclusionary **[**99]** language of *Section 207*. Moreover, Plaintiff's FCC complaint expressly indicated that no damages were being sought. (Doc. No. 22, p. 36).

Plaintiff also maintains that claim preclusion has no applicability to the *Section 251* claim because the case at bar represents "supplemental relief." *Id.* at 37.

3. Defendant's Reply

In reply, Defendant first reiterates its prior argument that *Section 207* disposes of the *Section 251* claim. Second, Defendant directs the Court's attention to paragraph 99 of the FCC complaint, where Plaintiff expressed an intent to "seek damages including, but not limited to, damages for lost customers, profits, goodwill, and increased costs." (Doc. No. 29, p. 17, n. 15).

4. Plaintiff's Sur-Reply

Plaintiff is emphatic that its FCC complaint did not seek damages. (Doc. No. 37, p. 17). Plaintiff also clarifies its argument that the situation at hand is a "bifurcated determination of liability and damages." *Id.* at p. 18, n. 23. Viewed in this light, the cases cited by Defendant are inapposite because "they involve claimants who received determinations as to both liability and damages and then filed identical claims in court." *Id.*

[100] B. Analysis**

1. The FCC Rules Do Not Discuss Bifurcation in the Sense in Which Plaintiff Uses the Term

a. *Section 1.722*

Plaintiff relies on *47 C.F.R. § 1.722* for the proposition that "under FCC rules, a party may request that the FCC bifurcate liability and damage questions. ***HN75***[] The FCC rules state that when a party makes this election, the damages proceeding is 'separate from and subsequent to' the liability complaint." (Doc. No. 37, p. 18). It does not follow that the damages proceeding is to be heard in federal court. This point is made clear in the relevant section of this regulation:

> ***HN76***[] (i) Where a complainant files a supplemental complaint for damages in accordance with paragraph (e) of this section, the following procedures may apply:
> (1) Issues concerning the amount, if any, of damages may be either designated by the Enforcement Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge. Such Administrative Law Judge shall be chosen in the following manner:
> (i) By agreement of the parties and the Chief Administrative Law Judge; or
>
> (ii) In the absence **[**101]** of such agreement, the Chief Administrative Law Judge shall designate the Administrative Law Judge.

b. *Section 208*

Plaintiff argues that its claim is not subject to the dictates of *Section 207* because its FCC complaint was predicated under *Section 208*. *Section 208* reads as follows:

> **[*552]** *§ 208*. ***HN77***[] Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation
>
> (a) Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of **[**102]** law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.
> (b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.
> (2) The Commission shall, with respect to any such investigation initiated prior to the date of enactment of this subsection [enacted Nov. 3, 1988], issue an order concluding the investigation not later than 12 months after such date of enactment.
>
> (3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under *section 402(a)* [*47 USCS § 402(a)*].

The Court's attention **[**103]** is particularly drawn to subpart three (3), ***HN78***[] which references appeals under *Section 402*. *Section 402* is entitled, "Judicial review of Commission's orders and decisions." The first sentence reads, "Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act…". In other words, as the title of *Section 402* suggests, the rule envisages ordinary appeals. It is fairly obvious that an appeal is very different from a fresh action for damages in a district court. The bottom line is that Plaintiff's reliance on *Section 208* is misplaced.

2. Fifth Circuit Doctrine Abjures the Formal/Informal Complaint Distinction Plaintiff Relies Upon

Plaintiff cites *Cancall PCS, LLC v. Omnipoint Corp., 2000 U.S. Dist. LEXIS 2830 (S.D. N.Y. 2000)* (Schwartz, J.) for the proposition that the filing of an "informal complaint" with the FCC does not bring the complainant within the ambit of *Section 207*. (Doc. No. 29, p. 36). This Court respectfully reads the law differently than does Judge Schwartz. The section of *Cancall* Plaintiff refers to reads as follows:

> *Section 207* thus 'precludes a complainant from filing suit in federal court once she **[**104]** has initiated the administrative complaint process with the FCC either by filing a formal or informal complaint.' *Stiles v. GTE Southwest Inc., 128 F.3d 904, 906 (5th Cir. 1997)*. However, only those claims and remedies sought by the plaintiffs in their informal complaint are barred from being brought in federal **[*553]** court. *See RCA Global Communications, Inc. v. Western Union Telegraph Co., 521 F. Supp. 998, 1005 - 1006 (S.D.N.Y. 1981)* ('Accordingly, we find that [the plaintiff] has not presented its claim for damages… to the FCC, and conclude that the FCC does not have exclusive jurisdiction over the claim under *§ 207*.').

Stiles v. GTE Southwest is the case on which Defendant places primary emphasis. In *Stiles,* the Court was clear:

> In this case, ***HN79***[] the language of the statute is unambiguous: A complainant can file a complaint either with the FCC or in federal district court, but not in both. Contrary to Stiles's arguments, *§ 207* draws no distinction between formal and informal complaints and the fact that the FCC has decided to provide both formal and informal complaint proceedings does not alter the clear language of the statute. **[**105]**

128 F.3d 904, 907 (5th Cir. 1997).

Whatever the state of the law elsewhere, this Court is guided by the clear teaching of *Stiles.* In the Fifth Circuit, regardless of whether Plaintiff filed a formal or informal complaint, *Section 207* is controlling.

3. Plaintiff's FCC Complaint Presents an Issue of Some Confusion

Arguably, Plaintiff's complaint in this action could proceed if it is not predicated upon the same issues as the prior FCC action. This issue goes to Defendant's claim preclusion argument. The FCC complaint is therefore highly relevant. Plaintiff attaches the FCC complaint as Exhibit H to its original opposition to Defendant's motion to dismiss. Plaintiff is clear, "this complaint, however, was not brought for damages and Z-Tel expressly indicated that damages were not being sought in the proceeding." (Doc. No. 22, p. 36) *(citing* page 2 of Exhibit H). The second page of Exhibit H is entitled "Formal Complaint Intake Form." In very small print, a checklist on this form reads "If damages are sought in this Complaint, the Complaint comports with the specifications prescribed by *47 C.F.R. Section 1.722 (a)*,*(c)*." Written **[**106]** next to this sentence is a notation, "N/A". However, the text of the complaint itself does not readily divulge the Plaintiff's "express indication that damages were not sought in the proceeding." Moreover, as explained in Part XV, B. 1, *supra, Section 1.722* ***HN80***[] does not envisage bifurcated damages/liability proceedings between the FCC and federal district courts.

In its Reply, Defendant quotes paragraphs 14 and 99 of the FCC complaint for language concerning "damages." This language would tend to cut at the heart of Plaintiff's argument. However, Exhibit H to Plaintiff's Opposition (i.e., the FCC complaint) is not numbered by paragraph. The Court is not clear what document Defendant quotes from.

4. Conclusion

Section 207 ***HN81***[] bars action in federal district court once an aggrieved party files a complaint with the FCC. *Stiles* directs that this result obtains upon the filing of both formal and informal complaints. Arguably, Plaintiff's complaint in this action could proceed if it is not predicated upon the same issues as the prior FCC action. There seems to be some confusion as to which document represents Plaintiff's FCC complaint.

For these reasons, Defendant's Motion to Dismiss **[**107]** Plaintiff's *§ 251* claim (Count No. 8) is **GRANTED without prejudice to repleading.** If Plaintiff chooses to replead, it should demonstrate how Plaintiff's complaint in the case at bar is predicated upon different issues vis-a-vis the prior FCC action. Having granted Defendant's motion on the more fundamental **[*554]** grounds of subject matter jurisdiction, the Court need not address Defendant's argument concerning claim Preclusion.

XVI. *TELECOMMUNICATIONS ACT § 202*

A. Plaintiff's Complaint

Plaintiff's Complaint regarding the *Telecommunications Act § 202* violation (Count No. 9) reads as follows:

> SBC's course of conduct, as described above, is systematically biased to advantage customers if they purchase their basic local service from SBC rather than Z-Tel, by depriving Z-Tel of complete, timely, and accurate line loss information and accurate billing information, while simultaneously providing for itself the same information. As a consequence, SBC's customers perceive SBC's service differently than Z-Tel's, purely based on the deliberate discrimination among the different class of customers by SBC. As such, SBC has violated *47 U.S.C. § 202*. **[**108]**

(Doc. No. 1, p. 49).

B. Defendant's Argument

1. *§ 202*

Section 202 reads as follows:

> ***HN82***[] (a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.
> (b) Charges or services included. Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

2. Defendant's First Argument: The Activities About Which Plaintiff Complains Are Not Subject to *Section 202*

Defendant advances two arguments in support of its motion to dismiss Plaintiff's *§ 202* claim. **[**109]** Defendant's first argument trains on the denotation of the words "communication services." (Doc. No. 7, p. 38). Defendant places heavy emphasis on the Fifth Circuit's opinion in *Brittan Communications. Int'l Corp. v. Southwestern Bell Tel. Co., 313 F.3d 899 (5th Cir. 2002)*. In *Brittan,* the plaintiff, a switchless reseller of long-distance telephone services, appealed the district court's order granting the defendant's motion for judgment on the pleadings on, *inter alia,* its *§ 202* claim. The Fifth Circuit affirmed Judge Kent's finding that, long distance "billing and collection services that do not utilize communications over the common carriers wire or radio facilities are not 'communications services' regulated by *Title II of the Communications Act*." *Id. at 904*.

3. Defendant's Second Argument: Plaintiff Fails to Allege Discrimination Among Similarly Situated Classes of Customers

Defendant's second argument is that Plaintiff fails to allege disparate treatment among classes of customers. (Doc. No. 7, p. 39). Defendant cites two cases from the D.C. Circuit, *American Message Ctrs. v. F.C.C., 311 U.S. App. D.C. 64, 50 F.3d 35, 40 (D.C. Cir. 1995)* **[**110]** and *Competitive Telecommunications Ass'n v. F.C.C., 302 U.S. App. D.C. 423, 998 F.2d 1058, 1061 (D.C. Cir. 1993)*, and a FCC order for the proposition that a **[*555]** *§ 202* claim trains on disparate treatment of similarly situated customers, rather than other parties. Defendant reads Plaintiff's complaint as alleging only that Defendant has treated "[itself] better than [it] has treated Z-Tel." *Id.*

C. Plaintiff's Response

1. Plaintiff's First Argument: *Brittan* is Distinguishable

Plaintiff's first argument trains on *Section 202*'s use of the words "in connection with" and seeks to distinguish *Brittan* for the following reason:

> 'Brittan and SWBT did not have a contractual relationship,' and the charges at issue were Brittan's charges to consumers, which SBC included on its bill to the consumer. Thus, in *Brittan,* SBC was not providing a 'communication service' to Brittan 'in connection with' the billing service at issue.

(Doe. No. 22, p. 39) (citation omitted).

2. Plaintiff's Second Argument: A Carrier's Provision of Services to Itself can be Used to Judge Service Quality

Defendant cites *Telecom Int'l Am., Ltd. v. AT&T Corp., 67 F. Supp. 2d 189, 211 n.22 (S.D.N.Y. 1999)* **[**111]** for the proposition that a carrier's provision of services to itself can be used to judge service quality under *§ 202(a)*. (Doc. No. 22, p. 40).

D. Analysis

1. The Court Does Not Accept Plaintiff's Reading of *Brittan*

In *Brittan,* the Court explained:

> Although it may be true that the FCC has moved away from the position that billing and collection services are financial and administrative services, this does not persuade us to conclude that the billing and collection services at issue in this case fall within Title II. Brittan ***HN83***[] has cited no FCC decision in which the FCC has altered its view that billing and collection services provided by LECs to unaffiliated long-distance providers fall outside the scope of Title II. *See In the Matter of Federal-State Joint Board on Universal Service, 13 F.C.C.R. 24,744, P 70 & n.87 (1998)* (finding that billing and collection services are subject to Title II, but only as to a carrier's own billing and collections). Likewise, Brittan has cited to no case holding that billing and collection services fall within the scope of Title II.

313 F.3d, at 904.

> ***HN84***[] Although carrier **[**112]** billing and collection for a communication service that it offers individually or as a joint offering with other carriers is an incidental part of a communication service, we believe that carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of *Title II of the Communications Act*.

Id. at. 905 (quoting *In the Matter of Detariffing of Billing and Collection Services, 102 F.C.C.2d 1150, p. 31 (1986)*).

Plaintiff's reliance on the existence, or lack thereof, of a contractual relationship carries no weight in assessing *Brittan's* fundamental holding. Since Plaintiff's allegations of billing and line-loss services are of a type far different from the "financial and administrative services" spoken about in *Brittan,* Plaintiff has failed to state a *Section 202* claim as matter of law.

2. Plaintiff Reads *Telecom Int'l Am.* Out of Context

Plaintiff cites *Telecom Int'l Am.* for the proposition ***HN85***[] that a carrier's provision of services to itself can be used to judge service quality under *§ 202 (a)*. This is fairly undebatable. However, the focus on **[*556]** "quality" is only relevant as to the provision of **[**113]** service to other customers. Plaintiff fails to note that immediately above the section it cites, the court in *Telecom Int'l Am.* explained:

> Courts determining whether a carrier has unlawfully discriminated utilize a tripartite test analyzing: (1) whether the services are 'like;' (2) if so, whether the carrier is offering the service to **other customers** at a 'different' price or under 'different' conditions than those offered to the petitioner; and (3) if such difference exists, whether that difference is unreasonable.

67 F. Supp. 2d 189, 210 (S.D.N.Y. 1999) (emphasis added).

This Court notes that *Telecom Int'l Am.* cites the same D.C. Circuit cases Defendant relies on in the case at bar. ***HN86***[] The bottom line is that the focus of a *§ 202* inquiry is on discrimination among customers. Plaintiff's complaint fails to make such an allegation. Herein lies an additional grounds for the Court's dismissal of Plaintiff's *Section 202* claim.

E. Conclusion

Defendant's motion to dismiss Plaintiff's *Section 202* claim (Count No. 9) is **GRANTED**. Plaintiff's *Section 202* claim is **DISMISSED without prejudice to repleading.**

XVII. TELECOMMUNICATIONS [**114] ACT *§ 222*

A. Plaintiff's Complaint

> In its capacity as a carrier customer of SBC, Z-Tel provided SBC's wholesale operations with proprietary information concerning its customers and potential customers. SBC was required under *47 U.S.C. § 222* to use that information only to provide the wholesale services Z-Tel ordered, and, not for its own marketing efforts. SBC misused that information, in violation of *Section 222 of the Act*, in order to solicit those customers as SBC's own retail customers. Some of those solicited customers canceled their orders with Z-Tel and became SBC customers.

(Doc. No. 1, p. 49).

B. Text of *§ 222*

> The text of *§ 222* reads as follows:
>
> ***HN87***[] (a) In general. Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.
>
> (b) Confidentiality of carrier information. A telecommunications carrier that receives or obtains proprietary information **[**115]** from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

C. Defendant's Argument

Defendant's argument trains on the words "another carrier" found in *§ 222 (b)*.

> As relevant here, *Section 222* prevents carriers (such as SBC's ILECs) from 'using… for its own marketing purposes' any 'proprietary information' that a 'telecommunications carrier… receives or obtains… from *another* carrier for purposes of providing any telecommunications service." *47 U.S.C. § 222 (b)* (emphasis added). The information Z-Tel places at issue in Count 10- the fact that a customer has left an SBC ILEC to take service from another carrier, along with a 'detailed summary' of the services the customer previously received from the SBC ILEC, *see* ***[*557]*** Compl. P 78-is Defendants' *own* information, which they possess by virtue of their own prior relationship with the customer.

(Doc. No. 7, p. 40) (italics in original).

Defendant expounds on this argument in its Reply:

> Z-Tel alleges that defendants used **[**116]** *their own* information- the fact that a customer had stopped purchasing services from one of the defendants-in its marketing efforts. But carriers are permitted to use *their own* information, and this allegation thus does not state a claim under *47 U.S.C. § 222 (b)*.
>
> Z-Tel… merely rehashes the language of *section 222* without providing notice of the proprietary information Z-Tel might be referring to.

(Doc. No. 29, p. 20) (italics in original).

D. Analysis

HN88[] "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Jones v. ALCOA, Inc., 339 F.3d 359, 362 (5th Cir. 2003)*. Plaintiff fails to allege, in even the vaguest of terms, what sort of data in the furnished information Defendant allegedly misused. Even viewing all allegations in the light most favorable to the non-movant, the Court cannot conclude that Plaintiff has alleged a legally cognizable claim.

E. Conclusion

Defendant's Motion to Dismiss Plaintiff's *Section 222* claim (Count No. 10) is **DISMISSED** without prejudice to repleading.

XVIII. RICO

A. Plaintiff's [**117] Complaint

The crux of Plaintiff's RICO claim is that Defendant's submission of false and fraudulent invoices and defective line loss information constitutes predicate acts of racketeering activity, particularly mail and wire fraud. (Doc. No. 1, p. 42-46). Plaintiff further alleges that Defendants aid and abet each one another in this scheme. Lastly, Plaintiff alleges that the subsidiary Defendants also assume a distinct role in facilitating and masking the underlying fraud. *Id.* at p. 45.

B. Defendant's Argument

1. Introduction

HN89[] To state a claim under the RICO statute, *18 U.S.C. § 1962*, a plaintiff must allege (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989) (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985))*. Defendant argues that Plaintiff has failed to allege elements (2) and (4).

2. Racketeering Activity

a. No Intent to Deceive

Defendant argues that Plaintiff fails to allege an intent to deceive. Defendant cites *Mazandarani v. American Express Travel Related Services. Co., 1996 U.S. Dist. LEXIS 13753 (N.D. Tex. 1996)* **[**118]** for the proposition that a simple failure to perform legal obligations (i.e., lease the network as required under the interconnection agreement) does not constitute *a priori* evidence of an intent not to perform. (Doc. No. 7, p. 26-28).

b. No Reasonable Reliance

Defendant cites *In re Mastercard Int'l Internet Gambling Litig., 313 F.3d 257 (5th Cir. 2002)* for the proposition that a civil RICO plaintiff must also allege facts showing that it reasonably relied on the allegedly false and fraudulent statements. (Doc. No. 7, p. 28). Defendant asserts Plaintiff did not so rely, as evidenced by **[*558]** Plaintiff's actions in lodging many complaints with Defendant about its service, or faulty provision thereof. In other words, Defendant maintains that Plaintiff's claim fails because Plaintiff knew about the lack of truth about which it now complains.

c. No Acquisition or Maintenance

> But plaintiff does not offer even a conclusory allegation, let alone well-pleaded facts, suggesting that SBC *acquired* its subsidiaries by virtue of the alleged scheme to defraud Z-Tel; rather, the complaint acknowledges that SBC acquired its subsidiaries years *before* the **[**119]** alleged scheme was hatched in 1999.

(Doc. No. 7, p. 29) (italics in original).

Defendant also directs the Court's attention to a case involving an "analogous complaint," *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2d Cir. 1996)*. *Id. at 30*.

3. No Distinct Enterprise

First, Defendant cites authority for the proposition that a corporation cannot be both the enterprise and the RICO perpetrator. For this reason, the Defendant subsidiaries are wrongly conflated with RICO persons. Defendant seeks to distinguish this Court's order in *Office Outfitters v. A.B. Dick Co., 83 F. Supp. 2d 772 (E.D. Tex. 2000)* from a recent Seventh Circuit opinion holding that subsidiaries and their parent companies are insufficiently distinct to trigger RICO liability. (Doc. No. 7, p. 31-33).

C. Plaintiff's Response

1. Intent May Be Averred Generally

First, Plaintiff points out that under *FED. R. CIV. P. 9 (b)*, intent may be averred generally. (Doc. No. 22, p. 24). Plaintiff also adduced authority for the proposition that intent to commit fraud is usually a question of fact.

2. Simply "Raising Questions" [120] Does Not Vitiate Reliance**

> Raising questions regarding representations in some invoices is hardly synonymous with actual knowledge of fraudulent statements in those invoices, much less with other invoices as to which Z-Tel had no knowledge of falsity at the time they were paid.

(Doc. No. 22, p. 26).

3. Defendant Misreads *Office Outfitters*

Plaintiff reads *Office Outfitters* as having rejected the restrictive view of the maintenance requirement adopted by the Second Circuit in *Discon.* Plaintiff asserts that an allegation that one took steps to enhance or protect value is sufficient. (Doc. No. 22, p. 28).

4. The Subsidiaries Played "Distinct Roles"

Plaintiff points to several places where it alleged conduct unique to the subsidiary Defendants. (Doc. No. 22, p. 30-31). Plaintiff also cites *Williams v. Ford Motor Co., 11 F. Supp. 2d 983 (N.D. Ill. 1998)* in support of its association-in-fact allegations. *Id.* at p. 31.

D. Analysis

1. Racketeering Activity

A. Intent to Deceive

In *Coffel v. Stryker Corp.,* the court explained, ***HN90***[] "since intent to defraud is generally not susceptible to direct proof, it **[**121]** usually must be proven by circumstantial evidence." *284 F.3d 625, 634 (5th Cir. 2002)*. *Rule 9 of the Federal Rules of Civil Procedure* ***HN91***[] requires that the circumstances constituting wire and mail fraud be stated with particularity. However, *Rule 9* should be read together with *Rule 8*, which requires only a "short and plain statement **[*559]** of the claim showing that the pleader is entitled to relief." *Landry v. Air Line Pilots Ass'n Int'l, AFL-CIO, 901 F.2d 404, 430 (5th Cir.)*, *cert. denied, 498 U.S. 895, 112 L. Ed. 2d 203, 111 S. Ct. 244 (1990)*.

For these reasons, the Court cannot say Plaintiff has failed to allege any set of circumstances that Defendant held an intent to deceive at the initiation of the interconnection agreement. Moreover, at the motion to dismiss stage, Plaintiff has not yet had an opportunity adduce evidence, direct or circumstantial, of intent to defraud on the part of Defendant.

b. Reasonable Reliance

HN92[] The "by reason of" language of RICO has been interpreted by the Supreme Court and to require a showing that the fraud was the "but for" cause and "proximate" cause of the injury. *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992).* **[**122]** "For a misrepresentation to cause an injury, there must be reliance. Knowledge of the truth defeats a claim of fraud because it eliminates the deceit as the 'but for' cause of the damages." *Sandwich Chef v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218-19 (5th Cir. 2003)*.

> Plaintiff presents a highly persuasive argument:
>
> Raising questions regarding representations in some invoices is hardly synonymous with actual knowledge of fraudulent statements in those invoices, much less with other invoices as to which Z-Tel had no knowledge of falsity at the time they were paid.

(Doc. No. 22, p. 26).

Moreover, objections were lodged only as to some fraction of the total number of bills and invoices. Plaintiff has raised a credible allegation that the condition of falsity was (arguably) present as to some of the other bills. Viewed in the light most favorable to the non-movant, the fact that no objection was raised demonstrates that this falsity was unknown to Plaintiff. For these reasons, the Court cannot agree with Defendant that Plaintiff has raised no allegation of reasonable reliance as to at least some critical mass of the bills at **[**123]** issue.

c. Acquisition or Maintenance

The RICO statute reads as follows:

HN93[] (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Defendant first argues that Plaintiff fails to allege that it acquired its subsidiaries by virtue of the alleged RICO violations. Plaintiff does not seem to particularly resist this argument. Since the subsidiaries were acquired before Plaintiff began to operate as a company, Plaintiff's "acquisition" argument is lacking. Were "acquisition" a necessary condition to a RICO claim, this would likely be the end of the story. However, ***HN94***[] in the section of the statute quoted immediately above, the words "acquire" and "maintain" are separated by the disjunctive word "or."

Defendant states, "While the complaint does contain a conclusory assertion that the alleged RICO scheme helped SBC 'enhance or protect the value' of its subsidiaries, it does not assert that the alleged scheme allowed SBC to *maintain* **[**124]** ownership of its subsidiaries." (Doc. No. 7, p. 29-30) (italics in original). Plaintiff's maintenance allegation is contained in paragraph 124 of its complaint. In *Office Outfitters v. A.B. Dick Co.,* this Court explained:

> **[*560]** Plaintiffs allege that GEC and GEC, Inc.--the RICO persons--took steps that enhanced or protected A.B. Dick's cash-in value and that such measures were injurious to Plaintiffs. Such an allegation is sufficient under *§ 1962(b)*.

83 F. Supp. 2d 772, 779 (E.D. Tex. 2000).

Plaintiff's theory is that Defendant's conduct allowed it to arrogate illegal profits it would not otherwise have been able to capture. The discounted value of illicit profits is reflected in shareholder equity to the same extent as are legitimate profits. Insofar as Defendant's alleged conduct was accretive to the value of these business firms, it cannot be said that the alleged RICO-violating conduct fails the maintenance requirement.

d. Maintenance Injury

Defendant argues that Plaintiff has not alleged an acquisition or maintenance injury separate from the injuries resulting from the predicate acts. (Doc. No. 7, p. 30-31). Defendant's argument is unavailing. **[**125]** ***HN95***[] A complaint does not need to make a large number of allegations relating to the injury suffered. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* (quoting *Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990))*. In *Nat'l Org. for Women v. Scheidler,* the Supreme Court reversed a decision by the lower court to dismiss a complaint for lack of standing to bring a RICO action. In doing so, the Supreme Court indicated that ***HN96***[] relatively few allegations are needed to state an injury under RICO:

> [Plaintiffs] alleged in their complaint that respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. [Plaintiffs] claimed that this conspiracy 'has injured the business and/or property interests of the [plaintiffs].' In addition, [plaintiffs] claimed that [a defendant] threatened [its] **[**126]** clinic administrator with reprisals if she refused to quit her job at the clinic. . . . Nothing more is needed to confer standing on [plaintiffs] at the pleading stage.

510 U.S. 249, 256, 127 L. Ed. 2d 99, 114 S. Ct. 798 (1994).

For these reasons, the Court also rejects Defendant's argument that Plaintiff's RICO damages are indistinct from its Tariff/Contract damages. (Doc. No. 7, p. 29). Defendant's Filed Tariff Doctrine argument will be discussed in more detail in Part XIX, *infra.* For present purposes, the Court notes that Defendant had not adduced sufficient authority for the proposition that the Filed Tariff Doctrine circumscribes a civil RICO plaintiff's damages.

e. Conclusion

Plaintiff has alleged a cognizable claim as to racketeering activity.

2. The "Enterprise" Element

a. Distinct Roles

Defendant cites *Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 583 (5th Cir. 1992)* for the proposition that "a corporation cannot be both the enterprise and the RICO perpetrator." Defendant is correct in this statement of the law. *See also* *Bishop v. Corbitt Marine Ways, Inc., 802 F.2d 122, 123 (5th Cir. 1986)* ("the 'person' **[**127]** and the 'enterprise must be distinct."); *see also* *Yellow Bus Lines, Inc. v. Local Union 639, 280 U.S. App. D.C. 60, 883 F.2d 132, 139 (D.C. Cir. 1989)* ("Logic alone dictates that **[*561]** one entity may not serve as the enterprise and the person associated with it because…you cannot associate with yourself.").

However, Defendant misapplies the law to the Plaintiff's allegations. Plaintiff does not allege that Defendant SBC is both the enterprise and the RICO perpetrator. To the contrary, under the title, "SBC's Subsidiaries Assume A Distinct Role in Facilitating And Masking Defendants' Fraud, Plaintiff alleges that, for at least some part of the allegedly illicit conduct, the subsidiary Defendants are the perpetrators. (Doc. No. 1, p. 45 (detailing distinct roles attributable to the subsidiaries)).

Both sides direct the Court to its order in *Office Outfitters v. A.B. Dick Co.* In that case, this Court explained, "plaintiffs allege that A.B. Dick was used to make 'most of the misrepresentations and fraudulent omissions toward distributors. . . .' Such an allegation is sufficient to withstand a motion to dismiss." *83 F. Supp. 2d, at 780*. For obvious reasons, **[**128]** Plaintiff feels that *Office Outfitters* is strongly correlative to the facts in the case at bar, while Defendant feels that the present set of facts are highly distinguishable.

In support of its argument, Defendant directs the Court to a recent opinion by Judge Posner, *Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923 (7th Cir. 2003)*. The Seventh Circuit explained:

> ***HN97***[] A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act, *see* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, unless the enterprise's decision to operate though subsidiaries rather than divisions somehow facilitated its unlawful activity, which has not been shown here.

Id. at 934.

The Court's first observation about *Bucklew* is that the plaintiff charged copyright infringement, fraud, conversion, and violation of RICO. The district judge dismissed all but the copyright claim, which was tried to a jury, resulting in a verdict for $ 660,000, which the judge remitted to $ 395,000. **[**129]** Even though the Circuit's review was *de novo* as to the pre-trial dismissal, the appellate court obviously had the benefit of a trial record to inform the totality of its analysis.

Second, *Bucklew* clearly holds out a flag for Plaintiff to capture, "unless the enterprise's decision to operate though subsidiaries rather than divisions somehow facilitated its unlawful activity…". In the case at bar, Plaintiff does in fact make such an allegation. "SBC's subsidiaries' actions are all aimed at concealing, masking, and facilitating the Defendants' fraudulent scheme." (Doc. No. 1, p. 45). The Court hastens to add that it passes no judgment as to the ultimate truth of this allegation. Nor does the Court foreclose the possibility that credible summary judgment evidence may not provide sufficient factual support. However, at the motion to dismiss stage, Plaintiff's allegation is sufficient to come within the ambit of *Bucklew's* exception.

b. Association-in-Fact

Defendant directs the Court's attention to an Eighth Circuit case, *Fogie v. THORN Ams., Inc., 190 F.3d 889 (8th Cir. 1999)* in which the court found a lack of sufficient distinction between the parents **[**130]** and subsidiary to warrant RICO liability. The Court's first observation is that, in *Fogie,* the Eighth Circuit was presented with a district court's order on a motion for summary judgment. In the case at **[*562]** bar, this Court is presented with a motion to dismiss.

The Court's second observation about *Fogie* is that the holding was not as broad as Defendant asserts.

> But we must consider whether a subsidiary may be sufficiently distinct from its parent or other related subsidiaries so as to satisfy *§ 1962(c)*'s distinctiveness requirement. We believe it cannot. A parent company and a subsidiary are separate legal entities, but this is not enough. Nor is it enough that the parent and subsidiary corporations have different roles in the alleged enterprise, as would be typical of every parent-subsidiary relationship. Rather, there must be a greater showing that the parent and subsidiary are distinct than the mere fact that they are separate legal entities. To conclude otherwise would be to read the distinctiveness requirement out of RICO.
>
> Turning our attention to the present case, the plaintiffs have not shown sufficient distinctiveness between THORN Americas; TEMINAH; THORN **[**131]** EMI, plc; or any of the other related business entities that allegedly comprise the RAC enterprise. All these entities are part of one corporate family operating under common control. Therefore, we affirm the District Court's granting of summary judgment to the defendants on the plaintiffs' *§ 1962(c)* claim.

Id. at 898.

In response, Plaintiff points out that *Fogie* is not a Fifth Circuit case. Plaintiff also indicates that it "has not located a single case in this circuit precluding a finding of distinctiveness under 1962 (c), where a subsidiary is identified as the RICO person, with an association-in-fact enterprise existing among the subsidiary and its parent." (Doc. No. 22, p. 31).

One such case is *Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438 (5th Cir. 1987)*. In *Atkinson,* the plaintiffs appealed the district court's decision to grant the defendant's motion for judgment notwithstanding the verdict regarding a RICO claim. Discussing the concept of distinctiveness, the Court explained:

> The record here contains no evidence that the bank, its holding company, and the three employees were associated in any manner apart **[**132]** from the activities of the bank. Plaintiffs wholly failed to establish the existence of any entity separate and apart from the bank. In this case, the alleged racketeering activity forming the predicate of the RICO charge was mail fraud -- the mailing of false statements requesting payment of interest in excess of the agreed amount. The mailing of loan statements was an activity of the bank There is no evidence of any other activity on the part of the alleged enterprise.
> In addition, there was no evidence presented that the five associates functioned as a continuing unit or formed an ongoing association. No connection was shown between the three individuals and the holding company. The only fact implicating the holding company in the alleged association was its purchase of shares of plaintiffs' notes from the bank. Reasonable jurors could not have found the existence of an enterprise separate and apart from the bank. The district court correctly set aside the jury's finding of a RICO violation.

Id. at 440.

The bottom line is that Plaintiff has its work cut out if it seeks to distinguish its case from the doctrine overviewed immediately above. However, ***HN98***[] the **[**133]** doctrine instructs the Court to be hesitant to cut off RICO plaintiffs before they have an opportunity to adduce "enterprise" evidence.

[*563] E. Conclusion

In Defendant's view, a simple contract dispute may not be elevated into a RICO violation. This is certainly a correct statement of the law. However, on a motion to dismiss, the Court is required to view all allegations in the light most favorable to the non-movant. In that light, Plaintiff has alleged a pattern of intentional wrongful conduct on the part of Defendant to misuse its network and submit false business material in such a way as to seriously hamper Plaintiff's ability to compete in the market. The Court hastens to add that it passes no judgment on the ultimate truth of these allegations.

Defendant would have the Court view Plaintiff's allegations in the light most favorable to Defendant. In that light, this is "simply a contract dispute." However, the Court concludes that, when the allegations are viewed in the light most favorable to Plaintiff, Plaintiff has alleged that Defendant breached its contract by way of conduct far more deleterious than that constituting the breach itself.

For these reasons, Defendant's **[**134]** Motion to Dismiss Plaintiff's RICO claim (Count No. 6) is **DENIED**.

XIX. FILED TARIFF DOCTRINE

A. Introduction

Defendant advances a separate argument in support of its motion to dismiss 1) the RICO claim (Count 6) and 2) the Telecommunications Act claims (Count Nos. 8, 9, 10, and 11). As an initial matter, the Court notes that the relationship between the Filed Tariff Doctrine and Plaintiff's RICO claim was discussed more fully in Part XVIII, D.1.d, *supra.* At that point, the Court explained why the Filed Tariff Doctrine argument was found to be unavailing with respect to the RICO claim. The analysis to follow is particularly, though not exclusively, directed to the Telecommunication Act claims.

B. Legal Standards

Section 203(a) of the Telecommunications Act ***HN99***[] requires local exchange carriers to file with the FCC tariffs "showing all charges" and "showing the classifications, practices, and regulations affecting such charges." *47 U.S.C. § 203(a)*. Under the filed rate doctrine, "once a carrier's rate is approved by the FCC, the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively **[**135]** enumerate the rights and liabilities' as between the carrier and the customer." *Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000)* (citation omitted). "The filed rate doctrine precludes the plaintiff in an antitrust suit from claiming speculative damages….[involving] a hypothetical lower rate that would have been charged in the absence of the [anticompetitive conduct] and the acceptability of those rates to the appropriate regulatory agency." *County of Stanislaus v. Pacific Gas & Elec. Co., 1995 U.S. Dist. LEXIS 21411, *10* *(citing* *Keogh v. Chicago & N.R. Co., 260 U.S. 156, 164, 67 L. Ed. 183, 43 S. Ct. 47 (1922))*. However, the filed rate doctrine does not apply to cases not involving rates or rate setting. *See Central Office Telephone, Inc. v. AT&T, 108 F.3d 981 (9th Cir. 1997)* (holding that the filed rate doctrine is inapplicable in a breach of contract dispute); *Columbia Steel Casting Co. v. Portland General Elec. Co., 103 F.3d 1446 (9th Cir. 1996)*.

C. Analysis

At one point, Defendant appears to seek to extend its Filed Tariff Doctrine argument to Plaintiff's entire complaint, "these allegations **[**136]** - and all of the causes of action that depend on them - thus implicate the expertise of the expert state commissions no less than Z-Tel's breach of contract claim." (Doc. No. 7, p. 24). However, **[*564]** the section heading under which the Filed Tariff Doctrine argument appears indicates that the propositions contained therein are directed solely at the RICO claim and Telecommunications Act claims. (Doc. No 7, p. 22).

Defendant's Filed Tariff Doctrine argument is primarily directed at the Telecommunications Act claims. Since the Telecommunications Act claims were dismissed on narrower grounds, the Court does not reach the Filed Tariff Doctrine argument as to these claims. However, should Plaintiff choose to replead the Telecommunications Act claims in such as way as to correct the indicated errors, Defendant is free to advance this argument again on a future dispositive motion.

XX. LANHAM ACT

A. Plaintiff's Complaint

> SBC, in connection with its provision of basic local and enhanced services, caused to be used in interstate commerce false and misleading descriptions or misleading representations of fact. The false and misleading descriptions or misleading representations **[**137]** of fact, in commercial promotion, misrepresented the nature, characteristics, and qualities of Z-Tel's services, in violation of *15 U.S.C. § 1125(a)*. In particular, SBC has misrepresented the nature, characteristics, and qualities of both SBC's and Z-Tel's basic local and enhanced services. For example, by providing line loss information to itself before providing it to Z-Tel and by falsely and fraudulently billing Z-Tel on a regular basis, SBC creates a false impression of the nature, characteristics, and qualities of the customer service Z-Tel provides, which it uses as the basis for its false and misleading descriptions or misleading representations of fact in commercial advertising or promotion.
>
> In addition, SBC has run advertisements on television that refers to competing carriers as Z-Tel such as 'parasites' who 'give nothing back' and who 'invest nothing in the networks.' Other advertisements state that SBC is 'real phone company,' implying that competing carriers are not, and calling competing carriers 'middlemen.' Further advertisements accuse competing carriers of 'go[ing] for short term profits at the expense of what's good for their customers' **[**138]** and making 'flashy moves for Wall Street" as compared to SBC 'making multi-year, multi-billion dollar commitments to develop new technologies for Main Street.' All of these statements constitute false or misleading statements or misleading representations of fact in commercial advertising or promotion.

(Doc. No. 1, p. 46-47).

B. Defendant's Argument

Defendants advances three (3) arguments. First, the alleged provision of faulty line loss information and fraudulent billing fails to identify false or misleading statements of fact about a product in the context of commercial advertising or promotion. (Doc. No. 7, p. 34). Second, the allegations concerning "parasites" and "middlemen" are statement of opinion rather than fact. Third, even if the first two arguments are found to be unavailing, Plaintiff's allegation of influence on consumer purchasing decisions is a legally insufficient allegation of fact for purposes of a motion to dismiss. *(Id.* p. 35.)

C. Analysis

1. Defendant's First Argument is Unavailing

a. *Seven-Up* is Not Well Tailored to Defendant's Argument

Defendant cites *Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379 (5th Cir. 1996)* **[**139]** for **[*565]** the proposition that only those statements made in the context of commercial advertising or promotion come within the ambit of the Lanham Act. As an initial matter, the Court notes that *Seven-Up* is not a terribly good fit for Defendant's argument. In that case, the court took a fairly broad view of these terms:

> ***HN100***[] Courts have noted that we should give the terms 'advertising' and 'promotion' their 'plain and ordinary meanings.' *American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F. Supp. 1072, 1077 (N.D.Ill.1993)*; *see also* *Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 236 (2d Cir.1974)* ('Notwithstanding that *§ 43(a)* applies to a broad range of misrepresentations, it does not have boundless application … but is limited to false advertising as that term is generally understood.') (internal quotation marks omitted). The courts are also in agreement, however, that "the Act's reach is broader than merely the classic advertising campaign.' *Gordon & Breach Science Publrs. S.A. v. American Inst. of Physics, 859 F. Supp. 1521, 1534* (citing cases). In *Gordon & Breach,* the court summed up the principles found in the case law and the Act's legislative **[**140]** history as follows:
>
> In order for representations to constitute 'commercial advertising or promotion' under *Section 43(a)(1)(B)*, they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a 'classical advertising campaign,' but may consist instead of more informal types of 'promotion,' the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry.
>
> We find this summary of the requirements for establishing 'commercial advertising or promotion' under *§ 43(a) of the Lanham Act* to be both accurate and sound.

86 F.3d, at 1384 (citation omitted).

b. Defendant Ignores Plaintiff's Second Paragraph

Second, Defendant's first argument ignores the second of the two paragraphs of Plaintiff's Lanham Act complaint (quoted above). In the second paragraph, Plaintiff alleges conventional advertising coming within the ambit of the definition enunciated in *Seven-Up.* The two paragraphs are not unrelated. **[**141]** In the final sentence of the first paragraph, Plaintiff identifies the context in which the second paragraph is to be read.

> SBC creates a false impression of the nature, characteristics; and qualities of the customer service Z-Tel provides, **which it uses as the basis** for its false and misleading descriptions or misleading representations of fact in commercial advertising or promotion.

(Doc. No. 1, p. 47) (emphasis added).

2. Defendant's Second Argument: Statements of Fact Versus Statements of Opinion

a. Legal Standards

HN101[] The viability of any claim under *section 43(a) of the Lanham Act* is a determination of whether the challenged statement is one of fact--actionable under *section 43(a)*--or one of general opinion--not actionable under *section 43(a)*. Bald assertions of superiority or general statements of opinion cannot form the basis of Lanham Act liability. *See* *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674, 685 (5th Cir. 1986)*. The statements at issue must be a "specific and measurable claim, capable of being proved false or of **[*566]** being reasonably interpreted as a statement of objective fact." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999).* **[**142]** In *Presidio,* the court explained: "[A] statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification." *784 F.2d at 679*.

b. Plaintiff Sufficiently Alleges Facts Capable of Empirical Verification

Plaintiff alleges that Defendant had advertised that Plaintiff "give[s] nothing back" and "invest[s] nothing in the networks." Plaintiff's investment in its network, or at least the facilities it has erected on Defendant's network, is certainly capable of empirical verification. The Court assumes that such verification would examine Plaintiff's investment vis-a-vis that of similarly situated telecommunications companies. Similarly, Plaintiff's support for community causes (to take one possible hypothetical) could be offered as empirical support that it fails to "give nothing back."

c. Conclusion

For these reasons, Defendant's second argument is unavailing.

3. Defendant's Third Argument: Impact on Purchasing Decisions

a. Legal Standards

> Plaintiff seeks actual damages. In *Pizza Hut v. Papa John's Int'l,*, the court explained:
>
> ***HN102***[] Plaintiffs looking to recover monetary **[**143]** damages for false or misleading advertising that is not literally false must prove actual deception. *See* *Balance Dynamics Corp. v. Schmitt Ind., 204 F.3d 683, 690 (6th Cir. 2000)*; *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Foundation, Inc., 926 F.2d 134, 139*. Plaintiffs attempting to prove actual deception have to produce evidence of actual consumer reaction to the challenged advertising or surveys showing that a substantial number of consumers were actually misled by the advertisements. *See, e.g.,* *PPX Enters. v. Audiofidelity Enters., 818 F.2d 266, 271 (2d Cir. 1987)* ('Actual consumer confusion often is demonstrated through the use of direct evidence, e.g., testimony from members of the buying public, as well as through circumstantial evidence, e.g., consumer surveys or consumer reaction tests.').

227 F.3d 489, 497 (5th Cir. 2000).

b. Analysis

The Court cannot usefully require Plaintiff to adduce evidence of actual consumer confusion, and yet not allow Plaintiff the opportunity to obtain evidence of actual consumer confusion. In any event, Plaintiff's allegations of being called a "parasite" who seeks only "short term profits" are the **[**144]** type of allegations which would tend to wrongfully and negatively shift inward the demand curve Plaintiff faces in the marketplace.

c. Conclusion

For these reasons, Defendant's third argument is unavailing.

D. Conclusion

Defendant's Motion to Dismiss Plaintiff' Lanham Act claim (Count No. 7) is **DENIED.**

XXI. CONCLUSION

Defendant's motion is **GRANTED** as to A) Plaintiff's Essential Facilities claim (Count No. 2), B) Breach of Contract claim (Count No. 11), and C) Telecommunications **[*567]** Act claims (Count Nos. 8, 9, and 10). Plaintiff's Essential Facilities Claim is **DISMISSED with prejudice.** By contrast, Plaintiff's "Breach of Contract" and Telecommunications Act claims are **DISMISSED without prejudice to repleading.**

The Court draws special attention to the Tying claim. (Count No. 5). As explained in Part XIII, E.4, *supra,* Defendant's motion is denied as to the Tying claim with a tying market defined as DSL service. Through its use of the disjunctive word "alternatively" Plaintiff's Complaint indicates that an alternative market for broadband internet access need not be considered. So as to avoid any confusion, Plaintiff's Tying claim involving **[**145]** a tying market for broadband internet access is **DISMISSED without prejudice to repleading.**

If Plaintiff chooses to replead any of the claims which are being dismissed without prejudice, it shall do so within thirty (30) days of the entry of this Order.

On all other claims, Defendant's motion is **DENIED**. Defendant urges dismissal of the state law claims if the federal causes of action fail. Not all of the federal causes of action having been found to fail, the state law claims receive no discussion in the Court's analysis.

SIGNED this 6th day of August, 2004.

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

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Public Util. Dist. No 1 v. IDACORP Inc.

United States Court of Appeals for the Ninth Circuit

June 10, 2004, Argued and Submitted, Seattle, Washington ; August 10, 2004, Filed

No. 03-35207

Reporter
379 F.3d 641 *; 2004 U.S. App. LEXIS 16415 **

PUBLIC UTILITY DISTRICT NO 1 OF GRAYS HARBOR COUNTY WASHINGTON, Plaintiff-Appellant, v. IDACORP INC., an Idaho corporation; IDAHO POWER COMPANY, an Idaho corporation; IDACORP ENERGY L.P., a Delaware limited partnership, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-02-05572-RJB. Robert J. Bryan, District Judge, Presiding.

Disposition: Affirmed in part and remanded.

Core Terms

rates, Energy, filed rate doctrine, market-based, regulation, district court, preemption, preempted, wholesale, contract formation, conflict preemption, state law, electricity, electric power, leave to amend, mega-watt, prices, exclusive jurisdiction, exclusive authority, state court, dysfunctional, manipulation, transmission, interstate, contends, amend

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN1[] **Standards of Review, De Novo Review**

A dismissal for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)* is reviewed de novo. A dismissal for failure to state a claim may be affirmed on any basis supported in the record. Review is limited to the contents of the complaint and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Standards of Review, Abuse of Discretion**

Denial of leave to amend is reviewed for abuse of discretion, dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Energy & Utilities Law > Pipelines & Transportation > Electricity Transmission

Transportation Law > Interstate Commerce > Federal Preemption

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Business & Corporate Compliance > ... > Electric Power Industry > Federal Power Act > Federal Rate Regulation

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

HN3[] **Commerce Clause, Interstate Commerce**

As an initial matter, it is clear that the Federal Power Act (FPA) grants Federal Energy Regulatory Commission (FERC) exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce. Through the FPA, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. This was done in the FPA by making FERC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. This power includes the exclusive authority to determine the reasonableness of wholesale rates. To the extent that it bars states from acting within the zone of FERC's authority, this exclusive jurisdiction is grounded in the *Supremacy Clause of the Constitution*.

Constitutional Law > Supremacy Clause > General Overview

HN4[] **Constitutional Law, Supremacy Clause**

Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states. When the federal government completely occupies a given field or an identifiable portion of it the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government. When considering preemption, no matter which type, the purpose of Congress is the ultimate touch-stone.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

HN5[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court--on how he casts his action.

Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

HN6[] **Constitutional Law, Supremacy Clause**

When Congress has established an exclusive form of regulation, there can be no divided authority over interstate commerce. Congress here has granted exclusive authority over rate regulation to the Federal Energy Regulatory Commission.

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Governments > Legislation > Effect & Operation > Retrospective Operation

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN7[] US Federal Energy Regulatory Commission, Authorities & Powers

Congress has granted exclusive authority over rate regulation to the Federal Energy Regulatory Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN8[] Jurisdiction, Subject Matter Jurisdiction

The Federal Energy Regulatory Commission does not pre-approve specific market-based rates, the shift to such rates may mean that prospective refunds are an inadequate remedy. But this fact, by itself, does not change the scope of preemption regarding FERC exclusive jurisdiction over wholesale rates.

Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

HN9[] Constitutional Law, Supremacy Clause

So-called conflict preemption exists if there is an actual conflict between federal and state law, or where compliance with both is impossible. Conflict preemption exists where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Under the obstruction strand of conflict preemption, an aberrant or hostile state rule is preempted to the extent it actually interferes with the methods by which the federal statute was designed to reach its goal.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Hearings & Orders > Judicial Review

HN10[] **Exemptions & Immunities, Filed Rate Doctrine**

Closely related to these preemption issues is the filed rate doctrine. This doctrine, applied in a variety of contexts, is grounded in an agency's exclusive rate-setting authority. At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question. The filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by Federal Energy Regulatory Commission, but also from assuming a hypothetical rate different from that actually set by FERC.

Energy & Utilities Law > Electric Power Industry > Federal Power Act > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN11[] **Electric Power Industry, Federal Power Act**

The market-based rate regime established by Federal Energy Regulatory Commission (FERC) continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. These conditions assure that the market-based rates charged comply with the Federal Power Act's requirement that rates be just and reasonable.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

HN12[] **Declaratory Judgments, Federal Declaratory Judgments**

A complaint that merely seeks declaratory relief as to contract formation issues would not necessarily intrude upon the rate-setting jurisdiction of Federal Energy Regulatory Commission.

Business & Corporate Compliance > ... > Contract Formation > Mistake > Mutual Mistake

Constitutional Law > Supremacy Clause > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > Unilateral Mistake

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > Mutual Mistake

HN13[] **Mistake, Mutual Mistake**

Questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts depend on the particular claims a suitor makes in a state court--on how he casts his action.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN14[] **Pleadings, Amendment of Pleadings**

Leave to amend shall be freely given when justice so requires.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Appellate Review

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Appellate Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN15[] **State Declaratory Judgments, Appellate Review**

Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment. Any amended complaint must be narrowly drafted to seek declaratory relief only as to issues of contract formation.

Counsel: William J. Ohle, Schwabe, Williamson & Wyatt, Portland, Oregon, for the plaintiff-appellant.

Gordon E. Erspamer, Morrison & Foerster, Walnut Creek, California, for the defendants-appellees.

Judges: Before: Harry Pregerson, David R. Thompson, and Consuelo M. Callahan, Circuit Judges. Opinion by Judge Pregerson; Dissent by Judge Callahan.

Opinion by: PREGERSON

Opinion

[*644] PREGERSON, Circuit Judge:

This dispute arises out of the West Coast's recent energy crisis. The case involves contract-related claims against energy wholesalers by a public utility which contends it was forced to pay exorbitant prices for electricity. The utility's case was dismissed by the district court because its claims were found to be preempted. For the reasons discussed below, we affirm in part and remand.

[*645] BACKGROUND [1]

[2]** Appellant Public Utility District No. 1 of Grays Harbor County, Washington ("Grays Harbor") is a public utility district that provides retail electric power services to residential, commercial, and government customers within Grays Harbor County, Washington. Appellees Idaho Power Company and IDACORP Energy L.P. market and sell electric power in the wholesale markets of the Pacific Northwest. Appellee IDACORP Inc. is the holding company for both Idaho Power Company and IDACORP Energy L.P., and it is also the general partner of IDACORP Energy L.P.

At the center of this dispute is a contract for power. On or about March 19, 2001, Grays Harbor entered into a 20 mega-watt purchase transaction with Idaho Power Company for the purchase of electric power from October 1, 2001 through March 31, 2002, at the "market rate," which turned out to be $ 249 per megawatt hour. In or around June 2001, Idaho Power Company assigned all of its rights and obligations under the contract to IDACORP Energy L.P. Subsequently, IDACORP Energy L.P. delivered the power under the contract, and Grays Harbor paid IDACORP Energy L.P. $ 21,757,620 for the power.

This contract was negotiated during a time--the summer **[**3]** and winter of 2000-2001--when the West Coast was experiencing extreme power shortages and price volatility. These shortages resulted in numerous blackouts in California and threatened blackouts in the Northwest. According to Grays Harbor, this situation was allegedly caused by "dysfunctional markets, market manipulation and the intentional withholding of generation capacity from the market."

On or about October 10, 2002, Grays Harbor filed suit against IDACORP, Inc.; Idaho Power Company; and IDACORP Energy L.P. in Washington state court. In the complaint, Grays Harbor sought rescission or reformation of the contract based on four theories--mutual mistake, unilateral mistake, duress, and unconscionability. The complaint also asserted a claim for unjust enrichment against IDACORP Inc. and IDACORP Energy L.P. [2] In essence, the complaint alleges that the market rate of $ 249 per megawatt hour price was agreed to only because

---

[1] Because this is an appeal of a dismissal pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the facts set forth here assume the truth of the allegations in the complaint.

[2] In support of this particular claim, Grays Harbor alleges that the assignment of the contract was "illegal, void and unenforceable . . . ." Grays Harbor presses the issue of the assignment in its opening brief but essentially abandons the issue in its reply. The issue was settled when, after the filing of the complaint, FERC officially approved the assignment. *Idaho Power Company, IDACORP Energy, L.P. , 102 F.E.R.C. P 61,213, 2003 WL 933594, at *1 (Feb. 26, 2003)*.

Grays Harbor believed that the rate was based on a properly functioning market, when in fact the price resulted from a dysfunctional, manipulated market.

[4]** As to the unjust enrichment claim, the complaint seeks restitution from IDACORP Inc. and IDACORP Energy L.P. in an amount "equal to the difference between $ 249 per mega-watt hour and the fair value for the electric power delivered by IDACORP Energy L.P." pursuant to the contract. Alternatively, the complaint seeks rescission or reformation of the contract "to a price that reflects a fair price absent dysfunction, manipulation and the intentional withholding of electric power and restitution from defendants jointly and severally in an amount equal to the difference **[*646]** between $ 249 per mega-watt hour and the fair value for the electric power" delivered under the contract.

On November 4, 2002, the defendants removed the case to the United States District Court for the Western District of Washington. On November 12, 2002, the defendants filed a motion to dismiss, which was ultimately heard on January 24, 2003. At the hearing on January 24, 2003, the district court issued an oral ruling dismissing the complaint. The district court concluded that it did not have jurisdiction to resolve the issues raised in the complaint. The court explained that the relief sought would require the court **[**5]** to determine a fair price and that "[the Federal Energy Regulatory Commission] has preempted the field of determining fair value of power . . . ." The judge stated, "all of the relief requested in the complaint would require this Court to undermine the Congressional scheme of uniform regulation of rates." [3] On January 28, 2003, the court issued a minute order and a judgment, dismissing the complaint. Grays Harbor filed a timely notice of appeal on February 27, 2003.

ANALYSIS

A. *Standard of Review*

HN1[] A dismissal for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)* **[**6]** is reviewed de novo. *Libas Ltd. v. Carillo, 329 F.3d 1128, 1130 (9th Cir. 2003)*. A dismissal for failure to state a claim may be affirmed on any basis supported in the record. *Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001)*. Review is limited to the contents of the complaint and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.*

HN2[] Denial of leave to amend, which we discuss hereafter, is reviewed for abuse of discretion, *United States ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1051 (9th Cir. 2001)*; "dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment," *Eminence Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)*.

B. *Discussion*

The arguments raised on appeal all involve the scope of preemption in the energy context and how that preemption applies to Grays Harbor's contract claims. [4] ***HN3***[] As an initial matter, it is clear that the *Federal Power Act* (the "FPA") grants FERC "'*exclusive* authority to regulate **[**7]** the transmission and sale at wholesale of electric energy in interstate commerce.'" *Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir. 2002)* ("*TANC*") (quoting *New England Power Co. v. New Hampshire, 455 U.S. 331, 340, 71 L. Ed. 2d 188, 102 S.*

[3] In so ruling, the district court cited with approval *Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc.(In re Cal. Wholesale Elec. Antitrust Litig.), 244 F. Supp. 2d 1072 (S.D. Cal. 2003)*. That opinion addresses issues that are essentially identical to those raised in this case. *See id.* The appeal in that case was argued to another panel of this court on June 14, 2004, in San Francisco.

[4] In a footnote at the end of their brief, the appellees request that, should the panel find that Grays Harbor's claims are not preempted, the panel should nevertheless affirm dismissal of the complaint based on the failure to state a claim under state law. But neither party seriously addresses these arguments on appeal.

Ct. 1096 (1982)); *see also* 16 U.S.C. §§ 824-824m. Through the FPA, " 'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . . This was done in the Power Act by making [FERC] jurisdiction plenary **[*647]** and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.' " Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986) (quoting Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16, 11 L. Ed. 2d 638, 84 S. Ct. 644 (1964)). This power includes the exclusive authority to determine the reasonableness of wholesale rates. *See* Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 371, 101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988); *see also* 16 U.S.C. § 824e(a) **[**8]** (stating that FERC shall determine the just and reasonable rate when it finds that "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential . . . ."). To the extent that it bars states from acting within the zone of FERC's authority, this exclusive jurisdiction is grounded in the Supremacy Clause of the Constitution. *See* Miss. Power & Light Co., 487 U.S. at 371; U.S. Const. art. VI, cl. 2; *see also* Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1055 (9th Cir. 2001) (noting that a preemption claim involving state actions that conflict with the Federal Power Act are properly understood as predicated on the Supremacy Clause).

[9]** There are three preemption-related theories that require this case to be dismissed. They are: field preemption, conflict preemption, and the filed rate doctrine. [5] We address them separately below.

1. *Field Preemption*

HN4[] "Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states." Gadda, 363 F.3d at 869. "When the federal government completely occupies a given field or an identifiable portion of it . . ., the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983) (quoting **[**10]** Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). "When considering preemption, no matter which type, 'the purpose of Congress is the ultimate touch-stone.'" Ting v. AT&T, 319 F.3d 1126, 1136 (9th Cir. 2003) (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)).

Grays Harbor's basic argument in this respect is that its complaint merely alleges facts that under state common law would allow the court to grant the equitable remedies of rescission or reformation and that the FPA does not necessarily grant FERC exclusive jurisdiction over all power-related contract disputes. Grays Harbor emphasizes the fact that its complaint is not about rates charged for power but rather about contract *formation*. Moreover, Grays Harbor argues, the congressional intent to preempt its action is especially lacking in the deregulated power markets, where prices are negotiated between parties and the rates are not filed **[*648]** and approved in advance by FERC. FERC is only authorized to provide refunds plus interest for a *prospective* period, 16 U.S.C. § 824e(b); [6] this type **[**11]** of relief, Grays Harbor contends, is inadequate in a deregulated market where the prices are not set in advance. [7]

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[5] Field and conflict preemption stand in contrast to express preemption. *See* Gadda v. Ashcroft, 363 F.3d 861, 869-71 (9th Cir. 2004). Express preemption is not at issue in this appeal.

[6] The relevant provision allows FERC to establish a "refund effective date" when adjusting rates in order to make them just and reasonable. 16 U.S.C. § 824e(b). This date "shall not be earlier than the date 60 days after the filing of [the] complaint nor later than 5 months after the expiration of such 60-day period." *Id.* "At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, *for the period subsequent to the refund effective date*. . ., in excess of those which would have been paid under the just and reasonable rate . . . ." *Id.* (emphasis added).

[7] Grays Harbor also argues that there is a presumption against preemption. "We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation." Gadda, 363 F.3d at 869. This presumption is almost certainly not applicable here because the federal government has long regulated wholesale

[12]** The Supreme Court has provided some support for Grays Harbor's argument: ***HN5***[] "questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court--on how he casts his action." *Pan Am. Petroleum Corp. v. Superior Court, 366 U.S. 656, 662, 6 L. Ed. 2d 584, 81 S. Ct. 1303 (1961)*. Here, Grays Harbor has "cast its action" as a simple question of contract formation. But Grays Harbor's arguments ignore the fundamental thrust of its complaint. In its current form, Grays Harbor's complaint seems to require the district court, at some point, to determine the fair price of the electricity that was delivered under the contract. This determination is clearly within FERC's jurisdiction for determining the reasonableness of wholesale rates. *Miss. Power & Light Co., 487 U.S. at 371*; *see also* 16 U.S.C. § 824e(a). At the very least, the requested relief intrudes on an "identifiable portion" of a field that the federal government has occupied and addresses **[**13]** a matter that is "in any way regulated by the federal government." *See* *Pac. Gas & Elec. Co., 461 U.S. at 212-13*.

It may be true that the district court could decide simply whether, for instance, there was duress or mutual mistake such that reformation or rescission may be appropriate, i.e., whether there was a contract formation problem. In fact, FERC has stated that such a determination, by itself, may be more appropriately resolved in the courts. *See* *Villages of Edgerton & Montpelier, Ohio v. Ohio Power Co., 49 F.E.R.C. P 61,306, 1989 WL 263107 (Dec. 11, 1989)* ("Unlike most contractual disputes that come before us, this case involves a question not of contract interpretation but of whether there is a contract. With respect to the issue of whether Ohio Power made a legally enforceable commitment to supply the Villages' full requirements service, we believe that generally the courts would be the appropriate forum for deciding whether two parties entered into a contract."). But the district court could do no more without intruding into an area of exclusive FERC authority. *See* *In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d at 1077* **[**14]** ("In order to resolve Plaintiff's claims and provide it the damages it seeks, the **[*649]** Court would be expressly required to assume a hypothetical rate different from that actually set by FERC. This, the Court cannot do.") (quotation marks and citation omitted). Thus, the situation is analogous to that in *Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 580, 69 L. Ed. 2d 856, 101 S. Ct. 2925 (1981)*, where the Supreme Court held: ***HN6***[] "the mere fact that respondents brought their suit under state law [does] not rescue it, for when Congress has established an exclusive form of regulation, there can be no divided authority over interstate commerce. Congress here has granted exclusive authority over rate regulation to the Commission." (quotation marks and citation omitted). [8]

[15]** The fact that the rates at issue in this case are market based does not alter this conclusion. Idaho Power Company's authority to charge market-based rates comes from FERC. Before allowing Idaho Power Company to charge market-based rates, FERC first confirmed that Idaho Power Company did not have, or had adequately mitigated, market power in generation and transmission and could not erect other barriers to entry. *Idaho Power Co., 78 F.E.R.C. P 61,343, 1997 WL 139585, at *1 (Mar. 27, 1997)*. Further, the ability to charge market-based prices comes with certain filing requirements, including providing FERC with individual service agreements for contracts such as the one at issue here. *See* *78 F.E.R.C. 61343, [WL] at *3*. Even in the context of market-based rates, FERC actively regulates and oversees the setting of rates. Thus there is no indication--and Grays Harbor has provided no authority to support the contention--that market-based rates are not within FERC's exclusive jurisdiction over wholesale rates.

The fact that FERC can only grant prospective refunds similarly fails to alter the conclusion that Grays Harbor's claims are preempted. As the Supreme Court has stated:

> ***HN7***[] Congress **[**16]** here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other

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electricity rates. *See* *Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 213, 11 L. Ed. 2d 638, 84 S. Ct. 644 (1964)* (discussing the development of the Federal Power Act of 1935).

[8] *Arkansas Louisiana Gas Co.* arose under the *Natural Gas Act*. But because the FPA and the Natural Gas Act are "substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co., 453 U.S. at 577 n.7*.

than the one on file. It would surely be inconsistent with this congressional purpose to permit a state court to do through a breach-of-contract action what the Commission itself may not do.

Ark. La. Gas Co., 453 U.S. at 580. True, because ***HN8***[] FERC does not pre-approve specific market-based rates, the shift to such rates may mean that prospective refunds are an inadequate remedy. But this fact, by itself, does not change the scope of preemption regarding FERC's exclusive jurisdiction over wholesale rates. [9] *See Ark. La. Gas Co., 453 U.S. at 584* ("A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.").

[17]** Therefore, we find that Grays Harbor's claims are barred because of field preemption.

2. *Conflict Preemption*

HN9[] So-called "conflict preemption" exists "if there is an actual conflict between **[*650]** federal and state law, or where compliance with both is impossible." *Gadda, 363 F.3d at 871*; *Pac. Gas & Elec. Co., 461 U.S. at 204* ("Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law."). Perhaps most relevant to the case at hand, conflict preemption exists "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ting, 319 F.3d at 1136* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941))*. "Under the obstruction strand of conflict preemption, an aberrant or hostile state rule is preempted to the extent it actually interferes with the 'methods by which the federal statute was designed to reach [its] goal.'" *Ting, 319 F.3d at 1137* (quoting *Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987)).* **[**18]**

Grays Harbor argues that no actual conflict exists in this case that would require a finding of conflict preemption. But, by asking the court to set a fair price, Grays Harbor is invoking a state rule (specifically, contract law) that would interfere with the method by which the federal statute was designed to reach it goals (specifically, FERC regulation of wholesale electricity rates). [10] To permit Grays Harbor to receive in its court action what is essentially a refund would create a conflict with FERC's authority over wholesale rates. And such a result would make state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the FPA.

[19]** Therefore, we find that conflict preemption applies here.

3. *The Filed Rate Doctrine*

HN10[] Closely related to these preemption issues is the "filed rate doctrine." [11] This doctrine, applied in a variety of contexts, is grounded in an agency's exclusive rate-setting authority. *TANC, 295 F.3d at 929-30*. "At its most

[9] The district court alluded to this practical problem in the oral ruling: "It sounds to me like FERC's scheme, which is where the remedy should lie here, may be some what broken and not very practical in order to get relief . . . under the circumstances that the plaintiffs allege in their complaint . . . ."

[10] In fact, FERC has investigated and rejected the possibility of refunds for "spot market" bilateral sales in the Pacific Northwest. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Elec. Energy and/or Capacity Mkts. in the Pac. N.W., 103 F.E.R.C. P 61,348, 2003 WL 21480253, at *6-11 (June 25, 2003)*. It appears as though Grays Harbor took part in these FERC proceedings and attempted to have the contract at issue in this suit included within the definition of the "spot market" transactions for which refunds were considered. *See* ***Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Elec. Energy and/or Capacity Mkts. in the Pac. N.W., 96 F.E.R.C. P 63,044, 2001 WL 1116440, at *9, *38 n.94, *44 (Sept. 24, 2001)***. FERC rejected refunds because it concluded, after weighing a number of factors, that "the directing of refunds in this proceeding would not result in an equitable resolution of the matter." *Puget Sound Energy, 103 F.E.R.C. 61348, 2003 WL 21480253, at *11*.

[11] In fact, "when the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the *Supremacy Clause*." *Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47, 156 L. Ed. 2d 34, 123 S. Ct. 2050 (2003)*.

basic, the filed rate doctrine provides that state law, and some federal law (e.g. ***antitrust law***), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." *Id. at 929*; *see also* *Ark. La. Gas Co., 453 U.S. at 577* (under the filed rate doctrine, "no court may substitute its own judgment on reasonableness for the judgment of the Commission."). "The filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming **[*651]** a hypothetical rate different from that actually set by FERC." *TANC, 295 F.3d at 930*.

[20]** The relief sought by Grays Harbor would require the court to set damages by assuming a hypothetical rate, the "fair value," in violation of the filed rate doctrine. *See TANC, 295 F.3d at 933* (finding that claim that rates were procured by fraud are barred under the filed rate doctrine because any award of damages would interfere with FERC's authority).

Grays Harbor describes at length the reasons why the filed rate doctrine should not apply here, but its arguments all center on the market-based nature of the rates at issue in this case. Grays Harbor contends that the $ 249 per megawatt hour that was charged was not "filed" with FERC and approved by FERC before it was charged. In short, according to Grays Harbor, FERC simply did not set any rates. Grays Harbor contends that to apply the filed rate doctrine to market-based rates that have not been filed with FERC would be an unwise and unprecedented expansion of the doctrine.

But, as described above, ***HN11***[] the market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether "the seller and its affiliates do not have, **[**21]** or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry." *Idaho Power Co., 78 F.E.R.C. 61343, 1997 WL 139585, at *1*. According to FERC, these conditions assure that the market-based rates charged comply with the FPA's requirement that rates be just and reasonable. *Cal. ex rel. Bill Lockyer v. British Columbia Power Exch. Corp., 99 F.E.R.C. P 61,247, 2002 WL 32035504, at *11 (May 31, 2002)*; *see also* *16 U.S.C. § 824d(a)*. This oversight is ongoing, in this case requiring Idaho Power Company to provide notice of any change in status, to file an updated market analysis every three years, and to file various sales agreements and transaction summaries. *Idaho Power Co., 78 F.E.R.C. 61343, 1997 WL 139585, at *3*. Further, FERC contends that such procedures effectively constitute review of rates prior to their implementation. *See* *British Columbia, 99 F.E.R.C. 61247, 2002 WL 32035504, at *12* ("Prior review consists, however, not of the particular prices agreed to by willing buyers and sellers. Rather, it consists of analysis to assure that the seller lacks or has mitigated market power so that its **[**22]** prices will fall within a zone of reasonableness."). FERC has clearly stated its belief that these procedures "satisfy the filed rate doctrine for market-based rates . . . ." *Id.*; *see also* *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Serv. into Mkts. Operated by the Cal. Indep. Sys. Operator Corp. & the Cal. Power Exch., 96 F.E.R.C. P 61,120, 2001 WL 1704964, at *9 n.31 (July 25, 2001)* ("The rationales underlying the filed rate doctrine apply to market-based rates."; "Thus, the filed rate doctrine and its corollary, the rule against retroactive rate-making, apply to market-based rates."). Grays Harbor, on the other hand, provides no persuasive authority that the filed rate doctrine does not apply to market-based rates. *Cf.* *In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d at 1079* ("Most damning to Plaintiff's argument is the simple fact that case law does not support its contentions that the market-based rate system circumvents the filed rate doctrine.").

Therefore, while market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of **[**23]** the purview of the doctrine. Therefore, **[*652]** the relief sought by Grays Harbor is barred under the filed rate doctrine.

4. *Leave to Amend*

In dismissing the case, the district court concluded: "It's hard for me to see now how a repleading would make any difference . . . ." We disagree. ***HN12***[] A complaint that merely seeks declaratory relief as to contract formation issues would not necessarily intrude upon the rate-setting jurisdiction of FERC. *Cf.* *Pan Am. Petroleum, 366 U.S. at 662* ***HN13***[] ("Questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts . . . depend on the particular claims a suitor makes in a state court--on how he casts his action."). For instance, the district court could determine that, because of wide-spread market manipulation and dysfunction, the contract was formed under circumstances of unilateral or mutual mistake. [12] As noted above, even FERC has acknowledged that such questions may be resolved by a court. *See* Villages of Edgerton & Montpelier, 49 F.E.R.C. 61306, 1989 WL 263107 ("With respect to the issue of whether Ohio Power made a legally enforceable commitment to supply the Villages' full requirements service, we believe that **[**24]** generally the courts would be the appropriate forum for deciding whether two parties entered into a contract.").

[25]** Therefore, we grant Grays Harbor leave to amend. *See* Fed. R. Civ. P. 15(a) ***HN14***[] ("Leave [to amend] shall be freely given when justice so requires."); Eminence Capital, 316 F.3d at 1052 ***HN15***[] ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment."). Any amended complaint must be narrowly drafted to seek declaratory relief only as to issues of contract formation. [13] More specifically, it **[*653]** must not require the district court to make a determination as to what the "fair" rate would have been. Should Grays Harbor eventually prevail and receive a determination that no valid contract exists, Grays Harbor may not turn to the district court for monetary relief. Grays Harbor's only avenue for relief at that point, if any exists, would be with FERC.

[26] CONCLUSION**

We affirm district court's dismissal of Grays Harbor's complaint. We remand to allow Grays Harbor the opportunity to amend its complaint.

AFFIRMED IN PART; REMANDED.

Dissent by: CALLAHAN (In Part)

Dissent

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[12] In supplemental briefing, the appellees argue that seeking such declaratory relief here would represent an improper collateral attack on a FERC decision. Under the FPA, a party aggrieved by a FERC order must obtain review of that order by petitioning the court of appeals; that party cannot attack the order by way of a new lawsuit in federal court. *See* 16 U.S.C. § 825*l*(b); *see also* City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335-36, 2 L. Ed. 2d 1345, 78 S. Ct. 1209 (1958). The appellees premise their argument on the fact that Grays Harbor advanced arguments regarding contract formation before FERC in proceedings in which FERC declined to provide refunds. *See* ***Puget Sound Energy, 96 F.E.R.C. 63044, 2001 WL 1116440, at *9, *38 n.94, *44***; Puget Sound Energy, 103 F.E.R.C. 61348, 2003 WL 21480253, at *11. At oral argument, the appellees attempted to direct the Court to a portion of the *Puget Sound Energy* proceedings in which contract formation claims made by Grays Harbor were explicitly considered and rejected. But a review of the document cited, paragraph 68 of FERC's order of November 10, 2003, Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Elec. Energy and/or Capacity Mkts. in the Pac. N.W., 105 F.E.R.C. P 61,183, 2003 WL 22680031 (Nov. 10, 2003), reveals no such finding. A finding such as that quoted by the appellees at oral argument appears in paragraph 68 of FERC's order of November 10, 2003, in Nevada Power Company v. Enron Power Marketing, Inc., 105 F.E.R.C. P 61,185 (Nov. 10, 2003), but it does not appear that Grays Harbor was a party to the *Nevada Power Company* proceedings.

In the absence of a finding by FERC in the *Puget Sound Energy* proceedings such as it made in the *Nevada Power Company* proceedings, we do not believe that declaratory relief as to contract formation is an impermissible collateral attack on FERC's order in the *Puget Sound Energy* proceedings. A finding that no contract existed between the parties here does not contradict, and would not call into question, FERC's conclusion that it could not equitably provide refunds for spot market transactions in the Pacific Northwest.

[13] Because such a complaint would go solely to issues of contract formation, the so-called *Mobile-Sierra* standards, which relate to post-hoc contract modification by FERC, are not relevant. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 100 L. Ed. 373, 76 S. Ct. 373 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 100 L. Ed. 388, 76 S. Ct. 368 (1956); *see also* Nev. Power Co. v. Enron Power Marketing, Inc., 103 F.E.R.C. P 61,353, 2003 WL 21485862, at *2 (June 26, 2003).

CALLAHAN, Circuit Judge, dissenting, in part:

I agree with the majority's opinion, but for the decision to allow Grays Harbor to amend its complaint.

My colleagues carefully and correctly show that Grays Harbor's contract-related claims are preempted because they trigger the exclusive jurisdiction of FERC. They explain that the Federal Power Act ("FPA") delegates to FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *New England Power Co. v. New Hampshire, 455 U.S. 331, 340, 71 L. Ed. 2d 188, 102 S. Ct. 1096 (1982)*. They, however, would permit Grays Harbor to amend its complaint because offering declaratory relief as to contract formation "would not necessarily intrude upon the rate-setting jurisdiction of FERC."

I question the factual basis of this assertion. Grays Harbor cannot escape preemption by restating a claim that is based on "dysfunctional markets, market manipulation and the intentional **[**27]** withholding of generation capacity from the market." We recently held that a lawsuit by the State of California to enforce its unfair competition laws against producers that engaged in fraudulent energy transactions was preempted because California sought "to impose judicial remedies in addition to those that FERC may impose." *People of California v. Dynegy, 375 F.3d 831, 2004 U.S. App. LEXIS 13813 (9th Cir. 2004)*. In addition, we have also rejected a suit for money damages "allegedly resulting from the operation of an interstate electricity intertie expressly approved by FERC, where the manner of operation was necessarily contemplated at the time of approval." *Transmission Agency of Northern California v. Sierra Pacific Power Company, 295 F.3d 918, 928 (9th Cir. 2002)*.

It is true that claims that are strictly contractual in nature are not preempted by the FPA, and that FERC has often declined jurisdiction over contractual matters that do not involve FERC's expertise. *See* *Gulf States Utilities v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987)* (stating that "The FPA would preempt a claim that frustration [of purpose of a contract] occurs because of high rates; the FPA **[**28]** would not preempt a claim that frustration occurs by buying electricity from Southern at any price."); *see also* *National Fuel Gas Supply Corporation, 27 F.E.R.C. P 63,074 (June 15, 1984)*.

Nonetheless, here, the issues of contract formation are tightly intertwined with complex matters of federal energy regulation. This case calls to mind the famous ontological debate of whether the chicken begat the egg. Like the scrambled relationship of the chicken and the egg, it is **[*654]** impossible to sever the issues of state contract formation in this case from matters of federal energy regulation that are purely within the province of FERC.

Grays Harbor's claims of unilateral and mutual mistake are rooted in an allegation that the Pacific Northwest energy market was not functioning properly at the time of contract formation. [1] Even if the amended complaint would not require the court to set a fair rate, it would still require an inquiry into the functioning of the energy market. This is the kind of technical inquiry that is best left to FERC's expertise.

[29]** Furthermore, considering that we are an appellate court, it is wrong to hold that the district court abused its discretion in denying leave to amend the complaint when neither the plaintiff nor the district court itself were able to conceive of any meaningful claim that was not preempted. Grays Harbor did not request leave to amend to seek declaratory relief until after the possibility of such relief was proffered by the panel.

[1] I note that these allegations conflict with the findings of the administrative law judge whose recommendations were considered by FERC in prior proceedings relating to these energy transactions. The judge determined that "evidence demonstrates that the Pacific Northwest market for spot sales of electricity was competitive and functional during the relevant period of time . . . ." *See* *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale Into Electric Energy and/ or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, 103 F.E.R.C. P 61,348 (June 25, 2003)*. Therefore, it would be impossible for a court to take judicial notice of the market's dysfunction as this fact is apparently a matter that is disputed.

In sum, as the contract formation issues involved in the present case cannot be unscrambled from matters that fall within the sole jurisdiction of FERC, I dissent.

United States v. LSL Biotechnologies

United States Court of Appeals for the Ninth Circuit

August 5, 2003, Argued and Submitted, Pasadena, California ; August 11, 2004, Filed

No. 02-16472

Reporter
379 F.3d 672 *; 2004 U.S. App. LEXIS 16507 **; 2004-2 Trade Cas. (CCH) P74,506

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. LSL BIOTECHNOLOGIES; SEMINIS VEGETABLE SEEDS, INC.; LSL PLANTSCIENCE LCC, Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the District of Arizona. D.C. No. CV-00-00529-RCC. Raner C. Collins, District Judge, Presiding.

United States v. LSL Biotechnologies, Inc., 2002 U.S. Dist. LEXIS 6499 (D. Ariz., Mar. 28, 2002)

Disposition: Affirmed.

Core Terms

tomatoes, seeds, commerce, district court, Antitrust, Sherman Act, anti trust law, direct effect, subject matter jurisdiction, consumers, import, reasonably foreseeable, shelf-life, effects, courts, export, domestic, cases, foreign nation, markets, territory, restraint of trade, fresh, grown, words, grow, substantial effect, reinsurance, competitor, farmers

LexisNexis® Headnotes

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Where a complaint alleges a restraint of trade on a foreign corporation, that restraint was executed in a foreign nation as the result of litigation in that foreign nation, and the defendants file a Fed. R. Civ. P. 12(b)(1) motion to dismiss the entire complaint for lack of subject matter jurisdiction, a court should determine its subject matter jurisdiction to entertain the entire complaint.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Standards of Review, Clearly Erroneous Review**

An appellate court reviews de novo a district court's dismissal for lack of subject matter jurisdiction. Factual findings made in support of the dismissal are reviewed for clear error.

Antitrust & Trade Law > Sherman Act > Jurisdiction

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Jurisdiction**

The Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Scope, Exemptions**

The Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, is intended to exempt from the Sherman Act export transactions that do not injure the United States economy.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Export Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Anti-trust Improvements Act of 1982 (FTAIA), *15 U.S.C.S. § 6a*, clarifies the Sherman Act to make explicit its application only to conduct having a direct, substantial and reasonably foreseeable effect on domestic commerce. Specifically, the FTAIA states: *15 U.S.C.S. §§ 1 to 7*, including the Sherman Act, shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of *15 U.S.C.S. §§ 1 to 7*, other than *15 U.S.C.S. § 6a*. *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Governments > Legislation > Interpretation

International Trade Law > General Overview

HN6[] International Aspects, Commerce With Foreign Nations

It is manifest that a court's role is to apply the laws that Congress passes and the executive branch enforces unless those laws violate the United States Constitution.

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

A court's task when interpreting legislation is to give meaning to the words used by Congress; the court strives to avoid constructions that render words meaningless.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN8[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, states that the Sherman Act shall not apply to foreign conduct unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. *15 U.S.C.S. § 6a(1)*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The United States Supreme Court reads the Alcoa test as conferring jurisdiction so long as the conduct creates some substantial effect in the United States. Unlike the Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, the Alcoa test does not require the effect to be "direct."

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN10[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, has created its jurisdictional test because the enactment of a single, objective test--the "direct, substantial, and reasonably foreseeable effect" test--will serve as a simple and straightforward clarification of existing American law. The specific purpose of the Sherman Act modification is to more clearly establish when antitrust liability attaches to international business activities.

Antitrust & Trade Law > Sherman Act > Jurisdiction

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN11[] **Sherman Act, Jurisdiction**

The Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, provides the guiding standard for jurisdiction over foreign restraints of trade.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

HN12[] **International Aspects, International Application of US Law**

"Direct" is defined as proceeding from one point to another in time or space without deviation or interruption.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

International Law > Foreign & International Immunity > General Overview

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

International Law > ... > Exceptions > Commercial Activities > Direct Effects

International Law > Foreign & International Immunity > Sovereign Immunity > General Overview

HN13[] **Foreign Sovereign Immunities Act, Construction & Interpretation**

The Foreign Sovereign Immunities Act states that immunity does not extend to commercial conduct outside the territory of the United States that causes a direct effect in the United States. *28 U.S.C.S. § 1605(a)(2)*. After the lower federal courts struggled for years to define "direct effect," the United States Supreme Court has unanimously declared that an effect is "direct" if it follows as an immediate consequence of the defendant's activity. Settling on this definition, the Supreme Court has rejected the suggestion that "direct" contains any unexpressed requirement of "substantiality" or "foreseeability."

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN14[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Anti-trust Improvements Act of 1982, *15 U.S.C.S. § 6a*, provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade.

Counsel: Steven J. Mintz, U.S. Department of Justice, Antitrust Division, Washington, D.C., for the plaintiff-appellant.

Thomas F. Connell and Jeffrey D. Ayer, Wilmer, Cutler & Pickering, Washington, D.C., for defendants-appellees LSL Biotechnologies, Inc. and LSL Plantscience LLC.

Sabina Bhalla, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, California, for defendant-appellee Seminis Vegetable Seeds, Inc.

Judges: Before: Ruggero J. Aldisert,* Richard C. Tallman, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Tallman; Dissent by Judge Aldisert.

Opinion by: RICHARD C. TALLMAN

Opinion

[*674] TALLMAN, Circuit Judge:

We must decide whether the district court erred by deter-mining that it lacked subject matter jurisdiction over this anti-trust action. The United States alleged that an agreement between the defendants (collectively, "LSL") and an Israeli company, Hazera Quality Seeds, Inc., violates the *Sherman **[**2]** Act*. Because the challenged agreement does not have a direct, substantial, and reasonably foreseeable effect on United States commerce, we affirm the district court's dismissal.

I

This dispute grows out of a joint business venture--always a fertile ground for litigation--that sought to solve the dilemma of how to bring fresher, tastier tomatoes to Americans who live in the northern part of the nation and therefore suffer from a lack of fresh tomatoes in the winter months.

In the early 1980s, LSL Biotechnologies, Inc., an American corporation that develops and markets seeds, entered into a relationship with Hazera. LSL began working with Hazera in the hope of developing a genetically-altered tomato seed that would produce tomatoes with a longer shelf-life. LSL and Hazera wanted to create such a tomato because, until recently, tomatoes had a very short shelf-life if they were picked from the vine already ripened. This means that tomato growers can only sell their product in a limited geographic area. Because most of the American climate cannot produce tomatoes during the winter months, consumers are unable to access vine-ripened tomatoes for much of the year. Instead, most United **[**3]** States consumers are relegated to eating foreign tomatoes that are picked before they are ripe, so they will still be fresh after shipping. Tomatoes picked in this fashion have a poor flavor compared to vine-ripened tomatoes.

To solve this dilemma, LSL and Hazera sought to develop a tomato with enough shelf-life after reddening on the vine to travel from growing locations primarily in Mexico to the rest of the American market before spoiling. On January 1, 1983, LSL and Hazera signed a contract that regulated their relationship in this joint endeavor. The contract allocated to each party exclusive territories in which they could sell the seeds they developed together and seeds that each party developed on its own. The contract provided that LSL would have the exclusive rights to the North American market.

LSL and Hazera eventually bred a ripening-inhibitor ("RIN") gene into tomato seeds to be grown in open fields. The RIN gene caused tomatoes to remain fresh longer after being picked. LSL obtained a patent for tomatoes and seeds containing the RIN gene; Hazera obtained no rights to the patent. The RIN gene tomatoes proved to be exceptionally successful when grown in Mexican climates, **[**4]** but failed to take in cooler American climates. As a result, Mexican growers now dominate the fresh winter-tomato market. To date, Hazera has not developed a long shelf-life tomato seed.

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* Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation. 1007.

The relationship between LSL and Hazera soon withered. Litigation ensued. In **[*675]** 1987, Hazera sued LSL in an Israeli court. This foreign litigation led to mediation in Israel that produced the renegotiation of and addendum to the contract. The addendum included a Restrictive Clause, which is the device the United States now claims violates the Sherman Act. The Restrictive Clause originally stated:

> Subsequent to the termination of the Agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or through third par-ties, in the development, production, marketing or other activities involving tomatoes having any long shelf life qualities. However, in the event that Hazera shall be requested by any third party to produce seeds of tomatoes having long shelf life qualities, Hazera may engage in such activities only if all of the following conditions are met: (A) the subject tomatoes do not have or involve long shelf life qualities which are included in LSL's proprietary **[**5]** rights; (B) Hazera shall not engage in such production prior to the year 2000 or prior to the expiration of 5 years following the termination of the Agreement, which-ever occurs later, and (C) Hazera has obtained LSL's advanced written consent, which shall not be unreasonably withheld . . . . LSL shall determine whether or not the proposed cooperation may involve any of its proprietary rights and shall not unreasonably withhold its consents to such production.

LSL and Hazera continued working together after adopting the Restrictive Clause, despite frequent returns to the legal system. In 1992, the parties modified the contract a final time and requested that an Israeli arbitrator "incorporate their final contract modifications into a stipulated arbitration order." The arbitration settlement affirmed the Restrictive Clause's ban on Hazera selling long shelf-life tomato seeds in North America. But the Restrictive Clause was amended to allow Hazera to sell other seeds (*e.g.*, tomato seeds for growing in green-houses) to North American consumers, provided that Hazera disclose the details of such sales to LSL.

The contract between Hazera and LSL expired on January 1, 1996, and the **[**6]** Restrictive Clause became effective.

On September 15, 2000, the United States filed its antitrust complaint. The government alleged that the Restrictive Clause is "so overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade in violation of *Section 1 of the Sherman Act*." The government also alleged that the Restrictive Clause is illegal because "it has harmed and will continue to harm American consumers by unreasonably reducing competition to develop better seeds for fresh-market, long shelf-life tomatoes for sale in the United States."

The government alleged that "[b]ut for the [Restrictive Clause], Hazera would likely be a significant competitor of [LSL] in North America." The Complaint stated that the defen-dants [1] collectively held more than 70 percent of the market for "fresh market tomato seeds." Nonetheless, LSL's competitors control a significant percentage of the market for "fresh market tomato seeds": Novartis and Monsanto together possess around twenty percent of the market, while several other companies together account for the remaining ten percent.

[7]** **[*676]** The portion of the Complaint titled "Anticompetitive Effects" alleged that the exclusion of Hazera from the North American market eliminated "one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during winter months." The government also alleged that the "Restrictive Clause may also allow defendants to charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise would."

LSL filed a motion to dismiss the Complaint, arguing that

the government failed to state a cause of action and that the district court lacked subject matter jurisdiction. In support of their positions regarding subject matter jurisdiction, the par-ties submitted declarations and other evidence. After hearing oral argument, the district court granted LSL's motion.

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[1] The Complaint names as defendants LSL, Seminis Vegetable Seeds, Inc., and LSL Plantscience LLC. At the time of the Complaint, Seminis and LSL each owned half of Plantscience; Plantscience was the repository for all of LSL's tomato seed assets, including the Restrictive Clause.

The district court's approach was to divide the Complaint into separate domestic and foreign components, because the area of restraint (North America) covered both domestic and foreign markets.

The district court first concluded that the Complaint **[**8]** failed to state a cause of action regarding conduct in the United States and dismissed that aspect of the action without prejudice under *Federal Rule of Civil Procedure 12(b)(6)*. The court concluded that the Complaint's market definition was so poor that the Complaint failed to establish anti-competitive effects. The United States chose not to amend its defective complaint.

The district court then held that it lacked jurisdiction over the claim that the restriction on the sale of seeds to Mexico violated the Sherman Act and dismissed that aspect of the Complaint *with* prejudice under *Rule 12(b)(1)*. In order to seek immediate appellate review, the government, rather than replead the domestic conduct aspect of the Complaint, requested that the district court dismiss the entire action with prejudice. The request was granted and the government perfected its appeal to this court under *28 U.S.C. § 1291*.

II

As an initial structural matter we must decide whether it was proper for the district court to divide the consideration of the Complaint into domestic and foreign components.

LSL moved to dismiss the Complaint, arguing **[**9]** primarily that the district court lacked subject matter jurisdiction. The

motion very briefly urged that the whole Complaint--not just the domestic aspect--also failed to state a cause of action. LSL's attack on the Complaint is not split into distinct "domestic" and "foreign" aspects. Likewise, the government's opposition to LSL's motion does not defend the Complaint in this fashion. The government concentrated the bulk of its response on the district court's subject matter jurisdiction, while briefly answering LSL's assertion that the entire Complaint failed to state a cause of action.

The district court evaluated different parts of the Complaint under different standards. On the one hand, the court considered whether the allegations in the Complaint concerning the restriction on selling seeds to the United States stated a cause of action under *Rule 12(b)(6)*. The district court was satisfied that it had subject matter jurisdiction over this component of the Complaint. On the other hand, the district court analyzed whether the court had subject matter jurisdiction over the portion of the Complaint alleging a restraint on the sale of seeds to Mexico **[*677]** under *Rule 12(b)(1)* and the Foreign **[**10]** Trade Anti-trust Improvements Act of 1982, *15 U.S.C. § 6a* ("FTAIA").

Of course, the parties' arguments did not prevent the district court from separately considering the Complaint's domestic and foreign allegations. Nonetheless, we think this two-pronged approach was not the most appropriate way to analyze the motion to dismiss. The threshold question in this case is whether the district court had subject matter jurisdiction. That inquiry pervades the entire Complaint; the government alleged only one cause of action, which lumped together the Restrictive Clause's ban on distributing certain modified tomato seeds to Mexico and the resulting fruit in the United States.

HN1[] Where, as here, a Complaint alleges a restraint of trade on a foreign corporation, that restraint was executed in a foreign nation as the result of litigation in that foreign nation, and the defendants file a *Rule 12(b)(1)* motion to dismiss the

entire Complaint for lack of subject matter jurisdiction, a court should determine its subject matter jurisdiction to entertain the entire Complaint. Accordingly, we consider whether the district court had subject matter jurisdiction over the entire Complaint, **[**11]** including the "domestic" allegations.

III

HN2[] We review de novo the district court's dismissal for lack of subject matter jurisdiction. *La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001)*. Factual findings made in support of the dismissal are reviewed for clear error. *Id.*

IV

The Sherman Act ***HN3***[] prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." *15 U.S.C. § 1*. Federal courts have struggled for decades to determine when United States courts have jurisdiction over allegations of foreign restraints of trade. *See* Areeda & Hovenkamp, ***ANTITRUST LAW***, P 272 (2d ed. 2000); *see also Den Norske Stats Oljeselskap As v. Heere-Mac v.o.f., et al.*, *241 F.3d 420, 423-24 (5th Cir. 2001)* ("The history of this body of case law is confusing and unsettled.").

Prior to the passage of the FTAIA, courts applied varying tests to determine when foreign conduct fell within the purview of the Sherman Act. The most widely used standard was the "effects test," which was developed by Judge Learned Hand in **[**12]** *United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945)* ("*Alcoa*"). [2] The *Alcoa* court considered whether Congress intended the Sherman Act to impose liability for conduct outside of the United States and whether the Constitution allowed Congress to do so. Judge Hand rejected the idea that Congress meant "to punish all whom [United States] courts can catch, for conduct which has no consequences within the United States." *Id. at 443*. Instead, the court held that the Sherman Act was meant to reach foreign conduct only if it was intended to and did affect United States commerce. *Id.* In *Hartford Fire Ins. Co. v. California*, the Supreme Court summarized the effects test, stating that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial **[*678]** effect in the United States." *509 U.S. 764, 796, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (citing *Alcoa*).

[13]** Application of the effects test, however, has proved difficult and the precise extraterritorial reach of the Sherman Act remains less than crystal clear. In an effort to address this uncertainty, Congress enacted the FTAIA in 1982. The FTAIA ***HN4***[] "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire, 509 U.S. at 796-97 n.23*. According to the House Report, another significant purpose of the FTAIA was to fix the problem that arose because "courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists." H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487 ("House Report") at 2487. The FTAIA tackled this issue by ***HN5***[] "clarifying the Sherman Act . . . to make explicit [its] application only to conduct having a 'direct, substantial and reasonably foreseeable effect' on domestic commerce." *Id.* Specifically, the FTAIA states:

Sections 1 to 7 of this title [including the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign **[**14]** nations unless --

> (1) such conduct has a direct, substantial, and reasonably foreseeable effect --
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.

15 U.S.C. § 6a.

Federal courts did not shower the FTAIA with attention for the first decade after its enactment. But in the last ten years, and in particular the last five years, the case reporters have steadily filled with decisions interpreting this previously obscure statute. As a threshold matter, many courts have debated whether the FTAIA established a new jurisdictional standard or merely codified the standard applied in *Alcoa* and its progeny.

Several courts have raised this question without answering it. The Supreme Court did as much in *Hartford Fire*. The *Hartford Fire* Court considered the jurisdictional status of an alleged conspiracy among London-based **[**15]** re-

[2] The *Alcoa* court sat as a court of last resort pursuant to *15 U.S.C. § 29*, which at the time authorized the designation of a court of appeal as the final stop in certain antitrust actions. *Alcoa, 148 F.2d at 421*.

insurers to manipulate the American insurance market by not offering certain types of re-insurance. The Court introduced its jurisdictional analysis by noting that the effects test is well established. Hartford Fire, 509 U.S. at 796. In a footnote, the Court stated that it is not clear "whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it. We need not address these questions here." Id. at 796 n.23. [3]

[*679] **HN6**[] It is manifest that our role is to apply the laws that Congress passes and the executive branch enforces unless those laws violate the Constitution. There is no suggestion that the FTAIA is unconstitutional. **[**16]** Thus, we must adhere to the FTAIA in determining whether a district court has subject matter jurisdiction over an alleged foreign restraint of trade. The government contends that the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct and that we should continue to employ the Alcoa effects test. We reject this contention.

HN7[] Our task when interpreting legislation is to give meaning to the words used by Congress; we strive to avoid constructions that render words meaningless. *See* United States v. Fiorillo, 186 F.3d 1136, 1153 (9th Cir. 1999). The FTAIA **HN8**[] states that the Sherman Act shall not apply to foreign conduct unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. 15 U.S.C. § 6a(1). **HN9**[] The Supreme Court reads the *Alcoa* test as conferring jurisdiction so long as the conduct creates "some substantial effect in the United States." Hartford Fire, 509 U.S. at 796. Unlike the FTAIA, the *Alcoa* test does not require the effect to be "direct." Adopting the government's argument and applying the *Alcoa* test would render meaningless the **[**17]** word "direct" in the FTAIA. [4] We are not willing to rewrite a statute under the pre-tense of interpreting it.

Moreover, applying *Alcoa* instead of the FTAIA would contravene the FTAIA's purpose. The FTAIA **HN10**[] created its jurisdictional test because the "enactment of a single, objective test--the 'direct, substantial, and reasonably foreseeable effect' test--will serve as a simple and straightforward clarification of existing American law." House Report at 2487-88. The House Report goes on to state: "The specific purpose of the Sherman Act modification is: to more clearly establish when antitrust liability attaches to international business activities." *Id.* at 2492.

It would be a serious departure from the goal of achieving clarity for us to conclude that Congress meant only "some substantial effect," Hartford Fire, 509 U.S. at 796, **[**18]** when it said "direct, substantial, and reasonably foreseeable effect." Clarity is not achieved by employing three modifiers ("direct," "substantial," and "reasonably foreseeable") as the standard for the required effect of the challenged conduct and then telling businesses that only one modifier ("substantial") is relevant to Sherman Act liability.

Our precedent supports the conclusion that the FTAIA **HN11**[] provides the guiding standard for jurisdiction over foreign restraints of trade. Most notably, in McGlinchy v. Shell Chem. Co., 845 F.2d 802 (9th Cir. 1988), we considered an antitrust claim that the defendants' refusal to deal in pipe-manufacturing products "in various foreign markets" violated the Sherman Act. Id. at 813. The district court dismissed the claim because it failed to satisfy the FTAIA's test for subject matter jurisdiction. We determined without difficulty that "we are bound to apply [the FTAIA]," id. at 813 n.8, and affirmed the district court, concluding that "appellants have failed to allege that the defendants' conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce or import trade. **[**19]** " Id. at **[*680]** 815. [5]

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[3] The Court devoted very little attention to whether jurisdiction existed. After concluding that the bare minimums were met, the Court quickly turned to a more robust discussion of whether principles of international comity should have prevented the exercise of jurisdiction. Id. at 797.

[4] Applying *Alcoa* might also ignore the words "reasonably foreseeable," although we recognize that foreseeability might be a concept inherent in any scheme that seeks to impose liability.

[5] Other circuits have also treated the FTAIA as the binding test for deter-mining jurisdiction over foreign restraints of trade. For example, in *United Phosphorous, Ltd. v. Angus Chem. Co.*, the Seventh Circuit thoroughly analyzed the FTAIA and concluded

[20]** As in *McGlinchy*, we conclude that the FTAIA controls in this case. Therefore, we must affirm the district court's dismissal for lack of subject matter jurisdiction unless we deter-mine that the Restrictive Clause operates to have a direct, substantial, and reasonably foreseeable effect on domestic com-merce. [6]

[21]** V

Before discussing whether there is a direct effect here, we must consider what Congress meant by "direct." A dictionary published contemporaneously with the enactment of the FTAIA ***HN12***[] defined "direct" as "proceeding from one point to another in time or space without deviation or interruption." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1982).

Further, our efforts at understanding the meaning of "direct" are aided by the Supreme Court's interpretation of a nearly identical term in the *Foreign Sovereign Immunities Act* ("FSIA"). The FSIA ***HN13***[] states that immunity does not extend to commercial conduct "outside the territory of the United States . . . that [] causes a direct effect in the United States." *28 U.S.C. § 1605(a)(2)*. After the lower federal courts struggled for years to define "direct effect," the Supreme Court unanimously declared that an effect is "direct" if it follows as an immediate consequence of the defendant's activity. *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (1992)*. Settling on this definition, the Court "reject[ed] the suggestion that ['direct'] contains any unexpressed requirement **[**22]** of 'substantiality' or 'foreseeability.' " *Id.*

Having defined "direct," we next consider what effects the government asserts. As the district court recognized, the Complaint alleges that the Restrictive **[*681]** Clause causes two effects: (1) the agreement makes less likely possible innovations from Hazera in the creation of heartier tomato seeds "that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long shelf-life tomatoes," and (2) the Restrictive Clause "may also allow defendants to profitably charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise could."

Neither of these effects is "direct." The delay of possible "innovations" does not have a direct effect on American commerce. Even if Hazera were free to distribute new types of long shelf-life seeds in North America, there is no indication that Hazera has yet figured out a different way to produce such a seed without violating LSL's intellectual property rights to the RIN gene. Moreover, there is no indication that Hazera is in a stronger (or as strong a) position to develop such a new seed as Monsanto and **[**23]** Novartis, which the Complaint alleges already account for 20 percent of the tomato seed market. Thus, any innovation that Hazera would bring to American consumers is speculative at best and doubtful at worst. An effect cannot be "direct" where it depends on such

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that "the legislative history shows that jurisdiction stripping is what Congress had in mind in enacting FTAIA." *322 F.3d 942, 951 (7th Cir. 2003)* (en banc). The court then applied the FTAIA jurisdictional standards and affirmed the district court's dismissal for lack of subject matter jurisdiction. *Id. at 952-53*; *see also* *Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 304-05 (3d Cir. 2002)* (affirming dismissal because the FTAIA's test was not satisfied); *Den Norske, 241 F.3d at 425-29* (applying the FTAIA to determine whether subject matter jurisdiction existed); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1085 (D.C. Cir. 1998)* ("It does seem clear, however, that we should use the standard set forth in the FTAIA to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide us with subject matter jurisdiction.").

[6] Unlike the government, the dissent does not argue that the effects need not be direct, but rather that the directness requirement has *always* been part of the "effects test." Thus, the panel agrees on the standard; we merely disagree about its source. We say it is the FTAIA, while the dissent says the common law. We all recognize that conduct related to international trade is exempt from the Sherman Act unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. Under either approach, the dispositive question is whether the Restrictive Clause operates to have a direct effect on U.S. commerce. We think the allegations in the government's complaint, even if taken to be true on a motion to dismiss, are insufficient to establish the effect required under the FTAIA. As currently pleaded, it is sheer speculation as to whether Hazera will ever be able to develop its own version of long shelf-life tomatoes suitable for growing in North America during the winter.

uncertain intervening developments. In this case, Hazera's delivery of long shelf-life seeds to North American growers depends on Hazera first creating such seeds, a development that is certainly not guaranteed. [7]

[24]** We can imagine a situation where the exclusion of a potential foreign competitor would satisfy the "direct" requirement.

Likewise, the government maintains that it demonstrated that Hazera can produce a long shelf-life seed that does not infringe on LSL's patents. But the document to which the government cites--a declaration from Hazera's president--speaks in purely forward-looking terms: "Hazera is now *developing* seeds for a winter tomato variety . . . . Hazera *intends* to develop a seed that produces a tomato that tastes better while staying firm without gassing or the RIN gene . . . . Hazera *will also launch* a program to develop improved extended shelf-life tomatoes for growers in California." (emphasis added). We find no express allegation that Hazera has actually produced a modified seed that can be successfully grown in North America for long shelf-life winter tomatoes. In sum, the record reveals that such seeds do not yet exist and the prospect of Hazera developing seeds that do not infringe LSL's patent is at best speculative. As a matter of common sense, regardless which of the many definitions of "direct" one adopts, this fact is crucial to the "direct effect" **[**25]** calculus.

One such scenario might be where the foreign competitor already has the good in hand. It might also be possible for a "direct" effect to exist where the potential foreign competitor does not yet have the product in hand. A potential foreign competitor might be able to demonstrate that its exclusion already has an effect on the American market. For example, the competitor might be able to demonstrate that its exclusion is causing existing market players to invest less in the research and development of new products. Although it might be possible in such situations for a **[*682]** "direct" effect to exist, the United States has not presented us with sufficient evidence to conclude that the district court clearly erred in ruling on the existing pleadings that Hazera's exclusion does not yet have a direct effect on domestic commerce.

The district court also held that the effect of the Restrictive Clause on prices paid by American consumers is not "direct." This ruling was not clearly erroneous. The government has presented no evidence that LSL has or will artificially inflate the prices it charges to Mexican farmers for LSL's long shelf-life seeds.

Perhaps more importantly, the government's **[**26]** argument about the directness of the effect of seed prices on tomato prices is undermined by the United States' recent agreement with Mexican farmers to set a floor on the price of tomatoes shipped from *Mexico to the United States. SUSPENSION OF ANTIDUMPING INVESTIGATION: FRESH TOMATOES FROM MEXICO, 67 Fed. Reg. 77044 (Dec. 16, 2002)*. The agreement covers all "fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin." *Id. at 77046*. The agreement fixes mini-mum prices that Mexican tomato growers must charge for their product. *Id. at 77045-50*. The agreement was necessary to "eliminate completely the injurious effect of exports to the United States of the subject merchandise and prevent the suppression or undercutting of price levels of domestic fresh tomatoes by imports of that merchandise from Mexico." *Id. at 77045*. The government initiated the investigation that led to the agreement because it was determined that Mexican tomato growers were selling their product "in the United States at less than fair value." *Id.* This agreement, and the concerns that gave rise to it, belie the United States' argument **[**27]** that LSL could raise the prices ultimately paid by American tomato consumers.

The government cites two cases in support of its argument that the Restrictive Clause has a "direct" effect on American commerce. First, the government points to *Hartford Fire*. However, the defendants in *Hartford Fire*

[7] The dissent consistently refers to Hazera's seeds as though they actually exist; it fails to appreciate that Hazera has not yet developed its own long shelf-life tomato seeds capable of cultivation in North America. *See* Dissent at 11048 ("First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds."); *id.* at 11048 ("Consumers in the United States are the persons injured by the Restrictive Clause, as they are the ones deprived of the superior tomatoes that competition from Hazera could bring."); *id.* at 11050 (". . . ignoring the effect of that conduct, which is to deprive the United States consumers of winter tomatoes from Hazera seeds."). We do not read the allegations of PP 38-39 of the government's Complaint as generously as our colleague in dissent. *See* Dissent at 11049-50 n.6.

"apparently con-cede[d]" that the district court had jurisdiction; rather than challenge the existence of jurisdiction, the defendants argued that the district court should decline to exercise jurisdiction because of comity concerns. *509 U.S. at 795*. Also, the *Hart-ford Fire* defendants' foreign conduct--not offering reinsurance--had a demonstrated impact on the American insurance market: certain types of primary insurance were made unavailable because primary insurers could not obtain necessary re-insurance. Here, the product "loss" suggested by the government is entirely speculative: but for the Restrictive Clause, Hazera might someday create a long shelf-life tomato seed suitable for growing by North American farmers that does not violate LSL's existing patents. While the Restrictive Clause in this case removes nothing from American consumers except the vague possibility **[**28]** that Hazera might create a new type of seed before Novartis or Monsanto or one of the other smaller competitors, conduct by the defendants in *Hart-ford Fire* actually deprived American consumers of a wider array of an existing product, primary insurance.

The government also relies on the Fifth Circuit's decision in *Den Norske*. Like *Hartford Fire*, *Den Norske* differs in at least one critical way from this case. In *Den Norske*, the plain-tiff alleged that the defendants caused Americans to pay $ 165 million in higher oil prices because the defendants' conspiracy raised the prices paid by off-shore oil producers for heavy-lift services in the Gulf of Mexico and the **[*683]** producers passed on the higher prices to American oil consumers. *241 F.3d at 426* & n.21. By contrast, here the government cannot demonstrate an existing effect on American tomato consumers. At most, the government can demonstrate that the Restrictive Clause removes the *possibility* of future innovation from Hazera and "*may* also allow defendants to profit-ably charge more for their seeds."

In assailing the district court's jurisdictional ruling, the dissent invokes the general notice pleading **[**29]** standard. *See*, *e.g.*, Dissent at 11046 n.5 ("Here, the government sufficiently averred that the adverse effect on the United States' domestic commerce of tomatoes has been an immediate consequence of the Restrictive Clause governing tomato seeds . . . ."); *id.* at 11048 ("First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds."). However, while federal complaints are generally construed liberally, in this case the district court correctly scrutinized the government's Complaint more closely in order to make the necessary threshold determination of whether it had subject matter jurisdiction. This scrutiny involved taking preliminary evidence, weighing that evidence, and deciding as a matter of law whether the facts alleged sup-ported jurisdiction. Here, the district court properly found that the operation of the Clause does not have the required direct effect on U.S. commerce. We agree and hold that as a matter of law the FTAIA does not confer jurisdiction. [8]

[30]** VI

HN14[] The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade. This standard was not met here because the government cannot demonstrate that the district court clearly erred by determining that the alleged effects of the Restrictive Clause are not direct.

Because we conclude that the district court lacked subject matter jurisdiction over the entire Complaint, we do not consider the district court's *Rule 12(b)(6)* dismissal of the domes-tic aspect of the Complaint. **AFFIRMED.**

Dissent by: Ruggero J. Aldisert

Dissent

ALDISERT, Circuit Judge, Dissenting:

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[8] In other words, the question of fact is whether, accepting the allegations of the Complaint as true, there is a "direct, substantial, and reason-ably foreseeable effect," while the question of law is whether the FTAIA provides a basis for jurisdiction. The legal question here is relatively straightforward; because the district court's finding of no direct effect survives clearly erroneous appellate review, affirmance of its jurisdictional finding necessarily follows.

This is a case of first impression. The panel is unanimous in agreeing that this appeal requires us to interpret critical language in the Foreign Trade Antitrust Improvements Act (FTAIA or "Act"), *15 U.S.C. § 6a (1994)*. We must express a judicial interpretation to a single word, "direct," in the FTAIA's provision of "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved. The flash point of controversy, however, is whether the word "direct" in the FTAIA is a new dimension added to traditional **[**31]** ***antitrust law*** that involves trade or commerce with foreign nations, as the majority concludes, as did the district court, or, as urged by the government in this appeal, is merely a codification of ***antitrust law*** in place prior to the enactment of FTAIA. I agree with the government's interpretation, **[*684]** and accordingly, respectfully dissent. I would reverse the judgment of the district court. [1]

I.

Our analysis, perforce, must begin with the statutory language of FTAIA:

> *Section 1 to 7* of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign **[**32]** nations unless--
>
> (1) such conduct has a *direct*, substantial, and reasonably foreseeable effect--
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.

15 U.S.C. § 6a (emphasis added).

Although other appellate courts have dodged the critical issue on which this appeal turns, [2] this panel has decided to face the dragon in his teeth and stop tap dancing around the meaning of the word "direct." As did the district court in this case, the majority adopts the view that something new has been added by Congress in 1994 in enacting FTAIA -- some-thing that restricts the operation of the *Sherman Act* when foreign conduct is involved, a new ingredient requiring proof of a "direct" effect on American commerce.

[33]** I take a contrary view. I believe that the new statute merely codified existing ***antitrust law*** in the use of the word "direct." And so interpreted, under the facts in this case, which I adopt as laid down by the majority, a result contrary to that of the district court is mandated for the reasons that follow in detail.

II.

The district court erred in dismissing the Complaint for lack of jurisdiction under the FTAIA by determining that the government failed to allege a "direct, substantial, and reason-ably foreseeable effect" on United States commerce.

"We review de novo a district court's dismissal for lack of subject matter jurisdiction. . . . The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error." *La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1024 (9th Cir. 2001)* (citations omitted).

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[1] The district court also entered judgment against the United States for failure to state a claim for which relief could be granted. *Rule 12(b)(6), Federal Rules of Civil Procedure.* Because the majority affirms the dismissal under *Rule 12(b)(1)* it does not meet this issue. In light of the view I take, it will be necessary for me to discuss this question, *infra.*

[2] *See, e.g.*, *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 789 n.23, 125 L. Ed. 2d 612, 113 S. Ct. 2891* ("Also unclear is whether the Act's 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it . . . . We need not address these questions here.") (citation omitted); *see also* *Dee-K Enters. v. Heveafil Sdn. Bhd, 299 F.3d 281, 287 (4th Cir. 2002)*; *Kruman v. Christie's Int'l P.L.C., 284 F.3d 384, 399 n.5 (2d Cir. 2002)*; *Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 428 (5th Cir. 2001)*.

The leading Supreme Court case discussing the FTAIA is *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 125 L. Ed. 2d 612,* ***[*685]*** *113 S. Ct. 2891 (1993)*. Although jurisdiction was conceded by both parties in that case and the Court was only interested in issues of comity, [3] it engaged in a significant **[**34]** discussion of the FTAIA's import:

> Under § 402 of the Federal Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, *15 U.S.C. § 6a*, the Sherman Act does not apply to con-duct involving foreign trade or commerce, other than import trade or import commerce, unless "such con-duct has a direct, substantial, and reasonably foresee-able effect" on domestic or import commerce. *§ 6a(1)(A)*.

Hartford Fire, 509 U.S. at 796 n.23.

[35]** In so stating the Court resolved any tension between the teachings of *American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* and *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)* (*Alcoa*). In *United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997)*, the court explained:

> Any perceived tension between *American Banana* and *Alcoa* was eased by the Supreme Court's most recent exploration of the Sherman Act's extraterritorial reach. In *Hartford Fire* . . . the Justices endorsed *Alcoa*'s core holding, permitting civil antitrust claims under Section One to go forward despite the fact that the actions which allegedly violated Section One occurred entirely on British soil. While noting *American Banana*'s initial disagreement with this proposition, the *Hartford Fire* Court deemed it "well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id. at 796*. The conduct alleged, a London-based conspiracy to alter the American insurance market, met that **[**36]** benchmark. *See id.*

109 F.3d at 3-4 (footnote omitted).

I now turn to the issue that divides this panel. Does "direct" in the phrase "direct, substantial, and reasonably foreseeable effect" reflect a statutory restriction of the operation of the Sherman Act, or does it merely codify existing case law?

A.

For over a century, at least since 1898, the jurisprudence of ***antitrust law*** has required that for *Section 1 of the 1890 Sherman Act to* apply there must be a "direct effect" on interstate commerce. Congress' enactment of the FTAIA in 1982 -- promulgating the statutory language "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved -- merely codified the direct effects requirement that has been set forth in teachings of (1) antitrust case law for over 100 years, (2) the *Restatement (Second) of Foreign Relations Law of the United States* (1965), (3) leading **[*686]** treatises of distinguished academics, (4) the *Antitrust Guide for International Operations* of the United States Department of Justice, Antitrust Division, January 26, 1977 and (5) the *Report to Accompany Resolutions Concerning* **[**37]** *Legislative Proposals to Promote Export Trading* of the American Bar Association, Section of ***Antitrust Law***, October 26, 1981.

We thus learn from the legislative history of the FTAIA:

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[3] The opposite situation is presented here. The contested issue is subject matter jurisdiction, not comity. "The general understanding [is] that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Hartford Fire, 509 U.S. at 797 n.24*. Thus, the list of factors relating to moderating enforcement powers of the United States in the interest of comity set forth in *Timberlane Lumber Co. v. Bank of America, N.T. and S.A., 549 F.2d 597, 614 (9th Cir. 1976)*, do not necessarily speak to the issue before us. Nor do my personal observations set forth in Ruggero J. Aldisert, "Federal Courts and Extraterritorial ***Antitrust Law***: Enlightened Self Interest or Yankee Imperialism?," 5 *J.L. & Com.* 415 (1985).

> Following the lead of *Alcoa* and its subsequent judicial interpretations, the Department of Justice announced its view in 1977 that the United States antitrust laws should be applicable to an international transaction "when there is a substantial and foreseeable effect on the United States commerce," and that it would be a miscarriage of Congressional intent to apply the Sherman Act to "foreign activities which have no direct or intended effect on United States consumers or export opportunities. . . ." United States Department of Justice, Antitrust Division, *Antitrust Guide to International Operations* 6-7 (1977) . . . .
>
> An ABA Antitrust Section analysis has concluded that, despite the variations in wording, "there is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the effects test." Antitrust Section Report at 10 (emphasis in original).

H.R. Rep. No. 97-686 at 5-6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, **[**38]** 2490-2491 (House Report).

The use of "direct effect" is historically an integral part of ***antitrust law***. "As Professors Areeda and Turner have said, the federal courts have been invested 'with a jurisdiction to create and develop an "***antitrust law***" in the manner of the common law courts.' I Areeda & Turner, ***Antitrust Law*** P 106, at 15 (1978)." *Nippon Paper, 109 F.3d at 9* (Lynch, J. concurring). I first turn to the antitrust cases of the Supreme Court announcing or explicitly endorsing the "direct effects" test.

B.

My starting point is the seminal cases in 1898. After some very broad language in *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*, that would seem "to reach every minor restraint . . . the Court cut back the *§ 1* dragnet in *Hopkins [v. United States, 171 U.S. 578, 43 L. Ed. 290, 19 S. Ct. 40, (1898)]*. . . ." 4 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1501, at 339 (2d ed. 2000). The Court in *Hopkins* declared that the Sherman Act

> must have a reasonable construction, or else there would scarcely be an agreement or contract among business [persons] that could not be said to have, indirectly **[**39]** or remotely, some bearing upon interstate commerce, and possibly to restrain it.

171 U.S. at 600.

Earlier the same year the Court had held:

> An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does *not directly* restrain such commerce, is not . . . covered by the act, although the agreement may indirectly and remotely affect that commerce.

United States v. Joint-Traffic Ass'n, 171 U.S. 505, 568, 43 L. Ed. 259, 19 S. Ct. 25 (1898) (emphasis added).

These clear statements by the Court enunciated the direct effects test in actions brought under *Section 1 of the Sherman Act*. In the words of the prominent commentators Areeda and Hovenkamp: "The **[*687]** Court then excepted from the statute indirect or remote restraints." Areeda & Hovenkamp, *supra*, P 1501, at 339.

Then in 1945 came Learned Hand's formulation in *Alcoa*: "the ingot fabricated by 'Alcoa,' *necessarily had a direct effect* upon the ingot market." *148 F.2d at 424* (emphasis added). To say, as does the majority, that "unlike the FTAIA, **[**40]** the *Alcoa* test does not require the effect to be "direct[,]" (Maj. Op. at 11020), runs counter to the explicit teachings of *Alcoa*. My view is endorsed by the authoritative commentators, Areeda and Hovenkamp:

> As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/*direct*/intended effects were required, for American commerce is affected in some degree by every force affecting the world's markets in which we buy or sell . . . .

4 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 277 at 363 (2d ed. 2000) (emphasis added).

The "direct effects" test has thus been part and parcel of ***antitrust law*** before and after the passage of FTAIA in 1982. Indeed it was an integral part of antitrust jurisprudence for at least 84 years before Congress used the word "direct" in its formula on what constitutes foreign conduct affecting United States commerce in the FTAIA. After over 100 years of anti-trust cases, the Supreme Court has not diluted the "direct effects" requirement. On the contrary, in 1951 the Court approved the district court's use of this explicit test in a case, similar to the one at bar, in which there **[**41]** was a foreign restraint on commerce in the United States.

In *United States v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949)*, the district court had before it evidence that the defendant and two foreign manufacturers had made and sold for over 20 years a substantial portion of the world's production of anti-friction bearings by engaging in market allocation, price fixing and other illegal restraints of trade. As part of its defense, Timken argued that the cartel agreements had been made in foreign countries and that the Sherman Act could not be applied extraterritorially. In rejecting the argument the court held:

> Nor does the fact that the cartel agreements were made on foreign soil relieve defendant from responsibility. . . . They had a *direct* and influencing effect on trade in tapered bearings between the United States and foreign countries.

Timken, 83 F. Supp. at 309 (emphasis added, citation omitted). When the defendant repeated the same argument on appeal, the Court rejected its contention, stating: "[T]he trial judge after a patient hearing carefully analyzed the evidence in an opinion prepared with obvious **[**42]** care. Appellant's lengthy brief has failed to establish that there was error in making any crucial, or even important, ultimate or subsidiary finding." *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)* (footnote omitted).

That there is not a host of cases emphasizing this very point attests to the requirement that showing a direct effect on inter-state commerce is a *sine qua non* of antitrust liability. Other-wise, as the Court stated, "there would scarcely be an agreement or contract among business [persons] that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." *Hopkins, 171 U.S. at 600*.

C.

In any event, the American Law Institute, composed of the leading judges, academics and lawyers, included the "direct effects" requirement in the relevant *Restatement* ***[*688]*** *(Second) of Foreign Relations Law of the United States* (1965) that was in effect at the time the Congress enacted the FTAIA in 1982.

Section 18, of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) provided in relevant part:

> A state has jurisdiction **[**43]** to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if . . .
>
> (b) (I) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is *substantial*: (iii) it occurs as a *direct* and *foreseeable* result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

§ 18 (emphasis added).

In light of the foregoing, it cannot be said that in its 1982 enactment the Congress intended to promulgate a new standard for restricting the operation of the Sherman Act by using the language "direct, substantial, and reasonably foreseeable effect," when in fact the existing case law had been using the identical formulation, to wit, "(ii) the effect within its territory is *substantial*: (iii) it occurs as a *direct* and *foreseeable* result of the conduct outside the territory." *Id.* Indeed, the Court of Appeals for the Third Circuit cited Section 18 of the *Restatement* as reflecting the components **[**44]** of the "intended effects" test in extraterritorial Sherman Act cases. *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979)*.

In 1986, when the bench, bar and professoriat promulgated the *Restatement (Third) of Foreign Relations Law of the United States*, the same formulation was retained, albeit in succinct form:

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has *substantial, direct, and foreseeable effect* upon or in the territory.

§ 403(2) (emphasis added).

D.

The treatises on ***antitrust law*** also reiterate that the "direct effects" test was integral to ***antitrust law*** when Congress enacted the FTAIA.

In Volume 1 of James Atwood, Kingman Brewster & Spencer W. Waller, *Antitrust and American Business Abroad* (3d ed. 2002), the commentators analyze leading antitrust cases preceding the 1982 Congressional action that discussed "direct and substantial effect upon trade" **[**45]** and " 'direct' effect on United States commerce." § 6, at 18 (quoting *United States v. Gen. Elec. Co., 82 F. Supp. 753, 884 (D.N.J. 1949)* and *Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 103 (C.D. Cal 1971))*.

In *General Electric Co.*, District Judge Forman explained that "the second requirement for the finding of a violation on the part of Philips [is] that its activities must have had a direct and substantial effect upon trade. . . ." *82 F. Supp. at 891*.

In *Occidental Petroleum*, the court set forth views of two leading commentators:

> See Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 191 (1966): "An '[e]ffect' is a necessary element of *jurisdiction* **[*689]** ***; a direct and substantial '[e]ffect' is necessary for Sherman Act *violations*. The problem arises when the standards of illegality (which might be modified to promote foreign trade) are confused with the jurisdictional feature of the '[e]ffect on foreign commerce' " (emphasis in original).
>
> In reviewing the cases, Von Kalinowski notes the confusion evident therein: "The cases that used **[**46]** the word "[e]ffect" have said that a restraint must (1) "directly affect," or (2) "substantially affect," or (3) "directly and substantially affect," or (4) simply "affect" the flow of foreign commerce. 1 J. Von Kalinowski, [Antitrust Laws and Trade Regulation] § 5.502[2], at 5-120 (footnotes omitted). He concludes that "[t]he better view would seem to be that any effect that is not both insubstantial and indirect will support federal jurisdiction under *Section 1*." *Id.* at 5-121-22.

331 F. Supp. at 102-103 (emphasis in original); *see also* *Todhunter--Mitchell & Co. v. Anheuser--Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974)* ("Restraints which directly affect the flow of foreign commerce into or out of this country are subject to the provisions of *Section 1 of the Sherman Act*. Von Kalinowski, *Antitrust Laws and Trade Regulations*, Vol.

1. § 5.02(2) (1971).").

Again turning to Areeda and Hovenkamp, the distinguished commentators jump into the new-law-versus-codification-of-the-old fray and persuasively argue that codification is the "better view":

> The most interesting question about the new statute is whether its standard for **[**47]** appraising export restraints differs from that for appraising import restraints or whether it merely "codifies" a general

> understanding of when American ***antitrust law*** should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or in ways that could not be foreseen. Although the "codification" reading would make the statute's distinction between import and export trade unnecessary, that distinction might simply reflect the new legislation's sole focus on export trade. In favor of the "codification" reading is *Alcoa* itself, which emphasized "significant" and "direct" effects on the United States, with intended effects as a possible alternative.
>
> Also supporting that reading is the policy that con-duct abroad whose primary effects are also abroad is not a fit subject for regulation by American domestic law. As Judge Hand made clear in his *Alcoa* opinion, the Sherman Act would govern the world unless significant/direct/intended effects were required, for American commerce is affected in some degree by every force affecting the world's markets in which we buy or sell . . . .
>
> If the new statute is not seen as a "codification" **[**48]** of the "better view" of the existing standard for jurisdiction, it might fail to have its intended effect even on export trade. It amends only the Sherman Act and the *Federal Trade Commission Act*, not the *Clayton Act*. Because some joint ventures can be reached under the latter statute, such a venture might be subjected to American ***antitrust law*** even though its effects would not satisfy the new statute.

Areeda & Hovenkamp, *supra*, P 272, at 362-363 (footnotes omitted).

E.

I now turn to the legislative history of the FTAIA for two distinct purposes. First, I emphasize that in formulating the expression specifically set forth in Section 18 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965), **[*690]** "such conduct has a direct, substantial, and reasonably foreseeable effect," Congress intended to voice its disagreement with some lower court decisions that did not require a "substantial" effect. My second purpose is to emphasize the conclusions sent to Congress by the United States Department of Justice and the American Bar Association, Section of Anti-trust Law that "direct," "substantial" and "foreseeable" constituted a correct formulation of existing **[**49]** law.

What concerned Congress was twofold: first, that in some private actions a few *lower* courts seemed to discuss a *de minimus* effect, a much lesser standard than that of the "substantial effects" test; [4] and, second, to make explicit the requirement that the effect be "reasonably foreseeable" rather than based on "intent." House Report, *supra*, at 2494.

In this regard, what the House Report may have suggested as "new" law is what the Department of Justice reported to Congress as *existing* law:

> . . . U.S. law in general, and the U.S. antitrust laws in particular, are not limited to transactions which take place within our borders. When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regard-less of where they take place.

Antitrust Division, *Antitrust Guide for International Operations* 6 (1977) (footnotes omitted).

The House Report acknowledged this view: **[**50]** "The Justice Department in its *Antitrust Guide* takes the position that only 'foreseeable' effects on U.S. commerce should result in U.S. antitrust jurisdiction." House Report, *supra*, at 2493.

Moreover, the American Bar Association Section of Anti-trust Law submitted a report to Congress in October of 1981 commenting on the purpose and effect of the various pending legislative proposals on extraterritorial ***antitrust law***. The ABA Antitrust Section concluded that "any business uncertainty as to the applicability of the antitrust laws to foreign trade would seem to be an overreaction, for there is, with rare exception, no *significant* inconsistency between judicial precedents and the Justice Department's view of the 'effects' test." American Bar Ass'n, Sec. of

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[4] *See* cases cited in House Report, *supra*, at 2490.

Antitrust Law, *Report to Accompany Resolutions Concerning Legislative Proposals to Promote Export Trading* 10 (1981) (emphasis in original). The *Antitrust Section Report* explained further:

> [I]t is clear . . . that a showing of something more than any effect on United States interstate, export, or import commerce would be required to establish subject matter jurisdiction. In this fundamental respect, the recent **[**51]** court decisions seem essentially consistent with the Justice Department's enforcement policy and with the state of the law generally, although courts and commentators may not always see eye to eye on what constitutes "substantiality" or "foreseeability."

Id. at 13 (footnotes omitted). The ABA Antitrust Section, in a footnote, quoted another 1981 report it authored that states:

> The cases decided since *Alcoa* likewise recognize a need for limiting antitrust subject matter jurisdiction to something less than all conduct having any impact on American commerce. The approach generally taken . . . has been to make jurisdiction dependent upon whether the effect on U.S. commerce in each case is **[*691]** *direct, substantial and reasonably foresee-able*.

Id. (quoting American Bar Ass'n, Sec. of ***Antitrust Law***, *U.S.* ***Antitrust Law*** *in International Patent and Know-How Licensing* 4-5 & nn.16-18 (1981)) (emphasis added). It is from this conclusion that the *Antitrust Section Report* recommended to Congress the language "direct, substantial, and foreseeable effect" -- to succinctly codify, for the purpose of clarification, existing antitrust case law.

When originally introduced **[**52]** in Congress, the FTAIA included only the words: "direct and substantial effect." H.R. 2326, 97th Cong. (1981). This indicates that the debate centered on the concept of foreseeability, not direct effects. But even then, the legislation as proposed did not reflect a change in existing case law, as the *Antitrust Section Report* explained: "H.R. 2326 [and its companion bill S. 795] is intended, *with-out changing the law substantively*, to use the 1977 Justice Department [Antitrust] Guide's wording to clarify the 'effects' test to be applied in foreign commerce cases." *Anti-trust Section Report, supra*, at 29-30 (emphasis added) (citing Hearing on S. 795, 97th Cong. 4 (1981) (Statement of William F. Baxter, Esq.) ("We understand that this bill is not intended to work any significant changes in the law, but rather to restate current enforcement policy and judicial interpretations governing the applicability of the antitrust laws to joint export activity.")).

In commenting on the *Antitrust Section Report*, the House Report noted: "An ABA Antitrust Section analysis has concluded that, despite the variations in wording, 'there is, with rare exception, no *significant* inconsistency **[**53]** between judicial precedents and the Justice Department's view of the effects test.' Antitrust Section Report at 10 (emphasis in the original)." House Report, *supra*, at 2490-2491.

F.

In sum, the promulgation of the statutory language "direct, substantial, and reasonably foreseeable effect" on United States trade or commerce when foreign activity is involved was merely a codification of the direct effects requirement that had been set forth in teachings of ruling case law, the Restatements of Foreign Relations Law, leading treatises of distinguished academics, the Department of Justice's 1977 *Antitrust Guide* and the American Bar Association's 1981 *Antitrust Section Report*. Although the panel agrees on the standard to be applied, the "direct effects test," I respectfully disagree with the contrary view expressed by my colleagues of the majority that the word "direct" in the FTAIA is a new dimension of ***antitrust law***. Whereas the majority interprets the term "direct" from scratch, I am guided by contemporary definitions of the term as well as relevant precedent, including that which preexisted the FTAIA, and therefore I diverge from my colleagues' interpretation of the "direct **[**54]** effects test" as applied to this case.

III.

The United States sufficiently alleged that the Restrictive Clause has a "direct" effect on United States commerce under the most useful and sensible interpretation of that term. The district court did not attempt to define direct, but instead simply accepted LSL's argument that the effect of the Restrictive Clause was not direct because the clause "involves the development of seeds, not tomatoes." This ruling was simply wrong.

It was as if to say that restricting vanadium ore, which was processed into vanadium oxide in Canada and then into ferrovanadium, had no direct effect in the United **[*692]** States markets, whereas here it was purchased by American steel companies for use as an alloy in hardening steels. *See* *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*. Likewise, we could not say that restricting sisal, the fiber of the henequen plant that is native to Mexico, had no effect on American commerce, because here the fabricated Mexican hemp amounted to more than 80 percent of the binder twine used for harvesting grain in the United States. *See* *United States v. Sisal Sales Corp., 274 U.S. 268, 71 L. Ed. 1042, 47 S. Ct. 592 (1927).* **[**55]** Neither could we say that restricting competition for the purchase of cattle was insufficient to support an intention to monopolize commerce in fresh meat. *See* *Swift Co. v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*.

"Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 388, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993)* (quoting *Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979))*. "Direct" has many meanings, in fact, only one of which is drawing direct lines on paper or geographically "from point to point without deviation" -- the definition used by the district court and accepted by the Majority. The same dictionary source contains seven main meanings in the adjective form, encompassing 31 more specific subsidiary meanings. *Webster's Third New International Dictionary* 640 (1981). All of those meanings are contemporary with the FTAIA, enacted in 1982, and many are both ordinary and common.

It would be arbitrary simply to pick one definition **[**56]** and declare it the "plain meaning" in the abstract. Determining the meaning of "direct" requires the consideration of definitions as informed by the FTAIA's context and history. In this light, I believe that the most pertinent and sensible definition of "direct" for current purposes is: "3a. characterized by or giving evidence of a close especially logical, causal, or consequential relationship." *Id*.

And, if we go to the granddaddy of all English dictionaries, *The Oxford Dictionary of the English Language*, the straight line definition is described as an adjective arising in LME (Late Middle English, 1350-1460). But the definition which I perceive to be most relevant here is "c. LOGIC. Proceeding immediately from consequent to antecedent, from cause to effect. Etc. 'E19' " (1800-1829). This comports with the dictionary definition urged by the United States before us, in its neat comparison with the law of torts' familiar phrase "proximate cause."

Just as well, this is how the Supreme Court interpreted the term "direct" in the Foreign Sovereign Immunities Act (FSIA), as the majority concedes: "an effect is 'direct' 'if it follows as an *immediate consequence* of the defendant's **[**57]** activity." Maj. Op. at 11023 (emphasis added) (quoting *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618, 119 L. Ed. 2d 394, 112 S. Ct. 2160 (1992)* (holding that Argentina's bond payment rescheduling had a "direct effect" in the United States, where Argentina was to perform its ultimate contractual obligations, even though the bond holders were foreign corporations)). [5]

[58]** **[*693]** A definition of "direct" that focuses on consequential relationships draws support from another area of ***antitrust law*** -- private plaintiffs' antitrust standing. In *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L.*

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[5] The majority points out that the Court in *Weltover* "reject[ed] the suggestion that ['direct'] contains any unexpressed requirement of 'substantiality' or 'foreseeability.' " *504 U.S. at 618*. This simply indicates, however, that "direct" requires something less than substantial and fore-seeable. *Id.* Indeed, a "direct" effect, or immediate consequence, on domestic commerce is the baseline -- the *sine qua non* -- of extraterritorial jurisdiction. Althoughthe FSIA requires this baseline, the FTAIA requires that the immediate consequence be substantial and foreseeable. Here, the government sufficiently averred that the adverse effect on the United States' domestic commerce of tomatoes has been an immediate consequence of the Restrictive Clause governing tomato seeds, and given Defendants' "market power," this "direct effect" has been, as well, "reasonably foreseeable" and "substantial." *See* discussion *infra*.

Ed. 2d 149, 102 S. Ct. 2540 (1982), the Court faced the issue of which persons sustained injuries too remote from an anti-trust violation to give them standing to sue for damages under Section 4 of the Clayton Act. In answering this question, the Court observed that, historically, some antitrust cases formulated a test that equated "remoteness" with "directness" and suggested that both terms are analogous to the common law concept of "proximate cause." Id. at 478 nn.12-13.

To be sure, proximate cause itself is not easily defined. Id. at 478 n.13. But it is still useful and important here for two reasons. First, it rightly focuses the inquiry about the meaning of "direct" into a relationship of logical causation rather than of something else such as time or geography. Second, it is a reminder that public policy undergirds concepts such as "proximate cause" and "direct effects." The "policy unequivocally laid down by the [Sherman] **[**59]** Act is competition[,]" N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958), and the FTAIA, which is part of the Sherman Act, should therefore be interpreted in light of its fundamental purpose to protect United States consumers from the consequences of anticompetitive conduct.

Indeed, even the master wordsmith Benjamin N. Cardozo had his fling with attempting to define "direct" in deciding what was required in the context of Congress' Commerce Clause power. He warned of confining a constitutional principle -- namely the power of one sovereign to regulate the commerce of another -- to a strict construction of a pair of opposing adjectives, for:

> 'the law is not indifferent to considerations of degree'. . . . Perhaps, if one group of adjectives is to be chosen in preference to another, 'intimate' and 'remote' will be found as good as any. At all events, 'direct' and 'indirect,' even if accepted as sufficient, must not be read too narrowly. . . . A survey of the [Commerce Clause] cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

Carter v. Carter Coal Co., 298 U.S. 238, 327-328, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) **[**60]** (Cardozo, J., dissenting) (citations omitted). After reviewing relevant Commerce Clause cases Cardozo concluded:

> What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain.

Id. at 328.

When directness is seen as a synonym for proximate cause, it is relevant that there are two types of causation: causation in fact, otherwise known as "but for" causation; and legal causation, the public policy imperative of cutting off liability **[*694]** when a causal chain of events becomes excessively complex or attenuated. *See, e.g.*, *Prosser and Keeton on Torts* § 42, at 272-73 (5th ed. 1984). It is evident here that the United States sufficiently alleged that the Restrictive Clause had a "direct," or proximate cause, effect on United States commerce in both senses.

First, the Complaint squarely alleged causation in fact: but for the restraint, United States consumers would have the important potential of better winter tomatoes grown from Hazera seeds. The Restrictive Clause, and indeed the entire LSL-Hazera relationship, **[**61]** was aimed at United States consumers. The United States tomato market drives the long shelf-life seed business. LSL sells its tomato seeds to farmers in Mexico and those farmers raise the seeds into tomatoes for the purpose of supplying grocery stores in the United States. Consumers in the United States are the persons injured by the Restrictive Clause, as they are the ones deprived of the superior tomatoes that competition from Hazera could bring.

Second, the causal link between seeds and tomatoes is very close and intimate. If seeds are allowed to grow (and other-wise they would be worthless), they quickly and inevitably become tomatoes. Because the principal use of tomato seeds is to grow tomatoes, tomatoes are more properly described as a different stage of the *same* product rather than as a related but downstream product. The seed, when planted, becomes the plant and the fruit that is yielded. Accordingly, LSL's contention, adopted by the district court, that the seed is only an input into the finished tomato, does not preclude a "direct" effect on United States consumers.

Moreover, the causal connection between the Restrictive Clause and its effect on United States consumers **[**62]** is extremely close and intimate. The United States alleged a restraint on the very tomato seeds that grow into tomatoes in Mexico expressly for shipment to the United States. The consequences to the commerce of tomatoes in the United States are immediate, as there are no diversions or other intermediate stops for either the seeds or the resulting tomatoes. Short of a restraint on import commerce (to which the FTAIA does not apply), it is difficult to imagine foreign conduct that would have a more direct effect on United States commerce.

Most obviously, in *Hartford Fire* the Supreme Court treated the plaintiffs' allegations as satisfying *both* the common law and the FTAIA's tests for subject matter jurisdiction as to a conspiracy involving the market for *reinsurance*, particularly in London, but ultimately targeting the United States domestic market for *primary* insurance. *509 U.S. at 795-796*. The two products, the London-based reinsurance and the United States primary insurance, were closely related -- in a proximate cause sense -- because primary insurers depend on reinsurance for their own protection and "the London reinsurance market [is] an important **[**63]** provider of reinsurance for North American risks." *Id. at 775*.

The district court's distinction between seeds and tomatoes, endorsed by the majority, is fundamentally inconsistent with *Hartford Fire.* If a restraint on reinsurance in the United Kingdom has a sufficiently "direct" effect on primary insurance in the United States under the FTAIA, it is impossible to see how a restraint on tomato seeds in Mexico does not have an equally direct effect on the resulting tomatoes in the United States -- particularly when the district court's order concedes that seeds and tomatoes are related and it is undisputed that Mexico is a significant **[*695]** provider of winter tomatoes for the United States. [6]

[64]** The United States alleged here that a contractual bar against Hazera selling seeds in Mexico adversely affected the domestic commerce of tomatoes, the inevitable outgrowth of the seeds, in the United States. *Hartford Fire* shows that the FTAIA is satisfied by these facts, and the district court's treatment of the distinction between seeds and tomatoes as dispositive was therefore error. Fundamentally, the district court confused *conduct* with *effect* under the FTAIA by focusing on what the Restrictive Clause bars -- Hazera selling seeds in Mexico -- and ignoring the effect of that conduct, which is to deprive United States consumers of winter tomatoes from Hazera seeds. But "it is the effect and not the location of the conduct that determines whether the antitrust laws apply," even under the FTAIA. *Kruman v. Christie's Intern. PLC, 284 F.3d 384, 395 (2d Cir. 2002)*.

Inasmuch as the Congress did not define the term "direct" by statute, this court should give the term its ordinary meaning within the context of Congress' *Commerce Clause* power. In the words of Cardozo, the "causal relation" between the restraints on the development and production of tomato seeds **[**65]** in Mexico and the marketing, price and consumption of the resulting tomatoes in the United States "is so close and inti-mate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain." *Carter, 298 U.S. at 328*.

Accordingly, I am convinced that there is no persuasive reason why a restraint on selling seeds in Mexico cannot have a "direct" effect on United States domestic commerce in toma-toes. [7]

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[6] The majority emphasizes that Hazera has not yet developed its own long term shelf-life tomato seeds and suggests that the Restrictive Clause cannot have a direct effect on United States commerce because the prospect of Hazera developing such a seed without infringing on LSL's patent is speculative. (*See* Maj. Op. at 11024 n.7). All of this flies in the face of the government's declarations in its Complaint that: (1) Hazera is one of the world's leading tomato seed producing companies, (2) Hazera sells more seeds than any other company in many important tomato producing countries, including Spain, Italy, Israel and Turkey, (3) For the European and Mediterranean regions, Hazera has bred long shelf-life tomatoes by traditional plant-breeding processes that do not incorporate the RIN gene (and accordingly do not implicate LSL's patent rights), (4) Hazera is one of the few firms with experience and know-how to develop seeds that will allow farmers from the United States and Mexico to grow better fresh-market tomatoes for United States consumers during winter months, (E.R. at 11-12, PP 37, 39), and but for the Restrictive Clause, Hazera would be a significant competitor to Appellees in North America. Indeed, LSL would have had little reason to impose the Restrictive Clause on Hazera if it believed that Hazera's prospect in developing its own long term shelf-life tomato seed was "speculative at best," as the majority suggests. Hazera cannot be faulted for not producing seeds in Mexico or the United States, as it has done elsewhere, because the Restrictive Clause prohibits it from doing so.

[66]** **[*696]** Although the district court determined there was no subject matter jurisdiction, it went further in its analysis and decided that the United States' Complaint failed to state a claim for which relief can be granted. *Rule 12(b)(6)*, Federal Rules of Civil Procedure. In so doing the court participated in an exercise of determining the relevant market definition for ***antitrust law***, and accordingly stepped beyond its bounds, "[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)*.

Moreover, the court erred in its treatment of the two components of defining a market in ***antitrust law***: first, identifying the relevant product for the service market, and, second, identifying the relevant geographic area. It is to this issue that I will now turn. The majority held that there was no subject matter jurisdiction and, following the teachings of *Steel Company*, it properly declined to address the *Rule 12(b)(6)* issue: "Jurisdiction is power to declare the law, **[**67]** and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *523 U.S. at 94* (quoting *Ex Parte McCardle, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1868))*. Because I conclude that there is subject matter jurisdiction, and the district court elected to decide the merits, so must I.

IV.

First, it is of import to provide a brief overview of market power, an underlying principle of ***antitrust law***. *Section 1 of the Sherman Act* reads in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1994).

Antitrust is concerned with the power of market participants to distort the competitive process. This distortion can misallocate resources, transfer wealth from consumers and other protected groups or, as in this case, by means of the non-compete agreement, stifle new entry or innovation and commercialization.

The power relevant to antitrust is market power, or as some economists put it "monopoly power." **[**68]** [8] This power is, at its core, linked to elasticity of demand. Although a participant can exercise market power either as a seller or as a buyer, it is usually defined from the point of view of the seller: Market power is the seller's ability to

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[7] The majority argues that an agreement with farmers in Mexico to set a floor on prices of tomatoes shipped from Mexico to the United States supports its position. *Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 67 Fed. Reg. 77044-02 (Dec. 16, 2002*). The agreement covers all "fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin . . . ." *Id. at 77046*. The agreement fixes mini-mum prices that tomato growers in Mexico must charge for their product. *Id. at 77045-77050*. The majority argues that this agreement, and the concerns that gave rise to it, belie the United States' argument that LSL could raise the prices ultimately paid by American tomato consumers. I disagree, and endorse completely the United States' reply to this argument:

> First, as the United States argued in its briefs, the primary effect of the Restrictive Clause on U.S. commerce is to limit innovation that improves tomato quality. The Restrictive Clause excludes Hazera's current and future long shelf-life seeds from North America and thereby ensures that no tomatoes grown from those seeds can reach U.S. grocery stores. The official anti-dumping agreement cited by LSL has nothing to do with this effect.
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> Second, the very existence of the anti-dumping agreements confirms that the importation of fresh tomatoes from Mexico, and the pricing of those tomatoes, have a substantial effect on U.S. domestic commerce. But it is impossible to determine, at least at this stage of the proceedings, whether the agreement prevents the Restrictive Clause from affecting prices in the United States.

[8] Frederic M. Sherer and David Ross, *Industrial Market Structure and Economic Performance* 17 (3d ed. 1990).

raise and sustain a price increase without losing so many sales that it must rescind the increase. William M. Landes & Richard A. Posner, "Market Power in **[*697]** Antitrust Cases," 94 *Harv. L. Rev.* 937, 939 (1981). [9]

[69]** Elasticity of demand is a concept used to signify the relationship between changes in price and responsive changes in demand. In monopolization cases, the Court has said that the existence of market power can be determined by examining elasticities. *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 400, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)* ("[t]he responsiveness of the sales of one product to price changes of the other").

V.

Under the rule of reason, or a market analysis of the circumstances presented in this case, the United States satisfied pleading requirements to withstand a motion to dismiss for failure to state an antitrust claim.

"Ordinarily, whether particular concerted activity violates *§ 1 of the Sherman Act* is determined through case-by-case application of the so-called rule of reason -- that is, 'the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' " *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* (quoting *Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977))*. "Certain **[**70]** categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation." *Id.* "Such agreements are those that always or almost always tend to restrict competition and decrease output." *United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)* (internal quotations and citations omitted). In general, "[a] market allocation agreement between competitors at the same market level is a classic *per se* anti-trust violation." *Id.*

Given the binding precedent of this court, however, the United States may not rely on a *per se* theory of a Sherman Act violation in this case. *Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 844-845 (9th Cir. 1996)* ("application of the per se rule is not appropriate where the conduct in question occurred in another country"). [10] **[**71]** Instead, we must examine whether there are **[*698]** intended and substantial effects in the United States -- an inquiry that must be conducted through a market analysis and the rule of reason. [11]

A.

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[9] Judge Posner has restated this definition in various opinions. *In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 603 (7th Cir. 1997)* (market power or monopoly power is "the power to raise price above cost without losing so many sales as to make the price rise unsustainable") *cert. denied*, *522 U.S. 1153, 140 L. Ed. 2d 186, 118 S. Ct. 1178 (1998)*; *Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 373 (7th Cir. 1986)* (market power is "the power to raise prices without losing so much business that the price increase is unprofitable"), *cert. denied*, *480 U.S. 934, 94 L. Ed. 2d 765, 107 S. Ct. 1574 (1987)*; *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)* (market power is the "power to raise prices significantly above the competitive level without losing all of one's business").

[10] This is not to say that I personally agree with this holding, but it nevertheless binds this panel in this judicial circuit. Like the United States, I am concerned that it runs counter to teachings of the Supreme Court that long ago held that international conduct such as price fixing and territorial allocations among horizontal competitors is *per se* unreasonable and hence *per se* unlawful under *Section 1* of the Sherman Act. *Timken, 341 U.S. at 599*, *aff'g* *Timken, 83 F. Supp. 284, 310 (N.D. Ohio. 1949)* ("In view of settled law and the facts, defendants' contention that the restraints were reasonable must be rejected as untenable. The restraints on commerce, here proved by abundant evidence, have been denounced as unreasonable per se."); *see also* *Nippon, 109 F.3d at 7* ("[t]he instant case falls within [the per se illegal] rubric") and Areeda & Hovenkamp, *supra*, P 273, at 379 (1997).

[11] The district court treated the domestic affairs of LSL as the backdrop of facts upon which to assess the *12(b)(6)* motion and used the foreign affairs as the backdrop for the *12(b)(1)* motion. I agree with the majority that this analysis improperly divided a course of conduct that is interrelated and comprised of an impetus in a foreign location and an alleged direct effects in a domestic one. The entire course of conduct must be analyzed to determine its effects and this can only be done with the rule of reason. A division of activities into domestic and foreign categories was improper.

"We review *de novo* the district court's order of dismissal for failure to state a claim." Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 984 (9th Cir. 2000). "A motion to dismiss for failure to state a claim may not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). Both the district **[**72]** court and this Court are required to "presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." *Id.* (citation omitted).

Here the district court ignored the Complaint's unanswered allegation that the Restrictive Clause is a horizontal non-compete agreement that amounts to a "naked restraint of trade." This was reversible error.

The district court demanded a level of detail at the pleading stage that the Federal Rules do not require in antitrust cases involving conduct subject to the rule of reason. "The complaint need not set out the facts in detail; what is required is a 'short and plain statement of the claim showing that the pleader is entitled to relief.' " Id. at 984 (quoting Rule 8(a), Federal Rules of Civil Procedure). "[N]otice pleading is all that is required for a valid antitrust complaint[,]" and thus "the complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983) **[**73]** (quoting Conley, 355 U.S. at 47), *accord* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980) ("There is no special rule requiring more factual specificity in antitrust pleadings.").

Moreover, in recent decisions the Supreme Court has been extremely emphatic on this issue. In Swierkiewicz v. Sorema N.A., 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002), the Court made clear that "Rule 8(a)'s simplified pleading standard applies to *all civil actions,* with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake." Id. at 513 (emphasis added).

In so proclaiming, the Court reaffirmed the teachings of Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993):

> Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley* . . . we said in effect that the Rule meant what it said:
>
> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts **[**74]** upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain **[*699]** statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.
>
> [355 U.S.] at 47 . . . (footnote omitted).

Id. at 168.

What the United States averred in its Complaint was all that is necessary under the teachings of *Swierkiewicz* and *Leatherman*. "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " Swierkiewicz, 534 U.S. at 512 (quoting Conley, 355 U.S. at 47). The United States alleged that the Restrictive Clause, which "bars Hazera from ever competing to develop tomato seeds specifically adapted for North American climates," violates the Sherman Act because it was so "overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade . . . ." The Complaint specified, in a short and plain statement, that "[t]he relevant market consists of seeds designed to grow fresh-market tomatoes in North America during the winter months." [12]

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[12] Defendants do not deny that they have market power in the market for "seeds designed to grow fresh-market tomatoes in North America during the winter months," or in any part thereof. In particular, they do not deny the Complaint's allegation that they control a 70+ share of the relevant market, which must be taken as correct for Rule 12(b)(6) purposes. Rather, they appear to deny market power in a market of their own definition, not alleged by the United States -- "the sale of long-shelf life tomato

[75]** These averments gave the defendants notice that the government's Sherman Act claim would focus on the Restrictive Clause's effect on competition with respect to (1) seeds designed to grow fresh-market tomatoes (thus excluding tomatoes destined for processing), (2) tomatoes grown in North America (thus including both the United States and Mexico), and (3) tomatoes that are grown in the winter months. The United States' Complaint was more than sufficient to put the defendants on fair notice of the claim and relevant market and enable them to frame responsive pleadings. *See, e.g.*, *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1086 (D.C. Cir. 1998)* (alleged "market for English-language radio broadcast advertising in the Eastern Caribbean" was sufficient); *Quality Foods, 711 F.2d at 996* ("United States market for frozen vegetables" was sufficient). The district court erred in finding fault with the product and geographical dimensions of the relevant market as set forth in the government's complaint.

B.

The court based its finding of fault with the product component of the relevant market on a premise **[**76]** of overbreadth: "by including seeds designed to grow in greenhouses, cherry tomato seeds, open-field seeds and seeds with long-shelf-life qualities," the Complaint's market included "different types of seeds [that] are not interchangeable."

By asserting that these seeds are not interchangeable, an assertion not made by LSL or Seminis, the court in effect participated in its own fact finding. The nature of *Rule 12(b)(6)* does not allow courts to reach "matters outside the pleading" without following the summary judgment procedures of *Rule 56*. *San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470, 477 (9th Cir. 1998)*. ("[i]f matters outside the pleadings are considered, the motion to dismiss is to be treated as one for summary **[*700]** judgment"). [13] The district court here did not invoke *Rule 56* procedures, and was thus precluded from relying on matters outside the four corners of the United States' Complaint. Moreover, the court may not make fact findings of a controverted matter when ruling on a *Rule 12(b)(6)* motion. *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)*.

[77]** Even if the court's unsupported supposition of overbreadth as to the product market definition was correct, the competitive analysis of the case would not change. [14] The Restrictive Clause, as interpreted by LSL, excludes Hazera from developing, marketing, or selling *any* kind of tomato seed that has *any* long shelf-life qualities, whether referred to as greenhouse, open-field, long shelf-life, extended shelf-life, or something else. The analysis would thus be the same in the smaller markets that the district court suggested as preferable. Aggregating these various tomato seed products was a reasonable convenience, and it certainly does not foreclose the United States' case.

[78]** But the court's error did not stop there. It committed reversible error also in finding fault with the geographical metes and bounds of the relevant market.

C.

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seeds for open-field cultivation in winter in the United States" -- a market in which they insist there is no commerce. (LSL Br. at 15-17).

[13] When a district court rules on a *Rule 12(b)(1)* motion, unlike a 12(b)(6) motion, it may consider affidavits or other extra-pleading evidence. *St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989)*.

[14] *Tanaka v. University of Southern California, 252 F.3d 1059 (9th Cir. 2001)*, on which the district court relied, differs from this case with respect to the sufficiency of the plaintiff's market, and anticompetitive effects allegations. In that case a former collegiate soccer player challenged an intercollegiate athletic association rule that discouraged her from an intraconference transfer to a single athletic program, but she apparently did not even attempt to allege geographic or product markets on the basis of any economic facts. Instead, she based her allegations simply on her own subjective personal preferences: she alleged that "the relevant [geographic] market is Los Angeles because she wanted to be close to her family," *id. at 1063* (internal quotations and brackets omitted), and that the relevant product market was UCLA because of her "strictly personal preference" that she wanted to play for UCLA's soccer team. *Id.* These market allegations were obviously defective, and Tanaka "failed to allege that the transfer rule has had significant anticompetitive effects within a relevant market, however defined." *Id. at 1064*.

As to the geographic scope of the relevant market, the crux of the district court's objection to the Complaint was also premised on overbreadth, as it reasoned: "open field winter tomatoes can only potentially be grown in Mexico and some Southern U.S. States" rather than throughout North America. The district court's approach misapprehends ***antitrust law*** dealing with the geographic market definition.

If Hazera was excluded with respect to all of North America, it necessarily was excluded with respect to Mexico and the southern U.S. States. And if all the relevant tomatoes were grown in those areas, then a market consisting of those areas would be equivalent, for purposes of this case, to a market encompassing all of North America, because it would include precisely the same tomatoes.

In any event, neither the district court nor the Appellees have cited any case that dismissed a complaint because of an allegedly *overbroad* market definition. The cases cited were dismissals in which the market was defined too narrowly. **[**79]** My own research has not unearthed any authority supporting the district court's decision in this respect. [15]

[80] [*701]** In a footnote, the court went further, reasoning that because tomato seeds are designed for microclimates, "[i]t seems to the Court that separate relevant markets exist for each growing region that requires a distinct seed variety." But Hazera was excluded from each of the court's suggested microclimate markets, and its exclusion from each eliminated a potent force for enhanced competition. Because the likely anticompetitive effect of the Restrictive Clause was basically the same for all the relevant microclimate markets, treating them as a single aggregate market cannot be a valid basis for dismissing the United States' Complaint.

In addition, the district court erred in holding that every microclimate for different tomato seeds is a separate market. This approach assumes, without logical underpinning or case law support, that any substitution had to occur at the level of the farmer when selecting seeds. The Complaint placed seeds for different microclimates in the same market because the tomatoes grown in the different microclimates compete at the level of grocery store shelves. It is the grocery store-level competition of tomatoes, not the farmers' selection of seeds with which **[**81]** to grow them, that goes to the heart of the United States' Complaint and constitutes the geographic contours of the market.

* * * * *

For all the foregoing reasons I would reverse the judgment of the district court that determined that there was no subject matter jurisdiction under *Rule 12(b)(1)* and that the Complaint failed to state a claim for which relief could be granted under *Rule 12(b)(6)*.

With respect, I dissent.

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[15] Rather, this case resembles one Justice Holmes described concerning the product and geographic scope of a domestic meat packing monopoly in 1905: "The scheme alleged is so vast that it presents a new problem in pleading . . . . Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place." *Swift & Co. v. United States, 196 U.S. 375, 395, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*. Like Justice Holmes, I conclude here that

> the scheme as a whole seems to . . . be within the reach of the law. The constituent elements . . . are enough to give the scheme a body and, for all that we can say, to accomplish it. . . . Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote, or merely probable . . . .

Id. at 396-397.

Jung v. Ass'n of Am. Med. Colleges

United States District Court for the District of Columbia

August 12, 2004, Decided ; August 12, 2004, Filed

Civil Action No. 02-0873 (PLF)

Reporter
339 F. Supp. 2d 26 *; 2004 U.S. Dist. LEXIS 16099 **; 2004-2 Trade Cas. (CCH) P74,517

PAUL JUNG, M.D., et al., Plaintiffs, v. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, et al., Defendants.

Subsequent History: Subsequent appeal at *Jung v. Ass'n of Am. Med. Colleges, 2005 U.S. App. LEXIS 554 (D.C. Cir., Jan. 11, 2005)*

Affirmed by *Jung v. Ass'n of Am. Med. Colleges, 2006 U.S. App. LEXIS 14079 (D.C. Cir., June 1, 2006)*

Prior History: *Jung v. Ass'n of Am. Med. Colleges, 300 F. Supp. 2d 119, 2004 U.S. Dist. LEXIS 1826 (D.D.C., 2004)*

Disposition: Defendants' motion for judgment on pleadings with respect to 14 defendants that filed answers, granted under *Rule 12(c) of the Federal Rules of Civil Procedure*; with respect to remaining 15 movants, motion treated as motion for failure to state claim under *Rule 12(b)(6)* and granted. All other pending motions denied. Final judgment entered.

Core Terms

Match, plaintiffs', resident, allegations, conspiracy, defendants', antitrust, anti trust law, price-fixing, pleadings, evidentiary, moot, accreditation, graduate, exemption, medical education, motion to dismiss, programs, courts, failure to state a claim, participated, residency program, certification, depress, sponsor, prongs, motion for judgment, anticompetitive, alleged conspiracy, resident physician

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN1[] **Antitrust & Trade Law, Exemptions & Immunities**

See *15 U.S.C.S. § 37b(b)(2)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN2[] **Antitrust & Trade Law, Exemptions & Immunities**

15 U.S.C.S. § 37b(b)(2) provides that evidence of any conduct to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN3[] **Antitrust & Trade Law, Exemptions & Immunities**

The stated purposes of *15 U.S.C.S. § 37b* are to confirm that the antitrust laws do not prohibit sponsoring, conducting, or participating in a graduate medical education residency matching program, or agreeing to do so; and to ensure that those who sponsor, conduct or participate in such matching programs are not subjected to the burden and expense of defending against litigation that challenges such matching programs under the antitrust laws. *15 U.S.C.S. § 37b(a)(2)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN4[] **Regulated Practices, Price Fixing & Restraints of Trade**

15 U.S.C.S. § 37b creates a price-fixing exemption for a certain class of antitrust claims, providing that nothing in the section shall be construed to exempt from the antitrust laws any agreement on the part of two or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs. *15 U.S.C. § 37b(b)(3)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Effect & Operation > Prospective Operation

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN5[] **Antitrust & Trade Law, Exemptions & Immunities**

15 U.S.C.S. § 37b took effect on April 10, 2004, and applies to conduct whether it occurs prior to, on, or after such date of enactment and to all judicial and administrative actions or other proceedings pending on such date of enactment. *15 U.S.C.S. § 37b(c)*.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN6[] **Pretrial Judgments, Judgment on Pleadings**

See *Fed. R. Civ. P. 12(c)*.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN7[] **Motions to Dismiss, Failure to State Claim**

If a party files a *Fed. R. Civ. P. 12(c)* motion before its answer, a court may treat it as a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim.

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

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN8[] **Motions to Dismiss, Failure to State Claim**

No prejudice to any party results from treating a *Fed. R. Civ. P. 12(c)* motion as a *Rule 12(b)(6)* motion because the standard of review for motions for judgment on the pleadings under *Rule 12(c) of the Federal Rules of Civil Procedure* is essentially the same as that for motions to dismiss under *Rule 12(b)(6)*. On either motion, a court may not rely on facts outside the pleadings and must construe the complaint in the light most favorable to the non-moving party.

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN9[] **Motions to Dismiss, Failure to State Claim**

Granting judgment on the pleadings pursuant to *Fed. R. Civ. P. 12(c)* or a motion to dismiss for failure to state a claim under *Rule 12(b)(6)* is warranted only if it appears beyond doubt, based on the allegations contained in the complaint, that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN10[] **Motions to Dismiss, Failure to State Claim**

Although certain defendants in a group may file motions to dismiss for lack of personal jurisdiction under *Fed. R. Civ. P. 12(b)(2)*, such motions do not preclude them from later filing motions to dismiss for failure to state a claim. *Fed. R. Civ. P. 12(g)*. *Rule 12(h)(2)* expressly mentions a motion to dismiss for failure to state a claim.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Regulated Industries, Higher Education & Professional Associations**

If lawful acts are used as the means to effectuate an antitrust conspiracy, the conspiracy itself is still unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

It is not of importance whether the means used to accomplish an unlawful objective are in themselves lawful or unlawful. Acts done to give effect to a conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN13[] **Antitrust & Trade Law, Exemptions & Immunities**

See *15 U.S.C.S. § 37b(b)(3)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN14[] **Antitrust & Trade Law, Exemptions & Immunities**

See *15 U.S.C.S. § 37b(f)*.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN15[] Antitrust & Trade Law, Exemptions & Immunities

15 U.S.C.S. § 37b does not exclude all price-fixing claims related to resident compensation; it only excludes price-fixing claims that allege agreements between two or more institutional defendants to fix resident stipends and other benefits.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN16[] Antitrust & Trade Law, Exemptions & Immunities

Application of 15 U.S.C.S. § 37b merely forbids invocation of the Graduate Medical Resident Matching Program as evidence in any antitrust suit, including one involving allegations of price-fixing; but price-fixing claims unrelated to the Match Program as described in § 37(b)(3) are not affected.

Governments > Legislation > Interpretation

HN17[] Legislation, Interpretation

Absent a valid constitutional challenge to a law passed by Congress and signed by the President, the responsibility of the courts is to interpret and apply the statute, not to second-guess.

Constitutional Law > Congressional Duties & Powers > Lower Federal Courts

Governments > Courts > Courts of Claims

Constitutional Law > Separation of Powers

HN18[] Congressional Duties & Powers, Lower Federal Courts

Congress is prohibited from prescribing a rule for a decision of a cause in a particular way in cases pending before the judicial department of the government.

Constitutional Law > Congressional Duties & Powers > Lower Federal Courts

Governments > Legislation > Interpretation

Constitutional Law > Separation of Powers

HN19[] Congressional Duties & Powers, Lower Federal Courts

Whatever the precise scope of Klein, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law. When a statute compels changes in the law, not findings or results under old law, it merely amends the underlying law, and therefore is not subject to a Klein challenge.

Governments > Legislation > Interpretation

HN20[] **Legislation, Interpretation**

The title of a statute is of use only when it sheds light on some ambiguous word or phrase in the statute itself.

Constitutional Law > Separation of Powers

Governments > Legislation > Interpretation

HN21[] **Constitutional Law, Separation of Powers**

The line between a statute that provides the standard to which courts must adhere and a statute that compels a specific result in a pending action at times is difficult to draw.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN22[] **Antitrust & Trade Law, Exemptions & Immunities**

15 U.S.C.S. § 37b precludes both claims challenging the antitrust status of the Graduate Medical Resident Matching Program itself, and the consideration of evidence related to the Match Program in actions brought under the antitrust laws.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN23[] **Fundamental Rights, Eminent Domain & Takings**

Plaintiffs have no property interest in their pending claim. Causes of actions only become actionable property interests upon the entry of final judgment.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN24[] **Fundamental Rights, Eminent Domain & Takings**

It is a denial of due process to create a cause of action in which parties have a property right and then to allow the state to take that right away without providing the party with any judicial forum.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN25[] **Antitrust & Trade Law, Exemptions & Immunities**

15 U.S.C.S. § 37b does not deny plaintiffs a forum in which to bring their claim. Instead, the statute restricts the basis for an antitrust cause of action, which is not an unconstitutional restriction so long as there is a rational basis for the law.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN26[] **Fundamental Freedoms, Freedom to Petition**

The constitutional right of access is predicated on the existence of an underlying claim, however. If the cause of action no longer exists, the right to access cannot save the claim.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN27[] **Fundamental Freedoms, Freedom to Petition**

Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, the cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Legislation > Interpretation

HN28[] **Congressional Duties & Powers, Commerce Clause**

There is a strong deference accorded legislation in the field of national economic policy, and Congress has considerable leeway to fashion economic legislation.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Interpretation

HN29[] **Procedural Due Process, Scope of Protection**

Legislative acts adjusting the burdens and benefits of economic life come to a court with a presumption of constitutionality, and the burden is on one complaining of a due process violation to establish that a legislature has acted in an arbitrary and irrational way.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

HN30[] **Antitrust & Trade Law, Exemptions & Immunities**

See *15 U.S.C.S. § 37b(a)(1)(E)*.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

HN31[] **Effect & Operation, Prospective Operation**

A court must ask whether the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Legislation > Interpretation

Constitutional Law > Equal Protection > General Overview

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN32[] **Equal Protection, Nature & Scope of Protection**

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are plausible reasons for Congress' action, a court's inquiry is at an end.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Governments > Legislation > Interpretation

HN33[] **Judicial Review, Standards of Review**

Rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.

Counsel: **[**1]** For PAUL JUNG, M.D., Plaintiff: Ann D. White, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; David E. Romine, FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA; Donald L. Perelman, FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA; Mark A. Griffin, KELLER ROHRBACK LLP, Seattle, WA; Megan E. Jones, COHEN, MILSTEIN, HAUSFELD & TOLL, PLLC, Washington, DC; Michael J. Freed, MUCH, SHELIST, FREED, DENENBERG, ARNENT & RUBENSTEIN, PC, Chicago, IL; Michael Hausfeld, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC; Michael J. Kane, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; Raymond J. Farrow, KELLER ROHRBACK LLP, Seattle, WA; Roberta D. Lienbenberg, FINE, KAPLAN AND

BLACK R.P.C., Philadelphia, PA; Susan B. White, FREEDMAN BOYD DANIELS HOLLANDER GOLDBERG & CLINE, P.A., Albuquerque, NM; Christopher J. Cormier, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC; Sherman Paul Marek, LAW OFFICE OF SHERMAN MAREK, P.C., Chicago, IL; Richard A. Koffman, COHEN MILSTEIN HAUSFELD & TOLL, PLLC, Washington, DC.

For LUIS LLERENA, M.D., Plaintiff: Ann D. White, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; David E. Romine, FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA; Donald L. Perelman, **[**2]** FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA; Mark A. Griffin, KELLER ROHRBACK LLP, Seattle, WA; Michael Hausfeld, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC; Michael J. Kane, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; Raymond J. Farrow, KELLER ROHRBACK LLP, Seattle, WA; Roberta D. Lienbenberg, FINE, KAPLAN AND BLACK R.P.C., Philadelphia, PA; Susan B. White, FREEDMAN BOYD DANIELS HOLLANDER GOLDBERG & CLINE, P.A., Albuquerque, NM.

For DENISE GREENE, M.D., Plaintiff: Ann D. White, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; Mark A. Griffin, KELLER ROHRBACK LLP, Seattle, WA; Michael Hausfeld, COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C., Washington, DC; Michael J. Kane, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA; Raymond J. Farrow, KELLER ROHRBACK LLP, Seattle, WA; Susan B. White, FREEDMAN BOYD DANIELS HOLLANDER GOLDBERG & CLINE, P.A., Albuquerque, NM.

For Defendant: Robert A. Burgoyne, FULBRIGHT & JAWORSKI LLP, Washington, DC; Caroline M. Mew, FULBRIGHT & JAWORSKI LLP, Washington, DC.

Judges: PAUL L. FRIEDMAN, United States District Judge.

Opinion by: PAUL L. FRIEDMAN

Opinion

[*31] This matter is before the Court for consideration of Defendants' Motion for Judgment on the **[**3]** Pleadings. Plaintiffs in this putative class action are medical school graduates currently or formerly enrolled in resident physician "residency" programs. The defendants can be categorized into two groups: the organizational defendants (organizations and associations that participate in the administration of graduate medical education in the United States) and the institutional defendants (universities, medical schools, foundations, hospitals, health systems and medical centers that sponsor medical residency programs). Plaintiffs filed suit charging that the defendants have violated Section 1 of the Sherman Act, *15 U.S.C. § 1*. Specifically, plaintiffs allege that the defendants have contracted, combined and conspired among themselves to "displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment." Complaint ("Compl.") P2.

On February 11, 2004, the Court issued an Opinion and Order addressing certain defendants' motions to **[**4]** dismiss this action on various grounds. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d 119 (D. D.C. 2004)* ("February 11 Opinion and Order"). After the Court issued this Opinion and Order, Congress enacted and President George W. Bush signed into law the Pension Funding Equity Act of 2004, *Pub. L. No. 108-218, 118 Stat. 596* (2004), which includes a provision entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," an amendment to the antitrust laws that has been codified as *15 U.S.C. § 37b*. Certain defendants now move under *Rule 12(c) of the Federal Rules of Civil Procedure* for judgment on the pleadings on the ground that the action must be dismissed in light of this new legislation which creates or confirms an antitrust exemption for graduate medical education residency matching programs.

I. BACKGROUND

A. Plaintiffs' Allegations

In their class action complaint in this case, plaintiffs assert that there are three intertwining prongs to the antitrust conspiracy they allege. The first prong of the alleged conspiracy concerns the annual assignment **[**5]** of fourth-year medical students to the institutional defendants' residency **[*32]** programs by the National Resident Matching Program ("NRMP"). The NRMP, an Illinois not-for-profit corporation, is managed and operated by defendant American Association of Medical Colleges ("AAMC") from AAMC's principal office in Washington, D.C. See Compl. P15. The AAMC also is an Illinois not-for-profit corporation, whose membership includes all 125 accredited medical schools, including those medical schools named in the complaint, and approximately 375 major teaching hospitals and health systems, some of which also are named in the complaint. These hospitals and health systems are member hospitals of a subsection of the AAMC, the Council of Teaching Hospitals and Health Systems ("COTH") Section. See id. P17.

Plaintiffs further allege that in order to effectuate the assignment, or the "Match," as it is commonly called, prospective medical residents enter into contracts with and submit to the NRMP a ranked list of desired medical resident positions with various institutions ("Student Match Contract"). The institutions themselves also enter into contracts with the NRMP and submit ranked lists of the **[**6]** medical students whom they are interested in hiring ("Institutional Match Contract"). On a date certain, the NRMP through an algorithm "matches" the students' lists against the institutions' rankings, resulting in the assignment of each prospective medical resident to one residency program. See Compl. PP 15, 83-86. Plaintiffs allege that this system eliminates a free and competitive market and substitutes a centralized, anticompetitive allocation system that assigns prospective resident physicians to a single, specific and mandatory residency program. Plaintiffs further allege that the defendants designed and implemented this system and collectively agreed to comply with it in violation of the antitrust laws. See id. P83.

Several specific features of this assignment system allegedly serve to impose anticompetitive restraints on medical residency hiring. Plaintiffs allege that a medical student is required to enter into the Match if he or she wishes to gain employment in a residency program accredited by defendant Accreditation Council for Graduate Medical Education ("ACGME"). See Compl. P71. An individual's participation in an ACGME-accredited residency program in turn **[**7]** allegedly is a prerequisite for specialty certification by a member board of defendant American Board of Medical Specialties ("ABMS"), an Illinois not-for-profit corporation consisting of 24 recognized medical specialty certification boards, upon completion of the residency. See id. PP 20, 69. Plaintiffs allege that eventual specialty certification by an ABMS board is considered critical to prospective residents inasmuch as they desire to be "certified" to practice within a specialty following the completion of their residencies. The practical effect of this structure, plaintiffs charge, is that the vast majority of medical students are compelled to participate in the Match, which is a substitute for all aspects of competitive individual negotiations and requires applicants to commit contractually to any assigned position as a condition of enrolling in the Match Program. See id. PP 69, 86. Furthermore, certain implementing policing mechanisms of the Match allegedly compel compliance with the foregoing restraints. These alleged mechanisms include the requirement that program participants immediately report suspected policy violations to the NRMP and advise the relevant organizational **[**8]** authorities of institution or resident physician violations. See id. P86(c).

In the second prong of the alleged conspiracy, plaintiffs assert that certain aspects of the aforementioned ACGME accreditation standards, with which the **[*33]** institutional defendants allegedly voluntarily comply, function to further restrict residency employment. Specifically, plaintiffs allege that the ACGME (1) has the authority to regulate the number of employment positions in a residency program; (2) imposes substantial obstacles to the ability of a resident to transfer employment from one employer to another during the period of a residency, thereby effectively making NRMP assignments permanent for the duration of a residency; (3) encourages and/or requires participation in the Match by an institution as a condition of accreditation; and (4) directly reviews compensation and other terms of employment with the purposes of fixing and depressing them. See Compl. P88.

The third prong of the alleged conspiracy concerns the exchange by defendants of information on resident compensation and other terms of employment through surveys and databases that plaintiffs allege has the purpose and effect of standardizing **[**9]** and stabilizing compensation and other terms of employment. See Compl. PP 73-

82. This exchange allegedly occurs in two ways. First, the AAMC annually surveys members of its COTH Section seeking compensation levels for the employment year, aggregates the results into various categories and distributes its findings in an annual report (the "COTH Survey" or "Survey"). See id. PP 74-79. Second, hospitals and health systems access similar information through an electronic database known as the Fellowship and Residency Electronic Interactive Database ("FREIDA"), which is maintained by defendant American Medical Association ("AMA"). See id. P80. Plaintiffs allege that this exchange of information allows institutional defendants to fix resident salaries and benefits each year at depressed, anticompetitive levels.

Plaintiffs charge that the execution of the Match program, the enforcement of the ACGME-accreditation standards, and the coordinated collection and distribution of residency program compensation information together produce a significant depression of residents' salaries and working conditions by removing residents' ability to achieve enhanced salaries and working conditions **[**10]** through competition. See Compl. PP 92-96. Plaintiffs allege that defendants have violated *Section 1 of the Sherman Act* by contracting, combining and conspiring to unreasonably restrain trade and commerce. Plaintiffs filed this antitrust action as a proposed class action and have moved to certify both plaintiff and defendant classes. See Motion for Class Certification, filed November 3, 2003.

B. The February 11 Opinion and Order

In its February 11 Opinion and Order, the Court (1) denied certain institutional defendants' motion to dismiss for lack of personal jurisdiction; (2) granted the motion to dismiss for lack of personal jurisdiction of defendants Washington University Medical Center, the American Board of Medical Specialties and the Council of Medical Specialty Societies; (3) denied defendant National Resident Matching Program's motion to dismiss for lack of subject matter jurisdiction under *Rule 12(b)(1) of the Federal Rules of Civil Procedure* and its motion to compel arbitration, and denied the motion to compel arbitration filed by the American Medical Association; (4) denied the motions to dismiss for failure to state a **[**11]** claim upon which relief can be granted filed by the Association of American Medical Colleges and the Accreditation Council for Graduate Medical Education; and (5) granted the motions to dismiss for failure to state a claim filed by the American Hospital Association, the **[*34]** American Medical Association and Yeshiva University.

Specifically, the Court first concluded that it had personal jurisdiction over certain institutional defendants under the "conspiracy theory" of personal jurisdiction. The Court found that plaintiffs adequately had alleged "a conspiracy to depress resident compensation between, *inter alia*, those institutional defendants that participated in the Match and the NRMP" and that certain acts in furtherance of the conspiracy had taken place in the District of Columbia. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 142*. The Court further concluded that it did not have personal jurisdiction over those moving defendants that plaintiffs had not adequately alleged participated in the conspiracy. See *id. at 143*. Second, the Court denied defendant NRPM's motion to compel arbitration of those elements of the conspiracy **[**12]** claim that concerned the Match, concluding that the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*, and its progeny manifested "a clear and compelling countervailing interest in the comprehensive adjudication of conspiracy claims brought under the *Sherman Act*." *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 156*. The Court denied the motion of the American Medical Association to compel arbitration on similar grounds. See id.

Third, the Court denied the motions to dismiss for failure to state a claim filed by the Association of American Medical Colleges and the Accreditation Council for Graduate Medical Education, concluding that "plaintiffs adequately have alleged a common agreement to displace competition in the recruitment, hiring, employment and compensation of resident physicians and to impose a scheme of restraints that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment among certain defendants" and that the moving defendants participated in that **[**13]** conspiracy. *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 173-74*. In considering the *Rule 12(b)(6)* motions, the Court assessed the conspiracy allegations holistically rather then parsing out and considering those allegations that expressly related to the individual moving defendants. See *id. at 160-61* (citing *Continental Ore Co.*

v. Union Carbide & Carbon Corp., 370 U.S. at 699, and American Tobacco Co. v. United States, 328 U.S. 781, 809, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)). [1]

C. The New Legislation

On April 10, 2004, President Bush signed into law the Pension Funding Equity Act of 2004, *Pub. L. No. 108-218, 118 Stat. 596* (2004), which includes Section 207 entitled "Confirmation of **[**14]** Antitrust Status of Graduate Medical Resident Matching Programs," now codified as 15 U.S.C. § 37b ("Section 207"). At its core, Section 207 provides that HN1[] "[it] shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program." 15 U.S.C. § 37b(b)(2) (the "substantive" provision). In addition, HN2[] the statute provides that "evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal **[*35]** court to support any claim or action alleging a violation of the antitrust laws." Id. (the "evidentiary prohibition"). HN3[] The stated purposes of the law are to "confirm that the antitrust laws do not prohibit sponsoring, conducting, or participating in a graduate medical education residency matching program, or agreeing to do so; and …[to] ensure that those who sponsor, conduct or participate in such matching programs are not subjected to the burden and expense of defending against litigation that challenges such matching programs under the antitrust laws." 15 U.S.C. § 37b(a)(2)(A)-(B) **[**15]** . Section 207 HN4[] creates a price-fixing exemption for a certain class of antitrust claims, providing that "nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs." 15 U.S.C. § 37b(b)(3).

Section 207 HN5[] took effect on April 10, 2004, and applies "to conduct whether it occurs prior to, on, or after such date of enactment" and "to all judicial and administrative actions or other proceedings pending on such date of enactment." 15 U.S.C. § 37b(c). Defendants argue that judgment must be entered on their behalf because Section 207 precludes plaintiffs from pursuing their claim in light of the Court's conclusion in the February 11 Opinion and Order that plaintiffs allege a single overarching conspiracy with three interrelated prongs with the Match program at its center. Section 207 requires this conclusion, defendants argue, both by expressly exempting the Match program and its participants from the antitrust laws and by forbidding the consideration **[**16]** of evidence related to any entities' sponsorship, conduct, or participation in a graduate medical education residency matching program, or agreement to sponsor, conduct, or participate in such a program, in support of any antitrust claim. See Defendants' Motion for Judgment on the Pleadings ("Defs. 'Mot.") at 5-6. Defendants further argue that the legislation expressly applies to this action and that the "price-fixing" clause does not save plaintiffs' claim. See id. at 6-7.

II. DISCUSSION

A. Procedural Posture of Defendants' Motion

Plaintiffs first argue that defendants' motion for judgment on the pleadings is premature because fifteen of the moving defendants have not yet answered the complaint. See Plaintiffs' Response Opposing Defendants' Rule 12(c) Motion for Judgment on the Pleadings ("Pls. 'Opp.") at 2-3. Rule 12(c) of the Federal Rules of Civil Procedure states that HN6[] "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). This argument must fail, however, because HN7[] if a party files a **[**17]** Rule 12(c) motion before its answer, the Court may treat it as a motion to dismiss under Rule 12(b)(6) for failure to state a claim. See Dale v. Executive Office of the President, 164 F. Supp. 2d 22, 24 (D. D.C. 2001) (citing Seber v. Unger, 881 F. Supp. 323, 325 n. 2 (N. D. Ill. 1995)); Moran v. Peralta Community College Dist., *825 F. Supp. 891, 894 (N. D. Cal. 1993)* (considering Rule 12(c) motion even though all defendants had not yet answered because otherwise plaintiff could avoid Rule 12(c) motion simply by not serving one defendant).

[1] The Court concluded that plaintiffs failed to allege adequately that defendants AHA, AMA and Yeshiva University participated in the conspiracy. See Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 173-74.

HN8[] No prejudice to any party results from treating a Rule 12(c) motion as a Rule 12(b)(6) motion because the standard of review for motions for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure **[*36]** is essentially the same as that for motions to dismiss under Rule 12(b)(6). See Ramirez v. Dep't of Corrections, 222 F.3d 1238, 1240-41 (10th Cir. 2000); Haynesworth v. Miller, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1254 (D. C. Cir. 1987); Transworld Products Co. v. Canteen Corp., 908 F. Supp. 1, 2 (D. D.C. 1995). **[**18]** On either motion, the Court may not rely on facts outside the pleadings and must construe the complaint in the light most favorable to the non-moving party. See Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D. C. Cir. 1994). **HN9**[] Granting judgment on the pleadings pursuant to Rule 12(c) or a motion to dismiss for failure to state a claim under Rule 12(b)(6) is warranted only if it appears beyond doubt, based on the allegations contained in the complaint, that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). See also Alicke v. MCI Communications Corp., 324 U.S. App. D.C. 150, 111 F.3d 909, 912 (D. C. Cir. 1997).

Fourteen of the moving defendants have filed answers. [2] The remaining 15 movants have not filed an answer or a motion to dismiss pursuant to Rule 12(b)(6). **HN10**[] Although certain defendants in this latter group filed motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2), such motions do not preclude them from later filing motions to dismiss for failure to state a claim. **[**19]** See FED. R. CIV. P. 12(g) ("If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, *except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated."*) (emphasis added). Rule 12(h)(2) expressly mentions a motion to dismiss for failure to state a claim.

Based on the foregoing authorities, the Court concludes that it is appropriate for it to proceed with consideration of defendants' motion under Rule 12(c) for those defendants that have answered the complaint and under Rule 12(b)(6) for those defendants that have not. The motion is not premature as to any defendant.

B. The Impact of Section 207

Defendants first argue that "Congress **[**20]** has now made clear through Section 207 that it is not unlawful under the antitrust laws to sponsor, conduct, or participate in the Match or to agree to sponsor, conduct or participate in the Match." Defs. 'Mot. at 6. While that may be true, that alone is insufficient because plaintiffs do not allege in their complaint that the existence of and/or participation in the Match is a *per se* violation of the antitrust laws. Instead, plaintiffs argue that the Match, in combination with the dissemination of the COTH Survey and the enforcement of the ACGME accreditation standards, functions to suppress competition in resident hiring and compensation, resulting in depressed salaries and benefits. See Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 161-62, 167. [3] This is a critical distinction, **[*37]** because, as the Court noted in its February 11 Opinion and Order, **HN11**[] if lawful acts are used as the means to effectuate an antitrust conspiracy, the conspiracy itself is still unlawful. See id. at 160-61. The Supreme Court has concluded that **HN12**[] "it is not of importance whether the means used to accomplish the unlawful objective are in themselves **[**21]** lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition." American Tobacco Co. v. United States, 328 U.S. at 809. See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. at 707 ("acts which are in and of themselves legal lose that character when they become constituent elements of an unlawful scheme."). Accordingly, congressional confirmation that the Match program or participation in the Match program does not constitute a *per se* violation of the antitrust laws in the substantive provision of Section 207 does not defeat plaintiffs' antitrust claim.

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[2] Contrary to the allegations in plaintiffs' brief, defendants ACGME and AAMC have filed answers to the complaint.

[3] Interestingly, in an effort to make out long-arm jurisdiction, plaintiffs did attempt to suggest at oral argument on defendants' motion to dismiss that the tortious injury (if not the antitrust injury) to plaintiffs was the Match itself but, in view of plaintiffs' complaint, the Court rejected the argument. See Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 136.

[22]** The second sentence of *Section 207(b)(2)* goes on to provide, however, that ***HN13***[] "evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws." *15 U.S.C. § 37b(b)(3)*. Defendants argue that this provision prohibits plaintiffs from "using allegations related to the Match to support any antitrust claim, price-fixing or otherwise. Because plaintiffs' 'single' claim depends on evidence that defendant sponsored, conducted, or participated in the Match, *Section 207* is fatal to their complaint, and it should be dismissed." Defs. 'Mot. at 7. Plaintiffs respond to this charge in two ways.

First, plaintiffs argue that "[the February 11 Order and Opinion] upheld plaintiffs' price-fixing conspiracy claim without significant reliance on the allegations regarding the Match." Pls. 'Opp. at 9-10. Accordingly, plaintiffs argue, the evidentiary prohibition does not defeat plaintiffs' claim. In support of this assertion, plaintiffs cite those portions of the February 11 Opinion in which the Court assessed the conspiracy claim as it relates to the AAMC and the **[**23]** ACGME and the allegations regarding the defendants' wage information and exchange and accreditation activities. See id. at 9. They argue that the Court focused not on the Match, but on the other prongs of the alleged conspiracy almost entirely. See id. at 9-10. In so arguing, however, plaintiffs fail to consider that the Court's conspiracy analysis entailed two steps, the first of which relied greatly on allegations related to the Match.

In considering the original *Rule 12(b)(6)* motions, the first question the Court asked was whether plaintiffs adequately had alleged that an antitrust conspiracy existed. In concluding that they had, the Court focused on the highly intertwined, three-pronged nature of the alleged conspiracy, and relied in large part on the primary role the Match allegations played in the conspiracy claim. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 162* (concluding that "plaintiffs adequately have alleged a common agreement … among a number of the named organizational defendants *and those institutional defendants that participated in the Match Program"*) (emphasis added). In the second prong of the *Rule 12(b)(6)* **[**24]** analysis the Court assessed whether plaintiffs had alleged adequately that the individual defendants participated in the conspiracy. While the Court did then focus on the allegations of the individual defendant at issue -- in the case of the AAMC, the allegations concerning the **[*38]** COTH Survey; with respect to the ACGME, the allegations that related to that defendant's accreditation standards -- such "individualized" analysis does not change the fact that the Court first had concluded that plaintiffs had alleged an intertwining three-pronged conspiracy with the Match at its core. Plaintiffs' assertion that the Court considered the claims of the AAMC and the ACGME without reference to the Match is simply incorrect.

Second, plaintiffs argue that "even without the Match allegations" the complaint satisfies "the three elements of a properly pleaded claim under *Section 1 of the Sherman Act*," Pls. 'Opp. at 10-11, and that even without the Match-related allegations, the complaint still alleges a price-fixing conspiracy. See id. at 11. This argument is unsupported by the complaint that plaintiffs filed in this case, however. The complaint does not allege a price-fixing conspiracy but a single **[**25]** overarching integrated antitrust conspiracy with the Match as its centerpiece. See Compl. PP 3 (alleging three-pronged conspiracy), 58 (defendant class is defined in part by "all NRMP Institutional Participants"), 83-86 (alleging anticompetitive function of Match). Even the allegations that pertain to the ACGME accreditation standards rely in part on Match-related allegations. See id. P88(c) ("the ACGME encourages and/or requires participation in the NRMP as a condition of accreditation"). Plaintiffs' argument also is inconsistent with the Court's characterization of plaintiffs' claim in the February 11 Opinion and Order. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 161-62*; see *id. at 166-67*. In fact, plaintiff's current position is inconsistent with plaintiffs' own previous position as set forth in their earlier filings. In opposing NRMP's motion to compel arbitration, for example, plaintiffs asserted that they allege:

> a single, overarching conspiracy and the gravamen of plaintiffs' claim against NRMP is that it combined and conspired with others to displace competition in the market for resident services **[**26]** and to fix and stabilize residents' wages. The conspiracy which plaintiffs allege involves conduct significantly beyond particular features of the operation of the match program. While plaintiffs refer to certain conduct related to the operation of the match and its effects as some evidence of how the defendants carry out their overarching conspiracy to depress residents' wages, the complaint makes clear that the anticompetitive conduct related to the Match is not limited solely to the NRMP and that *the anticompetitive conduct related to the match necessarily interrelates with the other anticompetitive conduct alleged* ….

Plaintiffs' Consolidated Brief Opposing Defendants' Motion to Dismiss and to Compel Arbitration at 5 (underscore in original, italics added). See also Plaintiffs' Brief in Support of Their Motion for Certification of a Plaintiff Class and Certification of a Defendant Class at 2, 5.

Finally, while arguing with reference to the allegations related to the other two prongs of the alleged conspiracy that the conspiracy claim is legally sufficient without consideration of the Match-related claims, plaintiffs make no attempt to demonstrate that absent **[**27]** the Match allegations, the Court in fact would have come to the same conclusion that a conspiracy existed based solely on the remaining prongs. Moreover, the burden cannot be on the Court to effectively rewrite the complaint and consider it, as reconfigured, without the central Match-related allegations in order to evaluate plaintiffs' argument here. [4] **[**28]** **[*39]** While there may be a "tree … without the Match limb," Pls. 'Opp. at 14-15, plaintiffs' conclusory argument does not convince the Court that it is so. [5] The Court concludes that the allegations concerning the Match and the institutional defendants' participation in the Match are so interdependent that the Court cannot separate them from the remaining allegations. Because Congress has prevented this or any other Federal court from considering evidence of Match-related conduct, the Court necessarily concludes that plaintiffs' complaint must be dismissed under *15 U.S.C. § 37b(b)(3)*.

C. The "Savings" Clause

Plaintiffs next argue that notwithstanding **[**29]** the "evidentiary" prohibition of *Section 207*, the clause exempting price-fixing claims preserves their complaint. *Section 207* provides that ***HN14***[] "nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs." *15 U.S.C. § 37b(f)*. Plaintiffs interpret this clause to exclude from the antitrust exemption all claims that allege the price-fixing of resident wages, including their own. See Pls. 'Opp. at 23. Plaintiffs construe this exclusion too broadly. *Section 207* ***HN15***[] does not exclude all price-fixing claims related to resident compensation; it only excludes price-fixing claims that allege agreements between two or more institutional defendants to fix resident stipends and other benefits. There is a difference, and plaintiffs' complaint demonstrates that difference. Their pleading does not allege an agreement among residency programs to fix wages paid to residents. It alleges that an agreement exists between institutional defendants and numerous organizational defendants to suppress **[**30]** competition and depress compensation, and the allegations related to the organizational defendants -- the Match Program, the AAMC dissemination of information, and the ACGME accreditation standards -- comprise the heart of plaintiffs' claim. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 161-62*.

In an attempt to save their claim, plaintiffs also maintain that the Court must conclude that the savings clause is exempt from the evidentiary prohibition of *Section 207*, arguing that the restrictions on the admissibility of certain evidence in *subsection (b)(2)* cannot apply to price-fixing suits provided for in *subsection (b)(3)* because the subsection states that "nothing" in *Section 207* shall provide exemptions **[*40]** from price-fixing claims. See Pls. 'Opp. at 26. Again, plaintiffs misread the statute. Application of the evidentiary provision to the savings clause does

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[4] Nor would such an endeavor by the Court be consistent with the February 11 Opinion and Order. See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 155* ("conspiracy allegations in antitrust cases cannot be compartmentalized and considered in isolation 'as if they were separate lawsuits, thereby overlooking the conspiracy claim itself'") (quoting *In re Fine Paper Antitrust Litigation, 685 F.2d 810, 822 (3d Cir. 1982))*.

[5] The Court's dismissal of the AMA in the February 11 Opinion and Order is irrelevant. Plaintiffs argue that "the Order shows -- indeed establishes as the law of this case -- that legal failure of one component of defendants' alleged conspiracy may lead to the dismissal of any defendant only involved in that component, but does *not* lead to the dismissal of the defendants involved in the remaining components." Pls. 'Opp. at 13 (emphasis in original). Plaintiffs base this argument on the Court's conclusion that the single allegation regarding the FREIDA database, in the absence of any other allegations relating to AMA participation in the conspiracy, "[did] not lend support to an inference that the AMA participated in the alleged conspiracy." See *Jung v. Association of American Medical Colleges, 300 F. Supp. 2d at 169*. The allegations concerning the Match program, by contrast, permeate the complaint and, as the Court concluded, serve as a cornerstone of the conspiracy. See *id. at 162*.

not function to preclude the excepted price-fixing claims. ***HN16***[] Application of the provision merely forbids invocation of the Match program as evidence in any antitrust suit, including one involving allegations of price-fixing; but price-fixing claims unrelated to the Match as described **[**31]** in *Section 207(b)(3)* are not affected.

D. Constitutional Challenges to Section 207

Plaintiffs understandably are frustrated. They won a significant victory in court; Congress now has snatched it away. As a result, they have spent a significant portion of their brief discussing the "highly peculiar" legislative path *Section 207* took before its passage. Pls' Opp. at 17. They point out that there were no hearings, no testimony, no significant debate, and vigorous opposition from those few Senators and Representatives who cared enough or were importuned enough to focus on the Match legislation. See id. at 16-22. "By furtively attaching the Match Legislation as a rider to an unrelated bill on the eve of imminent passage rather than introducing legislation through normal procedures, defendants were able to avoid public and Congressional awareness and avoid opposition to their scheme." Id. at 21. As Bismarck suggested, "the making of laws, like the making of sausage, is something from which the fastidious person would often be well advised to avert his or her gaze." *ACLU v. Capitol Square Review Advisory Board, 243 F.3d 289, 309 n.21 (6th Cir. 2001)*; *Community Nutrition Institute v. Block, 242 U.S. App. D.C. 28, 749 F.2d 50, 51 (D.C. Cir. 1984)* **[**32]** (same). ***HN17***[] Absent a valid constitutional challenge to a law passed by Congress and signed by the President, however, the responsibility of the courts is to interpret and apply the statute, not to second-guess. See *Mistretta v. United States, 488 U.S. 361, 384, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)* ("When this Court is asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, ... it should only do so for the most compelling constitutional reasons.") (quoting *Bowsher v. Synar, 478 U.S. 714, 736, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)* (Stevens, J., concurring)); *Nuclear Energy Inst., Inc. v. EPA, No. 01-1258, 362 U.S. App. D.C. 204, 373 F.3d 1251, 2004 U.S. App. LEXIS 14186, *144 (D. C. Cir. July 9, 2004)* ("Congress has settled the matter, and we, no less than the parties, are bound by its decision.").

Plaintiffs challenge the constitutionality of *Section 207* on several grounds. Upon consideration of the parties' arguments, the Court concludes that none of plaintiffs' arguments saves plaintiffs' conspiracy claim.

1. Separation of Powers

Plaintiffs charge that interpreting *Section 207* to require disposition of this action in defendants' **[**33]** favor would amount to "a legislative adjudication of this pending case" in violation of "bedrock separation of powers principles" because "Congress may not ... direct decisions in pending cases." Pls. 'Opp. at 28. Plaintiffs rely primarily on the Supreme Court's decision in *United States v. Klein, 80 U.S. 128, 20 L. Ed. 519, 7 Ct. Cl. 240 (1871)*. Klein concerned a suit seeking proceeds from cotton seized from a Confederate sympathizer and sold by the Union army during the Civil War. The petitioner filed the suit pursuant to a federal statute that allowed recovery of seized property by owners if they provided proof of loyalty to the Union, which loyalty, the Court previously had determined, could be proven by evidence of a presidential pardon of the owner for any support he offered to the **[*41]** Southern rebellion. See *id. at 142-43*. The owner of the cotton had received such a pardon. After petitioner had recovered in the Court of Claims, however, Congress passed another statute that precluded the use of any pardons given to those who participated in the rebellion to demonstrate proof of loyalty, and provided that acceptance of such a pardon in fact demonstrated *disloyalty* **[**34]** . Congress also directed that upon presentation of proof of such a pardon, the Court of Claims and the Supreme Court must dismiss the property claim for want of jurisdiction. See *id. at 143-44*.

The Supreme Court found the statute unconstitutional in two respects. First, the Court determined that ***HN18***[] Congress is prohibited from "prescribing a rule for the decision of a cause in a particular way" in cases "pending before [the Judicial department of the government]." *United States v. Klein, 80 U.S. at 146*. As noted, the Court of Claims had already rendered judgment for the claimant, and an appeal had been taken to the Supreme Court. The Supreme Court found the statute at issue unconstitutional because it had the effect of forbidding the Supreme Court (and for the future, the Court of Claims) from "giving effect to the evidence which, in [the Court's] judgment, such evidence should have, and ... direct[ing it] to give it an effect precisely [to] the contrary." *Id. at 147*. In so concluding, the Court distinguished those cases in which "new circumstances" are created under the statute that have the effect of determining the outcome **[**35]** of the case. Id. Second, the statute impaired the effect of the Presidential pardon and therefore infringed upon the constitutional power of the Executive. It was clear to the Supreme Court that "the legislature cannot change the effect of such a pardon any more than the executive can change a law [passed by the legislature]." *Id. at 147-48*. [6]

Plaintiffs argue that the evidentiary prohibition enacted by Congress with respect to the Match cannot stand under Klein because Congress "may not constitutionally **[**36]** assume the judicial function of determining the effect or weight to be given to evidence in a pending case" by altering the rules of decision such that the alteration directs disposition of the action in defendants' favor. [7]See Pls. Opp. at 32. [7] As the D.C. Circuit has noted, "Klein's exact meaning is far from clear." *National Coalition to Save Our Mall v. Norton, 348 U.S. App. D.C. 92, 269 F.3d 1092, 1096 (D. C. Cir. 2001)*. One thing is certain, however, and that is that ***HN19***[] "whatever the precise scope of Klein ... later decisions have made clear that its prohibition does not take hold when Congress 'amends applicable law.'" *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 131 L. Ed. 2d 328, 115 S. Ct. 1447 (1995)*. When "a statute 'compels changes in the law, not findings or results under old law, 'it merely amends the underlying law, and therefore is not subject to a Klein challenge." **[*42]** *Imprisoned Citizens Union v. Prasse, 169 F.3d 178, 187 (3d Cir. 1999)* (quoting *Robertson v. Seattle Audubon Society, 503 U.S. 429, 438, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992))*. See also *Benjamin v. Jacobson, 124 F.3d 162, 174 (2d Cir. 1997)* **[**37]** ("if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under pre-existing law, it will not violate the separation of powers principle formulated in Klein").

The Court concludes that by enacting the statute Congress changed the scope of permissible antitrust claims that may be resolved by the Federal courts. Congress exempted from antitrust prosecution all claims that directly challenge the legality of the Match and participation in the Match program by institutional defendants under the antitrust laws, and prohibited the use in antitrust actions of evidence concerning the Match **[**38]** Program and its participants. The plain language of the statute add a new antitrust exemption to the antitrust laws and new procedural or evidentiary restrictions on the prosecution of certain antitrust actions. See *15 U.S.C. § 37b(b)(2)*. [8] This change in or amendment to applicable ***antitrust law*** does not, however, prescribe a different finding, conclusion or result in the outcome of this or any other particular antitrust case. It therefore does not run afoul of Klein.

[39]** ***HN21***[] The line between a statute that provides the standard to which courts must adhere and a statute that compels a specific result in a pending action at times is difficult to draw. See *Benjamin v. Jacobson, 124 F.3d at 174* ("The distinction may in some cases be hard to discern."); *Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78, 81 (2d Cir. 1993)* ("The conceptual line between a valid legislative change in law and an invalid act of adjudication is often difficult to draw."). In this case, however, the line is clear, and the fact that *Section 207* has application to actions beyond this lawsuit only bolsters the Court's conclusion that the statute was amended.

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[6] As later explained by the Supreme Court, the statute at issue in Klein was unconstitutional in two respects: First, "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." Second, the statute infringed the constitutional power of the President to issue pardons. *United States v. Sioux Nation of Indians, 448 U.S. 371, 404-05, 65 L. Ed. 2d 844, 100 S. Ct. 2716 (1980)*.

[7] Plaintiffs also argue that interpreting the substantive provision of *Section 207* to require the disposition of this lawsuit in defendants' favor is unconstitutional. See Pls. Opp. at 30-31. In light of the Court's conclusion that *Section 207* by its own terms does not direct judgment for defendants, see Section II. B, *supra*, the Court does not reach this argument.

[8] Despite arguments to the contrary, the statute is not merely a confirmation of prior existing law, the titles of *Section 207*, "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," and of *subsection (b)(2)*, "Confirmation of Antitrust Status," and the articulated purpose of *subsection (a)(2)(A)* notwithstanding. ***HN20***[] "The title of a statute '[is] of use only when [it] sheds light on some ambiguous word or phrase' in the statute itself." *Carter v. United States, 530 U.S. 255, 267, 147 L. Ed. 2d 203, 120 S. Ct. 2159 (2000)* (quoting *Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998)* (internal quotation omitted)) (brackets in original). Here, the statute is unambiguous.

Section 207 **HN22**[] precludes both claims challenging the antitrust status of the Match Program itself, and the consideration of evidence related to the Match Program in actions brought under the antitrust laws. Accordingly, the Court concludes that plaintiffs can find no refuge in Klein and its articulation of the separation of powers doctrine.

2. Unconstitutional Taking

Plaintiffs next argue that dismissal of their complaint under the evidentiary prohibition of Section 207 would constitute an **[**40]** unlawful taking in violation of the Fifth Amendment. Specifically, plaintiffs argue that with dismissal they will lose their property interest in their future wages and working conditions. See Pls. 'Opp. at 36. These lost increased wages and bettered working conditions can only be considered "lost," however, if plaintiffs succeed in this action and wages in fact are increased. Otherwise, there is no basis on which to assume that compensation would increase in the future. The court of appeals has made it clear that **HN23**[] plaintiffs have no property interest in their pending **[*43]** claim. Causes of actions only become actionable property interests upon the entry of final judgment. *Adams v. Hinchman, 332 U.S. App. D.C. 98, 154 F.3d 420, 424 (D. C. Cir. 1998)* (a cause of action "affords no definite or enforceable property right until reduced to a final judgment"); *Grimesy v. Huff, 876 F.2d 738, 744 (9th Cir. 1989)* ("a party's property right in any cause of action does not rest until a final *unreviewable* judgment is obtained.") (internal quotations and citation omitted) (emphasis in original). Similarly, to the extent that plaintiffs implicitly assert that dismissal **[**41]** of their complaint would constitute a taking in the form of past wage loss stemming from defendants' anticompetitive behavior, those asserted losses likewise are compensable, if at all, only upon entry of a final judgment.

3. Additional Constitutional Arguments

Plaintiffs also argue that dismissal of their antitrust claim through the evidentiary restriction of Section 207 would violate their right to due process, their right to access to the courts and their right to equal protection of the laws. Plaintiffs first raise a due process claim under *Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982)*, asserting that "exclusion of this concededly relevant evidence would result in summary dismissal of plaintiffs' entire claim at the *pleading* stage," thereby denying them the right to adjudication on the merits. Pls. 'Opp. at 33 (emphasis in original). The Supreme Court in Logan did not conclude that litigants have a due process right to an adjudication on the merits, however. Instead, the Court concluded that **HN24**[] it was a denial of due process to create a cause of action in which parties have a property right and then to allow the state to take that right **[**42]** away without providing the party with any judicial forum. See *id. at 429-30*. This case does not present the same situation, and plaintiffs' reliance on *Logan* therefore is misplaced. Section 207 **HN25**[] does not deny plaintiffs a forum in which to bring their claim. Instead, the statute restricts the basis for an antitrust cause of action, which is not an unconstitutional restriction so long as there is a rational basis for the law, as the Court discusses, *infra* at Section II. D. 3.

Plaintiffs similarly argue that the evidentiary prohibition unconstitutionally prescribes their right to access to the courts under the First Amendment. **HN26**[] The constitutional right of access is predicated on the existence of an underlying claim, however. If the cause of action no longer exists, the right to access cannot save the claim. As the Supreme Court concluded in *Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002)*:

> **HN27**[] Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek **[**43]** judicial relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.

Id. at 414-15. Here, plaintiffs assert that dismissal of the complaint under Section 207 effectively denies plaintiffs access to the courts to adjudicate their claim. A more proper construction of the effect of the statute is that it effectively eliminates the cause of action in the first instance. Plaintiffs' "access to the courts" argument therefore is misplaced. Whether the congressional act was constitutional is a separate question, to be discussed, *infra* at Section II. D. 3.

[*44] Plaintiffs next argue that the evidentiary prohibition fails to comport with due process because "a special evidentiary rule that applies only to litigants who seek to include in their cases evidence relating to a matching program -- one that applies regardless of the merit of those litigants' claims -- is an archetype of irrational legislation." Pls. 'Opp. at 36. As a preliminary matter, the Court notes **[**44]** that ***HN28***[] there is a "strong deference accorded legislation in the field of national economic policy," *Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729, 81 L. Ed. 2d 601, 104 S. Ct. 2709 (1984)*, and "Congress has considerable leeway to fashion economic legislation." *Eastern Enterprises v. Apfel, 524 U.S. 498, 528, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998)*. As the Supreme Court has concluded, ***HN29***[] "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and … the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Eastern Enterprises v. Apfel, 524 U.S. at 524* (quoting *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976))*. Accordingly, the Court must assess whether the Congress acted in an arbitrary and irrational way in enacting the evidentiary prohibition of *Section 207*. Upon review of the policies expressly articulated in the statute, the Court concludes that it did not.

Subsection (a) of Section 207 articulates the congressional findings, purposes and intent **[**45]** justifying the exclusion of the Match Program and participation in the Match from the purview of the antitrust laws, both in actions against the program and its participants and in actions that more generally seek to demonstrate violation of the antitrust laws by making allegations concerning the Match. The subsection first references the historical impetus for the creation of the Match, which include a desire for efficiency, for fairness and for protection of students' early years of medical school. See *15 U.S.C. § 37b(a)(1)(A)-(D)*. The statute then provides:

> ***HN30***[] Antitrust lawsuits challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process. The costs of defending such litigation would divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research. In addition, such costs may lead to abandonment of the matching process, which has effectively served the interests of medical students, teaching hospitals, and patients for over half a century. **[**46]**

15 U.S.C. § 37b(a)(1)(E). The intent behind the enactment of *Section 207* was to secure the continuation of the Match itself, which Congress found is an efficient, valuable placement system, and to protect the financial resources of teaching hospitals and programs from costs of antitrust litigation that concern the Match program. The Court cannot conclude that this protection, effectuated by exempting the Match or its participants from antitrust prosecution, is an irrational or arbitrary act on the part of Congress.

Furthermore, if Congress's specific intent was to prevent use of funds in lawsuits that challenge the Match either directly or indirectly under the antitrust laws, the evidentiary prohibition is a rational means of actualizing that protection of resources. The fact that application of the statute effectively will end this litigation does not make the law irrational or arbitrary. See *National Coalition to Save Our Mall v. Norton, 269 F.3d at 1097* **[*45]** (Congress may enact legislation that affects pending actions so long as it does so by amending the relevant law); *Deck v. Peter Romein's Sons, Inc., 109 F.3d 383, 386 (7th Cir. 1997)* **[**47]** ("Congress' power to effect a change in the law and to make that change controlling as to pending cases is beyond peradventure."); *National Juvenile Law Center, Inc. v. Regnery, 238 U.S. App. D.C. 61, 738 F.2d 455, 465 (D. C. Cir. 1984)* ("Pending cases are often affected by the actions of coordinate branches of government. For instance, the general rule is that, if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment (including appellate judgment).").

This reasoning also disposes of any additional argument that retroactive application of the statute to this action violates plaintiffs' due process rights. It cannot be disputed that Congress intended that *Section 207* apply to this action. See *15 U.S.C. § 37b(c)* ("this section … shall apply to all judicial and administrative actions or other proceedings pending on [the] date of enactment"). ***HN31***[] The Court therefore must ask whether "the retroactive application of a statute [is] supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. at 729.* **[**48]** The policies articulated by Congress in *Section*

207 (a) ("Findings and Purposes") provide the bases for the conclusion that retroactive application of the statute is a rational means to effect these purposes. With Section 207, Congress intended to protect the Match Program and its participants from the cost of defending antitrust actions that challenge the Match. Clearly, this lawsuit is such an action, and application of the statute to this action accomplishes Congress's goal of conserving the resources of the medical education community. While plaintiffs disagree with many of the "findings" of Congress, particularly because they were made without the benefit of any congressional hearings, see *supra* at Section II. D, and question the policies underlying the statute, the findings themselves are not irrational and there is a rational connection between the findings made and the policies enacted. See *Hammond v. United States, 786 F.2d 8, 13 (1st Cir. 1986)* (plaintiff has not met burden of showing that statute is "arbitrary and irrational in purpose and effect" and not "reasonably related to a legitimate congressional purpose").

Plaintiffs raise a similar claim **[**49]** that Section 207 violates their equal protection rights. As the Supreme Court provided in *FCC v. Beach Communications, Inc., 508 U.S. 307, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*, however, ***HN32***[] "in areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. … Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end. '" *Id. at 313* (internal quotations and citations omitted). In the absence of any argument that plaintiffs are members of a suspect class or that their claim asserts infringement of a constitutional right, plaintiffs' equal protection argument fails on the same basis as did their due process claim. See *Calloway v. District of Columbia, 342 U.S. App. D.C. 110, 216 F.3d 1, 8-9 (D. C. Cir. 2000)* (where plaintiffs are not members of suspect class, equal protection challenge is reviewed under rational basis standard); *Hammond v. United States, 786 F.2d at 15* **[**50]** (failing to allege a suspect class, plaintiffs' equal protection argument fails on same basis as due process **[*46]** analysis). And ***HN33***[] "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. '… Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe, 509 U.S. 312, 319, 321, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993)* (quoting *FCC v. Beach Communications, Inc., 508 U.S. at 318*).

III. CONCLUSION

For the foregoing reasons, in view of the enactment of Section 207 by Congress, the Court concludes that with respect to the 14 defendants that have filed answers it must grant their motion for judgment on the pleadings under *Rule 12(c) of the Federal Rules of Civil Procedure*, and, with respect to the remaining 15 movants it must treat their motion as a motion for failure to state a claim under *Rule 12(b)(6)* and grant that motion. The Court will deny all other pending motions as moot. [9] A separate Order consistent with this Opinion will issue this same **[**51]** day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE:

ORDER AND JUDGMENT

For the reasons stated in the separate Opinion issued this same day, it is hereby

ORDERED that the motion for judgment on the pleadings under *Rule 12(c) of the Federal Rules of Civil Procedure* [259] is GRANTED with respect to the 14 defendants that have filed answers; it is

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[9] Had the Court not granted the instant motion, it would have granted the motion of certain defendants to certify an immediate appeal under *28 U.S.C. § 1292(b)*.

FURTHER ORDERED that with respect to the remaining 15 movants that have not yet filed answers, the motion for judgment on the pleadings shall be treated as a motion to dismiss for failure to state a claim under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, and it is GRANTED; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to strike **[**52]** plaintiffs' statement [190] is DENIED as moot; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to strike plaintiffs' response opposing defendant NRMP's motion for protective order [191] is DENIED as moot; it is

FURTHER ORDERED that the consent motion for entry of a stipulated order on experts' discovery [201] is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion for class certification [205] is DENIED as moot; it is

FURTHER ORDERED that defendants' motion to compel class discovery [223], [225] is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion to amend or correct order staying class discovery [234] is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion for a protective order [235] is DENIED as moot;

FURTHER ORDERED that plaintiffs' amended motion for class certification [238] is DENIED as moot; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to stay proceedings pending appeal [239] is DENIED as moot; it is

FURTHER ORDERED that certain defendants' motion for a certificate of appealability [241] is DENIED as moot; it is

[*47] FURTHER ORDERED that defendants' **[**53]** motion to stay proceedings pending appeal [243] is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion to amend the complaint [248] is DENIED as moot; it is

FURTHER ORDERED that certain defendants' motion to reconsider the *Rule 12(b)(2)* jurisdiction ruling [260] is DENIED as moot; it is

FURTHER ORDERED that judgment on the pleadings is entered for defendants and the case is DISMISSED for failure to state a claim; and it is

FURTHER ORDERED that this Order and Judgment shall constitute a FINAL JUDGMENT in this case. This is a final appealable order. See *Rule 4(a), Fed. R. App. P.*

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE:

Rambus, Inc. v. Infineon Techs. AG

United States District Court for the Eastern District of Virginia, Richmond Division

August 12, 2004, Decided ; August 12, 2004, Filed

Civil Action No. 3:00cv524

Reporter

330 F. Supp. 2d 679 *; 2004 U.S. Dist. LEXIS 16116 **; 2004-2 Trade Cas. (CCH) P74,558

RAMBUS, INC. v. INFINEON TECHNOLOGIES AG; INFINEON TECHNOLOGIES NORTH AMERICA CORP.; INFINEON TECHNOLOGIES HOLDING NORTH AMERICA, INC.

Subsequent History: Motion granted by *Rambus, Plaintiff v. Infineon Techs. AG, 2004 U.S. Dist. LEXIS 25528 (E.D. Va., Dec. 15, 2004)*

Prior History: *Rambus, Inc. v. Infineon Techs. AG, 326 F. Supp. 2d 721, 2004 U.S. Dist. LEXIS 13345 (E.D. Va., 2004)*

Disposition: **[**1]** Plaintiff's motion in limine denied.

Core Terms

patent, competitor's, patent application, invention, infringement, products, continuation, amend, technology, Tube, manufactured, patent law, electrical, unfair business practice, motion in limine, specification, insert, counterclaim, conduit, progeny, industry standard, district court, encompass, meetings, voltage, original application, written description, anti trust law, standard-setting, anticompetitive

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Effect of Inequitable Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Elements

HN1[] **Inequitable Conduct, Effect of Inequitable Conduct**

Inequitable conduct in the United States Patent and Trademark Office (PTO) requires: (1) a failure to disclose material information to the PTO or the submission of false information to the PTO; done with (2) an intent to deceive the PTO.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN2[] **Subject Matter Jurisdiction, Appeals**

The United States Court of Appeals for the Federal Circuit has stated that there is nothing improper, illegal or inequitable in filing a patent application for the purpose of obtaining a right to exclude a known competitor's product from the market; nor is it in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution. Any such amendment or insertion must comply with all statutes and regulations, of course, but, if it does, its genesis in the marketplace is simply irrelevant and cannot of itself evidence deceitful intent.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN3[] **Subject Matter Jurisdiction, Appeals**

The United States Court of Appeals for the Federal Circuit decision in Kingsdown stands for the proposition that filing claims with the United States Patent and Trademark Office in order to cover a competitor's product, standing alone, is not a sufficient basis for finding deceitful intent.

Patent Law > US Patent & Trademark Office Proceedings > Examinations > Amendments & New Matter

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN4[] **Examinations, Amendments & New Matter**

Under *35 U.S.C.S. § 132*, no amendment shall introduce new matter into the disclosure of the invention.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Patent Law > US Patent & Trademark Office Proceedings > Examinations > General Overview

HN5[] **Presiding Officers, Administrative Law Judges**

It is not permissible for an administrative law judge with the United States Patent and Trademark Office, in order to preserve the validity of patent claims, to rewrite them to add a limitation that the patentee had eliminated, and then to hold that the challenged devices did not infringe the rewritten claims.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN6[] **Basis of Recovery, Statutory Awards**

Under *35 U.S.C.S. § 285*, a court in exceptional cases may award reasonable attorney fees to the prevailing party in a patent infringement suit.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignments

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Patent Law > ... > Claims > Claim Language > Duplication & Multiplicity

Patent Law > Infringement Actions > General Overview

HN7[] **Conveyances, Assignments**

In the context of deciding whether a case was "exceptional" for purposes of the awarding of attorney fees under *35 U.S.C.S. § 285*, the United States Court of Appeals for the Federal Circuit, in Multiform Desiccants, Inc., reiterated the Kingsdown language that it is not in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution.

Patent Law > ... > Specifications > Description Requirement > General Overview

HN8[] **Specifications, Description Requirement**

Under *35 U.S.C.S. § 112* the specification shall contain a written description of the invention.

Patent Law > ... > Specifications > Description Requirement > General Overview

HN9[] **Specifications, Description Requirement**

In order to satisfy the written description requirement of *35 U.S.C.S. § 112*, any claims contained in subsequently filed amendments, continuation, or divisional applications must be supported by the original specification.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN10[] **Subject Matter Jurisdiction, Appeals**

The United States Court of Appeals for the Federal Circuit's decision in Kingsdown and its progeny stand for the unremarkable proposition that amending a patent application to cover a competitor's product is not, in and of itself, sufficient to show deceptive intent or bad faith under the patent laws. In addition, the cases stand for the proposition that prosecuting a patent in order to cover a competitor's product is not an illegitimate practice under the patent laws, provided that the patent applicant otherwise complies with the law.

Patent Law > US Patent & Trademark Office Proceedings > Examinations > Amendments & New Matter

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > Invention Date & Priority > General Overview

Patent Law > US Patent & Trademark Office Proceedings > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > General Overview

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > Copendency & Disclosure

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > Divisionals & Restrictions

HN11[] Examinations, Amendments & New Matter

Under *35 U.S.C.S. § 112*, a patent specification must, among other requirements, contain a "written description" of the invention. Under *35 U.S.C.S. § 112*, the specification also must convey with reasonable clarity to those skilled in the art that, as of the filing date, the patent holder was "in possession of the invention" now claimed in the patent. As a corollary, by virtue of *35 U.S.C.S. § 132(a)*, any amendment to a patent application must not contain any "new matter," that is, matter that describes a different invention or adds to or changes the nature of the invention disclosed in the specification. Likewise, to enjoy the priority date of the original application, any continuation or divisional application must also meet these requirements. *35 U.S.C.S. §§ 120* and *121*.

Patent Law > ... > Specifications > Description Requirement > General Overview

HN12[] Specifications, Description Requirement

The purpose of the written description requirement in *35 U.S.C.S. § 112* is to prevent an applicant from later asserting that he invented that which he did not; the applicant for a patent is therefore required to recount his invention in such detail that his future claims can be determined to be encompassed within his original creation.

Patent Law > ... > Specifications > Enablement Requirement > General Overview

Patent Law > ... > Specifications > Description Requirement > General Overview

Patent Law > ... > Specifications > Description Requirement > Standards & Tests

HN13[] Specifications, Enablement Requirement

The written description requirement under *35 U.S.C.S. § 112* requires a patent applicant to convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. The invention is, for purposes of the "written description" inquiry, whatever is now claimed.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN14[] Subject Matter Jurisdiction, Appeals

In the background of the United States Court of Appeals for the Federal Circuit's decision in Kingsdown and its progeny is the notion that the patent applicant's observation of the competing product simply occurred in the market. In none of the cases did the patent holder learn of the later-added inventions through its participation in a standard-setting organization.

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN15[] **Subject Matter Jurisdiction, Appeals**

In Kingsdown, the United States Court of Appeals for the Federal Circuit circumscribed the rule there announced by explaining that the genesis of an amendment to a patent application in the marketplace is simply irrelevant and cannot of itself evidence deceitful intent. Thus, Kingsdown itself dealt with what is already in the marketplace, not with an industry standard that is under development. More importantly, Kingsdown clearly says that the genesis of the amendment in the marketplace, standing alone, cannot evidence deceitful intent. Kingsdown thus does not foreclose consideration of the effect of the genesis of the idea together with evidence of other conduct, particularly not conduct that is unlawful under applicable statutes. Indeed, Kingsdown makes clear that the amendment must comply with all statutes and regulations. These circumscribing factors are not, in any way, eliminated in the ensuing decisions interpreting Kingsdown.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Patent Law > US Patent & Trademark Office Proceedings > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

Patent Law > Remedies > General Overview

HN16[] **US Department of Justice Actions, Criminal Actions**

The United States Court of Appeals for the Federal Circuit's decision in Kingsdown stands for the proposition that the patent laws are not offended if a patent applicant amends a pending application to cover a product that it observed in the market. The rule of Kingsdown cannot reasonably be extended to mean that it is appropriate or lawful to amend a pending patent application to secure patents when the act of doing so is part of conduct that violates other non-patent laws, for instance, 15 U.S.C.S. § 2. Otherwise, Kingsdown would operate to give unscrupulous persons an incentive to violate a panoply of civil and criminal laws knowing that the behavior will yield financial success by way of a valid patent. Indeed, such a patent could be sold for a profit to an innocent purchaser for value and thus placed beyond the reach of remedies that would apply to deal with the wrongdoer.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN17[] **Antitrust & Trade Law, Sherman Act**

The offense of monopoly under *15 U.S.C.S. § 2* has two principal elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Patent Law > Subject Matter > General Overview

HN18[] **Patent Law, Subject Matter**

An "open standard" is a standard that a manufacturer can practice without infringing any patents or intellectual property. In other words, a product manufactured in conformance with an open standard is non-royalty bearing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN19[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Standard-setting organizations (SSOs) allow industry players to meet as a group and exercise influence on their particular industry. It almost goes without saying, therefore, that the collusive atmosphere of an SSO presents a very real opportunity for anticompetitive behavior. Agreement on a product standard is, after all, implicitly an agreement not to manufacturer, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. Nonetheless, because of the need for interoperability in certain industries, SSOs are tolerated.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN20[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Far from being anticompetitive or merely benign, standard-setting organizations (SSOs) generally have beneficial effects on competition. Product uniformity through standardization, especially in technological markets, facilitates the comparison of competing products, which benefits consumers in the short run and provides incentives for engineers to develop the next generation of compatible products, thereby providing longer-term consumer benefits. Likewise, new producers have easier entry into a market when standards exist, thus also increasing competition. In addition, a future product will have the additional benefit of a longer product life if it revolves around an existing standard; a standardized technology core also lowers a company's cost of developing a next generation product. Finally, producers have lower marketing costs in bringing products to a predefined, standardized market. For all these reasons, when they operate correctly, SSOs foster competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN21[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

"Interoperability" is simply the ability of one manufacturer's product to interface with other manufacturers' products.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN22[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The fact remains that standard-setting organizations (SSOs) inherently are rife with opportunities for anticompetitive activity. An SSO affords the potential for industry players to act together and exert their anticompetitive conduct throughout the remainder of the industry. Moreover, even if the SSO itself is not corrupt, the subversion of an SSO by a single industry player or by a limited subset of SSO members can result in anticompetitive outcomes. Thus, ***antitrust law*** historically has been concerned with the risk of one or a small number of participants capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power. Simply put, by hijacking or capturing an SSO, a single industry player can magnify its power and effectuate anticompetitive effects on the market in question.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "rule of reason" requires the finder of fact to weigh the anticompetitive effects of the at-issue conduct against the procompetitive effects the conduct might have had. Stated otherwise, it requires the fact finder to determine whether the challenged conduct, on balance, promotes or suppresses competition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN24[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine holds that a concerted action consisting solely of activity aimed at influencing public officials does not violate the antitrust laws. In other words, it is a *First Amendment* gloss on the antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN25[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The United States Supreme Court has recognized the obvious fact that, when commandeered by a subset of industry players or, by obvious extension, a single industry player, conduct at a standard-setting organization (SSO) may violate the antitrust laws. Private standard-setting by associations comprising firms with horizontal and vertical relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits. Thus, if an SSO is conducted (or subverted) in a partisan manner that results in anticompetitive results, such activity may run afoul of the antitrust laws.

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN26[] **Inequitable Conduct, Effect, Materiality & Scienter**

The patent statutes and the decisional law implementing them do not exist or operate in isolation. Rather, they are a part of the legal fabric of a society that imposes on its citizens, individual and corporate, other legal constraints that cannot be rendered meaningless or marginalized by the distorted application of a principle of patent law that, in context and in its place, is no doubt valid. Indeed, the patent laws must, and certainly can, coexist with the other statutes that control the conduct of commerce.

Counsel: For Plaintiff: Michael W. Smith, Esquire, Craig T. Merritt, Esquire, R. Braxton Hill, Esquire, Christian & Barton, L.L.P., Richmond, Virginia.

For Plaintiff: Gregory P. Stone, Esquire, Peter A. Detre, Esquire, Munger, Tolles & Olson LLP, Los Angeles, CA.

For Defendants: Brian C. Riopelle, Esquire, Robert M. Tyler, Esquire, McGuire Woods, LLP, Richmond, Virginia.

For Defendants: John M. Desmarais, Esquire, Gregory S. Arovas, Esquire, Michael P. Stadnick, Esquire, Kirkland & Ellis, New York, New York.

Judges: ROBERT E. PAYNE, United States District Judge.

Opinion by: ROBERT E. PAYNE

Opinion

[*681] MEMORANDUM OPINION

This matter is before the Court on Rambus, Inc.'s ("Rambus") Motion in *Limine* No. 2, to Exclude Evidence or Argument that Plaintiff's **[**2]** Amendment of Patent Claims was Based on Stolen Ideas or was Otherwise Wrongful or Illegal (Docket No. 576). The Defendants are Infineon Technologies AG, Infineon Technologies North America Corporation, and Infineon Technologies Holding North America, Incorporated (hereinafter collectively "Infineon"). By way of this motion in *limine,* Rambus asks the Court to preclude Infineon from introducing evidence or presenting argument that Rambus' amendment of its patent claims was based on ideas acquired from documents produced and discussions conducted during the process of the development of an industry standard by a standard-setting organization, the Joint Electronics Devices Engineering Council ("JEDEC"). Infineon offers that conduct as one component of its proof to show that Rambus violated the federal ***antitrust law***, *15 U.S.C. § 2*, and the California unfair trade practice statute, *Cal. Bus. & Prof. Code § 17200*. Relying on the decision of the United States Court of Appeals for the Federal Circuit in *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc., 863 F.2d 867 (Fed. Cir. 1988)*, and its progeny, Rambus asserts that **[**3]** Infineon is entirely foreclosed from offering such evidence or making any such arguments. [1] For the reasons explained below, the motion *in limine* will be denied.

[1] Quite obviously, if the evidence is not admissible, Infineon cannot present argument about it. Hence, the real issue is whether the evidence is admissible.

STATEMENT OF FACTS

Founded in March 1990, Rambus develops, secures patents on, and licenses technologies to companies that manufacture semiconductor memory devices. Rambus is not a manufacturing company and thus it relies on the licensing of its patent portfolio for revenue.

[*682] In 1990, Rambus filed United States Patent Application Serial Number 07/510,898 (the "898 application") with claims directed to dynamic random access memory, or "DRAM" technology. The United States Patent and Trademark Office ("PTO") determined that the application covered several independent inventions. Consequently, the PTO issued an eleven-way restriction requiring Rambus to elect one invention to pursue in **[**4]** its application. In response, Rambus filed numerous divisional and continuation applications assertedly based on its original application. Thereafter, Rambus was awarded numerous DRAM patents. According to Rambus, these patents are directed to several DRAM-related technologies: Rambus DRAM ("RDRAM"), Synchronous Dynamic Random Access Memory ("SDRAM"), and Double Data Rate Synchronous Dynamic Random Access Memory ("DDR-SDRAM"). [2] Among those patents are the four patents-in-suit: United States Patent Nos. 5,954,804 (the "'804 patent"), 6,034,918 (the "'918 patent"), 5,953,263 (the "'263 patent"), and 6,032,214 (the "'214 patent"). [3] These patents were issued in 1999 and 2000.

[5]** In August 2000, Rambus filed a complaint against Infineon, alleging infringement of all four of those patents. Before trial, the Court issued a Memorandum Opinion pursuant to *Markman v. Westview Instruments. Inc., 52 F.3d 967 (Fed. Cir. 1995)* (en banc), aff'd *517 U.S. 370, 134 L. Ed. 2d 577, 116 S. Ct. 1384 (1996)*, construing the disputed claim terms of the patents-in-suit. Thereafter, Rambus abandoned, before trial, the charge of infringement as to the '804 patent.

Thus, at trial, Rambus proceeded against Infineon as to the '263 patent, the '214 patent, and the '918 patent. During the trial, however, judgment as a matter of law ("JMOL") was granted in Infineon's favor respecting the alleged infringement of those patents. Consequently, a number of Infineon's affirmative defenses and counterclaims were no longer relevant, and therefore, some were abandoned, and others were dismissed without prejudice.

Among the counterclaims that went to verdict were those for actual and constructive fraud. The fraud claims were predicated, in part, on the theory that Rambus had violated certain patent disclosure policies of JEDEC [4] **[**7]** during the process by which JEDEC was establishing **[**6]** an industry standard for SDRAMs and later DDR-SDRAMs. As part of the evidence offered in connection with its fraud claims, Infineon introduced evidence that Rambus attended the JEDEC meetings first to try to get its RDRAM technology adopted as an industry standard and later for the purpose of learning about the proposed DRAM standards being developed there and then using that information to amend its pending patent applications and to file continuation and divisional applications intended to produce patents that, when issued, would encompass any technology made in compliance with the JEDEC **[*683]** SDRAM and DDR-SDRAMs standards. In other words, at trial, Infineon offered evidence that Rambus clandestinely used information that it had acquired at, and in connection with, JEDEC meetings to guide its patent prosecution so as to capture products made pursuant to the JEDEC standard and deliberately waited until

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[2] These technologies are described in some detail at *Rambus, Inc. v. Infineon Techs. Ag., 318 F.3d 1081, 1085 (Fed. Cir. 2003)*. See also *Rambus, Inc. v. Infineon Techs. AG., 164 F. Supp. 2d 743, 747-48 (E.D. Va. 2001)*. Broadly, a DRAM is a high-speed, shortterm memory device where information being used by the central processing unit of a computer is temporarily stored.

[3] As a result of the 2001 trial of this matter, as well as a motion for summary judgment of noninfringement on remand, the '804 patent and the '214 patent are no longer in play and will not be at issue at the upcoming trial.

[4] JEDEC is affiliated with the Electronics Industries Association ("EIA"). *Rambus, Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1086 (Fed. Cir. 2003)*.

after the DRAM industry had become "locked in" to producing products that complied with the JEDEC SDRAM and DDR-SDRAM standards to announce that the patents it had thusly procured covered the JEDEC standards. [5]

During closing arguments, Infineon's counsel argued, inter alia: "If they had invented it, it would have been in the patent in the first place, but they didn't. They stole it. They stole it from the industry standards bodies." [6] Counsel further argued: "They [Rambus] go to … [JEDEC] meetings, they see the presentations …. They go meet with their patent lawyer, they start amending the claims." [7] And: "Did Rambus attend standards bodies meetings and change their patents to cover what they saw at the standards meetings? You can't reach any other conclusion." [8]

[8]** To rebut this evidence and defuse this line of argument, Rambus proffered a jury instruction based on *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc., 863 F.2d 867 (Fed. Cir. 1988)*. In particular, Rambus offered an instruction based on the following language from that case:

> It should be made clear … that there is nothing improper, illegal or inequitable in filing a patent application for the purpose of obtaining a right to exclude a known competitor's product from the market; nor is it in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution.

Kingsdown, 863 F.2d at 874.

Finding that the instruction was neither accurate nor complete as respected the facts in evidence, the Court declined to give the jury instruction as tendered. Instead, the Court offered instead to give an instruction based on Kingsdown that made it apparent that, although it is not per se improper to amend patent claims in order to cover a competitor's product, it is not proper to violate the law in the course of obtaining the information that facilitates **[**9]** the amended filings. Specifically, the alternate instruction read as follows:

> It is not improper to amend or add patent claims intended to cover a competitor's product about which the applicant has learned during the prosecution of the patent application, including a continuation or divisional patent application, provided that the claims are supported by the original patent application … [and] provided that the added or amended claims are not based on information obtained by engaging in wrongful conduct.

Rambus, Inc. v. Infineon Techs. AG, 164 F. Supp. 2d 743, 774 (E.D. Va. 2001). Rambus, however, declined the Court's offer to give this alternate instruction. Id.

Ultimately, the jury found Rambus liable on Infineon's counterclaim for actual and constructive fraud. The Court granted **[*684]** Rambus' post-trial motion for JMOL as to the constructive fraud claim and as to that part of the actual fraud verdict that related to the DDR-SDRAM standard of JEDEC. *Rambus, Inc., 164 F. Supp. 2d at 767*. Rambus' post-verdict motion for JMOL on the fraud verdict as it related to the SDRAM standard was denied and judgment was entered on that verdict.

[10]** On appeal, the United States Court of Appeals for the Federal Circuit affirmed in part and reversed in part. *Rambus, Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1106 (Fed. Cir. 2003)*. Respecting the fraud verdict, the court held that the JEDEC patent disclosure policy applied only to patent claims that reasonably read on or covered the standard under consideration by JEDEC and that, although Rambus wanted to obtain claims covering SDRAM standards, it did not in fact obtain any SDRAM patent claims while it was a member of JEDEC. *Rambus, Inc., 318 F.3d at 1103-04*. In reaching this conclusion, the Federal Circuit stated:

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[5] That same evidence was offered as part of Infineon's monopolization counterclaim that, for reasons not here pertinent, was dismissed without prejudice after JMOL was granted on the claims of Rambus that Infineon had infringed the patents-in-suit. That counterclaim is now back in the case on remand.

[6] Trial Transcript, Vol. VIII, Rambus, Inc. v. Infineon Tech. AG, No. 3:00CV524, May 8, 2001, at 161.

[7] Id. at 74.

[8] Id. at 93.

> The record shows that Rambus's claimed technology did not fall within the JEDEC disclosure duty. The record shows at most that Rambus wanted to obtain claims covering the SDRAM instead. Some of that evidence does not put Rambus in the best light. Rambus thought it could cover the SDRAM standard and tried to do so while a member of an open standards-setting committee. While such actions impeach Rambus's business ethics, the record does not contain substantial evidence that Rambus breached its duty under the EIA/JEDEC policy.

[11]** *Id. at 1104*. The Federal Circuit thereafter set aside the fraud verdict, reversed this Court's construction of five of the disputed claim terms contained in the patents-in-suit, and remanded the case for further proceedings.

The motion in *limine* under consideration is predicated on the fact that, in its Second Amended Answer and Counterclaims ("SAC"), filed after the remand, Infineon again alleges that Rambus improperly acquired the information that it used in amending its applications to secure the patents-in-suit and that the acquisition of that information was a part of Rambus' monopolistic conduct and unfair business practices. For instance, Infineon alleges that:

> Rambus utilized its participation in the JEDEC SDRAM standardization process to learn the direction of the SDRAM standardization, and to learn about the next generation DRAM called DDR-SDRAM. Unbeknownst to JEDEC and its members, Rambus then used that confidential information to amend its existing patent portfolio and to file new patent applications, which were divisions or continuations of its existing pending applications. This allowed Rambus to draft new claims that if interpreted **[**12]** as contended by Rambus covered the very SDRAM standards Rambus was helping JEDEC to standardize, and to cover the next generation DDR-SDRAM chips as well.

SAC, at 30 P94. The SAC states further:

> Rambus was slowly, secretly seeking to acquire an illegal monopoly by: secretly incorporating in its patent applications what it was learning at JEDEC meetings thereby building a patent portfolio to cover JEDEC's SDRAM and later DDR-SDRAM standards.

SAC, at 44 P146. In other words, Infineon continues to allege (and, notably, the evidence of record, if credited by a jury, herein would support a finding) that, after Rambus' efforts to have JEDEC adopt its RDRAM as the industry standard were unsuccessful, Rambus attended JEDEC meetings for the purpose of learning the standards that were to be adopted by the **[*685]** DRAM industry and then steered its patent prosecution in such a way as to encompass products made in compliance with those standards. As proffered by Infineon, these contentions are pertinent to Infineon's counterclaim for monopolization, *15 U.S.C. § 2*, as well as its counterclaim for unfair business practices under *Cal. Bus. & Prof. Code § 17200* **[**13]** . They also are relevant to some of Infineon's defenses.

Now, however, that the Federal Circuit has rejected the finding of fraud on the part of Rambus at JEDEC, Rambus argues that Infineon has no basis for arguing that Rambus' amendment of its patent claims was improper, wrongful, or illegal, whether standing alone or as part of Rambus' other conduct. In other words, by way of its Motion *in Limine* No. 2, Rambus argues that, now that fraud, on which this Court previously distinguished Kingsdown [9] and its

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[9] In a post-trial Memorandum Opinion rejecting Rambus' contention that the failure to give its proffered Kingsdown instruction was in error, the Court analyzed Kingsdown generally and compared Rambus' proposed instruction with the instruction that the Court had offered to give:

> The distinction offered in the Court's proffered version of the instruction is analogous to the exception mentioned in Kingsdown: "any such amendment or insertion must comply with all statutes and regulations." *Kingsdown, 863 F.2d at 874*. That text teaches that the instruction permitted by Kingsdown cannot be based on information obtained by engaging in wrongful conduct because that conduct is in violation of the law of fraud .... Even though Rambus is allowed, at some general level, to draft claims to cover a competitor's product, it cannot do so when that action would breach a duty it incurred as result of being a member of a standard-setting body. The breach of that duty was based on a failure to disclose pending patent applications, not on Rambus choice to amend its patents.

application to this case is no longer in play, Infineon should be precluded from offering evidence that Rambus acquired, during the JEDEC standard-setting process, the information that it used to acquire its patents and to acquire monopoly power and to violate the unfair business practices law. Rambus also asks that Infineon's counsel be precluded from arguing that Rambus stole the ideas that it used to acquire the patents-in-suit. In sum, says Rambus, any such argument or evidence would run afoul of the rule announced in Kingsdown (as interpreted by Rambus) and would undermine seriously Rambus' right to a fair trial. For the reasons stated below, Rambus' motion *in limine* **[**14]** will be denied.

[15] DISCUSSION**

An understanding of Kingsdown, as well as its progeny, is necessary to resolution of Rambus' motion. Thus, the analysis of the motion will begin with an analysis of Kingsdown, as well as the four subsequent decisions of the Federal Circuit in which the at issue portion of the Kingsdown decision has been applied.

I. The Decision in Kingsdown

Kingsdown Medical Consultants ("KMC") filed a patent infringement action against Hollister, Inc. ("Hollister"), alleging that Hollister had infringed KMC's patents that covered a two-piece colostomy appliance. KMC filed its original application with the PTO in 1978. Over the next **[*686]** six years, a complex prosecution ensued, involving multiple submissions, rejections, amendments, and continuation applications.

At some point during this six year prosecution, KMC's patent attorney saw, apparently in the marketplace, [10] a two-piece colostomy device manufactured by Hollister, a competitor in the market. Thereafter, KMC filed a continuation application. In filing this continuation application, KMC submitted a two-column list, one column listing the claim numbers of twenty-two previously allowed claims and the **[**16]** other column listing the claim numbers of twenty-one new claims in the continuation application that corresponded to those previously allowed claims. In filing this list, however, KMC indicated, incorrectly, that claim 43 in the continuation application corresponded to claim 50 in the parent application (claim 50 in the parent application had already been allowed by the PTO). In reality, claim 43 in the continuation application corresponded to another claim that the PTO previously had rejected for indefiniteness. The PTO did not notice this error; and, eventually, a patent issued as a result of the continuation application. Thereafter, KMC sued Hollister for infringing this patent.

As a defense to KMC's infringement case, **[**17]** Hollister raised the defense of inequitable conduct in the PTO. [11] And, the district court found that, by representing that claim 43 in the continuation application corresponded to allowable claim 50 in the parent application, KMC had provided false information to the PTO. The district court

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Rambus, Inc. v. Infineon Techs. AG, 164 F. Supp. 2d 743, 775 (E.D. Va. 2001). That discussion reflected the fact that, at trial, the instruction offered by Rambus pertained to only to the fraud claim. Infineon's monopolization claim had been dismissed without prejudice because JMOL had been granted on Rambus' patent infringement claims. See Unpublished Memorandum Opinion, Rambus v. Infineon, 3:00CV524, (E.D. Va. July 21, 2004) (Docket No. 813). The monopolization claim is once again part of the case and, due to amendments on remand, so is a unfair business practices claim under California law. *Rambus, Inc. v. Infineon Techs. AG, 304 F. Supp. 2d 812 (E.D. Va. 2004)*.

[10] The opinion does not specify where the competitor's product was seen. Rather, it says only that the "attorney saw [the competitor's product]." *Kingsdown, 863 F.2d at 870*. Later, however, the opinion refers to "its genesis in the marketplace." *Id. at 874*.

[11] ***HN1***[] Inequitable conduct in the PTO requires (1) a failure to disclose material information to the PTO or the submission of false information to the PTO, done with (2) an intent to deceive the PTO. *J.P. Stevens & Co., Inc. v. Lex Tex Ltd., 747 F.2d 1553, 1559 (Fed. Cir. 1984)*. Pursuant to a motion for summary judgment filed by Rambus, the Court, by way of Memorandum Opinion entered on July 21, 2004, dismissed Infineon's defenses of invalidity and unenforceability of the patents-in-suit for inequitable conduct in the PTO.

further found that KMC had submitted this information with the requisite deceitful intent, in part, because KMC's lawyer had viewed the Hollister device before filing the continuation application.

[18]** On appeal, the Federal Circuit reversed, in part, because it rejected the district court's finding of deceitful intent. In so doing, ***HN2***[] the Court of Appeals stated:

> It should be made clear … that there is nothing improper, illegal or inequitable in filing a patent application for the purpose of obtaining a right to exclude a known competitor's product from the market; nor is it in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution. Any such amendment or insertion must comply with all statutes and regulations, of course, but, if it does, its genesis in the marketplace is simply irrelevant and cannot of itself evidence deceitful intent.

Kingsdown, 863 F.3d at 874 (citing *State Indus., Inc. v. A.O. Smith Corp., 751 F.2d 1226 (Fed. Cir. 1985))*. [12] ***HN3***[] The Kingsdown **[*687]** decision, therefore, stands for the proposition that filing claims with the PTO in order to cover a competitor's product, standing alone, is not a sufficient basis for finding deceitful intent.

[19] II. Federal Circuit Decisions Subsequent to Kingsdown**

After 1988, the Federal Circuit has returned on four occasions to the part of Kingsdown that is at issue here. First, a year after Kingsdown, the court decided *Texas Instruments, Inc. v. United States Int'l Trade Comm'n, 871 F.2d 1054 (Fed. Cir. 1989)*. Texas Instruments, Inc. ("TII") filed an administrative complaint with the United States International Trade Commission ("ITC") against Samsung Company, Ltd. ("Samsung") for importing into the United States various products which TII alleged to infringe certain of its patents. After a hearing, the administrative law judge ("ALJ") decided, among other things, that certain Samsung products did not infringe United States Patent No. 4,533,843 (the "' 843 patent"). Subsequently, a full commission of the ITC affirmed this ruling. It was this full commission ruling that the parties appealed to the Federal Circuit.

The finding of non-infringement respecting the '843 patent largely obtained because of the ALJ's interpretation of the claim term "selected voltage." In reviewing the ALJ's decision, the Federal Circuit recounted somewhat the prosecution **[**20]** history of the '843 patent, specifically, the insertion of the claim term "selected voltage" by TII during the patent prosecution.

In TII's original patent application, TII did not employ the term "selected voltage," but rather the term "said voltage." *Texas Instruments, Inc., 871 F.2d at 1064*. After, however, TII filed the original application, MOSTEK Electronics ("MOSTEK") began manufacturing a competing product similar to that claimed by TII in its application. Thereafter, seeking broader claim coverage that would reach MOSTEK's competing product, TII filed a continuation application that substituted the words "selected voltage" for "said voltage." In so doing, TII informed the patent examiner that the original specification disclosed this newly claimed technology. Indeed, thereafter, the examiner did not object to the claims as interjecting "new matter" and issued eventually the '843 patent. *Texas Instruments, Inc., 871 F.2d at 1065*; see also *35 U.S.C. § 132* (***HN4***[] "No amendment shall introduce new matter into the disclosure of the invention.") (emphasis added).

The ALJ ruled that, in amending its claims, TII had in fact **[**21]** added "new matter" not supported by the original specification. The ALJ, however, preserved the validity of the claim by construing the amendment which changed "said voltage" to "selected voltage" as limited to a smaller subset of the claimed technology. *Texas Instruments,*

[12] Although not cited by the Federal Circuit in Kingsdown, several district courts courts previously had made similar statements. See *Micro-Acoustics Corp. v. Bose Corp., 493 F. Supp. 356, 367 (S.D.N.Y. 1980)* ("There is nothing wrong with broadening the claims to cover competitive devices about which the applicant … learns after the application is filed, so long as the claims are supported by the specification."); *Penn Yan Boats, Inc. v. Sea Lark Boats, Inc., 359 F. Supp. 948, 954-55 (S.D. Fla. 1972)* ("There is nothing inherently wrong or dishonest in amending claims in a pending application during the course of prosecution before the United States Patent Office in order to insure that the claims which ultimately appear in the issued patent will cover the commercial activity of third parties, whose potentially infringing activities are discovered subsequent to the filing of a patent application, so long as the claims are supported by the original patent application disclosure.").

Inc., 871 F.2d at 1065. The Federal Circuit reversed the ALJ's decision, ruling that, although claims, whenever possible, should be read so as to preserve their validity, the ALJ, in imposing a preserving construction on TII's claim, impermissibly had rewritten the claim in order to add a limitation that the patentee had not included. Id. (***HN5***[] "It was not permissible for the ALJ, in order to preserve the validity of the claims, to rewrite them to add a limitation that the **[*688]** patentee had eliminated … and then to hold that the challenged devices … did not infringe the rewritten claims.").

However, before making that ruling (which is the holding in the case respecting the '843 patent), the Federal Circuit explained TII's conduct and the prosecution history of the '843 patent and then observed:

> Here Texas Instruments broadened the claim during prosecution to cover the competing MOSTEK [product]. **[**22]** It is not "improper to amend or insert claims intended to **[*689]** cover a competitor's product the applicant's attorney has learned about during the prosecution of a patent application."

Id. (quoting *Kingsdown, 863 F.3d at 874*). It is not entirely clear why that statement was made because, at least as respects the '843 patent, the discussion of which contains the foregoing text, [13] TII's conduct in obtaining the patent was not challenged as wrongful. Nonetheless, in Texas Instruments, Inc., albeit in dictum, the Federal Circuit reiterated the Kingsdown language here at issue and indicated again, as a broad proposition relating to patent law, that there is nothing inherently improper in amending patent claims in order to cover competitors' products.

The Federal Circuit next returned to the at-issue **[**23]** Kingsdown language in *Multiform Desiccants, Inc. v. Medzam, Ltd., 133 F.3d 1473 (Fed. Cir. 1998)*, wherein Multiform Desiccants, Inc. ("Multiform") added certain language to its claims during the patent prosecution of the patent-in-suit. Subsequently, in defending against Multiform's claims of patent infringement, Medzam, Ltd. ("Medzam") uncovered evidence supportive of a finding that Multiform had added that language to its claims specifically in order to cover Medzam products of which Multiform had learned during the pendency of its patent application.

The district court entered judgment of non-infringement, finding that Medzam's product did not infringe Multiform's patent. The district court, however, refused to grant Medzam's request for attorneys fees under *35 U.S.C. § 285*, in part, because it rejected Medzam's argument that Multiform acted in bad faith by adding a claim to try to cover Medzam's accused product. *133 F.3d at 1475*. [14] Multiform appealed the finding of non-infringement, and Medzam cross-appealed, inter alia, the trial court's denial of attorneys fees.

[24]** On appeal, the Federal Circuit upheld the district court's finding that Medzam's accused product did not infringe Multiform's patent, either literally or under the doctrine of equivalents. *Multiform Desiccants, Inc., 133 F.3d at 1480-81*. The Court of Appeals also upheld the district court's refusal to grant attorneys fees in Medzam's favor. Among Medzam's asserted bases for an award of attorneys fees was an argument that, in amending its claims, Multiform had engaged in bad faith. The Federal Circuit rejected that contention with a cite to Kingsdown:

> Medzam also argues that it was an act of bad faith for Multiform to add … claims to the '266 patent in an attempt to cover Medzam's products. However, it is neither illegal nor bad faith for an applicant to amend the claims in view of a competitor's product. See Kingsdown … ("Nor is it in any manner improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution.") …

Multiform Desiccants, Inc., 133 F.3d at 1482. Thus, ***HN7***[] in the context of deciding whether a case was "exceptional" for purposes of the **[**25]** awarding of attorney fees under *35 U.S.C. § 285*, the Federal Circuit, in Multiform Desiccants, Inc., reiterated the here at issue Kingsdown language.

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[13] Texas Instruments, Inc. involved many patents and patent claims and implicated many legal doctrines; the statement quoted above, however, pertains to no other issue in the case.

[14] ***HN6***[] Under *35 U.S.C. § 285*, a "court in exceptional cases may award reasonable attorney fees to the prevailing party" in a patent infringement suit.

In 2002, the Federal Circuit again cited that portion of Kingsdown in deciding PIN/NIP, Inc. v. Platte Chem. Co., 304 F.3d 1235 (Fed. Cir. 2002), wherein Platte Chemical Company ("Platte") alleged that products manufactured by PIN/NIP, Incorporated ("PIN/NIP") infringed multiple claims of a patent to which Platte was an assignee. [15] Among other defenses to these allegations of infringement, PIN/NIP contended that claim 33 of the '912 patent, which Platte alleged PIN/NIP to have infringed, was invalid for failing to satisfy the written description requirement of 35 U.S.C. § 112. PIN/NIP, Inc., 304 F.3d at 1237; see also 35 U.S.C. § 112 (**HN8**[] "The specification shall contain a written description of the invention."). [16] The evidence showed that claim 33 was added after the inventors learned that subsequent to the filing of the initial application, PIN/NIP had publicly disclosed a method for treating potatoes in which the **[**26]** separate chemicals were added in spaced, sequential applications rather than in a mixture.

PIN/NIP argued that claim 33 was invalid under 35 U.S.C. § 112 because the claim extended beyond the invention as described in the originally **[**27]** filed application. PIN/NIP, Inc., 304 F.3d at 1247. Specifically, PIN/NIP asserted that claim 33, which, as mentioned, defined a spaced, sequential application of the utilized chemicals, extended beyond the invention as described in the originally filed specification, which described an application of the chemicals in a unitary mixture. Id. In response, Platte argued that, although claim 33 was admittedly broader than the original application, the subject matter of claim 33 was actually and adequately disclosed in the original specification.

The jury, among other findings not here relevant, agreed with Platte, finding that claim 33 satisfied the written description requirement. On appeal, however, the Federal Circuit reversed this finding, holding that nothing in the specification indicated that the invention claimed anything other than a mixture of chemicals whereas the claim-in-suit described an invention intended to encompass separate unitary applications of the chemicals to the potatoes. The Federal Circuit stated:

> Platte even admits that "claim 33, as written, is arguably broader than the examples disclosed in the '912 patent." While it is legitimate **[**28]** to amend claims or add claims to a patent application purposefully to encompass devices or processes of others, there must be support for such amendments or additions in the originally filed application. See Kingsdown ... ("Nor is it in any manner improper to amend or insert claims intended to cover a competitor's product **[*690]** the applicant's attorney has learned about during the prosecution of a patent application. Any such amendment or insertion must comply with all statutes and regulations, of course, but, if it does, its genesis in the marketplace is simply irrelevant."). In this case, the originally filed application, which is devoid of any mention or even implication that the two chemicals can be applied in a spaced, sequential manner, does not support the later-added claim 33.

PIN/NIP, Inc., 304 F.3d at 1247-48. Thus, in PIN/NIP, Inc., the Court of Appeals took no issue with the fact that the inventor had filed an additional claim apparently based on ideas gained from a competitor's product; rather, it held that the later claim was invalid because the claim lacked support in the specification.

Lastly, earlier this year, the Federal Circuit returned **[**29]** to the pertinent Kingsdown language in Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898 (Fed. Cir. 2004), wherein the Liebel-Flarsheim Company ("Liebel") alleged that products manufactured by Medrad, Inc. ("Medrad") infringed various of its patents. The patents related to certain methods and devices for use in connection with powered fluid injectors, which are used to inject fluids into patients during medical procedures. Medrad, Inc., 358 F.3d at 900.

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[15] The patent-in-suit, United States Patent No. 5,622,912 (the "'912 patent") was directed to a composition and method for inhibiting sprout growth in potatoes and other tubers.

[16] As discussed in more detail infra, **HN9**[] in order to satisfy the written description requirement, any claims contained in subsequently filed amendments, continuation, or divisional applications must be supported by the original specification. Cooper Cameron Corp. v. Kvaerner Oilfield Prods., 291 F.3d 1317, 1323 (Fed. Cir. 2002); Lockwood v. Am. Airlines, Inc., 107 F.3d 1565, 1571-72 (Fed. Cir. 1997); Applied Materials v. Advanced Semiconducter Materials Am., 98 F.3d 1563, 1579 (Fed. Cir. 1996) (Mayer, J. concurring).

On summary judgment, the district court granted summary judgment of non-infringement and Medzam appealed. For reasons not here pertinent, the Federal Circuit reversed the summary judgment ruling. However, in an attempt to give meaning to several claim terms, the Federal Circuit, as had the district court, examined the prosecution history of the patents. In so doing, the Federal Circuit noted that, during the pendency of the patent prosecution, Liebel learned about a "jacketless" injector made by Medrad and filed additional claims which omitted any reference to a jacket "in order to encompass Medrad's injector." *Medrad, Inc., 358 F.3d at 909*. Immediately after making this statement, **[**30]** the court dropped a footnote that made reference to Kingsdown:

> The district court recognized that it is not improper for an applicant to broaden his claims during prosecution in order to encompass a competitor's product, as long as the disclosure supports the broadened claims. See Kingsdown … (holding that it is not improper "to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the prosecution of a patent application"). If the disclosure does not support the broadened claims, the applicant will not be accorded priority based on the original disclosure, and the claims may be invalidated.

Medrad, Inc., 358 F.3d at 909 n.2. It is not readily apparent why that language was cited because there was no challenge to the broadened claim. Nonetheless, although again in dictum, the Federal Circuit in Medrad, Inc. reiterated the notion that, as a matter of patent law, there is nothing improper about prosecuting a patent in such a way as to encompass competitors' products.

Understood in the context in which they were decided,***HN10***[] *Kingsdown* and its progeny stand for the unremarkable proposition **[**31]** that amending a patent application to cover a competitor's product is not, in and of itself, sufficient to show deceptive intent or bad faith under the patent laws. In addition, the cases stand for the proposition that prosecuting a patent in order to cover a competitor's product is not an illegitimate practice under the patent laws, provided that the patent applicant otherwise complies with the law. Against this background, it is now appropriate to resolve Rambus' motion *in limine.*

[*691] III. Kingsdown and its Progeny do not Support Rambus' Motion *in Limine*

Rambus contends that, in light of Kingsdown and the other decisions discussed above in DISCUSSION Section II, any proof or argument by Infineon that Rambus "stole," misappropriated, or misused ideas from JEDEC would be improper and would serve solely to inflame unfairly the jury. Also, relying on Kingsdown and its progeny, Rambus argues that, even if Infineon's factual allegations respecting Rambus' conduct at JEDEC are true, those decisions by the Federal Circuit clearly permit the alleged conduct and, therefore, those decisions foreclose the admission of evidence respecting how Rambus acquired the information **[**32]** that it used to secure the patents-in-suit.

To be sure, Rambus agrees that it would be rather odd if the law were to allow patent applicants to misappropriate the ideas and inventions of others and then secure patents on them. According to Rambus, however, the patent law itself provides the sole and sufficient protection against the absurdity of an outcome where an "inventor" is awarded a patent covering an invention acquired wrongfully from someone else. Specifically, Rambus argues that the provisions of *35 U.S.C. §§ 112*,*120*,*121* and*132* foreclose that result, and that, because of Kingsdown, the evidence that Infineon seeks to introduce in support of its monopolization and unfair business practices claims and any of its defenses is likewise foreclosed.

HN11[] Under *35 U.S.C. § 112*, a patent specification must, among other requirements, contain a "written description" of the invention. Under *35 U.S.C. § 112*, the specification also must convey with reasonable clarity **[*692]** to those skilled in the art that, as of the filing date, the patent holder was "in possession of the invention" now claimed in the patent. *Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1560-61 (Fed. Cir. 1991).* **[**33]** As a corollary, by virtue of *35 U.S.C. § 132(a)*, any amendment to a patent application must not contain any "new matter," that is, matter that describes a different invention or adds to or changes the nature of the invention disclosed in the specification. *Regents of Univ. of N.M. v. Knight, 321 F.3d 1111, 1121 (Fed. Cir. 2003)*. Likewise, to enjoy the priority date of the original application, any continuation or divisional application must also meet these requirements. *35 U.S.C. §§ 120*,*121*; see also *Applied Materials v. Advanced Semiconductor Materials Am.., 98 F.3d 1563, 1579 (Fed. Cir. 1996)* (Mayer, J. concurring); *Mahurkar, 935 F.2d at 1560*. [17]

According to Rambus, the requirement of support in the original application for any later-issued claims, along with the prohibition against newly added material, are the **[**34]** mechanisms, and indeed, says Rambus, are the only mechanisms that fetter the conduct of patent applicants when making patent claims. This contention is based largely on the decision in *Amgen Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313 (Fed. Cir. 2003)*, wherein the Federal Circuit explained that:

> ***HN12***[] The purpose of the written description requirement is to prevent an applicant from later asserting that he invented that which he did not; the applicant for a patent is therefore required to recount his invention in such detail that his future claims can be determined to be encompassed within his original creation.

314 F.3d at 1330; see also *Mahurkar, 935 F.2d at 1563-64* (holding that ***HN13***[] the written description requirement requires patent applicant to "convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. The invention is, for purposes of the 'written description' inquiry, whatever is now claimed") (emphasis in original).

Rambus, of course, is correct that, as Amgen explains, the patent system itself provides a mechanism **[**35]** to confine patent applicants to the structures of lawful conduct in prosecuting patents and to prevent the outright stealing or misappropriation of inventions. The problem with Rambus' position is that it would leave the above surveyed patent law as the only check on, and remedy for, abuse. At bottom, Rambus reads Kingsdown for the proposition that, so long as any later-added claims are adequately disclosed in the original application, it makes absolutely no difference whether the applicant violated any other law when acquiring the information that is added later. [18] Rambus' contention is wrong for several reasons.

[36]** First, Kingsdown itself simply does not reach to the extreme that Rambus urges. Rather, ***HN15***[] in Kingsdown, the Federal Circuit circumscribed the rule there announced by explaining that the "genesis [of the amendment] in the marketplace is simply irrelevant and cannot of itself evidence deceitful intent." *Kingsdown, 863 F.2d at 874* (emphasis added). Thus, Kingsdown itself dealt with what is already in the marketplace, not with an industry standard that is under development. More importantly, Kingsdown clearly says that the genesis of the amendment in the marketplace, standing alone, cannot evidence deceitful intent. Kingsdown thus does not foreclose consideration of the effect of the genesis of the idea together with evidence of other conduct, particularly not conduct that is unlawful under applicable statutes. Indeed. Kingsdown makes clear that the amendment "must comply with all statutes and regulations." [19] These circumscribing factors are not, in any way, eliminated in the ensuing decisions interpreting Kingsdown. Yet, under Rambus' theory, those factors would no longer circumscribe the application of Kingsdown.

[37]** Second, if given the effect for which Rambus presses, the rule of Kingsdown would lead to absurd results. For instance, under Rambus' theory, if an individual, who has a pending patent application with the PTO, commits

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[17] Here, all the patents-in-suit claim priority to the '898 application, filed in 1990.

[18] In Kingsdown, and indeed in the subsequent Federal Circuit cases, the Federal Circuit did not discuss in any depth how the patent-applicant learned of the competing product. ***HN14***[] In the background of the cases, however, is the notion that the patent-applicant's observation of the competing product simply occurred in the market. For instance, in PIN/NIP, Inc., the court stated that the inventors filed additional claims after "PIN/NIP had publicly disclosed" a new method. *304 F.3d at 1239*. Similarly, in Kingsdown itself the court recounted that, "Kingsdown's patent attorney saw a two-piece ostomy appliance manufactured by Hollister," *863 F.3d at 870*, suggesting that the lawyer simply viewed a device that had been released into the market. Suffice it to say that, in none of the cases, did the patent holder learn of the later-added inventions through its participation in a standard-setting organization.

[19] Rambus suggests that this means "all patent statutes and regulations." That, however, is not what the Federal Circuit said: the rule is that the amendment "must comply with all statutes and regulations." *863 F.2d at 874* (emphasis added).

industrial espionage, bribery, breaking and entering, or outright threats and intimidation, and thereby obtains concepts that he later uses to amend his patent application, Kingsdown confers legitimacy on the patent that is thereafter issued, and no evidence of those facts can be introduced for any purpose. Transcript of Hearing, Rambus, Inc. v. Infineon Tech. AG, No. 3:00CV524, July 16, 2004, at 7-10. To Rambus, the aggrieved party's remedy **[*693]** lies in the fact that the individual engaging in such conduct could be pursued in a separate action, either civilly or criminally, for the act of bribery, espionage, breaking and entering, or assault. But, according to Rambus, because of Kingsdown, a jury would need to be told that the unlawful methods through which the applicant obtained the concepts underlying the later-added claims cannot be considered in determining whether the ultimately issued patents were valid or for any other purpose legitimately in the **[**38]** case. [20]

[39]** ***HN16***[] Kingsdown stands for the proposition that the patent laws are not offended if a patent applicant amends a pending application to cover a product that it observed in the market. The rule of*Kingsdown* cannot reasonably be extended to mean that it is appropriate or lawful to amend a pending patent application to secure patents when the act of doing so is part of conduct that violates other non-patent laws, for instance, *15 U.S.C. § 2*. Otherwise, Kingsdown, as posited by Rambus, would operate to give unscrupulous persons an incentive to violate a panoply of civil and criminal laws knowing that the behavior will yield financial success by way of a valid patent. Indeed, such a patent could be sold for a profit to an innocent purchaser for value and thus placed beyond the reach of remedies that would apply to deal with the wrongdoer. [21]

[40]** **[*694]** Further, and more importantly for this case, Rambus also argues that Kingsdown establishes the proposition that prosecuting a patent in the PTO in such a way as to cover the products of others can simply never be wrongful or illegal, under any set of facts or precepts of law. And, according to Rambus, that is so even if Infineon proves that Rambus' actions were wrongful and monopolistic under the Sherman Act or an "unfair business practice" under *Cal. Bus. & Prof. Code § 17200*.

The Federal Circuit, however, has never taken such an extreme position. Nor has the Federal Circuit ever held that it is always legitimate, no matter what the factual or legal context, for a patent applicant to add patent claims

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[20] Although the Court will deny Rambus' motion *in limine,* it may well be that the term "stolen," even under Infineon's theory of the case, is an inappropriate term to use in describing Rambus' conduct. There are disputes of fact respecting whether proposed JEDEC standards were available to non-JEDEC members and whether, and, to what extent, they were to remain confidential. Although it is undisputed that minutes of JEDEC meetings were available to non-JEDEC members, it is unclear what these minutes consisted of. According to Infineon, proposed standards offered at JEDEC were supposed to remain confidential. Regardless, even under Infineon's theory of the case, Rambus did not come into possession of the information wrongly. Rather, as a member of JEDEC, it was entitled to know of the proposed standards; thus, it is difficult to understand how Rambus can be said to have "stolen" the information. In other words, although Infineon uses the term "stolen" in describing Rambus' actions, the import of Infineon's allegations is more that Rambus misappropriated the information learned at JEDEC, using it to guide its patent prosecution in order to effectuate a monopoly and in a way that constituted an unfair business practice. This issue will need to be sorted out after the factual record is developed at trial.

[21] Infineon further argues that its equitable defense of prosecution laches allows it to introduce evidence and argument on Rambus' use of information gleaned at JEDEC in the prosecution of the patents-in-suit. Infineon contends that, notwithstanding Kingsdown, amending a patent application to cover a competitor's product can be pertinent under the doctrine of prosecution laches. See *Webster Elec. v. Splitdorf Elec. Co., 264 U.S. 463, 68 L. Ed. 792, 44 S. Ct. 342, 1924 Dec. Comm'r Pat. 520 (1924)*; *Woodbridge v. United States, 263 U.S. 50, 68 L. Ed. 159, 44 S. Ct. 45, 59 Ct. Cl. 952, 1924 Dec. Comm'r Pat. 534 (1923)*; *Chiron Corp. v. Genentech, Inc., 268 F. Supp. 2d 1139 (E.D. Cal. 2002)*. Specifically, referencing its prosecution laches defense, Infineon contends that Rambus deliberately stood by while the DRAM industry grew up around the JEDEC standards and, as a component of this effort, amended its claims in order to capture the JEDEC standard. There is evidence to support that theory and, interestingly, in response, Rambus does not really argue that Infineon's proposed use of the JEDEC evidence is not probative of its prosecution laches defense. Rather, Rambus challenges the merits of Infineon's prosecution laches defense. Stated otherwise, in responding to Infineon's argument on this score, Rambus more-or-less raises a summary judgment challenge to Infineon's ability to proceed on the defense of prosecution laches. This, of course, is improper. Summary judgment motions have already been filed, briefed, argued, and ruled on. It is simply too late for Rambus to move, especially in stealth form, for summary judgment on Infineon's prosecution laches defense.

covering a competitor's product. Indeed, the court, in Kingsdown itself, held that a patent applicant must, of course, "comply with all statutes and regulations." Accordingly, under the explicit text of Kingsdown, if Rambus' actions violated the Sherman Act or *Cal. Bus. & Prof. Code § 17200*, the general rule of Kingsdown does not protect Rambus. Indeed, an examination of the counterclaims at issue in this case, **[**41]** and Rambus' Kingsdown-based responses thereto, shows the incorrectness of Rambus' interpretation of Kingsdown. [22]

[42]** Third, the factual setting in which the*Kingsdown* text on which Rambus relies is far different than the facts on which this action will be tried. In this case, Infineon proffers Rambus' conduct of attending JEDEC meetings for the purpose of obtaining information to guide its prosecution in the PTO as a component of its monopolization counterclaim and of its unfair business practices counterclaim under *Cal. Bus. & Prof. Code § 17200*. Def. Mem. Regarding Kingsdown, June 18, 2004, at 17. [23] Infineon argues that Rambus' **[*695]** amendment of its patent applications based on information it obtained at JEDEC was part of Rambus' anticompetitive scheme and wrongful acquisition of monopoly power in the worldwide DRAM market. Further, Infineon maintains that Rambus' actions constituted an unlawful business practice under the California statute. And, there is evidence to support those allegations. As the fulsome recounting undertaken above illustrated, Kingsdown and its progeny did not involve alleged violations of such statutes.

[43]** Notwithstanding these distinguishing factors, Rambus asserts that Kingsdown and its progeny forecloses any evidence, or argument, that, by amending its claims in order to cover the JEDEC standards, Rambus was engaged in monopolistic conduct or in an unfair business practice. In other words, Rambus is attempting to use Kingsdown for the proposition that a company, without running afoul of the Sherman Act, Section 17200, or any other law, can join a standard-setting organization ("SSO"), which is dedicated to the adoption of open standards, [24] for the purpose of learning about proposed standards, and then can use the knowledge thereby gained to guide its patent applications with the PTO in order to cover the standards issued by the SSO. Nor, according to Rambus, can such evidence be used in defense of a patent infringement claim.

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[22] Further, Infineon's non-patent law based counterclaims aside, as a matter of the patent-law regime surveyed above, Rambus' motion *in limine* is misplaced. For instance, under *35 U.S.C. § 112*, the patent specification must "convey with reasonable clarity to those skilled in the art that, as of the filing date [the patent holder] was in possession of the invention." ***Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1563 (Fed. Cir. 1991)***. Here, Infineon asserts (and there is evidence to show) that, as of the filing of the '898 application, Rambus was not in possession of the inventions claimed by the patents-in-suit. Rather, according to Infineon, Rambus only thought to expand its patents to cover those technologies after it learned about them at JEDEC. And, under Federal Circuit decisional law, the evidence that Rambus is here seeking to preclude is probative to the *35 U.S.C. § 112* inquiry. *Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473, 1479 (Fed. Cir. 1998)* ("Finally, although not dispositive, because one can add claims to a pending application directed to adequately described subject matter, Sproule admitted at trial that he did not consider placing the controls outside the console until he became aware that some of Gentry's competitors were so locating the recliner controls. Accordingly, when viewed in its entirety, the disclosure is limited to sofas in which the recliner control is located on the console."). In other words, as a part of its *35 U.S.C. § 112* defense, Infineon, in its attempt to show that Rambus was not in possession of the disputed inventions at the time it filed the '898 application, can offer evidence and argument that, far from disclosing the invention in the '898 application, Rambus in fact only learned of the inventions from its attendance at JEDEC. Thus, as part of its written description defense, Infineon can show that Rambus used information learned at JEDEC to guide its patent prosecution in order to cover technologies that it did not actually invent and that were not disclosed in the '898 application. This fact alone requires denial of Rambus' motion *in limine.*

[23] ***HN17***[] The offense of monopoly under *15 U.S.C. § 2* has two principal elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. To the extent that Infineon's *Section 17200* claim is based on the California statute's "unlawful" prong, Infineon's *Section 17200* claim also turns on these two elements.

[24] ***HN18***[] An "open standard" is a standard that a manufacturer can practice without infringing any patents or intellectual property. In other words, a product manufactured in conformance with an open standard is non-royalty bearing.

[44]** There are several problems with Rambus' arguments. Most basically, neither the Kingsdown decision itself, nor any of the subsequent cases, involved facts remotely similar to those presented here. In Kingsdown and the subsequent cases, the Federal Circuit stated that it is not "improper to amend or insert claims intended to cover a competitor's product the applicant's attorney has learned about during the [patent's] prosecution." That, however, according to Infineon's theory of the case and indeed the evidence, is not at all what happened here.

Here, there is evidence to support Infineon's contention that Rambus amended its claims not to cover a "product," but rather to cover a contemplated industry standard with a view toward capturing the entire DRAM market in its patent snare. Moreover, this standard (rather than "product") was not really that of a "competitor," as the Federal Circuit in Kingsdown and its progeny used the term, but was that of an SSO dedicated to the adoption of open standards. In other words, rather than the two manufacturers competing in the market as in*Multiform Desiccants, Inc.,* this case involves an organization of horizontal competitors **[**45]** who were acting in unison to develop an open standard. And, according to Infineon's allegations, this is not a case wherein a patent applicant simply "learned about" a "competitor's product," but rather a situation where a patent applicant joined an SSO, at least in part, for the express purpose of learning about contemplated standards in order to guide its patent prosecution as part of its effort to achieve a monopoly. [25]

In sum, the Kingsdown rule was not made, and has never been applied, in the context of an industry wide standard or an SSO. Rather, Kingsdown and subsequent cases involved the amending of a patent application to add claims intended to cover a single competitor's product of which the **[*696]** applicant had learned by simply monitoring the market.

HN19[] Standard-setting organizations allow industry players to meet as a group and exercise influence on **[**46]** their particular industry. It almost goes without saying, therefore, that the collusive atmosphere of an SSO presents a very real opportunity for anticompetitive behavior. See *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)* ("Agreement on a product standard is, after all, implicitly an agreement not to manufacturer, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny."); *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 571, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)* ("[A] standard-setting organization … can be rife with opportunities for anticompetitive activity."); see also David M. Schneck, Setting the Standard: Problems Presented to Patent Holders Participating in the Creation of Industry Uniformity Standards, 20 Hastings Comm. & Ent. L.J. 641, 655 (1998) ("Standardization involves agreements among horizontal competitors, which draws antitrust scrutiny.").

Nonetheless, because of the need for interoperability [26] in certain industries, SSOs are tolerated. Indeed, ***HN20***[] far from being **[**47]** anticompetitive or merely benign, SSOs generally have beneficial effects on competition. David A. Balto, Standard Setting in the 21st Century Network Economy, 18 No. 6 Computer & Internet L. 5, 7 (2001). Product uniformity through standardization, especially in technological markets, facilitates the comparison of competing products, which benefits consumers in the short run and provides incentives for engineers to develop the next generation of compatible products, thereby providing longer-term consumer benefits. James C. De Vellis, Patenting Industry Standards: Balancing the Rights of Patent Holders with the Need for Industry-Wide Standards, 31 AIPLA Q.J. 301, 316 (2003). Likewise, new producers have easier entry into a market when standards exist, thus also increasing competition. In addition, a future product will have the additional benefit of a longer product life if it revolves around an existing standard; a standardized technology core also lowers a company's cost of developing a next generation product. Finally, producers have lower marketing costs in bringing products to a predefined, standardized market. David M. Schneck, Setting the Standard: Problems **[**48]** Presented to Patent

[25] There are, as mentioned, disputes of fact respecting the general public availability of the proposed JEDEC standards. See supra, footnote 20.

[26] ***HN21***[] "Interoperability" is simply the ability of one manufacturer's product to interface with other manufacturers' products. Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce, 14 Berkeley Tech. L.J. 745, 746 (1999)*.

Holders Participating in the Creation of Industry Uniformity Standards, 20 Hastings Comm. & Ent. L.J. 641, 642 (1998). For all these reasons, when they operate correctly, SSOs foster competition.

Notwithstanding these benefits, ***HN22***[] the fact remains that SSOs inherently are "rife with opportunities for anticompetitive activity." *American Soc'y of Mech. Eng'rs, 456 U.S. at 571*. An SSO affords the potential for industry players to act together and exert their anticompetive conduct throughout the remainder of the industry. Moreover, even if the SSO itself is not corrupt, the subversion of an SSO by a single industry player or by a limited subset of SSO members can result in anticompetive outcomes. Thus, **[**49]** ***antitrust law*** historically has been concerned with the risk of one or a small number of participants capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power. Simply put, by hijacking or capturing **[*697]** an SSO, a single industry player can magnify its power and effectuate anticompetitive effects on the market in question. That, of course, is what Infineon proposes to prove that Rambus has done.

The decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*, is instructive. The National Fire Protection Association ("NFPA") is an SSO which publishes, among other things, the National Electrical Code ("NEC"). The NEC establishes product and performance requirements for the design and installation of electrical wiring systems; these standards are revised every three years. A substantial number of state and local governments routinely adopt the NEC wholesale into law. Moreover, private certification laboratories often will not list or label an electrical product unless it complies with NEC standards. Likewise, many electrical contractors and distributors will not use or sell a product **[**50]** that is not NEC compliant. *Indian Head, 486 U.S. at 496*. For these reasons, it is in a manufacturer's obvious interest to produce NEC compliant goods.

Among the types of products covered by the NEC is "electrical conduit," that is, the hollow tubing used to carry electrical wires through the walls, floors, and ceilings of buildings. In the 1970s, the NEC only certified electrical conduit made of steel. Starting in 1980, however, Indian Head, Inc. ("Indian Head") began offering electrical conduit made of polyvinyl chloride. Thereafter, Indian Head initiated a proposal with NFPA to include polyvinyl chloride conduit as an approved type of electrical conduit in the NEC. Following approval by one of the NFPA's panels, Indian Head's proposal was scheduled for consideration at the 1980 annual NFPA meeting, where it could be rejected or adopted by a simple majority of the members present. *Indian Head, 486 U.S. at 496*.

Allied Tube and Conduit Corporation ("Allied Tube"), which, at that point in time, was the nation's largest producer of steel conduit, became worried that Indian Head's polyvinyl chloride product would cut into its market. Allied Tube, therefore, **[**51]** along with several other electrical conduit manufacturers and distributers, agreed to pack the 1980 NFPA meeting with new members whose only function would be to vote against Indian Head's proposal. Thus, Allied Tube recruited over 150 persons, including employees, executives, sales agents, the agents' employees, and the wife of a sales director, for this scheme. Allied Tube paid for the NFPA memberships for these individuals, as well as for their registration and attendance expenses for the 1980 meeting. The vast majority of these individuals did not have the technical expertise or background necessary to understand the discussions held at the meeting; indeed, none of them spoke at the meeting or participated in any manner save voting. With Allied Tube's ringers in place, Indian Head's proposal was easily defeated. *Indian Head, 486 U.S. at 497*.

Thereafter, Indian Head brought a federal antitrust action alleging that Allied Tube unreasonably had restrained trade in the electrical conduit market in violation of federal law. The jury, instructed under the "rule of reason," [27] found Allied Tube liable. In so finding, the jury returned special interrogatories that, **[**52]** inter alia, Allied **[*698]** Tube had not violated any of NFPA's rules. Nonetheless, the jury indicated that Allied Tube, by packing the meeting, had "subverted" the consensus standard-making process of the NFPA and thereby illegally restrained trade. *Indian Head, 486 U.S. at 498*. The district court, however, overturned this verdict because it found that the

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[27] ***HN23***[] The "rule of reason" requires the finder of fact to weigh the anticompetive effects of the at-issue conduct against the procompetive effects the conduct might have had. Stated otherwise, it requires the fact finder to determine whether the challenged conduct, on balance, promotes or suppresses competition. *National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*.

NFPA was akin to a governmental legislature and thus Allied Tube's actions were protected under the Noerr-Pennington doctrine. [28]

[53]** On appeal to the United States Court of Appeals for the Second Circuit and later the Supreme Court of the United States, the key issue was whether Allied Tube was entitled to Noerr-Pennington immunity. Ultimately, the Second Circuit, and then the Supreme Court, rejected the district court's holding that the NFPA was akin to a legislature, and held that the district court's application of Noerr-Pennington was in error, as was its attendant reversal of the jury's verdict. *Indian Head, 486 U.S. at 510*.

The Supreme Court's principal holding in Indian Head, which turned on an interpretation of the Noerr-Pennington doctrine, is, of course, not directly relevant to this case. In deciding the case, however, the Court embraced the notion that an entity's conduct at an SSO may run afoul of the antitrust laws even if that entity did not violate the SSO's express rules. *Id. at 509* ("The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the association."). [29] And, addressing SSOs generally, the Court stated that the antitrust laws tolerate SSOs because, when functioning **[**54]** properly, such entities benefit competition. ***HN25***[] The Court, however, recognized the obvious fact that, when commandeered by a subset of industry players or, by obvious extension, a single industry player, conduct at an SSO may violate the antitrust laws:

> Private standard-setting by associations comprising firms with horizontal and vertical relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits.

486 U.S. at 506-7 (emphasis added). Thus, if an SSO is conducted (or subverted) in a partisan manner that results in anticompetive results, such activity may run afoul of the antitrust laws. *Id. at 511*.

Application of these concepts negates Rambus' arguments that its alleged conduct at JEDEC, **[**55]** if proven, was appropriate or lawful. Rather, if, as Infineon says it can prove, Rambus joined an SSO dedicated to open standards, learned of standards and proposed standards through that membership, and then prosecuted its patents with the PTO to cover the standards, a jury could find that Rambus acted in a profoundly anticompetitive manner. In particular, a jury could find that, by guiding its patent applications to cover the JEDEC standards, Rambus was able to exert a tremendous amount of influence over the unaware DRAM industry; an industry comprised of manufacturers who had developed JEDEC-compliant products **[*699]** in the belief that such products would not be royalty bearing and who, if they wished to remain JEDEC compliant and manufacture the goods they had developed, thus needed to obtain Rambus licenses or suffer prosecution. In other words, a jury could find, on the record evidence if given credence, that Rambus' conduct allowed it to obtain its market power, not through superior products, historical accident, or business acumen, but through unlawful behavior. Any sensible interpretation of *15 U.S.C. § 2* would recognize that this conduct, if proven, is behavior **[**56]** violative of the monopoly law. Similarly, under California jurisprudence, the alleged conduct, if proven, would constitute an unfair business practice under *Cal. Bus. & Prof. Code § 17200*. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. 1999)*.

Moreover, Rambus' contentions to the contrary notwithstanding, the Kingsdown line of cases says absolutely nothing about the antitrust or unfair business practices liability of a corporate patent applicant which acts to hijack a SSO; the Kingsdown line of cases--all of which were decided solely under the patent law--all involved a patent

[28] ***HN24***[] The Noerr-Pennington doctrine, predicated on the cases of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, holds that a concerted action consisting solely of activity aimed at influencing public officials does not violate the antitrust laws. *City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 379-80, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*. In other words, it is a *First Amendment* gloss on the antitrust laws.

[29] This, of course, means that, standing alone, the fact that Rambus did not violate JEDEC's patent disclosure policy does not insulate it absolutely from antitrust liability.

holder which amended its application in order to cover a single competitor's product. And, none of those decisions involved alleged monopolistic behavior or conduct alleged to have violated an unfair business practice statute. Hence, neither Kingsdown nor its progeny have been applied to the circumstances or the legal theories at issue in this action.

HN26[] The patent statutes and the decisional law implementing them do not exist or operate in isolation. Rather, they are a part of the legal fabric of a society **[**57]** that imposes on its citizens, individual and corporate, other legal constraints that cannot, as Rambus would have it, be rendered meaningless or marginalized by the distorted application of a principle of patent law that, in context and in its place, is no doubt valid. Indeed, the patent laws must, and certainly can, coexist with the other statutes that control the conduct of commerce. See generally Herbert Hovenkamp, Mark D. Janis, & Mark A. Lemley, Intellectual Property & Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law (2004). In the context of this litigation, appropriate instructions can be crafted to facilitate that kind of coexistence. To be sure, such instructions must be tailored to fit the evidence and to account for the controlling law, patent and otherwise. That effort, of course, is better accomplished later in perspective of the case as it develops at trial. Followed to its conclusion, however, the logic offered by Rambus in support of its motion in *limine* would foreclose completely an outcome wherein patent law is given its rightful holistic place within the law as a whole.

CONCLUSION

For the reasons stated above, **[**58]** the Court declines Rambus' invitation to apply Kingsdown in an extreme manner never authorized by the Federal Circuit and in a way that elevates a valid precept of patent law to a position of jurisprudential primacy for which there is no precedent. Accordingly, Plaintiff's Motion *in Limine* No. 2, to Exclude Evidence or Argument that Plaintiff's Amendment of Patent Claims was Based on "Stolen" Ideas or was Otherwise Wrongful or Illegal (Docket No. 576) will be denied.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

ROBERT E. PAYNE

United States District Judge

Richmond, Virginia

Date: August 12, 2004

Water Craft Mgmt., L.L.C. v. Mercury Marine

United States District Court for the Middle District of Louisiana

August 12, 2004, Decided ; August 12, 2004, Filed; August 12, 2004, Docketed

CIVIL ACTION NUMBER 99-1031-B-M1

Reporter

361 F. Supp. 2d 518 *; 2004 U.S. Dist. LEXIS 24692 **; 2004-2 Trade Cas. (CCH) P74,641

WATER CRAFT MANAGEMENT, L.L.C., ET AL. VERSUS MERCURY MARINE (A DIVISION OF BRUNSWICK CORPORATION), ET AL.

Subsequent History: Affirmed by *Water Craft Mgmt. LLC v. Mercury Marine, 2006 U.S. App. LEXIS 18582 (5th Cir. La., July 25, 2006)*

Prior History: *Watercraft Mgmt. v. Mercury Marine, 191 F. Supp. 2d 709, 2001 U.S. Dist. LEXIS 13186 (M.D. La., 2001)*

Disposition: Court issued findings for it's previous rulings.

Core Terms

dealer, Boating, dealership, geographic, detrimental reliance, Craft, marine, promises, parties, purchaser, representations, competitor, seller, Sales, good faith, parol evidence, negotiations, preponderance of evidence, plaintiffs', discounts, damages, sales and service, misrepresentations, meeting competition, integration clause, antitrust claim, financing, opening, present evidence, compete

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN1[] **Price Discrimination, Buyer Liability**

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN2[] Anticompetitive & Predatory Practices, Predatory Pricing

The United States Court of Appeals for the Fifth Circuit follows the United States Supreme Court and other circuits in making a distinction between primary-line injury and secondary-line injury in claims under the Robinson-Patman Act. Primary-line injury occurs at the level of direct competition and customarily results when a seller uses predatory pricing policies to enhance his market position over competitors, thereby diminishing competition and increasing market concentration. Secondary-line injury occurs when a large purchaser uses its vast purchasing power to obtain low prices from the manufacturers or distributors whose products it stocks, thereby enabling it to undersell competitors. A secondary-line injury occurs when competition between favored and disfavored purchasers of a discriminating seller is unlawfully affected. A plaintiff alleging secondary-line injury must prove that a seller made a sale to two different buyers at the same functional level of competition charging different prices to each.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

HN3[] Price Discrimination, Buyer Liability

To establish illegal secondary-line price discrimination between purchasers, a plaintiff must prove the following elements by a preponderance of the evidence: (1) sales made in interstate commerce; (2) the commodities sold to the purchaser were of the same grade and quality as those sold to other purchasers; (3) that seller discriminated in price between purchasers; and (4) that the discrimination had a prohibited effect on competition. A plaintiff who meets the above requirements establishes a prima facie case of price discrimination. In addition to the above requirements, the plaintiff has the burden of proving the extent of his actual injuries to recover damages.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN4[] Price Discrimination, Buyer Liability

A price discrimination within the meaning of *15 U.S.C.S. § 13(a)* is merely a "price difference." More specifically, price discrimination is defined as charging different buyers different prices for the same items. A plaintiff in a secondary-line injury action must prove actual instances of price discrimination. If the challenged lower price is in fact, and not merely theoretically, made available to the allegedly disfavored purchaser, the seller cannot be held liable under the Robinson-Patman Act.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN5[] **Robinson-Patman Act, Defenses**

In the context of the Robinson-Patman Act, the "prohibited effect on competition" element is usually defined by courts by directly quoting the language of the statute which says "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This language focuses on two general effects under this portion of the Robinson-Patman Act--the effect on the general competitive market and the effect on the individual competitors or the disfavored purchaser. With respect to the effect on the general competitive market, the Robinson-Patman Act does not require that the discrimination in fact have harmed competition. Instead, the Robinson-Patman Act requires the plaintiff show there is a reasonable possibility that the price difference may harm competition. This reasonable possibility of harm is usually referred to as competitive injury. Once the plaintiff proves a discrimination in price, the burden then shifts to the defendant to negate competitive injury. Unless rebutted by one of the Robinson-Patman Act's affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to establish a claim under the Robinson-Patman Act.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN6[] **Price Discrimination, Buyer Liability**

In the context of the Robinson-Patman Act, to recover treble damages, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. It must prove more than a violation of the Act, since such proof establishes only that injury may result. According to the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court standard requires a plaintiff to demonstrate by a preponderance of the evidence that an actual antitrust violation has caused his damages. The "prohibited effect on competition" element of the prima facie case requires a showing that the discrimination have caused an actual injury to the disfavored purchaser as a prerequisite for recovery under the federal antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN7[] **Robinson-Patman Act, Claims**

In the context of the Robinson-Patman Act, causation under the "prohibited effect on competition" element is established by examining two things: whether the favored and disfavored buyers were in actual competition with each other and proof of injury. Thus, to establish competitive injury in a secondary-line case, the disfavored purchaser must prove that it was engaged in actual competition with the favored purchasers at the time of the price discrimination. This actual competition requirement is satisfied by showing the competitors competed at the same functional level and within the same geographic market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN8[] **Robinson-Patman Act, Claims**

In the context of the Robinson-Patman Act, to establish illegal secondary-line price discrimination between purchasers, a plaintiff must prove the following elements: (1) sales made in interstate commerce; (2) the commodities sold to the purchaser were of the same grade and quality as those sold to other purchasers; (3) that the seller discriminated in price between purchasers; and (4) that the discrimination had a prohibited effect on competition. A price discrimination within the meaning of *15 U.S.C.S. § 13(a)* is an actual price difference. The "prohibited effect on competition" element of the prima facie case requires that the discrimination have caused an actual injury to the disfavored purchaser. Causation is established by examining whether the favored and disfavored buyers were in actual competition with each other and proof of injury. Actual competition requires that the plaintiff prove a relevant product and geographic market to be defined. Proof of injury to competition is established prima facie by proof of a "substantial" price discrimination between competing purchasers over time.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN9[] **Robinson-Patman Act, Claims**

In the context of the Robinson-Patman Act, it is well settled that the relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine if federal antitrust laws have been violated.

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

Evidence > ... > Testimony > Expert Witnesses > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN10[] **Relevant Market, Product Market Definition**

Courts consistently require that expert testimony adequately define the relevant geographic and product markets in antitrust cases.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN11[] **Regulated Practices, Market Definition**

Defining a relevant market requires expert identification of both the product at issue and the geographic market for that product.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

HN12[] **Price Discrimination, Defenses**

See *15 U.S.C.S. § 13(b)*.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN13[] **Robinson-Patman Act, Defenses**

15 U.S.C.S. § 13(b) expressly establishes certain prerequisites for the successful assertion of the meeting competition defense. The seller-defendant has the burden of proving four requirements in order to establish his defense: (1) to rebut the prima facie case thus made by showing that his lower price was made; (2) in good faith; (3) to meet an equally low price; and (4) of a competitor.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Exculpatory Clauses

Contracts Law > Personal Property > Bona Fide Purchasers

Torts > ... > Defenses > Exculpatory Clauses > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Criminal Law & Procedure > Defenses > Burdens of Proof

Evidence > Burdens of Proof > General Overview

HN14[] **Contract Conditions & Provisions, Exculpatory Clauses**

In the context of the Robinson-Patman Act, the meeting competition defense is an absolute defense. The seller has the burden of bringing himself within the exculpating provision of § 2(b), which has been interpreted to afford an absolute defense to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect. The seller also has the burden of proving the meeting competition defense. Under *15 U.S.C.S. § 13(b)*, the seller charged with a violation has the burden of rebutting a prima facie case of discrimination in price or services or facilities by demonstrating that its lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. Courts have held that, to meet its burden, a defendant who knowingly discriminated in price or services or facilities furnished to a customer must demonstrate the existence of facts that would lead a reasonable and prudent person to believe that granting the lower price or service or facility would meet a competitor's equally low price.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN15[] **Robinson-Patman Act, Defenses**

When proved, the meeting-competition defense of § 2(b) (*15 U.S.C.S. § 13(b)*) exonerates a seller from Robinson-Patman Act liability. The meeting-competition defense at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Further, the seller is required show that under the circumstances, it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN16[] **Price Discrimination, Defenses**

When demonstrating the reasonableness requirement in the meeting competition defense, in most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good faith response.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

HN17[] **Robinson-Patman Act, Defenses**

When demonstrating the reasonableness requirement in the meeting competition defense, at the heart of § 2(b) (*15 U.S.C.S. § 13(b)*) is the concept of "good faith." This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. Whether this standard is met depends upon the facts and circumstances of the particular case, not abstract theories or remote conjectures. The strict requirement of good faith is illustrated throughout federal jurisprudence and secondary sources.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN18[] **Robinson-Patman Act, Defenses**

When demonstrating the reasonableness requirement in the meeting competition defense, good faith, rather than absolute certainty, is the key requirement. Thus, as long as the seller acts in good faith, it may even inadvertently undercut the competitor's price without forfeiting this defense. The good faith aspect of the defense can be summarized in the following way: In general, the basic requirement of the § 2(b) (*15 U.S.C.S. § 13(b)*) good faith defense is that the seller's conduct must be a reasonable response to the price discrimination of a competitor; if the seller acts reasonably, good faith will likely be found.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN19[] **Price Discrimination, Defenses**

When demonstrating the reasonableness requirement in the meeting competition defense, if the seller's actions are inappropriate, unnecessary, or unreasonable with respect to the threat posed by its competitor, the seller is not in good faith and will not be allowed to assert the meeting competition defense.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN20[] **Price Discrimination, Defenses**

When demonstrating the reasonableness requirement in the meeting competition defense, the "meet and not beat" requirement provides that a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to meet not beat the competitor's low price.

Contracts Law > Contract Formation > General Overview

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN21[] **Contracts Law, Contract Formation**

A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. *La. Civ. Code Ann. art. 1906*. A contract has the effect of law between the parties, and courts are bound to give legal effect to the parties' agreements. A contract may be in writing or made orally as long as the law does not require specific form requirements to be met. If the agreement has been reduced to writing, and the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. *La. Civ. Code Ann. art. 2046*. This rule does not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists, nor does it authorize the court to make a new contract for the parties. In fact, courts generally find that the meaning and intent of the parties to a written instrument should be determined within the four corners of the document. Its terms normally cannot be explained or contradicted by extrinsic evidence.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > Breach > Breach of Contract Actions > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

HN22[] Contract Conditions & Provisions, Integration Clauses

In order to sustain a cause of action for breach of an oral agreement for value in excess of $ 500, a party must prove its existence by at least one witness and corroborating circumstances. *La. Civ. Code Ann. art. 1846*.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN23[] Contract Interpretation, Parol Evidence

See *La. Civ. Code Ann. art. 1848*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Evidence > Admissibility > Statements as Evidence > Parol Evidence

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Types of Contracts > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN24[] Types of Contracts, Oral Agreements

Louisiana courts consistently hold that an oral agreement may not be admitted to vary the terms of a written contract except under the circumstances enumerated by *La. Civ. Code Ann. art. 1848*. Thus, because oral agreements do not fall within the ambit of *La. Civ. Code Ann. art. 1848*, contemporaneous oral agreements or understandings between the parties which are not made part of the written contract do not qualify as an exception to the parol evidence rule. Similarly, parol evidence is not admissible to show prior oral agreements that contradict the terms of a written contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN25[] Types of Contracts, Oral Agreements

There are some judicially carved exceptions that permit courts to admit parol evidence when a written contract is at issue. Under Louisiana law, parol evidence is admissible to show fraud, mistake, illegality, want or failure of consideration, and to explain an ambiguity when such explanation is not inconsistent with the written terms. One of the most discussed exceptions to the parol evidence rule is the principle that parol evidence is admissible to show that a writing is only part of an oral contract.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN26[] Contract Interpretation, Parol Evidence

The parol evidence rule does not make evidence of prior negotiations irrelevant; the new agreement in writing makes evidence of prior negotiations irrelevant, but only if the written agreement is a complete and accurate statement of all of the terms agreed upon by the parties.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN27[] Contract Interpretation, Parol Evidence

Parol evidence may be admitted to show a subsequent, new and independent agreement that was intended to modify the original contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > Contract Conditions & Provisions > General Overview

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

HN28[] Contract Conditions & Provisions, Integration Clauses

The United States Court of Appeals for the Fifth Circuit, applying Louisiana law, has held that a merger clause precludes evidence of agreements made outside of the written contract.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN29[] Consideration, Detrimental Reliance

La. Civ. Code Ann. art. 1967 provides that a party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. This article of the Louisiana Civil Code sets forth Louisiana's version of the doctrine known as detrimental reliance, and is designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence. Some Louisiana courts have characterized detrimental reliance as being a disfavored doctrine and have held that it should be applied sparingly because it bars the normal assertion of rights otherwise present. While some courts may be reluctant to apply the doctrine, it is clear that the Louisiana jurisprudence has approved its use in appropriate cases.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN30[] **Consideration, Detrimental Reliance**

Louisiana law requires a plaintiff to prove the following to recover for a claim of detrimental reliance: (1) a representation was made; (2) there was justifiable reliance thereon; and (3) there was a change of position to one's detriment because of the reliance. The plaintiff bears the burden of proving each of these elements by a preponderance of the evidence.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN31[] **Consideration, Detrimental Reliance**

In determining if the party claiming detrimental reliance was justified in his reliance thereon, the courts generally look to whether the reliance was reasonable under the circumstances. Under Louisiana law, reasonableness is determined by examining factual circumstances like the commercial sophistication of the party claiming detrimental reliance and the negotiations and/or documents the party relied on. In some cases, courts have found that the presence of an integration clause in a contract is a factual circumstance that makes one's reliance unreasonable.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN32[] **Consideration, Detrimental Reliance**

In order for plaintiffs to prove that they changed their position to their detriment in reliance on a representation from defendant, the Louisiana courts require proof that the plaintiffs suffered damages not adequately compensated by the defendant. Essentially, this means that damages must be proven in order for a claim of detrimental reliance to be sustained.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN33[] **Consideration, Detrimental Reliance**

A per-se rule that an integration clause nullifies any claim for detrimental reliance contradicts the very nature of a claim for detrimental reliance.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

HN34[] **Consideration, Detrimental Reliance**

The existence of a promise and reasonable reliance on that promise to one's detriment are the only requirements needed to sustain a claim for detrimental reliance.

Civil Procedure > Remedies > Damages > Monetary Damages

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN35[] **Damages, Monetary Damages**

Louisiana recognizes a cause of action for intentional fraudulent misrepresentation as to present or past facts. A party who is injured by the fraud and deceit of another has a cause of action for damages. The action for fraudulent misrepresentation may be brought either as a breach of contract or tort action. If the cause of action is under contract, the plaintiff's damages are limited to actual pecuniary loss proven by a preponderance of the evidence. If the action lies in tort, the plaintiff may recover non-pecuniary losses as well, but only if he proves such losses by a preponderance of the evidence.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN36[] **Business Torts, Fraud & Misrepresentation**

The Louisiana Civil Code defines fraud as a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. *La. Civ. Code Ann. art. 1953*. Fraud does not vitiate consent when the party against whom it is directed could have ascertained the truth without difficulty, inconvenience, or special skill. However, this exception does not apply when a relation of confidence reasonably induced a party to rely on the other's assertions or representations. *La. Civ. Code Ann. art. 1954*. The commercial sophistication of the parties is considered by the court when determining if a party could have ascertained the truth without difficulty, inconvenience, or special skill.

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Torts > Business Torts > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN37[] **Consideration, Enforcement of Promises**

The United States Court of Appeals for the Fifth Circuit has set forth the following elements to sustain a claim for fraud under Louisiana law: (1) a misrepresentation of material fact; (2) made with the intent to deceive; and (3) causing justifiable reliance with resultant injury. The requirement that a party justifiably rely on the alleged fraudulent misrepresentation is required to sustain the claim. To determine whether or not plaintiffs' reliance was justifiable, the court must conduct the same reasonableness inquiry it previously made on the detrimental reliance claim. A fraud claim based on unfulfilled promises or statements as to future events will not satisfy the justifiable reliance requirement. However, a claim of fraud may be predicated on promises made with the intention not to perform at the time the promise is made.

Counsel: **[**1]** For WATER CRAFT MANAGEMENT, L.L.C., DOUGLAS WAYNE GLASCOCK, NICK A MARTRAIN, plaintiffs: Christopher M. Moody, Moody & Moody, Hammond, LA USA.

For MERCURY MARINE, A Division of Brunswick Corp, defendant: Craig Lewis Caesar, B. Franklin Martin, III, Colvin G. Norwood, Jr., Anne Dorman LeJeune, McGlinchey Stafford, PLLC, New Orleans, LA USA.

For KENNETH HEBERT, HELEN HEBERT, consolidated plaintiffs: Marjorie Ruth Esman, Milling Benson Woodward, LLP, New Orleans, LA USA; Christopher M. Moody, Moody & Moody, Hammond, LA USA.

For MERCURY MARINE, counter-claimant: Craig Lewis Caesar, B. Franklin Martin, III, Colvin G. Norwood, Jr., Anne Dorman LeJeune, McGlinchey Stafford, PLLC, New Orleans, LA USA.

For WATER CRAFT MANAGEMENT, L.L.C., DOUGLAS WAYNE GLASCOCK, NICK A MARTRAIN, counter-defendants: Christopher M. Moody, Moody & Moody, Hammond, LA USA.

Judges: FRANK J. POLOZOLA, CHIEF JUDGE.

Opinion by: FRANK J. POLOZOLA

Opinion

[*526] RULING

Water Craft Management, L.L.C. ("Water Craft"), Douglas Wayne Glascock ("Glascock"), and Nick Martrain, III ("Martrain") have filed this suit against Mercury Marine (A Division Of Brunswick Corporation) ("Mercury") alleging violations of federal ***antitrust*** **[**2]** ***law*** under *15 U.S.C. § 13(a)* and various state law claims, including breach of contract, detrimental reliance, fraud, and misrepresentation claims. [1] With the consent of the parties, the claims were trifurcated. The Court tried the antitrust claims and state law claims separately. A trial on the issue of damages will be held at a later date.

The antitrust claims were tried by the Court without a jury. [2] After hearing the evidence in this case, considering the credibility of the witnesses who testified in person at trial, and reviewing the briefs, deposition transcripts, and other arguments presented by the parties, the Court finds that plaintiffs failed to prove all of the elements of their federal antitrust claims by a preponderance of the evidence. [3] The Court further finds in the alternative, that even if plaintiffs did prove their antitrust claim, Mercury has proved as a matter of law under the facts of this **[**3]** case its meeting competition defense by a **[*527]** preponderance of the evidence which serves as a complete bar to plaintiffs' federal antitrust claims.

The state law claims were also tried before this Court without a jury. [4] **[**4]** After hearing the evidence on this claim, [5] the Court finds that: (1) plaintiffs have failed to prove all of the elements of their state law breach of contract claims by a preponderance of the evidence, and (2) plaintiffs have proven all of the elements of their state law claims based on detrimental reliance, fraud, and misrepresentation by a preponderance of the evidence. Accordingly, it is necessary for the Court to proceed with the trial of damages to determine the extent, if any, of the plaintiffs' damages sustained based on their state law detrimental reliance, fraud, and misrepresentation claims.

The state law counter-claims brought by Mercury were also tried before this Court without a jury. [6] The Court finds that Mercury has proven the following claims by a preponderance of the evidence:

(1) The sum of $ 79,117.32 plus interest and attorneys fees against Glascock and Martrain;
(2) The sum of $ 11,379.75 plus interest and attorneys fees against Water Craft, Glascock and Martrain;
(3) The sum of $ 3,855.12 against Water Craft, Glascock and Martrain;
(4) The sum of $ 6,076.67 against Glascock and Martrain;
(5) The sum of $ 26,576.94 against Glascock

Mercury is also entitled to recover interest from the date of judgment until paid on each of these claims.

[5]** The Court now proceeds to give reasons for the Court's rulings.

I. Factual Background [7]

This case involves transactions between the manufacturers and dealers in the boating industry. Both of the plaintiffs, Glascock and Martrain, are experienced businessmen and marine dealers. Since 1986, Glascock owned six separate marine dealerships before opening LA Boating Center ("LA Boating") which did business as the Water

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[1] The plaintiffs will sometimes be referred to collectively as Water Craft.

[2] Rec. Doc. Nos. 315, 317, 319, and 320.

[3] The Court issued a short opinion on the antitrust claim on March 9, 2004. See Rec. Doc. No. 365.

[4] Rec. Doc. Nos. 366, 367, and 369.

[5] In reaching its decision the Court considered the credibility of the witnesses who testified in person at trial, and reviewed the briefs, trial and deposition transcripts, and the other arguments presented by the parties.

[6] Rec. Doc. Nos. 366, 367, and 369.

[7] The factual findings made by the Court apply to all claims unless the Court notes otherwise. All of the claims and contentions of the parties have been fully considered by the Court whether specifically discussed in this opinion or not.

Craft store in Baton Rouge. These dealerships were located in various parts of Louisiana. In some of these dealerships, Glascock had business partners. Glascock owned Hammond Boating Centre in Hammond, Louisiana, which opened in 1986 and operated as a Mercury dealership carrying Mariner motors. During the time Water Craft was a going concern, Glascock **[**6]** continued to run his Mercury dealership in Hammond, Louisiana. Glascock also owned other Mercury dealerships which were Tracker Marine ("Tracker") dealerships. During this time, he served on the Tracker Dealer Council and had been one of its top ten dealers for ten years. Thus, Glascock had been actively and successfully involved in the marine dealership industry for approximately twelve years at the time he and Martrain opened LA Boating in January 1997. The evidence also reveals that Glascock had served on several manufacturer-dealer councils in connection with the marine **[*528]** products industry and was a member of several trade associations. In addition to Glascock's extensive experience in the marine product industry, Glascock owned and managed several other successful businesses and by his own admission, has become a millionaire because of his business activities and experience.

Martrain had over twenty years experience in the marine dealer industry before opening LA Boating in Baton Rouge. He also had served on numerous industry boards throughout that time, including the Advisory Council for Stratos Boat Company and the National Dealer Council for Outboard Marine Corporation ("OMC"). **[**7]** Before opening the Water Craft store, Martrain owned and managed a Baton Rouge OMC dealership, Martrain Marine, which opened in 1983. Martrain closed this dealership on October 31, 1996. It is clear that one of the primary reasons Martrain closed Martrain Marine was because of the extensive and robust competition in the Baton Rouge marine product marketplace. In October 1996, Martrain had agreed that he would sell his dealership's assets in Martrain Marine to Kenny Hebert ("Hebert") who owned Plaquemine Marine. It was also agreed that Hebert would lease the former Martrain Marine building from Martrain and his family.

Both Glascock and Martrain knew the Baton Rouge marine business market was highly competitive. Glascock had operated a Baton Rouge Mercury dealership carrying Mariner motors, and had closed the dealership in the early 1990's because the Baton Rouge market was too competitive. He sold that dealership to Travis Boating Center ("Travis"), which was an OMC dealer at the time. Travis would later become a very important party in this litigation.

A. The Initial Negotiations

Both Glascock and Martrain testified that because they previously had bad experiences with **[**8]** the Baton Rouge marine market, they had no desire to open a Baton Rouge Mercury dealership. Though the motivation is disputed, Glascock and Martrain began to discuss the possibility of the two partnering to open a Mercury dealership in Baton Rouge in September 1996. Glascock contends he was approached by David Rohrbach, a sales representative for Mercury, in 1996 to discuss the possibility of opening a Baton Rouge Mercury dealership. Rohrbach eventually signed Water Craft d/b/a LA Boating to be a Mercury dealer. Rohrbach was assigned to the Louisiana territory from approximately April 1996 until he left his employment with Mercury in May 1997. During the course of Glascock's initial discussions with Mercury, he testified that he was very negative about opening a Baton Rouge Mercury dealership. However, in later discussions, Glascock testified that the Mercury representatives said they could make the offer very attractive, and put him in contact with Martrain to discuss a joint venture. At about the same time, Martrain testified that he was approached by Rohrbach and/or Glascock to discuss the possibility of entering into a joint venture with Glascock for a Baton Rouge Mercury dealership.

[9]** During their testimony, Glascock and Martrain contended that one of the initial and primary concerns they had about going into business again in Baton Rouge was the presence of Travis in the Baton Rouge market. [8] Both knew that Travis was receiving deep discounts from OMC and also knew it would be difficult for them to compete with Travis price-wise **[*529]** unless certain price concessions could be obtained from Mercury. Glascock and Martrain were also concerned about the number of Mercury dealers already doing business in the Baton Rouge

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[8] As noted above, Glascock sold his prior Baton Rouge dealership to Travis, which was then an OMC dealer. As will be noted later in this opinion, Travis became a Mercury dealer after plaintiffs opened the Baton Rouge store and signed their agreement with Mercury.

area. Finally, Glascock and Martrain stated that they both knew about Bill Seeley and John Randolph and their method of operation, and testified they had expressed this concern to Rohrbach personally. Both Glascock and Martrain expressed a concern that both Seeley and Randolph were Mercury executives, but had previously worked for OMC and were instrumental in signing Travis as an OMC dealer. Glascock and Martrain feared that Mercury now intended to make Travis a Mercury dealer because Travis was a fast-growing multi-location dealer for OMC, and Seeley and Randolph had been responsible for signing Travis to be an OMC dealer.

[10]** Glascock and Martrain claim that Rohrbach was quick to dispel these fears. According to plaintiffs, Rohrbach expressly advised them that Mercury would be providing LA Boating with the deepest possible discounts, and they would be able to buy boat motors as cheap or cheaper than anyone in the Baton Rouge market, including Travis. In addition, Glascock and Martrain claim Rohrbach made other promises to them concerning advertising co-op money and discounts on parts and supplies. Finally, Glascock and Martrain claim that Rohrbach and other Mercury representatives assured them that Travis would never be made a Mercury dealer. Throughout both bench trials, Glascock and Martrain testified that Mercury representatives had referred to Travis as being "public enemy number one," a statement Mercury emphatically denies Rohrbach, or any of its representatives, ever made.

Glascock and Martrain, also claim that Rohrbach made representations to them that Mercury planned to reduce the total number of dealerships in the Baton Rouge market, and wanted to consolidate its business into one strong dealer who could effectively compete against Travis and allow Mercury to recapture its market share from **[**11]** OMC.

During the discussions with Glascock and Martrain, Mercury revealed that it was also adding Kenny Hebert of Plaquemine Marine as a dealer in the Baton Rouge market. However, Glascock and Martrain claim that this did not dissuade them from continuing negotiations with Rohrbach because they were advised by Mercury that Hebert would not become a "full-line dealer," but instead would be principally a "package" dealer. A full-line dealer is a dealer that purchases Mercury motors directly from Mercury and receives discounts off of a net dealer cost. Package dealers do not buy loose engines from Mercury, but rather obtain their inventory from boat dealers who sell them packaged units with the boat and motor already installed, or at least included, in the sale of the boat price. In Louisiana, a large share of the marine business is for loose engines since so many engines are sold to "re-power" older or homemade boats. [9] A full-line dealer is one that can buy package units and loose engines and is free to create or set up his own package.

[12]** During the testimony, Mercury representatives presented an entirely different picture of these initial negotiations between Rohrbach, Glascock and Martrain. Mercury claims that it was Glascock who first expressed interest and approached Rohrbach about opening a Baton Rouge dealership. Rohrbach testified in his deposition that Glascock even told him about the location he was considering for the dealership. Rohrbach noted that the first time that he ever met Martrain was at a breakfast meeting and that he did not **[*530]** suggest that Glascock approach Martrain about opening a Baton Rouge Mercury dealership. Although Rohrbach admits that Mercury was excited about Glascock and Martrain opening a Baton Rouge dealership, he testified that the opening of a Baton Rouge dealership was not tied to any special deal. To the contrary, Rohrbach and other Mercury representatives testified that Rohrbach did not have the authority to offer any special deals that were not in the standard dealer program, and to do so would have required approval from his superiors. [10]

[13]** Rohrbach testified that Travis did not play a major role in the negotiations he had with Glascock and Martrain regarding the Baton Rouge agreement. During the time he worked at Mercury, Rohrbach testified that he never learned that Mercury was considering entering into a contract with Travis to be a Mercury dealer. Thus, Rohrbach testified he would not have told any of the dealers he serviced whether or not there were discussions occurring between Travis and Mercury. Rohrbach claims he did not tell Glascock and Martrain that Mercury would reduce the number of Mercury dealerships in the Baton Rouge area, nor did he mention there were Baton Rouge dealerships which would be phased out by Mercury.

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[9] This is partially caused by the salt water in the Louisiana marsh area.

[10] There were obvious antitrust concerns about favoring one dealer.

Mercury argues that the true motivating factor which caused Glascock to open another Baton Rouge dealership was to protect his Tracker dealership in Hammond. As noted above, Glascock's other Mercury dealerships were Tracker dealerships. Defendants contend that Tracker boat packages are outfitted with Mercury Motors. Thus, in order to sell Tracker boat packages, a Tracker dealer must also be a Mercury dealer. Mercury presented evidence that from late 1995 to early 1996, Tracker representatives, **[**14]** including David Camp and his supervisor Nick Vann, discussed the possibility of opening a Tracker store in Baton Rouge with Glascock. Tracker allegedly told Glascock that it would open another Baton Rouge dealership with another company if Glascock did not wish to do so. Mercury contends that Glascock's true motivation was to protect his then-current status of having the only Tracker dealership in the Baton Rouge area. This contention is supported by the evidence in the case.

B. The Sales & Service Agreements

Despite the conflicting contentions set forth above regarding the initial negotiations between Rohrbach, Glascock and Martrain, it appears that an agreement was eventually reached. On October 31, 1996, Glascock and Martrain signed the lease for the building where they would operate LA Boating. On November 25, 1996, Glascock and Martrain formed Water Craft, and on November 28, 1996, Martrain, in his capacity as "President," signed a Mercury Marine Sales & Service Agreement ("the 1997 Sales & Service Agreement") on behalf of Water Craft, doing business as LA Boating in Baton Rouge. It is a stipulated fact that both Glascock and Martrain were familiar with the terms contained **[**15]** in the 1997 Sales & Service Agreement because of their prior experience in the marine business. It is also clear and undisputed that both Glascock and Martrain understood from their prior experience in the marine product industry that non-exclusive dealerships were the standard practice for marine engine dealers.

The parties have stipulated that the 1997 Sales & Service Agreement is non-exclusive. Further, the 1997 Sales & Service Agreement noted that the price determination of Mercury products would be based on price lists published by Mercury **[*531]** from time to time, reserving to Mercury the right to revise the price lists and applicable discounts at any time. Finally, the 1997 Sales & Service Agreement contained an integration clause that provided that it was the "entire agreement" between the parties and "replaced all prior agreements between the parties." Additionally, this integration clause stated the 1997 Sales & Service Agreement could be amended or modified "only by written instrument signed by Mercury Marine and Dealer." Both Glascock and Martrain testified at trial that based on this agreement and their prior marine product experience, they did not believe that Water Craft would **[**16]** be the exclusive Mercury dealer in the Baton Rouge area.

Water Craft, doing business as LA Boating, began its operation as a marine dealership in January 1997. Martrain was the managing partner of Water Craft, and ran the day-to-day business, operations, and accounting of LA Boating. Glascock was not present in the LA Boating store very often and did not take an active role in the day-to-day management of the dealership. After the Water Craft Baton Rouge store had been opened for approximately eight months, Glascock, on behalf of himself, Martrain, and Water Craft, executed a renewal contract with Mercury ("the 1998 Sales & Service Agreement") on August 3, 1997. The terms of the 1998 Sales & Service Agreement are identical to those contained in the 1997 Sales & Service Agreement. [11]

As Glascock and Martrain were opening their Baton Rouge Mercury dealership, Kenny **[**17]** Hebert opened "Boats Unlimited," another Mercury dealership in Baton Rouge. Both Baton Rouge dealerships began operation around January 1, 1997 as full-line Mercury dealers approximately five miles from each other and approximately five to six miles from the Travis location. Hebert testified that he was not told by Rohrbach that both he and Glascock and Martrain would become Mercury dealers. Instead, he claims only one - not both - of them would be signed as a Mercury dealer. As noted above, Glascock and Martrain also did not think they would be competing with Hebert as full-line dealers in the Baton Rouge market. Mercury contends that both Glascock and Martrain knew they would be competing with Hebert prior to signing the 1997 Sales & Service Agreement. Rohrbach testified that he never made the "full-line" and "dual-line" distinctions to Glascock and Martrain, and Mercury produced emails at

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[11] Because the terms of the agreements are identical, the Court will address arguments related to the validity of these agreements collectively.

trial from Rohrbach to Mercury representatives indicating that both Hebert and Glascock and Martrain knew that both would be operating Baton Rouge Mercury dealerships.

C. Negotiations Subsequent to the 1997 Sales & Service Agreement

Despite the fact that a signed sales and service agreement **[**18]** was entered into, Glascock and Martrain testified it was unclear at the outset of the agreement the precise "program" that Water Craft's Baton Rouge store would be operating under. There were numerous discussions and communications between Glascock and Martrain and Mercury representatives from January to April of 1997. Glascock and Martrain contend it was not until April that the ultimate program was agreed to. These discussions were presented during both bench trials, including during the testimony of Glascock, Martrain, and Randolph. Glascock and Martrain argue that these ongoing discussions were made part of the overall contract with Water Craft concerning the purchase **[*532]** of Mercury engines, and constituted a modification and extension of the earlier written agreement. In the alternative, Glascock and Martrain argue that these negotiations with Mercury representatives constituted separate agreements from those contained in the 1997 Sales & Service Agreement, and these subsequent agreements were not fully integrated into either the 1997 or 1998 Sales & Service Agreements.

In approximately March or April 1997, Glascock and Martrain met with Rohrbach, Randolph [12] and Bill Burns, the **[**19]** regional sales representative, for dinner at Juban's Restaurant and thereafter for cocktails at the Hilton Hotel bar. According to plaintiffs, the supposed purpose of this meeting was to resolve the issues left unaddressed in the 1997 Sales & Service Agreement and to visit the new dealership. Mercury disputes this contention and denies this was the purpose of the meeting. Glascock and Martrain testified that during dinner and at the hotel Randolph reassured both of them that Mercury did not intend to make Travis a Mercury dealer, and he would make sure they received the deepest possible discounts from Mercury to help Glascock and Martrain be the number one Mercury dealer in Baton Rouge. Martrain testified specifically that he "flat-out" asked Randolph at this meeting if Mercury was trying to make Travis one of its dealers, considering Randolph's prior dealings with Travis when he worked for OMC. Martrain testified that Randolph emphatically advised him in response to that question that Travis would not become a Mercury dealer, and that Mercury's plan was to compete directly with Travis in order to regain market share from OMC. Randolph, on the other hand, never fully denied making **[**20]** these promises to Glascock and Martrain as the Court expected him to do. During his testimony at the antitrust trial, Randolph was very noncommittal in testifying whether or not he had led Glascock and Martrain to believe that Mercury would not make Travis a Mercury dealer.

During this time period, Glascock and Martrain claim that Mercury, with the full knowledge and assistance of Randolph, was actively pursuing Travis. Eventually, Travis did become a Mercury dealer, and these alleged misrepresentations are pivotal to Water Craft's contract, detrimental reliance, fraud, and misrepresentation claims. This conflicting testimony is irrelevant to the Court's determination that plaintiffs failed to prove the required elements of their antitrust claim.

D. Operation of LA Boating and Its Eventual Demise

LA Boating began its operations **[**21]** and its relationship with Mercury. It received free interest from Mercury for the first nine months it was in business, as do all new Mercury dealerships. However, LA Boating finished its first year of operation with more than a $ 70,000 loss. Glascock and Martrain claim that this was the projected loss for their first year of operation while Mercury takes the position that the store should have made a profit during its first year. The testimony and other evidence presented during the trials revealed that LA Boating should have made a profit during its first year according to its pro rata plan. Mercury presented evidence that almost immediately after opening, LA Boating fell behind on its floor-plan financing payments, and by the spring of 1998, LA Boating was on

[12] Randolph was Rohrbach's boss and Mercury's national sales director. As noted earlier, he had formerly worked for OMC and recruited Travis to sign an agreement with OMC.

a COD basis with its suppliers. Mercury also presented evidence that, by 1998, LA Boating was "Sold **[*533]** and Unpaid" ("SAU") or sold out of trust on all its lines including Mercury Marine Acceptance Corporation ("MMAC"), Deutsche Financial, Tracker, Bayliner, and Bombardier. Mercury contends that LA Boating was selling product, and instead of paying its lenders and floor financiers, was diverting the proceeds to meet other obligations.

[22]** Because LA Boating had fallen behind in its payments to Mercury and MMAC, Mercury claims it had Glascock and Martrain sign a promissory note on April 14, 1998 in its favor in the amount of $ 29,519.90 to address LA Boating's outstanding debt. Additionally, by August 1998, LA Boating owed MMAC over $ 177,000, which began to send demand letters to LA Boating. Around this time, Glascock and Martrain testified that they were ready to close LA Boating because of these financial problems. In addition, Glascock and Martrain testified that there were rumors circulating in the marine industry that Mercury was going to make Travis a Mercury dealer. Glascock and Martrain stated they did not want to remain in business as a Mercury dealer if they had to compete with Travis. However, Glascock and Martrain claim that conversations with Jeanne Koenen of MMAC and Kurt Schmiedel, the Mercury zone representative who had replaced Rohrbach, convinced them otherwise. Specifically, Glascock and Martrain claim that Schmiedel assured them Travis would not become a Mercury dealer, and that Koenen promised them extra financing. Despite making these assurances to the plaintiffs in response to their direct question **[**23]** on the issue, Schmiedel testified that he knew during his contacts and conversations with Glascock and Martrain that Mercury was negotiating with Travis to become a Mercury dealer. According to Schmiedel, Mercury representatives had told him to just give the other Baton Rouge dealers "lip service" when questioned about a possible Mercury deal with Travis. Additionally, Glascock and Martrain testified about a meeting at a bank in which Glascock and Martrain were about to close the store. During this meeting, plaintiffs received a cellular telephone call from Koenen promising them extra financing from Mercury which convinced plaintiffs to keep the business open. Based on these specific assurances from Schmiedel and Koenen, Glascock testified that he put up an additional $ 50,000 in capital, and that he and Martrain decided not to close the Baton Rouge dealership.

In October 1998, the existence of a business relationship between Mercury and Travis became well-known to both Glascock and Martrain. On October 16, 1998, Travis signed its letter of intent to become a Mercury dealership. The testimony and other evidence presented at the trial established that some Mercury products were already **[**24]** at the Baton Rouge Travis dealership at this time although Travis did not officially become a Mercury dealer until January 1999. Glascock and Martrain claim that this was a direct contradiction to the reassurances they had received from Rohrbach, Randolph, and Schmiedel. Glascock also testified that Schmiedel apologized to them when Travis became a Mercury dealer. Mercury disputes the testimony set forth above and denies ever making any promise to Glascock and Martrain that it would not sign Travis as a Mercury dealer.

After Travis officially became a Mercury dealer, relations between Mercury and Glascock and Martrain began to sour, and Mercury engaged in a series of discussions and meetings with Glascock and Martrain in an attempt to save the financially troubled LA Boating and the relationship between the parties. The first of these meetings occurred on October 29, 1998 between Schmiedel, Glascock and Martrain. **[*534]** At this meeting, Glascock and Martrain claim they asked for extra financing to keep LA Boating afloat. Mercury's proffered evidence claims they discussed LA Boating's poor financial situation at this meeting and discovered that gross sales were down, and LA Boating was losing **[**25]** $ 40,000 a month in overhead while paying $ 20,000 a month in interest alone. Glascock and Martrain claim they made it abundantly clear that if LA Boating did not receive additional working capital quickly, the Baton Rouge dealership was going to close.

The second meeting and additional telephone negotiations occurred during November 1998. At a meeting held on November 17, 1998 between Koenen and Martrain, a non-interest bearing loan from Mercury for $ 350,000 was requested. The testimony regarding this request and meeting is highly disputed. Koenen testified Martrain requested the loan, and she made no promises that the loan would be approved because the loan request was unprecedented. She noted that the request essentially asked that Mercury assist plaintiffs in paying off delinquent debts that the plaintiffs owed to Mercury and other lenders. Koenen also testified that she would never, in these negotiations or in any of the other negotiations she had with Glascock and Martrain, have had the authority to bind Mercury or MMAC to make any loan to them. Glascock and Martrain testified that Koenen had suggested the loan request, and that in his experience as a marine dealer, loans like **[**26]** that requested were commonplace. In fact, Martrain testified at the antitrust trial that he told Koenen he was in no position to suggest interest rates, and it was Koenen who specifically suggested a zero interest rate.

The loan request was subsequently denied by Mercury, and on December 7, 1998, Water Craft closed its LA Boating store. Mercury denies any of its actions or inactions caused the losses sustained by LA Boating. It argued and also presented evidence to show that absenteeism on the part of Glascock and Martrain, too much inventory, a general downturn in the marine products market, and LA Boating's inability to meet lawful competition all contributed to LA Boating's failure. Glascock and Martrain disagree, and argued and presented evidence that the losses sustained by LA Boating and its ultimate closure were attributed to Mercury's anticompetitive behavior in allegedly promising plaintiffs that Travis would not become a Mercury dealer [13] and the misrepresentations made by Mercury representatives to Glascock and Martrain during the formation and operation of LA Boating.

[27] E. The Slidell and Hammond Stores**

Because the principal claim and counter-claim relate to Glascock's other stores in Slidell and Hammond, the Court must address the Slidell and Hammond stores owned by Glascock before applying the law to the facts of this case. With regard to the principal claim, Glascock and Martrain claim that Glascock's "Hammond Boating Center" and their Slidell store were both affected by the closure of LA Boating. Basically, the plaintiffs claim these stores sustained severe credit problems because of the extra slack they had to pick up during the liquidation and debt collection processes related to LA Boating's closure.

In its counter-claim, Mercury claims that the debts owed to it by the Slidell store are Water Craft debts recoverable in this lawsuit. In January 1998, Water **[*535]** Craft acquired the assets of another dealership, Boating Centres, Inc. d/b/a Slidell Boating Centre, which was owned in part by Glascock. Glascock owned the building in which the Slidell dealership was located, and Water Craft leased the building from Glascock. To accomplish the transfer from Boating Centres, Inc., Martrain paid $ 125,000 to Glascock, and Glascock transferred **[**28]** the assets of Boating Centres, Inc. d/b/a Slidell Boating Centre to Water Craft d/b/a Slidell Boating Centre. On February 11, 1998, Martrain signed a Sales & Service Agreement with Mercury on behalf of Water Craft, doing business as "Slidell Boating Centre," in Slidell. The terms of this Sales & Service Agreement are virtually identical to the Sales & Service Agreements that LA Boating signed with Mercury.

At the time LA Boating was closing and liquidating, the Slidell store showed a profit of $ 77,682.68 in 1998. Further, the parties have stipulated that Slidell was not part of the Baton Rouge marine products market area, and the Baton Rouge Travis dealership had no influence on the Slidell market. In July 1999, Water Craft sold the Slidell dealership to a third-party, SS Marine, Inc.

II. Law and Analysis

A. Antitrust Claims

The plaintiffs have filed this secondary-line injury antitrust claim pursuant to *15 U.S.C. § 13(a)* which provides in part:

> ***HN1***[] It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities **[**29]** of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such

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[13] In essence, plaintiffs are arguing that Mercury was going to violate the antitrust laws against Travis to give plaintiffs the entire market and keep Travis out. The court assumes it would then be trying an antitrust suit filed by Travis.

> discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the **[**30]** market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

HN2[] The Fifth Circuit follows the United States Supreme Court and other circuits in making a distinction between primary-line injury and secondary-line injury in claims under the Act. [14] Primary-line injury occurs at the level of direct competition and customarily results when a seller uses predatory pricing policies to enhance his market position over competitors, **[*536]** thereby diminishing competition and increasing market concentration. [15] Secondary-line injury occurs when a large purchaser uses its vast purchasing power to obtain low prices from the manufacturers or distributors whose products it stocks, thereby enabling it to undersell competitors. [16] A secondary-line injury occurs when competition between favored and disfavored purchasers of a discriminating seller is unlawfully affected. [17] The parties agree, and the Court finds, that this case is clearly a secondary-line injury case. A plaintiff alleging **[**31]** secondary-line injury must prove that a seller made a sale to two different buyers at the same functional level of competition charging different prices to each. [18]

HN3[] To establish illegal secondary-line price discrimination between purchasers, a plaintiff must prove the following elements by a preponderance of the evidence: (1) sales made in interstate commerce; (2) the commodities **[**32]** sold to purchaser were of the same grade and quality as those sold to other purchasers; (3) that seller discriminated in price between purchasers; and (4) that the discrimination had a prohibited effect on competition. [19] A plaintiff who meets the above requirements establishes a prima facie case of price discrimination. In addition to the above requirements, the plaintiff has the burden of proving the extent of his actual injuries to recover damages. [20]

HN4[] A price discrimination within the meaning of *§ 13(a)* is merely a "price difference." [21] More specifically, price discrimination is defined as charging different buyers different prices for the same items. A plaintiff in a secondary-line injury action must prove actual instances of price discrimination. If the challenged lower price is in

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[14] *Lycon, Inc. v. Juenke, 250 F.3d 285, 288 (5th Cir.)*, *cert. denied,* ***534 U.S. 892, 122 S. Ct. 209, 151 L. Ed. 2d 148 (2001)***; *Eximco, Inc. v. Trane Co., 737 F.2d 505, 515 (5th Cir. 1984)*.

[15] The courts have gone further to identify third-line injury and fourth-line injury, but such explanations are not necessary since this is an undisputed secondary-line injury case.

[16] *Eximco, supra at 515*.

[17] *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556, 110 S. Ct. 2535, 2543, 110 L. Ed. 2d 492 (1990)*.

[18] *Eximco, supra at 515*.

[19] *Texaco, supra at 556, 110 S. Ct. at 2543*; *Lycon, supra at 288*.

[20] *Texaco, supra at 556, 110 S. Ct. at 2543*.

[21] *Texaco, supra at 557, 110 S. Ct. at 2543-44*.

fact, and not merely theoretically, made available to the allegedly disfavored purchaser, the seller cannot **[**33]** be held liable under the Act. [22]

HN5[] The "prohibited effect on competition" element is usually defined by courts by directly quoting the language of the statute which says ". . .may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit **[**34]** of such discrimination, or with customers of either of them." [23] This language focuses on two general effects under this portion of the Act - the effect on the general competitive market and the effect on the individual competitors or the disfavored purchaser. With respect to the effect on the general competitive market, the Act does not require **[*537]** that the discrimination in fact have harmed competition. Instead, the Act requires the plaintiff show there is a reasonable possibility that the price difference may harm competition. This reasonable possibility of harm is usually referred to as competitive injury. Once the plaintiff proves a discrimination in price, the burden then shifts to the defendant to negate competitive injury. Unless rebutted by one of the *Robinson-Patman Act*'s affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to establish a claim under the Act. [24]

[35]** Where the plaintiff claims the effect is on the individual competitors or the disfavored purchaser, the burden of proof is greater. This standard was set forth by the United States Supreme Court and the Fifth Circuit Court of Appeals in *Chrysler Credit Corp. v. J. Truett Payne.* [25] In *Chrysler,* the United States Supreme Court held ***HN6***[] "to recover treble damages[,]. . .a plaintiff must make some showing of *actual injury* attributable to something the antitrust laws were designed to prevent. It must prove more than a violation of [the Act], since such proof establishes only that injury may result." [26] On remand, the Fifth Circuit held that Chrysler had not violated the Act under the Supreme Court's standard by offering the product at different prices based on incentives. According to the Fifth Circuit, the Supreme Court standard requires a plaintiff to demonstrate by a preponderance of the evidence that an actual antitrust violation has caused his damages. The plaintiff in *Chrysler* simply had not done this because there was a question as to whether discrimination even existed because the challenged plan was available to all dealers. The Fifth Circuit further held that **[**36]** conclusory statements by the plaintiff, without evidentiary support of actual causation, was not sufficient to meet the burden of proof. [27] This case is extremely important because it illustrates what is now required of a plaintiff to prove a "prohibited effect on competition." The "prohibited effect on competition" element of the prima facie case requires a showing that the discrimination have *caused* an *actual injury* to the disfavored purchaser as a prerequisite for recovery under the federal antitrust laws.

HN7[] Causation under the "prohibited effect on competition" element is established by examining two things: whether the favored and disfavored buyers **[**37]** were in actual competition with each other and proof of injury. Thus, to establish competitive injury in a secondary-line case, the disfavored purchaser must prove that it was engaged in actual competition with the favored purchasers at the time of the price discrimination. This actual

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[22] *Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 326 (5th Cir. 1998)*, *cert. denied,* ***525 U.S. 1068, 119 S. Ct. 798, 142 L. Ed. 2d 660 (1999)***. In *Metro Ford,* a vehicle dealership claimed price discrimination under the Act because of a competitive price assistance program used as a discount incentive for all of its dealers. The plaintiff dealer failed to demonstrate that the same level of discount was not available to all dealers, and the court concluded the dealership was treated the same as all other dealers with respect to discounts.

[23] *15 U.S.C. § 13(a)*.

[24] *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35, 103 S. Ct. 1282, 1288-89, 75 L. Ed. 2d 174 (1983)*.

[25] *Chrysler Credit Corp. v. J. Truett Payne Co., 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*.

[26] *Id. at 562, 101 S. Ct. at 1927*.

[27] *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 581 (5th Cir. 1982)*, *cert. denied,* ***459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)***.

competition requirement is satisfied by showing the competitors competed at the same functional level and within the same geographic market. [28] Plaintiffs rely on *FTC v. Morton Salt Co.,* [29] in support of their argument that plaintiffs have a lesser burden of proof on the second component of causation, proof of injury. Under *Morton Salt,* **[*538]** an injury to competition is established by proof of a "substantial" price discrimination between competing purchasers over time. However, the Court finds that *Morton Salt* is not applicable under the facts of this case. [30]

[38]** Thus, in summary, ***HN8***[] to establish illegal secondary-line price discrimination between purchasers, a plaintiff must prove the following elements: (1) sales made in interstate commerce; (2) the commodities sold to purchaser were of the same grade and quality as those sold to other purchasers; (3) that the seller discriminated in price between purchasers; and (4) that the discrimination had a prohibited effect on competition. A price discrimination within the meaning of *§ 13(a)* is an actual price difference. The "prohibited effect on competition" element of the prima facie case requires that the discrimination have *caused* an *actual injury* to the disfavored purchaser. Causation is established by examining whether the favored and disfavored buyers were in actual competition with each other and proof of injury. Actual competition requires that the plaintiff prove a relevant product and geographic market to be defined. Proof of injury to competition is established prima facie by proof of a "substantial" price discrimination between competing purchasers over time.

The Court finds that plaintiffs have failed to establish liability under the Robinson-Patman Act. Specifically, plaintiffs **[**39]** failed to satisfy their prima facie case because they have not shown an actual injury to a disfavored purchaser because of a violation of the federal antitrust laws. Also, plaintiffs did not prove that they were in actual competition with Travis. The Court also finds that a relevant geographic and product market was not established by the testimony and evidence presented in this case. Finally, the Court finds, in the alternative, that Mercury satisfied the elements of the meeting competition defense which precludes liability in a claim filed under the Robinson-Patman Act. The Court now turns to a more detailed discussion of the evidence to set forth why plaintiffs failed to satisfy their burden of proof on the antitrust claims.

1. Failure to Establish Causation or Injury to Competition

The Court discussed the causation element set forth in *Chrysler Credit Corp. v. J. Truett Payne Co.* [31] earlier in this opinion. Because of its importance and applicability to this case, the Court believes further discussion is required. In *Chrysler,* the manufacturer, Chrysler, offered nineteen sales incentive programs to its Birmingham dealers in which the dealers would receive bonuses **[**40]** based on either the number of retail sales or wholesale purchases in excess of an objective set by Chrysler. The dealer, J. Truett Payne, was the long-time dominant dealer in Birmingham, and consequently, Payne's objective was set higher by Chrysler. [32] Payne failed to meet its objective, received less bonuses than other area dealers, and eventually went out of business. As a result, it claimed the disparity in bonus payments constituted price discrimination that had resulted in its loss of profits, and sued Chrysler under *Section 4* and *2(a) of the Clayton Act*, as amended by Robinson-Patman Act. [33] In response to plaintiffs' **[*539]** contentions, Chrysler argued that the sales incentive programs were nondiscriminatory, had no effect on competition, and did not injure Payne because the programs were available to all dealers on a

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[28] *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (2d Cir. 1987)*.

[29] *334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)*.

[30] *See* *Borden Company v. FTC, 381 F.2d 175 (5th Cir. 1967)*, which required a competitive advantage by which competition could be injured and that one customer be favored over another.

[31] *670 F.2d 575 (5th Cir. 1982)*, *cert. denied,* ***459 U.S. 908, 103 S. Ct. 212, 74 L. Ed. 2d 169 (1982)***.

[32] *Chrysler, supra at 579*.

[33] *Id. at 577, 579*.

nondiscriminatory basis. [34] In an earlier opinion, the Fifth Circuit had ruled in favor of Chrysler at the directed verdict stage, [35] and reasoned that Payne had failed to introduce evidence of an injury attributable to Chrysler's alleged price discrimination. In that same opinion, the Fifth Circuit had also found that price discrimination which threatens competition, **[**41]** but does not cause actual competitive injury, will not support an action for damages. On review, the United States Supreme Court vacated and remanded the case for further proceedings. The Supreme Court ordered the Fifth Circuit to review the record for specific evidence in the record of violations of the price discrimination law, injury, or damages using the following standard: To recover treble damages, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent; it must prove more than a violation of *Section 2(a)*, since such proof establishes only that injury may result. [36]

In determining **[**42]** if a violation of the Robinson-Patman Act occurred on remand, the Fifth Circuit first concluded that in order to recover treble damages under *Section 4 of the Clayton Act*, a plaintiff must prove (1) a violation of the antitrust laws; (2) cognizable injury attributable to the violation; and (3) at least the approximate amount of the damage. [37] **[**43]** Next, the Court identified this as a secondary-line injury case, and found the plaintiff must demonstrate the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from the disfavored competitor. [38] Considering these standards, the Court next turned to Payne's evidence and found that speculative and unsupportive testimony during the trial did not link the incentive programs to Payne's failure to compete with dealers in the Birmingham area. The Court further found that Payne could not benefit from the *Morton Salt* inference because it was not available to a plaintiff who had not proven the elements that support the inference. [39] Thus, the Court held that no violation of the Robinson-Patman Act had occurred. [40]

The Court then turned to the cognizable injury requirement, and held that a plaintiff must demonstrate an antitrust injury by a preponderance of the evidence in addition to the violation of the Act requirement. The Court also found that the plaintiff had the burden of establishing this standard "as a matter of fact and with a fair degree of certainty." The Fifth Circuit specifically held that conclusory statements alone, without evidentiary support, will not satisfy this standard. After reviewing the record, the Court characterized Payne's evidence as speculative and unsupportive, and found the evidence insufficient to demonstrate actual injury attributable to something **[**44]** the antitrust laws were designed to prevent. [41] Thus, the "prohibited effect on competition" element **[*540]** of the prima facie case requires a showing that the discrimination has caused an actual injury to the disfavored purchaser that is attributable to an alleged violation of the antitrust laws before treble damages under the Robinson-Patman Act may be awarded.

This Court finds that the testimony and evidence presented in this case is speculative and conclusionary as to Mercury's alleged violation of the antitrust laws. Plaintiffs have not presented any evidence to demonstrate an actual injury attributable to something the antitrust laws were designed to prevent. Even under a liberal

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[34] *Id. at 579*.

[35] Today, this would be judgment as a matter of law stage.

[36] *Id. at 578*.

[37] *Id. at 579*.

[38] *Id. at 580*.

[39] "*Morton Salt* upheld an inference of likely injury from the fact of substantial price differences granted to market leaders in a highly competitive market in which minor price differences significantly affected competitors' low profit margins." *Id. at 581*. The Court discussed the *Morton Salt* inference earlier in this opinion.

[40] *Id. at 581-82*.

[41] *Id. at 581-82*.

interpretation of the legal standard and facts of this case, Travis did not enter the marketplace as a competing Mercury dealer until two months before the plaintiffs' Baton Rouge dealership closed. Travis signed the letter of intent to become a Mercury dealer on October 16, 1998, and the testimony **[**45]** supports a finding that there were Mercury products on the site of the Baton Rouge Travis dealership at this time. Travis officially became a Mercury dealer under the contract effective January 1999. LA Boating closed its doors on December 7, 1998 and began its liquidation process. These dates illustrate that LA Boating only competed with the Baton Rouge Travis dealership for this short two month period if it competed at all. Even if Mercury had violated the antitrust laws by offering greater discounts to Travis, it would be difficult to conclude that the losses sustained by Water Craft were attributable to such a violation when it had competed with Travis for such a short period of time.

It is even more difficult to prove that Water Craft's losses were attributable to Mercury's alleged violation of the antitrust laws because the testimony and evidence presented at the trial supports a finding that other reasons led to the eventual demise of the LA Boating store. LA Boating operated its first year without Travis as a competing Mercury dealer, and still sustained a $ 70,000 loss. This outcome occurred despite the business's pro rata business plan which had projected a profit of over **[**46]** $ 370,000 for the first year. Correspondence dated before Travis became a Mercury dealer was offered into evidence made references to a "bad year" for LA Boating, and also contained references to hurricanes and a general downturn in the market as reasons for Water Craft's economic troubles. Glascock himself admitted during his testimony that there had been a downturn in the market at the same time that LA Boating revenues were declining. Finally, the evidence establishes that the LA Boating store was in serious trouble by August 1998, months before Travis had even signed the letter of intent to become a Mercury dealer. By this time, Glascock and Martrain had already decided to shut down their failing dealership, even without any competition from Travis as a Mercury dealer. In addition, financial specialists were already very concerned about the fact that LA Boating was classified as being SAU. This meant they were selling products out of inventory, but using the proceeds to pay off other creditors instead of the creditor which had provided the inventory.

Considering these facts, the Court finds that Water Craft's injuries and the closing of the LA Boating store were not attributable **[**47]** to Mercury's offering deeper discounts to Travis. The period of competition between Travis and LA Boating was too short to support a finding that all of the injuries Water Craft alleges it sustained are attributable to Mercury's alleged violation of the antitrust laws. There are simply too many other reasons that caused the eventual closing of Water Craft. Thus, plaintiffs have not established causation between the actual injury sustained by Water Craft and Mercury's alleged violation of the antitrust laws.

[*541] 2. Failure to Establish a Geographic and Product Market

Plaintiffs also failed to prove a prima facie Robinson-Patman claim because they failed to offer testimony or other evidence that adequately defined the relevant geographic and product markets as well as the product itself.***HN9***[] It is well settled that the relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine if federal antitrust laws have been violated. [42] In this case not only did plaintiff fail to establish the requisite geographic markets, it failed to establish what product was involved. As noted earlier, there are dealers which just sell engines, **[**48]** there are package dealers, and dealers which act as full-line dealers. [43] Plaintiff failed to establish which, if any, of these products constituted the relevant product market.

In *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* [44] a purified water manufacturer filed suit seeking damages for violations of several antitrust statutes including the *Clayton Act,* the *Sherman Act*, and Texas ***antitrust law***. The

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[42] *Olympia Co., Inc. v. Celotex Corp., 597 F. Supp. 285, 293 (E.D.La. 1984)* (Schwartz, J.), *aff'd, 771 F.2d 888 (5th Cir. 1985)*, *cert. denied,* ***493 U.S. 818, 110 S. Ct. 73, 107 L. Ed. 2d 39 (1989)***.

[43] *See* Section I(A) of this opinion, *supra.*

[44] *300 F.3d 620 (5th Cir. 2002)*.

district court dismissed the antitrust claims because the manufacturer had failed to prove a relevant geographic market. The Fifth Circuit affirmed. [45]

[49]** In affirming the district court, the Fifth Circuit required that a relevant geographic and product market be proven in order for a prima facie case of Clayton and Sherman Act violations to be established. [46] The Court also set forth the standards required to properly prove what the relevant product and geographic markets were. With regard to product market, the Court considered the extent to which the seller's product is "interchangeable in use" and the degree of "cross-elasticity" of the demand between the product itself and its substitutes. Factors used in this analysis include public recognition of a submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. [47]

In defining the relevant geographic market, the Court stated the standard was the area of effective competition charted **[**50]** by careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies. Also, the relevant geographic market should correspond to the commercial realities of the industry and be economically significant. The geographic market can be the entire nation, or it could be as small as a single metropolitan area. [48] **[**51]** The factors to consider in determining the economic significance of the relevant geographic market include the size, cumbersomeness, and other characteristics of the relevant product; regulatory constraints impeding the free flow of competing goods into the area; perishability of products; and transportation barriers. [49] The economic **[*542]** significance of the relevant geographic market does not depend on singular elements such as population, income, political boundaries, or geographic extent. Rather, it depends on the relationship between these elements and the characteristics of competition in the relevant product market within a particular area. [50]

After setting forth the requirements for an antitrust plaintiff to prove the relevant geographic and product markets, the Fifth Circuit dismissed all of the antitrust claims in *Apani* because the plaintiff had failed to define a relevant geographic market. According to the Court, where a plaintiff fails to define a relevant market or alleges one that is insufficient, the antitrust claims must be dismissed. [51] The decision in *Apani* illustrates that failure to adequately define the relevant geographic and product markets is fatal to an antitrust claim in the Fifth Circuit.

HN10[] Courts consistently require that expert testimony adequately define the relevant geographic and product markets in antitrust cases. Plaintiffs failed to present such expert testimony in this case. In *Surgical Care Center of Hammond, L.C. v. Hospital Service District* **[**52]** *No. 1 of Tangipahoa Parish,* [52] the Fifth Circuit affirmed a district court's dismissal of antitrust monopolization and tying claims because the plaintiff had failed to define a relevant geographic market. [53] In determining that the plaintiff failed to define a relevant geographic market, the

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[45] *Id. at 623-24*.

[46] *Id. at 625, 627*.

[47] *Id. at 626*.

[48] "An area containing only a small percentage of business activity may qualify as being economically significant if the relevant competition in that specific area is insulated from equivalent competition elsewhere." *Id. at 627*.

[49] *Id.*

[50] *Id. at 626-27*.

[51] *Id. at 628*.

[52] *309 F.3d 836 (5th Cir. 2002)*.

Court held that the preliminary inquiry in an antitrust case is whether the defendant possesses market power in a relevant market. This inquiry requires a clear definition of the relevant geographic market. [54] Geographic evidence must take into account where consumers can practicably go, not where they actually go. Thus, a plaintiff cannot rely solely on a competitor's service area to compose the geographic market. This is exactly what the Fifth Circuit found the plaintiff had done. Instead, the Court said a plaintiff would fail to meet its burden of establishing a geographic market unless it showed where a consumer could practicably go. [55]

[53]** In *Surgical Care,* the reason why the plaintiff had failed to show the elements necessary to prove geographic market was attributed to the inadequate testimony of the expert. In noting the expert had failed to define a relevant geographic market, the Court stated:

> Nevertheless, St. Luke's expert did not attempt to identify the hospitals or clinics that may be deemed competitors of North Oaks. He relied solely on what he defined as North Oaks's service area to compose the geographic market. Absent a showing of where people could practicably go for inpatient services, St. Luke's failed to meet its burden of presenting sufficient evidence to define the relevant geographic market. Without a proper market definition, St. Luke's could not establish the predicate of a monopolistic leveraging claim, i.e., market power in the market for inpatient hospital services, and thus could not show a dangerous probability that North Oaks would gain monopoly power in the outpatient surgery market. The district court, after carefully analyzing the reports presented by experts for both St. Luke's and North Oaks, found that St. Luke's had not adduced sufficient evidence to delineate the relevant **[**54]** geographic **[*543]** market. St. Luke's counters that a detailed analysis of the relevant geographic market is not necessary . . .We hold that the district court did not err in dismissing St. Luke's claims of attempted monopolization because St. Luke's failed to meet its burden of presenting sufficient evidence to define the geographic market. [56]

Similarly, in *Lantec, Inc. v. Novell, Inc.,* [57] the Tenth Circuit affirmed a district court's dismissal of antitrust claims because the relevant geographic and product markets had not been established by proper expert testimony. [58] The Court first noted that a relevant market had to be established in order for the plaintiff to prevail in an antitrust suit. A relevant market is made up of the product at issue and available substitutes for that product. In defining the relevant market, [59] two aspects must be considered: the product market and the geographic market. [60] In reviewing the expert testimony, the Court found that the expert **[**55]** used unreliable data; failed to understand the product or the product market; did not conduct or cite surveys revealing consumer preferences; did not calculate the cross-elasticity of demand to determine which products were substitutes; gave a different opinion from that he gave in an earlier expert report; and failed to address changes in the product market. [61]

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[53] *Id. at 840, 842*.

[54] *Id. at 839*.

[55] *Id. at 840*.

[56] *Id.* (Citations omitted.)

[57] *306 F.3d 1003 (10th Cir. 2002)*.

[58] *Id. at 1027, 1030-31*.

[59] The Court divided its analysis into the evidence presented by both expert and lay testimony when it determined that no relevant geographic market had been defined.

[60] *Id. at 1024*.

[61] The expert was also criticized for relying heavily on his own personal experiences and personal conversations with consulting firms in a limited geographic area to define a worldwide market. *Id. at 1025-26*.

The Court also rejected the plaintiff's after-the-fact attempts to use the record to define a geographic market because **[**56]** of flaws in the expert's testimony. The Court held that "skimpy evidence" of one's own experiences in the market was not sufficient to support a worldwide geographic market. [62] The Tenth Circuit's analysis illustrates that courts place a high value on expert testimony and reports in determining whether the relevant geographic and product markets have been proven. It is also clear that the Court in *Lantec* refused to permit a plaintiff to use facts in the record to establish the relevant geographic and product market where the expert has failed to do so.

In *Bailey v. Allgas, Inc.,* [63] the Eleventh Circuit also adopted a requirement that adequate expert testimony is required to define the relevant geographic and product market to a claim brought under the Robinson-Patman **[**57]** Act. In *Bailey,* the plaintiff brought a primary-line price discrimination lawsuit under the Robinson-Patman Act. The district court found that the expert's methodology failed to meet the *Daubert* standard and granted the defendant's motion for summary judgment. [64]

The Eleventh Circuit held, as does the Fifth Circuit, that ***HN11***[] defining a relevant market requires expert identification of both the product at issue and the geographic market for that product. According to the **[*544]** Eleventh Circuit, construction of the relevant market requires expert testimony, [65] and where an expert fails to provide a sufficient basis upon which a relevant market can be defined, a Robinson-Patman claim fails. [66] The Eleventh Circuit found that the expert failed to define the product because he failed to analyze substitutes for the relevant product, conduct surveys of homes in the geographic area, or determine the cross-elasticity of the product. **[**58]** [67] The Court also found that the expert had failed to identify the relevant geographic market because he only defined it as the intended area of service instead of properly assessing all of the factors that must be considered when measuring the relevant geographic market. [68]

[59]** Applying the above jurisprudence to the facts of this case, the Court finds that the expert testimony offered by plaintiffs did not properly establish a relevant geographic and product market.

Dr. Stuart Wood was tendered as an expert by the plaintiffs in this case, and he openly admitted the deficiencies in his opinion and analysis during cross-examination. It is clear that Dr. Wood did not analyze or set forth the necessary factors required by the jurisprudence to prove a geographic market. Specifically, Dr. Wood did not examine where the consumers of the product went to purchase outboard motors or where exactly the consumers were buying their product. Instead, Dr. Wood testified that he felt the geographic market was tacit in this case because LA Boating was located only a short distance from the Baton Rouge Travis dealership. This tacit finding is not supported by the jurisprudence. The relevant cases clearly illustrate that the determination of a geographic market is more complex than the mere distance between two competitors. Thus, the Court finds that Dr. Wood's assumption that the geographic market in this case was tacit is an incorrect assumption as a matter of law. This **[**60]** incorrect finding fails to support a critical element plaintiff must prove in their antitrust claim.

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[62] Despite factual evidence in the record that illustrated where the product was sold, the Court held the plaintiff had failed to establish a worldwide geographic market with this mere evidence in the record. *Id. at 1026-27*.

[63] *284 F.3d 1237 (11th Cir. 2002)*.

[64] *Id. at 1239*.

[65] This statement by the Court affirmed the reasoning of the District Court in *Bailey v. Allgas, Inc., 148 F. Supp.2d 1222 (N.D.Ala. 2000)* (Blackburn, J.) that (a) an essential element of any Robinson-Patman claim is the definition of a relevant geographic market and (b) defining such a market may only be accomplished with expert testimony. *Id. at 1242*.

[66] *Bailey, supra at 1246-47*. This is the Eleventh Circuit *Bailey* opinion.

[67] *Id. at 1247*.

[68] According to the Court, such factors include "price data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors." *Id. at 1247*.

Dr. Wood also failed to conduct the analyses required by the jurisprudence to properly establish a product market. Dr. Wood failed to determine if the product was just the motors or boats and motors, or if the boats and motors were sold as part of a package. Dr. Wood also failed to take into account that the product market could go beyond the scope of Mercury engines. It is clear that Dr. Wood failed to consider the distinction between being a full-line or package dealer. The evidence presented in this case established that Mercury had other competitors in the boat engine market, but Dr. Wood's focus was only on Mercury engines. Dr. Wood's failure to conduct the proper legal and factual analyses and his decision to define the product narrowly contributed to the plaintiffs' failure to adequately define the product market under settled jurisprudence.

[*545] Although the jurisprudence requires adequate expert testimony to define the geographic market and product, the Court finds in the alternative that, even if factual evidence could establish the geographic and product markets, the evidence **[**61]** produced in this case failed to prove these required factors.

Plaintiffs argue the market was obvious because LA Boating was only five to six miles away from the Baton Rouge Travis dealership. Plaintiffs also argue that Mercury representatives admitted in testimony that LA Boating and Travis were in the same geographic market. The Court finds these arguments are without merit. In the deposition and trial testimony presented, there were discrepancies regarding the size of the geographic market that ranged from 25 to 100 miles. Such discrepancies forces the Court to conclude that the relevant geographic market in this case is not as obvious as the plaintiffs contend. The Court acknowledges that the distance between LA Boating and the Baton Rouge Travis dealership would have fallen within any of these ranges. However, this fact is meaningless because the factual evidence offered in this case fails to establish the remaining factors required by the jurisprudence to prove a geographic market.

The testimony and evidence offered in this case never distinguished if the product in this case was limited to the product offered by full-line dealers, or both full-line and package dealers. Further, **[**62]** the facts fail to prove whether the market was limited to Mercury products alone, or if it also extended to Mercury competitors such as Yamaha or OMC.

Therefore, the Court finds that the expert testimony and the factual evidence in this case fails to prove a product or product market as required by the jurisprudence.

3. The Meeting Competition Defense

The defendant also asserts as an affirmative defense the meeting competition defense.

The meeting competition defense to a Robinson-Patman claim is set forth in *15 U.S.C. § 13(b)* as follows:

> ***HN12***[] Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or **[**63]** facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

HN13[] This section expressly establishes certain prerequisites for the successful assertion of the meeting competition defense. The seller-defendant has the burden of proving four requirements in order to establish his defense: (1) to [rebut] the prima facie case thus made by showing that his lower price was made; (2) in good faith; (3) to meet an equally low price; and (4) of a competitor. [69]

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[69] EARL C. KINTNER ET AL., FEDERAL ***ANTITRUST LAW***, § 24.5 (1983).

HN14[] The meeting competition defense is an absolute defense. "The seller has the burden of bringing himself within the exculpating provision of § 2(b), which has been interpreted to afford an absolute defense to a charge of violating § 2(a), notwithstanding **[*546]** the existence of the statutorily prohibited anticompetitive effect." [70]

[64]** The seller also has the burden of proving the meeting competition defense. "Under *[section 13(b)]*, the seller charged with [a violation] has the burden of rebutting a prima facie case of discrimination in price or services or facilities by demonstrating that its lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. Courts have held that, to meet its burden, a defendant who knowingly discriminated in price or services or facilities furnished to a customer must demonstrate the existence of facts that would lead a reasonable and prudent person to believe that granting the lower price or service or facility would meet a competitor's equally low price." [71]

[65]** The United States Supreme Court set forth defendant's requisite burden in proving the meeting competition defense in *Falls City Industries v. Vanco Beverage, Inc.* [72] Here, the Court reiterated its meeting competition defense standard by stating, ***HN15***[] "when proved, the meeting-competition defense of § 2(b) exonerates a seller from Robinson-Patman Act liability." [73] The Court reaffirmed the standard discussed above and held that the meeting-competition defense "at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." [74]

[66]** Further, the Court requires a seller to show that under the circumstances, it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors. [75]

Falls City addresses what facts are required to ***HN16***[] demonstrate the reasonableness requirement in the meeting competition defense: "In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good faith response." [76]

Falls City also **[**67]** discusses the requirement of good faith on the part of the defendant: ***HN17***[] "At the heart of Section 2(b) is the concept of 'good faith.' This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." [77] Whether this standard is met depends upon "the

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[70] *Federal Trade Commission v. Sun Oil Company, 371 U.S. 505, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963) citing Standard Oil Company v. Federal Trade Commission, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239, 47 F.T.C. 1766 (1951)*.

[71] Amy P. Bunk, Annotation, *Meeting Competition Defense under § 2(b) of Clayton Act, as Amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)),* 164 A.L.R. Fed. 633 (2000).

[72] *460 U.S. 428, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)*.

[73] *Id. at 438, 103 S. Ct. at 1290*.

[74] *Id. quoting United States v. United States Gypsum Co., 438 U.S. 422, 451, 98 S. Ct. 2864, 2880, 57 L. Ed. 2d 854 (1978), quoting FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-760, 65 S. Ct. 971, 977, 89 L. Ed. 1338, 40 F.T.C. 906 (1945)*.

[75] *Id.*

[76] *Id. at 439, 103 S. Ct. at 1291*.

facts and **[*547]** circumstances of the particular case, not abstract theories or remote conjectures." [78] **[**69]** The strict requirement of good faith is illustrated throughout federal jurisprudence and secondary sources:

> The only question in any meeting competition defense is whether the seller has acted in good faith in response to a competitive encroachment. Where a seller has good reasons to believe that a competitor is charging lower prices throughout a particular region, it must be allowed to respond accordingly. While 'good faith' is not defined by the Act, the Federal Trade Commission has developed guidelines which now govern the good faith inquiry. Despite these definitions, the good faith element of the meeting competition defense has proved difficult to apply. **[**68]** Thus far, no pattern has emerged for determining whether a given conduct will satisfy the *section 2(b)* good faith requirement. At best, some broad guidelines may be constructed from past decisions. The question of whether a given pricing response is valid remains a factual determination based on the reasonableness of the conduct. The same is true for area-wide pricing. Where there is reasonable proof from past conduct that a competitor is systematically going after a seller's market, the seller should be free to defend its market by meeting the anticipated competition. Because good faith is a flexible and pragmatic concept, a case-by case approach is almost inevitable. [79]

HN18[] Good faith, rather than absolute certainty, is the key requirement. Thus, as long as the seller acts in good faith, it may even inadvertently undercut the competitor's price without forfeiting this defense. [80]

The good faith [81] aspect of the defense can be summarized in the following way: "In general, the basic requirement of the Section 2(b) good faith defense is that the seller's conduct must be a reasonable response to the price discrimination of a competitor; if the seller acts reasonably, good faith will **[**70]** likely be found."

HN19[] If, however, the seller's actions are inappropriate, unnecessary, or unreasonable with respect to the threat posed by its competitor, the seller is not in good faith and will not be allowed to assert the meeting competition defense. [82]

[71]** **[*548]** There are two other facts concerning the meet the competition defense that are relevant in this case. First, there is ***HN20***[] a "meet and not beat" requirement which provides that: ". . .a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to 'meet not beat' the

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[77] *Falls City Industries, supra at 441, 103 S. Ct. at 1292* *citing* *In the matter of Continental Baking Co., 63 F.T.C. 2071, 2163 (1963)*.

[78] *Id. citing* *United States v. United States Gypsum Co., supra at 454, 98 S. Ct. at 2882*. Note that Kintner and Bauer agree that the basic standard of the meeting competition defense is reasonable and prudent conduct. "Good faith for the purposes of the meeting competition defense is conduct based on 'the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor' or 'the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.'" EARL C. KINTNER ET AL., FEDERAL ***ANTITRUST LAW***, § 24.8 (1983).

[79] Nwaneri, Angela. *The Good Faith Meeting Competition Defense to a Section 2(a) Violation of the Robinson-Patman Act: Area-Wide Pricing as a Valid Response to Competition,* 14 Wm. Mitchell L. Rev. 759, 859 (Fall 1998).

[80] HOLMES, WILLIAM C., ***ANTITRUST LAW*** HANDBOOK § 4.4 (2004) *citing* *Falls City Industries v. Vanco Beverage, Inc., 460 U.S. 428, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)*.

[81] The Fifth Circuit case *Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970)* is an example of where good faith was found. The Fifth Circuit noted that although "summary judgment judgments in antitrust cases often are inadvisable," it was proper because the plaintiff failed to introduce the evidence to question or contradict the defendant's asserted good faith defense. *Id.* at note 84, *citing* *Jones, supra at 569, 574*.

[82] *Id. at 390*. *See also* *McWhirter v. Monroe Calculating Machine Co., 76 F. Supp. 456 (W.D. Mo. 1948)* (Duncan, J.) as an example of conduct which led to the denial of the defense.

competitor's low price." [83] Second, the Supreme Court found this defense applies to both retaining old customers and gaining new ones when it stated: "Section 2(b) . . .does not distinguish [84] between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers." [85]

The Court finds that, under the testimony and other evidence **[**72]** presented in this case, Mercury has proved the required elements of the meeting competition defense by more than a preponderance of the evidence. The evidence presented shows that it was reasonable for Mercury to believe that the discounts it gave to Travis were necessary to meet its competitor, OMC. In addition, the evidence presented shows that Mercury acted in good faith when it negotiated the discounts available to Travis. Mercury's intent at the time was not to drive Water Craft or any of its other dealers into debt and out of business. To the contrary, the testimony shows that Mercury benefitted when its dealers were able to compete with its competition. Mercury wanted to provide Travis with the same discounts it was receiving from OMC so that Mercury could adequately compete with OMC. The evidence also reveals that Mercury was losing its dealers to OMC, a fact that caused it to try to keep the dealers it had as well as allowing its dealers to compete with OMC.

The testimony and evidence also reveal that Mercury was reasonable in believing that it had to provide Travis with these specific discounts to compete with OMC. Even Glascock testified that it was well known within the **[**73]** marine industry that Travis was receiving substantial discounts from OMC. Further, the Mercury employees who testified or were deposed stated that the caliber of the discount that Travis was receiving from OMC was common, though speculative, knowledge in the marine industry. Also, the Court cannot overlook the fact that former OMC employees went to work for Mercury, and it is very possible and indeed probable that substantial information regarding the agreement Travis had with OMC was made known to Mercury. Finally, the low prices that Travis was able to provide to its consumers as an OMC dealer should have and indeed did support Mercury's reasonable and supported belief that it had to provide Travis with the discount that it did in order to secure it as a dealer and to compete with OMC.

The evidence presented in this case also shows that Mercury acted in good faith when it negotiated its discounts with Travis. The dealership scheme existing between Mercury and its dealers clearly shows that it was not in Mercury's best interest to drive its own dealers out of business. In reaching this conclusion on the meeting competition defense, the Court does not find and indeed cannot conclude **[**74]** that Mercury always had the best interest of its dealers at heart when negotiating with Travis. However, under the **[*549]** evidence presented, the Court finds that Mercury had no intent to drive LA Boating out of business by signing Travis as a dealer. Instead, the evidence showed that Travis was dealing with OMC both before and during the time that it was negotiating with Mercury. Travis was putting OMC engines instead of Mercury engines on its boats. At the same time, Travis was rapidly expanding its presence in the marine industry, and this expansion was occurring with OMC engines. Consequently, Mercury was losing its market share and was forced to take action. Thus, Mercury had to sign Travis in order to compete with OMC. These facts illustrate that Mercury was acting reasonably and in good faith in negotiating a discounts with Travis. Thus, Mercury has proven the meeting competition defense by a preponderance of the evidence. Therefore, plaintiffs' federal antitrust claims would be barred even had plaintiffs been able to prove the elements required to support an antitrust claim, which it clearly failed to do under the facts of this case.

B. State Law Claims

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[83] *Falls City Industries, supra at 1294, referencing United States v. United States Gypsum Co., supra at 454, 98 S. Ct. at 2882*.

[84] The Court stated that such a distinction would be inconsistent with the section's language and logic.

[85] *Id.* (Citations omitted.)

The Court now turns **[**75]** to a discussion of the plaintiffs' state law claims based on breach of contract, detrimental reliance, fraud, and misrepresentation. The Court has jurisdiction over these claims pursuant to *28 U.S.C. § 1332*. Under the *Erie* doctrine, [86] the Court must apply Louisiana substantive law in reaching its decision in this case.

1. Breach of Contract

As noted earlier, plaintiffs have asserted a breach of contract claim under Louisiana law. This claim is governed by provisions of the Louisiana Civil Code and applicable Louisiana jurisprudence.

HN21[] A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished. [87] A contract has the effect of law between the parties, and courts are bound to give legal effect to the parties' agreements. [88] A contract may be in writing or made orally as long as the law does not require specific form requirements **[**76]** to be met. If the agreement has been reduced to writing, and the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. [89] "[This] rule. . .does not authorize a perversion of language, or the exercise of inventive powers for the purpose of creating an ambiguity where none exists, nor does it authorize the court to make a new contract for the parties. . ." [90] In fact, courts generally find that the meaning and intent of the parties to a written instrument should be determined within the four corners of the document. Its terms normally cannot be explained or contradicted by extrinsic evidence. [91]

[77]** **[*550]** The determination of whether a contract is clear or ambiguous is a question of law. [92] The Fifth Circuit, applying Louisiana law, explained this distinction in *Texas Eastern Transmission Corp. v. Amerada Hess Corp.* [93] According to the Court, a contract provision is not ambiguous where only one of two competing interpretations is reasonable or merely because one party can create a dispute in hindsight. However, a contract provision is considered ambiguous when it is uncertain what the parties' intentions were and its provisions are susceptible to more than one reasonable meaning under the circumstances and applicable rules of construction. [94]

Although the agreement between the plaintiffs and Mercury was reduced to writing, the plaintiffs base their breach of contract and detrimental **[**78]** reliance claims on oral misrepresentations and promises allegedly made by Mercury representatives prior to and after the written Sales and Service Agreements were executed. Mercury has not claimed that the alleged oral agreements made between it and the plaintiffs were required to be in writing under

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[86] *See* *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*.

[87] *La. Civ. Code art. 1906*.

[88] *Rivercity v. American Can Co., 600 F.Supp 908, 916 (E.D.La. 1984)* (Arceneaux, J.), *aff'd,* *753 F.2d 1300 (5th Cir. 1985)*.

[89] *La. Civ. Code art. 2046*.

[90] *Badalamenti v. Jefferson Guar. Bank, La. App. 99-1371, 759 So. 2d 274, 281 (La.App. 5 Cir. 4/25/00)*.

[91] *See* *Omnitech Intern., Inc. v. Clorox Co., 11 F.3d 1316, 1330 (5th Cir. 1994)*, *cert. denied*, ***513 U.S. 815, 115 S. Ct. 71, 130 L. Ed. 2d 26 (1994)***; *Perfection Metal v. Independent Supply, 97-800 (La.App. 5 Cir. 1998), 707 So.2d 86, 89* and ***Barnco Int'l v. Arkla, Inc., La. App. 28157, 684 So.2d 986, 991 (La.App. 2 Cir. 11/15/96)***, *writs denied,* 97-0019, ***La. 97-0058, 688 So. 2d 511 (La. 2/7/97)***.

[92] *Shaw Constructors, Inc. v. ICF Kaiser Engineers, Inc., 192 F. Supp.2d 545, 550 (M.D.La. 2001)* (Riedlinger, Mag. J.).

[93] *145 F.3d 737 (5th Cir. 1998)*.

[94] *Id. at 741*.

Louisiana law. However,*HN22*[] in order to sustain a cause of action for breach of an oral agreement for value in excess of $ 500, a party must prove its existence by at least one witness and corroborating circumstances. [95] **[**79]** It is clear that the plaintiff claiming that an oral agreement exists may himself meet the requirement that there be at least "one credible witness." [96] Because there is a written contract in this case, the Court must address whether the facts of this case permit it to use parol evidence and whether the integration clause in the contract at issue precludes the Court from going outside the four corners of the contract to even consider whether there was a valid oral agreement between the parties.

The parties dispute whether or not parol evidence should be admitted to allow the plaintiffs to present evidence to establish the various oral promises allegedly made by Mercury. *Article 1848 of the Louisiana Civil Code*, which sets forth Louisiana's rule on admitting parol evidence in contract disputes, provides:

> *HN23*[] Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as vice of consent, or a simulation, or to prove that the written act was modified by a subsequent and valid oral agreement. [97]

HN24[] Louisiana courts consistently hold that an oral agreement may not be admitted to vary the terms of a written contract except under the circumstances enumerated by *article 1848*. [98] Thus, because oral agreements do not fall within the ambit of *article 1848*, "contemporaneous oral **[**80]** agreements or understandings between the parties which are not made part of the written contract" do not qualify as an exception to the parol evidence rule. [99] Similarly, parol evidence is not admissible to **[*551]** show prior oral agreements that contradict the terms of a written contract. [100]

HN25[] There are some judicially carved exceptions to the above rule that permit courts **[**81]** to admit parol evidence when a written contract is at issue. Under Louisiana law, parol evidence is admissible "to show fraud, mistake, illegality, want or failure of consideration, [and] to explain an ambiguity when such explanation is not inconsistent with the written terms. . ." [101] One of the most discussed exceptions to the parol evidence rule is the principle that parol evidence is admissible to show that a writing is only part of an oral contract. [102] This exception was explained in *Stokes v. Georgia-Pacific Corp.,* [103] wherein the plaintiff sued Georgia-Pacific under the theory of detrimental reliance. Plaintiff alleged that Georgia-Pacific had made an oral contract to purchase a certain amount of wood chips a week in exchange for the plaintiff's investing in a large woodchipper. These purchases were memorialized by 30-day written contracts. These contracts set forth the volume of chips to be delivered, the price

[95] *La. Civ. Code art. 1846*. *See also* *Conkling v. Turner, 18 F.3d 1285, 1301 (5th Cir. 1994)*.

[96] *Conkling, supra at 1301* *citing* *Samuels v. Firestone Tire & Rubber Co., 342 So.2d 661, 662 (La. 1977)*.

[97] *La. Civ. Code art. 1848*. *See also* *Grabert v. Greco, La. App. 96-0415, 686 So. 2d 1032, 1034 (La.App. 4 Cir. 12/27/96)*, *writ denied*, ***La. 97-0260, 689 So. 2d 1388 (La. 3/14/97)***.

[98] *Conkling, supra at 1304* *citing* various Louisiana cases.

[99] *Crochet v. Pierre, La. App. 94-543, 646 So. 2d 1222, 1225 (La.App. 5 Cir. 11/29/94)*, *writ denied, La. 95-0004, 649 So. 2d 429 (La. 2/9/95)*. *See also* *Perfection Metal, supra at 89-90*.

[100] *Miller v. Irshaid Inc., La. App. 96-1473, 692 So. 2d 710, 712 (La.App. 3 Cir. 4/2/97)* and *Barnco, supra* at 991.

[101] *Scafidi v. Johnson, 420 So.2d 1113, 1115 (La. 1982)*. *See also* *Land and Offshore Co. v. Martin, 469 So.2d 1177, 1181 (La.App. 3 Cir. 1985)* for fraud, misrepresentation, or error.

[102] *See* *Stokes v. Georgia-Pacific Corp., 894 F.2d 764, 768 (5th Cir. 1990)*. *See also* *Scafidi, supra at 1115*.

[103] *Stokes, supra.*

per ton, and the time period involved. The court found that parol evidence of additional oral agreements allegedly made between the plaintiff and Georgia-Pacific was admissible because the 30-day written contracts did not encompass the complete and entire agreement **[**82]** between the parties. [104]

The Louisiana Fourth Circuit Court of Appeal summarized this exception that parol evidence is admissible to show that a writing is only part of an oral contract in *Kirsch v. Pier Orleans, Inc.:* [105]

> ***HN26***[] The parol evidence rule does not make [evidence of prior negotiations] irrelevant; the new agreement in writing makes [evidence of prior negotiations] irrelevant, but only if the written **[**83]** agreement is a complete and accurate statement of all of the terms agreed upon by the parties. [106]

In *Kirsch,* the court admitted evidence of prior negotiations into the record to show that the written agreement at issue was not the complete agreement made between the parties. The court reasoned that parol evidence is admissible to show that the parties did not intend to substitute one written contract for all of their prior negotiations and agreements. [107]

HN27[] Parol evidence may also be admitted to show a subsequent, new and independent agreement that was intended to modify the original contract. [108]

[84] [*552]** Under the law applicable to the facts of this case, the Court finds that parol evidence may be admitted in this case to prove the following issues: (1) fraud, misrepresentation, or error in their negotiations with Mercury; (2) a subsequent agreement between the parties that was independent of the disputed written agreement or intended to modify the original contract; (3) the written agreement only represented part of the entire agreement between the parties; and (4) a subsequent and valid oral agreement was entered into between the parties.

The parties also argue over whether the integration clause contained in the disputed Sales and Service Agreements precludes the use of parol evidence. The presence of a merger clause in a contract does not preclude the use of parol evidence *per se.* Instead, the court must look at the facts of the individual case to determine if the merger clause "compel[s] a conclusion that [it] correctly reflected the parties' intentions and should thus be enforced as written." [109] ***HN28***[] The Fifth Circuit, applying Louisiana law, has held that a merger clause precludes evidence of agreements made outside of the written contract. Thus, in *Omnitech Intern.* **[**85]** *, Inc. v. Clorox Co.,* [110] the Fifth Circuit precluded the use of parol evidence to prove alleged oral representations and subsequent oral

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[104] These contracts only regulated the volume and movement of the wood chips. Thus, parol evidence of other agreements made between the parties was admissible. *Id. at 768*.

[105] *362 So.2d 1182 (La.App. 4 Cir. 1978)*.

[106] *Id. at 1184*.

[107] *Id. at 1185*.

[108] *Anzalone v. Gregory, 334 So.2d 504, 506 (La.App. 1 Cir. 1976)*. In *Anzalone v. Gregory,* the general and electrical contractors filed suit under the *Private Works Act* against the homeowner. The original plans called for an elaborate electrical system. After further negotiations, the parties agreed on a basic electrical system. The court rejected the homeowner's argument that parol evidence of this subsequent agreement was inadmissible. The court held that parol evidence is admissible to show a subsequent, new and independent agreement.

[109] *Omnitech, supra at 1328*.

[110] *Omnitech, supra.*

modifications because the disputed contract at issue contained a merger clause that only allowed it to be modified in writing. [111]

[86]** In contrast to the *Omnitech* case, the Fifth Circuit did hold in *Stokes v. Georgia-Pacific Corp.* that "parol evidence is admissible to prove a non-integrated side agreement." [112] In *Stokes,* the court found that parol evidence is admissible, even when a written contract contains an integration clause, if the facts showed the parties did not intend to substitute one written contract for all of their prior negotiations and agreements and the written agreement was not assented to as a complete integration. [113]

The integration clause contained in the disputed Sales and Service Agreement entered into between Water Craft and Mercury provided that the agreement could only be "amended or modified. . . by written instrument." [114] Though parol evidence could be used to show this agreement **[**87]** did not represent the full agreement **[*553]** between plaintiffs and Mercury Marine, this integration clause clearly shows that the parties intended this written agreement to be the complete understanding between them and could only be amended or modified in writing. The *Omnitech* and *Talbert-Siebert* cases, as well as the Fifth Circuit's recent decision in *Drs. Bethea,* all support a decision not to consider parol evidence in this case, especially in light of the integration clause's specific instruction on how amendments and modifications were to be made to this agreement. However, *Stokes* supports this Court's decision to allow parol evidence to be admitted to establish that a non-integrated side agreement existed between the plaintiffs and Mercury.

Considering the above legal principles, the Court cannot consider the parol evidence submitted by the plaintiff which related to the preliminary discussions between Glascock, Martrain and Rohrbach. The integration clause contained **[**88]** in the Sales and Service Agreements clearly shows that the parties intended for this document to supercede all prior agreements between Water Craft and Mercury Marine. The Court also finds that it cannot consider any evidence of the alleged promises made by Rohrbach prior to the execution of the Sales and Service Agreements because the integration clause effectively superceded any discussions that Glascock and Martrain had with Rohrbach. In short, the Court finds that the agreement entered into between Water Craft and Mercury was a comprehensive document meant to cover virtually every facet of the relationship between the parties.

The Court must now determine whether the subsequent representations made to Glascock and Martrain by Randolph, Koenen, Schmiedel, and other Mercury representatives after approximately March or April 1997, can be admitted into evidence. Specifically, the Court finds that discussions between Glascock and Martrain with Mercury representatives regarding certain discounts and incentives that they would receive as Mercury dealers are not admissible because the Sales and Service Agreements determined the discounts and incentives that Glascock and Martrain were **[**89]** to receive. The integration clause specifically set forth a method to subsequently modify these

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[111] The Court did not admit parol evidence here because the merger clause had defined the agreed-upon means by which the parties' obligations could be modified. *Id. at 1328*. Recently, the Fifth Circuit applied *Omnitech* in the context of a claim for detrimental reliance in *Drs. Bethea v. St. Paul Guardian Ins. Co., 376 F.3d 399, 2004 WL 1464637 (5th Cir. 2004)*. This decision did not deal directly with parol evidence or a breach of contract claim; however, it did use an integration clause to preclude claims for detrimental reliance and unjust enrichment. *Drs. Bethea* illustrates the importance that the Fifth Circuit places on only looking at a contract dispute in the context of the four corners of the document whenever the disputed document is an unambiguous, fully-integrated agreement. *See also* *Talbert-Siebert Ent., Inc. v. Shell Oil Company, 1992 U.S. Dist. LEXIS 8033, 1992 WL 119916, *2 (M.D.La. 1992)* (Parker, J.), *aff'd,* *995 F.2d 224 (5th Cir. 1993)* (Refused to allow parol evidence in when "the integration clause [forbade] consideration of any oral agreement either before or after execution of [the written agreement].").

[112] *Stokes, supra at 768*.

[113] The Fifth Circuit required the integration clause to be "complete written integration" and an "accurate statement of all the terms agreed upon by the parties. *Id.*

[114] Rec. Doc. No. 326 at 9.

discounts and incentives. No evidence has been presented to show that this required procedure was followed to revise that section of the written agreements which pertained to discounts and incentives.

However, the Court does find that the representations made to Glascock and Martrain regarding whether or not Travis would be made a Mercury dealer are admissible under the parol evidence rule. The Court finds that the representations made by Randolph to Glascock and Martrain at the Hilton Hotel bar and Juban's Restaurant and the representations made by Schmiedel throughout his dealings with Water Craft were nonintegrated side agreements which were not included within the scope of the Sales and Service Agreements. These agreements were nonintegrated because the Sales and Service Agreements did not contain or represent the complete integration of subsequent representations made to Glascock and Martrain regarding Travis. Thus, the Court finds that the Sales and Service Agreements were not a complete and accurate statement of all the terms agreed upon by the parties. The representations and agreement **[**90]** by Mercury representatives to not make Travis a Mercury dealer, unlike the Rohrbach negotiations, was an agreement not contemplated under nor included within the language of the Sales and Service Agreements. These important facts distinguish these later representations from Rohrbach's representations which were integrated into the 1997 Sales **[*554]** and Service Agreement. Specific questions were asked by plaintiffs. In response thereto, specific promises were made by Mercury in response to these questions. Mercury's specific responses and promises that it was not going to make Travis a Mercury dealer constitute separate contracts. Under the unique facts of this case, the Court finds that plaintiffs have a right to introduce parol evidence to prove that these nonintegrated but very important and pertinent promises formed contracts separate and apart from the Sales and Service Agreements.

The Court further finds that the conversations between Glascock and Martrain and Koenen regarding extra financing can also be admitted as parol evidence under the facts of this case. Although it can be argued that details regarding financing may be covered by the Sales and Service Agreements, the Court concludes **[**91]** that these specific conversations and promises were made at a very important time and circumstance and constitute nonintegrated and separate agreements under the facts of this case. Specifically, the facts indicate that the circumstances were substantially different at this crucial time when Water Craft was engaged in very serious negotiations with Mercury regarding whether it should close and whether it would get financing to remain open. The evidence reveals that these conversations with and representations by Mercury did occur. Glascock and Martrain were ready to close LA Boating. However, the testimony indicates that something important occurred which made them change their decision to close LA Boating. The Court finds the representations by Koenen that extra financing would be available from Mercury to keep the LA Boating store afloat were the catalyst which caused Glascock and Martrain to decide not to close LA Boating at that time. At this point, the cause of the agreement was to keep the entire entity of Water Craft running despite the economic troubles facing LA Boating. Another cause of the agreement at this critical stage of the case was to keep LA Boating running so that **[**92]** it would eventually become the powerhouse Mercury dealer in the Baton Rouge market which Mercury desired. These causes are entirely different from the cause that existed for Glascock and Martrain when they entered the Sales and Service Agreements. Thus, the Court will permit the introduction of parol evidence of the financing negotiations between Glascock and Martrain and Koenen as a nonintegrated side agreement.

Having determined what parol evidence is admissible, the Court now turns to a discussion of whether the, plaintiffs have proven their breach of contract claims by a preponderance of the evidence. The Court finds that Mercury did not breach any contractual obligation it had to the plaintiffs under the Sales and Service Agreements. This preliminary finding is an easy decision for the Court to make because the plaintiffs did not introduce any evidence to prove that the obligations required under these agreements were not fulfilled or breached. Instead, the plaintiffs chose to introduce evidence of promises made by Mercury representatives to give them the best discounts, not to make Travis a Mercury dealer, and promises of extra financing into evidence. Since all of this evidence **[**93]** has either been declared inadmissible under the parol evidence rule or declared to be a nonintegrated side agreement, separate from the Sales and Service Agreements, the Court finds that the Sales and Service Agreements entered into between Mercury and Water Craft were not violated.

The Court also finds that plaintiffs' claim that Mercury breached an oral contract with Water Craft by making Travis a Mercury dealer is without merit. The Court concludes that no such contract existed **[*555]** under the facts presented in this case. The Court does find that representations were made to Glascock and Martrain in early 1997 by Mercury representatives that Travis would not be made a Mercury dealer. This important finding and determination is very relevant to plaintiffs' detrimental reliance claim and will be discussed in great detail later in this opinion when the Court considers the detrimental reliance claim. While this finding is important to the detrimental reliance claim, it does not prove that a valid contract existed between the plaintiffs and Mercury that Travis would not be made a Mercury dealer. The evidence and testimony presented fail to show that there was ever a meeting of the minds **[**94]** between the parties that Mercury was obligated not to make Travis a dealer. Instead, Randolph's assertions that Travis would not become a Mercury dealer were misrepresentations that prompted Glascock and Martrain to continue operating LA Boating in the Baton Rouge market. While these misrepresentations cannot be sanctioned by the Court, they did not constitute a complete and valid contract between the parties that would support a claim for breach of contract.

Similarly, the representations made by Schmiedel to Glascock and Martrain that Travis would not become a Mercury dealer were largely based on misinformation. The Court finds that Schmiedel was initially just reporting what he had heard from his Mercury superiors - that Travis was not going to be made a Mercury dealer. However, once Schmiedel began giving Glascock and Martrain "lip service" at the direction of his Mercury superiors, this misinformation became a misrepresentation. While Schmiedel's misrepresentations are important on the detrimental reliance claim, they do not support plaintiffs' breach of contract claim.

The Court also finds the promises of Koenen and other Mercury representatives to keep a sinking LA Boating **[**95]** afloat did not amount to a complete and valid contract that could be breached between the plaintiffs and Mercury. These representations of extra financing are relevant to the detrimental reliance claim and will be discussed in more detail later in this opinion. Though Martrain may have relied on Koenen's optimism and promises of financing to the plaintiffs' detriment, a contract was never formed.

Because the Court finds that Mercury did not breach the Sales and Service Agreements and that no valid oral contract was ever formed between Mercury and the plaintiffs for additional interest free financing or to not make Travis a Mercury dealer, the Court finds that the plaintiffs have failed to satisfy their required burden to prove their breach of contract claims by a preponderance of the evidence. Therefore, the Court dismisses plaintiffs' state law contract claims.

2. Detrimental Reliance

The plaintiffs have also filed a claim based on detrimental reliance. Plaintiffs argue that they relied to their detriment on various misrepresentations and promises made by Mercury and their representatives during the course of their relationship with Mercury in opening and operating a Baton **[**96]** Rouge dealership. Thus, plaintiffs contend they are entitled to damages under a theory of detrimental reliance.

HN29[] *Article 1967 of the Louisiana Civil Code* provides that "[a] party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." [115] This article of the **[*556]** Louisiana Civil Code sets forth Louisiana's version of the doctrine known as detrimental reliance, and is "designed to prevent injustice by barring a party from taking a position contrary to his prior acts, admissions, representations, or silence." [116] **[**97]** Some Louisiana courts have characterized detrimental reliance as being a disfavored doctrine and have held that it should be

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[115] *La. Civ. Code art. 1967*.

[116] *Andrus v. Andrus, La. App. 93-856, 634 So. 2d 1254, 1258 (La. App. 3 Cir. 3/2/94)*.

applied sparingly because it bars the normal assertion of rights otherwise present. [117] While some courts may be reluctant to apply the doctrine, it is clear that the Louisiana jurisprudence has approved its use in appropriate cases.

HN30[] Louisiana law requires a plaintiff to prove the following to recover for a claim of detrimental reliance: (1) a representation was made; (2) there was justifiable reliance thereon; and (3) there was a change of position to one's detriment because of the reliance. [118] **[**98]** The plaintiff bears the burden of proving each of these elements by a preponderance of the evidence. [119]

HN31[] In determining if the party claiming detrimental reliance was justified in his reliance thereon, the courts generally look to whether the reliance was reasonable under the circumstances. Under Louisiana law, reasonableness is determined by examining factual circumstances like the commercial sophistication of the party claiming detrimental reliance and the negotiations and/or documents the party relied on. [120] In some cases, courts have found that the presence of an integration clause in a contract is a factual circumstance that makes one's reliance unreasonable. For example, the Fifth Circuit, applying Louisiana law, held in *Omnitech* that it is unreasonable as a matter of law for a party to rely on representations or promises made outside of a written agreement if the agreement has been reduced to writing, contains an integration clause, and such representations or promises were made outside of the scope of the fully-integrated written agreement. [121] Recently, the Fifth Circuit, relying on *Omnitech,* **[**99]** found that a plaintiff's reliance on promises made outside of an unambiguous, fully-integrated agreement was unreasonable as a matter of law in *Drs. Bethea v. St. Paul Guardian Ins. Co.* [122] **[**100]** Similarly, in *Talbert-Siebert Ent., Inc. v. Shell Oil Company,* [123] Judge John V. Parker found that an integration clause barred a claim for detrimental reliance since the reliance was on alleged representations not memorialized in the written contract. [124] It is noteworthy that in each **[*557]** of these cases the courts required complete and full integration of all of the agreements made between the parties into the disputed documents for the integration clause to effectively preclude a claim for detrimental reliance. Complete integration is a factual issue and is not an automatic finding the courts generally make. [125]

HN32[] In order for the plaintiffs to prove that they changed their position to their detriment in reliance on a representation from Mercury, the Louisiana courts require proof that the plaintiffs suffered damages not adequately

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[117] *Holt v. Bethany Land Co., La. App. 36,888, 843 So. 2d 606, 613 (La. App. 2 Cir. 4/9/03) citing Miller v. Miller, La. App. 35,934, 817 So. 2d 1166 (La. App. 2 Cir. 5/8/02), writ denied,* ***La. 02-1890, 827 So. 2d 1154 (La. 10/25/02)***.

[118] *Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1069 (5th Cir. 1993), cert. denied,* ***512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 836 (1994)***; *Barnett v. Bd. of Trustees for State Colleges & Univs., La. App. 2000-1041, 809 So. 2d 184, 189 (La. App. 1 Cir. 6/22/01)*; *Babkow v. Morris Bart, P.L.C., La. App. 98-0256, 726 So. 2d 423, 427 (La. App. 4 Cir. 12/16/98)*; *Orr v. Bancroft Bag, Inc., La. App. 29,046, 687 So. 2d 1068, 1070 (La. App. 2 Cir. 1/22/97)*; and *Law v. City of Eunice, La. App. 94-1312, 653 So. 2d 149, 150 (La. App. 3 Cir. 4/5/95)*.

[119] *Babkow, supra* at 427 *citing Law, supra* at 150-51.

[120] *Compare Babkow, supra* at 427-28 *with Academy Mortg. Co., LLP v. Barker, Boudreaux, Lamey & Foley, La. App. 96-0053, 673 So. 2d 1209, 1211-12 (La. App. 4 Cir. 4/24/96)*.

[121] *Omnitech, supra at 1330*.

[122] *376 F.3d 399, 2004 WL 1464637 (5th Cir. 2004)*.

[123] *Talbert-Siebert, supra.*

[124] *1992 U.S. Dist. LEXIS 8033, [WL] at *4*.

[125] *See e.g. Stokes, supra at 768*. The *Stokes* decision and its illustration of how the Fifth Circuit has found the existence of non-integrated, side agreements in certain factual settings is discussed fully in Section II(B)(1) of this opinion, *supra.*

compensated by the defendant. [126] Essentially, this means that damages must be proven in order for a claim of detrimental reliance to be sustained. [127]

[101]** Thus, to sustain their claim for detrimental reliance against Mercury, the plaintiffs must prove by a preponderance of the evidence that (1) Mercury made oral representations that it would not contract with other dealers, specifically Travis, and would supply plaintiffs with financing; (2) the plaintiffs justifiably relied on these representations; and (3) the plaintiffs' positions changed to their detriment because of this reliance. Further, the plaintiffs must prove that their reliance on these alleged misrepresentations made by Mercury was reasonable under the facts and circumstances of this case.

The Court finds that the plaintiffs have proven their claim for detrimental reliance by a preponderance of the evidence. As a preliminary matter, the Court finds that the presence of an integration clause in the Sales and Service Agreements entered into between Water Craft and Mercury does not make Glascock and Martrain's reliance on Mercury's representations automatically unreasonable under the unique facts of this case. ***HN33***[] A per-se rule that an integration clause nullifies any claim for detrimental reliance contradicts the very nature of a claim for detrimental reliance. This is particularly **[**102]** true under the facts of this case where it is clear that plaintiffs asked specific questions about matters of particular importance and representatives of Mercury intentionally gave false and misleading answers to these questions which clearly caused the plaintiffs to take a different course of action to their detriment. The purpose of this remedy is to afford a party relief whenever no contract is found. ***HN34***[] The existence of a promise and reasonable reliance on that promise to one's detriment are the only requirements needed to sustain a claim for detrimental reliance. [128] **[**104]** Based on the unique facts of this case and the remedies available to plaintiffs, the equitable nature of detrimental reliance should be applied herein and the integration clause in the contract does not automatically make plaintiffs' reliance unreasonable on this claim for detrimental reliance. Further, the Court finds that the *Omnitech, Talbert-Siebert,* and *Drs. Bethea* cases did not fix a per-se unreasonable rule. Rather, the courts in these cases relied on the presence of an integration clause to determine that the parties' reliance was unreasonable under the factual circumstances of those cases. A careful **[**103]** reading of the three opinions reveals that they do not **[*558]** mandate a court to find that a claim for detrimental reliance is barred in every case where there is an integration cause in a contract. [129] Instead, these decisions only preclude detrimental reliance claims when the disputed contract was a fully integrated document. As noted earlier in this opinion, this Court has found that the Sales and Service Agreements were not fully integrated documents that contained **all of the agreements** made between plaintiffs and Mercury representatives. This Court's decision to apply the detrimental reliance doctrine is not only appropriate under the facts of this case, but is further supported by the Court's conclusion that there were nonintegrated agreements made by the parties. Thus, the Court finds that plaintiffs' detrimental reliance claim is not barred because there was only an integration clause in **some of the agreements** which exist in this case.

The applicable law set forth above and the facts of this case clearly support a finding that Glascock and Martrain relied to their detriment upon representations made by Randolph, Schmiedel, and other Mercury representatives that Travis would not be made a Mercury dealer. The Court further finds that the promises and statements upon which the plaintiffs relied were made in early 1997 when plaintiffs met with Randolph and Bill Burns at the Hilton Hotel bar, and Juban's Restaurant. At these meetings, Randolph and Burns did specifically promise the plaintiffs

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[126] *Babkow, supra* at 428 *citing* *Autin's Cajun Joint Venture v. Kroger Co., La. App. 93-0320, 637 So. 2d 538, 543 (La. App. 1 Cir. 2/16/94)*, *writ denied,* ***La. 94-0674, 638 So. 2d 224 (La. 4/29/94)***.

[127] *Autin's, supra* at 542-43.

[128] *Percy J. Matherne Contractor, Inc. v. Grinnell Fire Protection Systems Co., 915 F. Supp. 818, 824 (E.D.La. 1995)*, *aff'd,* ***102 F.3d 550 (5th Cir. 1996)*** (Vance, J.).

[129] *See* *Bethea v. St. Paul Guardian Ins. Co., 2002 U.S. Dist. LEXIS 23141, 2002 WL 31697714, *5 (E.D.La. Oct 20, 2002)* (Duval, J.), *aff'd,* *376 F.3d 399, 2004 WL 1464637 (5th Cir. 2004)* ("*Omnitech,* however, does not state that a merger clause will render reliance on extra-contractual promises unreasonable in all cases.").

that Travis would not be made a Mercury dealer in response to direct questions plaintiffs asked on this important factor. It is also clear that Glascock and Martrain relied on these promises **[**105]** and were reasonable in doing so. Glascock and Martrain consistently testified that they were well aware of the powerful presence of Travis in the marine industry and what Travis would do in the Baton Rouge area. The Court finds these experienced businessmen would not have invested the amount of money and other resources they did in their Baton Rouge dealership had they known that Travis would be competing with them in selling Mercury engines. To hold otherwise would cause this Court to sanction the inappropriate and misleading statements, actions and inactions of Mercury and its authorized representatives. This Court is not prepared to do so under the facts of this case.

The Court finds the Hilton and Juban meetings to be very important evidence to support the plaintiffs' detrimental reliance, fraud and misrepresentation claims for two reasons. First, these meetings were conducted with Mercury executives. Unlike the Rohrbach negotiations, the plaintiffs were being told in a very specific and direct way that Travis would not be made a Mercury dealer from the "horse's mouth." Second, the evidence shows that both Randolph and Bill Seely caused Glascock and Martrain to be concerned about **[**106]** the possibility of Travis becoming a Mercury dealer. It was well-known that Randolph and Seely had worked for OMC and they had been responsible for bringing Travis to OMC. It was only reasonable and indeed understandable for the plaintiffs to speculate and be concerned that Seely and Randolph would use their prior relationship with Travis to convince Travis to become a Mercury dealer. Thus, when Glascock and Martrain heard from Randolph that Travis would not become a Mercury dealer, Glascock and Martrain gained the confidence to proceed with their Baton Rouge dealership and make the necessary **[*559]** investments knowing that Travis would not become a Mercury dealer in Baton Rouge. Plaintiffs were justified in relying on these statements and acted appropriately under the facts of this case.

The credibility of the witnesses who testified was taken into consideration by the Court in reaching its findings of fact in this case. The Court has no doubt that Randolph made these promises to Glascock and Martrain in early 1997 considering the manner that Randolph testified at trial and the Court's belief that Randolph was not a credible witness during these proceedings. Randolph's failure to deny that **[**107]** he told the plaintiffs Travis would not be a Mercury dealer is difficult to understand. He did testify that he was "not sure" if Glascock and Martrain had even asked him about Travis. Considering the evidence, the Court simply does not believe that Randolph was "not sure" about this very important fact since the evidence reveals that Glascock and Martrain consistently testified that they had voiced their concerns about Travis being a Mercury dealer from the very beginning of their negotiations with Rohrbach. Whether Travis would become a Mercury dealer, and how Glascock and Martrain would react to such an event was the subject of numerous emails admitted in evidence before the Court. For Randolph to testify that he could not remember the crucial detail of whether Glascock and Martrain ever asked him about Travis supports the Court's decision to discount his credibility.

During his later testimony, Randolph again testified he was "not sure" what he had told Glascock and Martrain about Travis. Because the Court became so concerned with Randolph's carefully crafted testimony and his inability to recall important details about his discussions with Glascock and Martrain, the Court asked **[**108]** Randolph to specifically tell the Court what he had told Glascock and Martrain about Travis:

> Q. MR. RANDOLPH, DID YOU TELL THEM AT ANY TIME DURING THAT MEETING THAT MERCURY WAS ALSO PLANNING AND DEVELOPING A STRATEGY TO CONVERT TRAVIS TO A MERCURY DEALER?
> A. I AM NOT SURE IF THAT CONVERSATION CAME UP AT THAT PARTICULAR TIME, BUT THAT WAS AN ONGOING CONVERSATION WITHIN MERCURY AND HAD BEEN FOR, AT THIS POINT, TEN YEARS.
> Q. I UNDERSTAND THAT, BUT DID YOU TELL THAT TO MR. GLASCOCK AND MR. MARTRAIN?
> A. I AM NOT SURE I WOULD HAVE, IT WOULD HAVE BEEN A POINT FOR ME BRINGING THAT UP TO THEM.
> Q. MR. RANDOLPH, DO YOU REMEMBER SITTING AT THE HILTON IN THE BAR AND HAVING A DRINK WITH MR. MARTRAIN THE SAME NIGHT Y'ALL WENT TO DINNER AT JUBAN'S RESTAURANT, AND HE EXPRESSED SOME CONCERN TO YOU ABOUT ARE YOU GOING TO BE MAKING TRAVIS A DEALER, BECAUSE I COMPETED AGAINST THEM WHEN THEY WERE AN OMC DEALER? DO YOU REMEMBER HIM ASKING YOU DIRECTLY, ARE Y'ALL GOING TO MAKE THEM A DEALER?

A. THAT MAY HAVE BEEN A CONVERSATION. I DON'T RECALL EXACTLY WHAT WAS SAID THAT NIGHT. I DO RECALL THE EVENING. YES.

Q. AND YOU NOW MAY RECALL THAT HE EVEN ASKED THAT QUESTION TO **[**109]** YOU?

[*560] A. IF HE HAD ASKED ME THAT QUESTION, MY RESPONSE AT THAT TIME WOULD HAVE BEEN THAT YOU ARE THE DEALER THAT WE ARE SIGNING FOR MERCURY TODAY.
Q. AND YOU DIDN'T TELL HIM THERE WAS A PLAN IN PLACE TO MAKE TRAVIS A DEALER, DID YOU?
A. I DON'T KNOW THAT IT WOULD HAVE COME UP IN THE CONTEXT OF THE CONVERSATION.
THE COURT: WELL, THAT ISN'T THE QUESTION. THE QUESTION IS DID YOU TELL HIM?
A. I DON'T RECALL. [130]

The above testimony is just one example of the evasive manner in which Randolph testified and supports the Court's decision to question Randolph's credibility and testimony at the trial. Even after the Court questioned Randolph about his representations, he could not recall what he had told Glascock and Martrain about Travis. The Court does not believe this testimony. The testimony presented and the other evidence admitted during the trial clearly shows that Randolph was very instrumental in convincing Travis to become a Mercury dealer. Randolph covered up the possible deal with Travis to the plaintiffs. Because of the false promise and misrepresentations Randolph made to the plaintiffs, the plaintiffs invested a lot of money into their Baton Rouge **[**110]** dealership without being told the true facts by Mercury.

The Court further finds that the plaintiffs' claim for detrimental reliance is also supported by the representations that Schmiedel made to Glascock and Martrain. Because of his dealings with Glascock and Martrain and his knowledge of their business, Schmiedel testified that he thought that the Travis deal was clearly unfair to Glascock and Martrain despite his employment by Mercury. Schmiedel denied the existence of a Travis deal with Mercury to most of his dealers at the direction of Mercury representatives even though he knew a deal between Travis and Mercury was in the making. In fact, Schmiedel testified that Mercury representatives had told him to give "lip service" to Mercury dealers when questioned about the possibility of a deal between **[**111]** Mercury and Travis. Schmiedel's testimony also reflects that he was accused by Mercury representatives of not being a "team player" for questioning the Travis deal and the effect that it would have on other Mercury dealers.

Though Schmiedel was cross examined thoroughly concerning these damaging statements, the Court believes that such statements were made. The Court also finds that the plaintiffs relied on Schmiedel's promises and misrepresentations to their detriment. Glascock and Martrain continued to invest capital into the Baton Rouge dealership based on their reasonable and justified belief that these investments would pay off without the Travis presence in the Baton Rouge market. It is clear that Glascock and Martrain invested in and opened their Baton Rouge dealership because they had relied to their detriment on the misleading promises that Mercury representatives had made to them that Travis would not be a Mercury dealer.

Finally, the Court finds that the representations made to Glascock and Martrain by Koenen around the August 1998 time frame when Glascock and Martrain were considering closure of the Baton Rouge **[*561]** dealership, also support the plaintiffs' claim for detrimental **[**112]** reliance. The Court finds that, in August 1998, Glascock went to the bank with every intent of closing the Baton Rouge dealership because it was in financial trouble. [131] Further, the Court finds that the efforts and statements of Schmiedel and Koenen were instrumental in Glascock and Martrain deciding not to close the Baton Rouge dealership at this time. The testimony about various meetings, telephone conversations, and emails admitted into evidence clearly support the Court's finding. Further, the Court finds that Martrain's version of his discussion with Koenen regarding the need for financing is the most accurate version of what occurred between Koenen and Martrain. The Court believes that Koenen brought up the zero-interest

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[130] Trial Transcript at 103:12-104:19, Water Craft Management, L.L.C., *et. al.* v. Mercury Marine (A Division of Brunswick Corporation), *et. al.* (Civ. Action No. 99-1031-B-M1) (M.D.La. August 19, 2003).

[131] The Court knows that other factors have also caused the financial losses of LA Boating. The issue of what damages were caused by Mercury will be decided at a later date.

financing proposal in an effort to keep Glascock and Martrain from closing the Baton Rouge dealership. The Court further finds that Koenen's careful testimony to the contrary is somewhat suspect, especially since she testified under the watchful eyes of her Mercury superiors. The Court also finds that the only reason that Glascock and Martrain kept the Baton Rouge dealership open at this time was because of the insistence of Koenen and Schmiedel and the promises **[**113]** of extra financing Koenen made to keep the Baton Rouge dealership open. When Mercury failed to provide this financing, Glascock and Martrain sustained some damages, though the determination of the amount of damages is not before the Court at this time. Thus, the discussions regarding extra financing to keep the Baton Rouge dealership open in August 1998 support the plaintiffs' claim for detrimental reliance.

In conclusion, the Court finds that the plaintiffs have proven their claim for detrimental reliance by a preponderance of the evidence. This conclusion is based upon: (1) the testimony regarding the meetings at the Hilton Hotel bar and Juban's Restaurant; (2) representations made by Schmiedel to the plaintiffs; and, (3) the efforts of Koenen and Schmiedel to convince Glascock and Martrain not to close the Baton Rouge dealership in August **[**114]** 1998. It is also important to note that the Court's decision to find that plaintiffs have proven their detrimental reliance claim was not based on any alleged misrepresentations made by Rohrbach or other acts or statements made before the meetings held at the Hilton Hotel bar and Juban's Restaurant.

Before the Court turns to a discussion of plaintiffs' other claims, the Court believes it is necessary to address one additional argument made by Mercury on the detrimental reliance claim. Mercury has argued that the plaintiffs' reliance on its alleged promises not to enter into contracts with other dealerships, such as Travis, was unreasonable because such an agreement would have violated state law, and specifically *article 1968 of the Louisiana Civil Code and the Louisiana Used Motor Vehicle Dealers and Marine Product Dealers Act*. [132] Mercury contends that a contract is null if it is based on an unlawful cause. [133] Louisiana courts have interpreted this principle to mean that contracts with a cause that violates a state statute are null. [134] **[**116]** Mercury says that the **[*562]** 1996 version of the Louisiana Used Motor Vehicle Dealers and Marine Product Dealers Act [135] prohibited it from agreeing **[**115]** not to enter into contracts with other dealers to sell Mercury products. Though Mercury has presented several cases saying that a cause that violates a state statute could make a contract null, it has not presented any cases that say that reliance on such assertions is *per se* unreasonable in a claim for detrimental reliance. Mercury's argument also fails to acknowledge the well settled legal principle that a valid contract is not necessary to sustain a claim for detrimental reliance. Because of Mercury's failure to fully develop this argument outside of the context of a breach of contract claim, the Court finds this argument to be without merit on the detrimental reliance claim.

3. Fraudulent Misrepresentations

The plaintiffs also contend that the oral misrepresentations and promises made by Mercury were fraudulent under Louisiana law. Although the Court has previously dismissed all tortious misrepresentation claims, [136] **[**117]** it still must decide whether Mercury made fraudulent misrepresentations to the plaintiffs which caused plaintiffs to sustain

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[132] *La. R.S. 32:771, et seq.*

[133] *La. Civ. Code art. 1968* ("The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.").

[134] *Bach Investment Co. v. Philip, La. App. 98-667, 722 So. 2d 1222, 1223 (La. App. 5 Cir. 12/16/98)* and *Lieber v. Caddo Levee Dist. Bd. of Com'rs, La. App. 27,267, 660 So. 2d 188, 193 (La. App. 2 Cir. 8/23/95)*, *writ denied,* ***La. 95-2355, 664 So. 2d 427 (La. 12/8/95)***.

[135] *La. R.S. 32:771, et. seq.*

[136] *See* Rec. Doc. No. 318 at 4.

damages.*HN35*[] Louisiana recognizes a cause of action for intentional fraudulent misrepresentation as to present or past facts. A party who is injured by the fraud and deceit of another has a cause of action for damages. [137] The action for fraudulent misrepresentation may be brought either as a breach of contract or tort action. If the cause of action is under contract, the plaintiff's damages are limited to actual pecuniary loss proven by a preponderance of the evidence. If the action lies in tort, the plaintiff may recover non-pecuniary losses as well, but only if he proves such losses by a preponderance of the evidence. [138]

HN36[] The Louisiana Civil Code defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." [139] Fraud does not vitiate consent when the party against whom it is directed could have ascertained the truth without difficulty, inconvenience, or special skill. However, this exception does not apply when a relation of confidence reasonably induced a party to rely on the other's assertions or representations. **[**118]** [140] The commercial sophistication of the parties is considered by the Court when determining if a party could have ascertained the truth without difficulty, inconvenience, or special skill. [141]

HN37[] The Fifth Circuit has set forth the following elements to sustain a claim for fraud under Louisiana law: (1) a misrepresentation of material fact; (2) made with the intent to deceive; and (3) causing justifiable reliance with resultant injury. [142] **[*563]** The requirement that a party justifiably rely on the alleged fraudulent misrepresentation is required to sustain the claim. [143] To determine whether or not plaintiffs' reliance was justifiable, the Court must conduct the same reasonableness inquiry it previously made on the detrimental reliance claim. A fraud claim based on unfulfilled promises or statements as to future events will not satisfy the justifiable reliance requirement. **[**119]** However, a claim of fraud may be predicated on promises made with the intention not to perform at the time the promise is made. [144] Thus, in order for the Court to determine whether Mercury made fraudulent misrepresentations to the plaintiffs, the Court must examine the facts and decide whether Mercury simply made unfulfilled promises, or whether Mercury never intended to honor the alleged misrepresentations it made to plaintiffs.

To prove their **[**120]** claim for fraudulent misrepresentation against Mercury, the plaintiffs are required to prove that (1) Mercury made misrepresentations of material fact to them during their business relationship; (2) such representations were made by Mercury Marine with the intent to deceive the plaintiffs; and (3) the plaintiffs justifiably relied on these misrepresentations and such reliance caused them injury. The plaintiffs must also prove that these misrepresentations were fraudulent. In other words, the plaintiffs must show that Mercury misrepresented facts to them or suppressed the truth in order to obtain an unjust advantage over plaintiffs or to cause plaintiffs loss

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[137] *Sun Drilling Prods. Corp. v. Rayborn, La. App. 2000-1884, 798 So. 2d 1141, 1152 (La. App. 4 Cir. 10/3/01)* *writ denied,* ***La. 2001-2939, 807 So. 2d 840 (La. 1/25/02)***. *See also* *Coates v. Anco Insulations, Inc., La. App. 2000-1331, 786 So. 2d 749, 756 (La. App. 4 Cir. 3/21/01)*, and *Coffey v. Block, La. App. 99-1221, 762 So. 2d 1181 (La. App. 1 Cir. 6/23/00)* (Caraway, J., concurring), *writ denied,* ***La. 2000-2226, 772 So. 2d 651 (La. 10/27/00)***.

[138] *Haggerty v. March, 480 So.2d 1064, 1068 (La.App. 5 Cir. 1985)*.

[139] *La. Civ. Code art. 1953*.

[140] *La. Civ. Code art. 1954*.

[141] *See* *Griffing v. Atkins, 1 So.2d 445 (La.App. 1941)*.

[142] *Abell v. Potamac Ins. Co., 858 F.2d 1104, 1131 n.33 (5th Cir. 1988)*, *vacated on other grounds sub nom.,* ***Fryar v. Abell, 492 U.S. 914, 106 L. Ed. 2d 584, 109 S. Ct. 3236 (1989)***.

[143] *Abbott v. Equity Group, Inc., 2 F.3d 613, 624 (5th Cir. 1993)*, *cert. denied, Turnbull v. Home Ins. Co., 510 U.S. 1177, 114 S. Ct. 1219, 127 L. Ed. 2d 565 (1994). See also* *Jefferson v. Lead Industries Ass'n, Inc., 106 F.3d 1245, 1254 (5th Cir. 1997)*.

[144] *Sun Drilling, supra* at 1152.

or inconvenience. The plaintiffs must also show they could not have ascertained the truth without difficulty, inconvenience, or special skill based on their commercial sophistication. Finally, the plaintiffs must show that their reliance on the alleged misrepresentations was justifiable and reasonable under Louisiana law.

The Court finds that the plaintiffs have proven their claim for fraudulent misrepresentation by a preponderance of the evidence. Many of the factual findings the Court made in deciding the detrimental reliance **[**121]** claim earlier in this ruling are also applicable to the plaintiffs' claim for fraudulent misrepresentations. These prior findings are adopted by reference and will not be repeated in detail in this part of the opinion. The Court finds that Randolph did know of the possibility that Travis would become a Mercury dealer at the time that he told Glascock and Martrain the exact opposite during the meetings held at the Hilton Hotel bar and Juban's Restaurant. This conclusion is supported by the fact that Randolph was later extensively involved in signing Travis to be a Mercury 'dealer. He also testified that there had been talk of making Travis a Mercury dealer in the Mercury circle for the past ten years. Randolph also failed to tell Glascock and Martrain the truth once negotiations did begin with Travis. The Court finds that the statements regarding Travis were false when made because the testimony and evidence presented throughout this case supports a finding that Mercury intended to make Travis one of its dealers even when it was negotiating with plaintiffs. The testimony of Schmiedel also establishes that Mercury executives encouraged Schmiedel to give "lip service" to Mercury dealers, **[**122]** like Glascock and Martrain, when questioned about the possibility of Travis becoming a Mercury dealer. These facts clearly show that Mercury never intended to honor its representations **[*564]** to Glascock and Martrain that Travis would not become a Mercury dealer. The Court finds as a matter of fact and law that the representations Mercury representatives made to Glascock and Martrain about Travis were not merely unfulfilled promises, but were fraudulent misrepresentations.

The Court also finds that Mercury made misrepresentations of material fact to the plaintiffs when Randolph, Schmiedel, and other Mercury representatives told plaintiffs that Travis was not going to be made a Mercury dealer or was not in the process of becoming a Mercury dealer. It is clear that these misrepresentations were made with the intent to deceive the plaintiffs. The Court's finding is supported by the evidence which established that Mercury representatives took affirmative steps to shield the truth about a possible Travis deal from Glascock and Martrain. Finally, the Court finds that the plaintiffs were justified in relying upon the misrepresentations made by the Mercury representatives. [145] Plaintiffs were also **[**123]** justified in believing that Mercury wanted to put all of their market power into one super-dealer who would then compete with Travis, which at the time was an OMC dealer, a big competitor of Mercury. Mercury was then able to secretly pursue Travis with the hope and expectation that the powerful marine dealer would eventually be a Mercury dealer, while at the same time, having the plaintiffs locked up as a Mercury dealer and investing time, money, and efforts to become Mercury's only dealer in the Baton Rouge market. Glascock and Martrain justifiably and properly believed Mercury's promises under the facts of this case. Thus, the plaintiffs were reasonable in relying on the misrepresentations made to them by Mercury representatives. Therefore, the Court finds that the plaintiffs have proven their claim based on fraudulent misrepresentation by a preponderance of the evidence.

[**124] C. The Counterclaims

Mercury has filed two counterclaims against Glascock and Martrain. Each of Mercury's claims will be discussed separately.

1. Counterclaim I

Counterclaim I consists of several claims Mercury has filed against the plaintiffs. The plaintiffs have not presented any credible evidence in opposition to Mercury's claims.

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[145] This is particularly so under the facts of this case because the plaintiffs asked specific and direct questions about whether Travis would be made a Mercury dealer. Despite knowing plaintiffs wanted to know the true status of Travis' negotiations with Mercury, Mercury representatives chose to misrepresent the truth.

Mercury's first claim is based on a promissory note signed by Glascock and Martrain in the amount of $ 79,117.32. The record shows Mercury is entitled to recover this amount plus attorneys fees in the amount of 10%. Mercury also seeks interest on this amount. Mercury is entitled to recover prejudgment interest from April 11, 1999 at the rate of 18% to the date of judgment. Interest from date of judgment shall be awarded as permitted by federal law.

Mercury also asserts a claim in the sum of $ 11,379.75 against Water Craft, Glascock and Martrain. The Court finds Mercury is subrogated to the rights of MMAC and is entitled to recover this sum from Water Craft, Glascock and Martrain. The Court also finds that Mercury is entitled to interest at the rate of 6% from the date the sum was due until the date of judgment. Interest from date **[**125]** of judgment until the sum is paid shall be in accordance with federal law. The Court also finds **[*565]** Mercury is entitled to attorneys fees in the sum of 10% on this claim.

Mercury seeks the sum of $ 3,855.12 under the 1997 and 1998 Sales and Service Agreements of Water Craft d/b/a Louisiana Boating and its guarantors, Glascock and Martrain. Mercury is entitled to recover this amount from Water Craft d/b/a Louisiana Boating, Glascock and Martrain.

Finally, Mercury seeks to collect the sum of $ 6,076.67 due on an open account. The Court finds Mercury is entitled to recover this sum from Glascock and Martrain.

2. Counter-Claim II

There is a second counterclaim asserted against Boating Centres, Inc. d/b/a Slidell Boating debt of $ 26,576.94 and Glascock. This sum can only be collected against Glascock under the law and facts of this case. Any claim against Boating Centres, Inc. d/b/a Slidell Boating must be asserted in a separate action. The Court finds Mercury is entitled to recover $ 26,576.945 with interest from the date of judgment until paid from Glascock.

III. Summary and Conclusions

Based on the factual and legal conclusions set forth above, the Court finds that: **[**126]** (1) the plaintiffs have failed to prove the antitrust claims by a preponderance of the evidence; (2) even if the plaintiffs have proven their antitrust claims, Mercury has proven the meeting competition defense by a preponderance of the evidence, which absolves it of any antitrust liability; (3) plaintiffs have failed to prove their state law breach of contract claims by a preponderance of the evidence; (4) plaintiffs did prove their state law detrimental reliance, fraud, and misrepresentation claims by a preponderance of the evidence; and (5) Mercury has proven that it is entitled to recover on its counterclaim against the plaintiffs.

Finally, the Court finds it will be necessary to proceed to trial to determine the amount of damages, if any, plaintiffs are entitled to recover from Mercury. However, the Court will allow the parties to advise the Court within fifteen (15) days whether they jointly wish the Court to enter a judgment under *Rule 54(b) of the Federal Rules of Civil Procedure* to allow the parties to appeal the Court's decision on the liability issues at this time or whether the parties wish to proceed with the trial on damages.

Should the parties wish to now proceed with **[**127]** a trial to determine the extent of the plaintiffs' damages, a trial date shall be scheduled by the Court after consultation with the parties.

Baton Rouge, Louisiana, August 12, 2004.

FRANK J. POLOZOLA, CHIEF JUDGE

MIDDLE DISTRICT OF LOUISIANA

FTC v. Arch Coal, Inc.

United States District Court for the District of Columbia

August 16, 2004, MEMORANDUM OPINION DECIDED

CIVIL ACTION NO. 04-0534 (JDB), CIVIL ACTION NO. 04-0535 (JDB) (CONSOLIDATED CASES)

Reporter

329 F. Supp. 2d 109 *; 2004 U.S. Dist. LEXIS 15996 **; 2004-2 Trade Cas. (CCH) P74,513

FEDERAL TRADE COMMISSION, PLAINTIFF, V. Arch COAL, INC., ET AL., DEFENDANTS. STATE OF MISSOURI, ET AL., PLAINTIFFS, V. Arch COAL, INC., ET AL., DEFENDANTS.

Subsequent History: Later proceeding at *FTC v. Arch Coal, Inc., 2004 U.S. App. LEXIS 17304 (D.C. Cir., Aug. 17, 2004)*

Appeal dismissed by *FTC v. Arch Coal, Inc., 2004 U.S. App. LEXIS 19405 (D.C. Cir., Sept. 15, 2004)*

Disposition: [1]** Plaintiffs' request for preliminary injunction denied. Defendants' motion to consolidate preliminary and permanent injunction proceedings denied.

Core Terms

coal, afternoon, coordination, producers, morning, merger, concentration, FTC, reserves, prices, Hake, bids, contracts, customers, tons, relevant market, anticompetitive, post-merger, effects, savings, output, competitor, acquisition, tacit, proposed transaction, Creek, interaction, Dynamics, Decl, compete

LexisNexis® Headnotes

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN1[] Evidence, Burdens of Proof

Section 7 of the Clayton Act, *15 U.S.C.S. § 18*, prohibits a merger between two companies where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly. Section 7 deals in probabilities, not certainties. To warrant injunctive relief under the Clayton Act, a challenged acquisition must be likely substantially to lessen competition. Although certainty is not required, § 7 does demand that a plaintiff demonstrate that the substantial lessening of competition will be sufficiently probable and imminent to warrant relief.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] Grounds for Injunctions, Public Interest

The Federal Trade Commission (FTC) is empowered to seek preliminary injunctive relief preventing parties from consummating a merger until it has had an opportunity to adjudicate the merger's legality. *15 U.S.C.S. § 53(b)* provides for the grant of a preliminary injunction where such action will be in the public interest, as determined by a weighing of the equities and a consideration of the FTC's likelihood of success on the merits. The FTC is not required to prove, nor is a court required to find, that a proposed merger would in fact violate § 7 of the Clayton Act. The FTC need only show that there is a reasonable probability that the acquisition may substantially lessen competition. Proof of actual anticompetitive effects is not required. The FTC must show an appreciable danger of future coordinated interaction based on a predictive judgment. While proof of prior cooperative behavior is relevant, it is not a necessary element of likely future coordination in violation of § 7. The FTC must raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for its thorough investigation, study, deliberation and determination in the first instance and ultimately by an appeals court. The FTC's burden is not insubstantial, and a showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN3[] **Injunctions, Preliminary & Temporary Injunctions**

Because the public interest in effective enforcement of the antitrust laws is of primary importance, a showing of likely success on the merits will presumptively warrant an injunction. Conversely, absent a likelihood of success on the merits, equities alone will not justify an injunction.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Evidence > Burdens of Proof > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Remedies

HN4[] **Antitrust Statutes, Clayton Act**

The Federal Trade Commission (FTC) may establish a *15 U.S.C.S. § 18* violation by showing that a merger will produce a firm controlling an undue share of the relevant market and will result in a significant increase in the concentration of the market. Such a showing establishes a presumption that the merger will substantially lessen competition. Defendants can then rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition in the relevant market. If a defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion which remains with the government at all times. Accordingly, plaintiffs have the burden on every element of their *§ 18* challenge, and a failure of proof in any respect will mean the transaction should not be enjoined.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN5[] **Relevant Market, Product Market Definition**

Only examination of a particular market, its structure, history, and probable future, can provide the appropriate setting for judging the probable anticompetitive effects of a merger. Hence, antitrust theory and speculation cannot trump facts, and even *15 U.S.C.S. § 53(b)* cases must be resolved on the basis of the record evidence relating to the market and its probable future. Analysis of the likely competitive effects of a merger requires determinations of: (1) the relevant product market in which to assess the transaction; (2) the geographic market in which to assess the transaction; and (3) the transaction's probable effect on competition in the relevant product and geographic markets.

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

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN6[] **Market Definition, Relevant Market**

The definition of the relevant market is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal monopolistic or oligopolistic position. A relevant market has two dimensions. First, the relevant product market identifies the product and services with which the defendants' products compete. Second, the relevant geographic market identifies the geographic area in which the defendant competes in marketing its products or service. The Federal Trade Commission bears the burden of proof and persuasion in defining the relevant market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN7[] **Regulated Practices, Market Definition**

In determining relevant product markets, courts have traditionally emphasized two factors: the reasonable interchangeability of use by consumers and the cross-elasticity of demand between the product itself and substitutes for it. The general question is whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other. Relevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other. Determining interchangeability is relatively straightforward. Courts compare the use or function of a defendant's product with other products, and assess the degree to which buyers are willing to substitute those similar products for the test product. If consumers can substitute the use of one for the other, then the products in question will be deemed functionally interchangeable. Courts will generally include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Market Definition**

After finding interchangeability in determining relevant product markets, courts look for cross-elasticity of demand. If a slight decrease in the price of product A causes a considerable number of customers of product B to switch to A, that would indicate that a cross-elasticity of demand exists between A and B and that they compete in the same product market. In defining relevant product markets, courts should exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN9[] **Antitrust, Horizontal Mergers**

The Federal Trade Commission's (FTC) Horizontal Merger Guidelines set forth an analytical framework for considering the issues of interchangeability and cross-elasticity of demand by defining a product market as a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (monopolist) likely would impose at least a small but significant and nontransitory increase in price (SSNIP). In most contexts, the FTC considers a price increase of five percent to constitute a SSNIP. Courts also rely on several practical indicia to help identify the relevant product market. A relevant product market can exist within a larger market. Although courts sometimes refer to this as a "submarket," the term "submarket" can be used interchangeably with "relevant product market," and the analysis is the same regardless of which term is used. The indicia used to help identify the relevant product market include: industry or public recognition of a submarket as a separate economic entity, a product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized venders. Examination of such factors is helpful to augment the assessment of interchangeability and cross-elasticity of demand when determining the relevant product market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > General Overview

HN10[] **Regulated Practices, Market Definition**

Relevant market analysis is based on the narrowest market principle and begins by examining the most narrowly-defined product or group of products sold by merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. The process continues until a relevant market is identified. In a relevant market analysis, the hypothetical monopolist test is generally used to identify whether a small but significant price increase for the product tested would be profitable. The test assumes a five to ten percent price increase on the identified test product in the hands of a hypothetical monopolist and examines whether there will be a sufficient diversion or loss of sales to producers of another product to make that price increase unprofitable. If so, the market is too narrowly delineated. The market is appropriately defined when the price increase will be profitable to a hypothetical monopolist. To measure the volume of diverted sales needed to make a particular price increase unprofitable under the hypothetical monopolist test, economists generally perform a critical loss analysis, which is mathematically informative of the percentage of lost sales needed to defeat the hypothetical price increase.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN11[] **Regulated Practices, Market Definition**

A determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another. In determining interchangeability, therefore, a court must consider the degree to which buyers treat the products as interchangeable, but need not find that all buyers will substitute one commodity for another.

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

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN12[] **Relevant Market, Geographic Market Definition**

The relevant geographic market in which to examine the effects of a merger is the region in which the seller operates, and to which the purchaser can practicably turn for supplies. The relevant geographic market must both correspond to the commercial realities of the industry and be economically significant. The Federal Trade Commission's Horizontal Merger Guidelines also provide guidance for determining the relevant geographic market. The geographic market should be delineated as a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a small but significant and nontransitory increase in price, holding constant the terms of sale for all products produced elsewhere. If buyers will respond to a small but significant and nontransitory increase in price (SSNIP) by shifting to products produced outside the proposed geographic market, and this shift is sufficient to render the SSNIP unprofitable, then the proposed geographic market will be too narrow. The relevant geographic market depends on interchangeability and cross-elasticity of demand.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Evidence > Burdens of Proof > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN13[] **Antitrust Statutes, Clayton Act**

The theory of merger law is that in a market with few rivals, firms are able to coordinate behavior, either by overt collusion or implicit understanding, to restrict output and achieve anticompetitive profits. The Federal Trade Commission (FTC) has the burden of showing that challenged transactions will result in undue concentration in the market. Increases in concentration exceeding certain levels raise a likelihood of interdependent anticompetitive conduct. Market concentration is a function of the number of firms in a market and their respective market shares. Market shares are calculated by the United States Department of Justice and the FTC using the best indicator of firms' future competitive significance. Dollar sales, shipments, and unit sales can be used to calculate market shares, depending on the nature of the firms and their products. Physical capacity or reserves generally will be used as an indicator of firms' future competitive significance if these are the measures that most effectively distinguish those firms.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN14[] **Regulated Practices, Market Definition**

Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The Herfindahl-Hirschman Index (HHI) of market concentration is used by the Federal Trade Commission to interpret market data. The HHI is calculated by summing the squares of the individual market shares of all the participants in the market. The spectrum of market concentration as measured by the HHI is divided into three regions. Under the Federal Trade Commission's Horizontal Merger Guidelines, a market with an HHI of less than 1000 is unconcentrated, a market with an HHI between 1000 and 1800 is moderately concentrated, and a market with an HHI above 1800 is highly concentrated. An increase in HHI of greater than 100 points in a post-merger moderately concentrated market potentially raises significant competitive concerns. Likewise, an increase in the HHI of 50 points or more in a post-merger highly concentrated market may raise significant competitive concerns. It is presumed that mergers producing an increase in HHI of greater than 100 points in a highly concentrated market are likely to create or enhance market power or facilitate its exercise. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN15[] **Regulated Practices, Market Definition**

If Herfindahl-Hirschman Index (HHI) figures are sufficiently large, they will establish a prima facie case of an anticompetitive merger. Thus, where the HHI calculation potentially raises significant competitive concerns or indicates a merger to be presumptively illegal, the factors set forth in §§ 2 through 5 of the Federal Trade Commission's Horizontal Merger Guidelines become relevant in undertaking a more comprehensive and holistic assessment of whether the proposed merger is likely to create or enhance market power or facilitate its exercise. These factors broadly include: the potential adverse competitive effects of a merger, entry analysis, efficiencies, and failure and exiting assets.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Price Terms

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > General Overview

HN16[] **Regulated Practices, Market Definition**

Market shares are calculated by the United States Department of Justice and the Federal Trade Commission using the best indicator of firms' future competitive significance. Evidence of market shares and market concentration should provide a proper picture of a company's future ability to compete. Reserves are a valid measure of market concentration, albeit an imperfect one. Although a court will look primarily to market concentration as measured by reserves, it will also consider other measures. Those other measures can also be expected to provide some indication of the projected increase in market concentration resulting from the challenged transactions. Loadout capacity is a helpful measure of market concentration, but it is likewise imperfect. Production and practical capacity are less useful measures, although they can still be informative. Both are, like loadout capacity, static measures that are not stable predictors of a producer's ability to deliver in the future in the form of sales or contracts. In a market where the availability and price of coal are set by long-term contracts rather than immediate or short-term purchases and sales, reserves rather than past production are the best measure of a company's ability to compete.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Burdens of Proof > General Overview

HN17[] **Antitrust & Trade Law, Clayton Act**

Less of a showing is required from defendants to rebut a plaintiff's less-than-compelling prima facie case of increased market concentration. The more compelling the prima facie case, the more evidence a defendant must present to rebut it successfully.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN18[] **Regulated Practices, Market Definition**

Rebuttal evidence to the government's prima facie case of increased market concentration may take the form of nonstatistical market evidence raising doubts about the persuasive quality of the Federal Trade Commission's statistics or economic circumstances undermining the predictive validity of the government's statistical presentation.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN19[] **Regulated Practices, Market Definition**

Although significant, statistics concerning market share and concentration are not conclusive indicators of anticompetitive effects. A broad analysis of the market to determine any effects on competition is required. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN20[] **Regulated Practices, Market Definition**

The Federal Trade Commission's Horizontal Merger Guidelines define coordinated interaction as actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself. A market is conducive to tacit coordination, then, where producers recognize their shared economic interests and their interdependence with respect to price and output decisions. Successful coordination requires two factors: (1) reaching terms of coordination that are profitable to the firms involved; and (2) an ability to detect and punish deviations that would undermine the coordinated interaction. Coordination need not be complex or complete. Instead, the terms of coordination may be imperfect and incomplete and still result in significant competitive harm. The Merger Guidelines provide, moreover, that the punishment of deviation will not always be direct and specific. Credible punishment may not need to be any more complex than temporary abandonment of the terms of coordination by other firms in the market. But where detection or punishment is likely to be slow, incentives to deviate are enhanced and coordinated interaction is unlikely to be successful.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Business & Corporate Law > Cooperatives > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

HN21[] **Regulated Practices, Market Definition**

An oligopolist market is one having a modest to a relatively few number of players and is distinguished from either perfect competition or monopoly. A non-cooperative oligopolist market (or non-coordinated oligopolist market) is recognized in the economic literature to be a market characterized by competitive outcomes even though there are relatively few firms.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN22[] **Regulated Practices, Market Definition**

A market is conducive to tacit coordination where producers recognize their shared economic interests and their interdependence with respect to price and output decisions. Successful coordination requires both that firms reach terms of coordination that are profitable and that they be able detect and punish deviations from the coordinated interaction. In order for producers to be able to coordinate production, they would need a reliable reference point to attain agreement as to a lag in production.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN23[] **Antitrust, Horizontal Mergers**

An important consideration when analyzing possible anticompetitive effects is whether an acquisition will result in the elimination of a particularly aggressive competitor in a highly concentrated market. For purposes of a coordinated effects analysis, the Federal Trade Commission's (FTC) Horizontal Merger Guidelines define a "maverick" firm as one possessing a greater economic incentive to deviate from the terms of coordination than those of its rivals. FTC officials have noted that, in the context of an auction market, to be a maverick a firm must consistently compete aggressively when it bids, causing other firms to bid more aggressively when it is present.

Antitrust & Trade Law > Clayton Act > Defenses

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

HN24[] Clayton Act, Defenses

The United States Supreme Court has not sanctioned the use of an efficiencies defense in a case brought under § 7 of the Clayton Act, *15 U.S.C.S. § 18*. However, the trend among lower courts is to recognize the defense. A defendant may rebut the government's prima facie case with evidence showing that the merger would create significant efficiencies in the relevant market.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN25[] Antitrust, Horizontal Mergers

The Federal Trade Commission's Horizontal Merger Guidelines recognize that mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Hence, efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. However, the government will only consider those efficiencies that are merger-specific and verifiable by reasonable means. The higher the market concentration present in a given case, moreover, the more extraordinary the efficiencies that a defendant must show. When there are high market concentration levels, a court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior. However, even where evidence of efficiencies in the relevant market will not support an outright defense to an anticompetitive merger, such evidence is relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Business & Corporate Law > Corporations > Corporate Finance > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN26[] **Robinson-Patman Act, Defenses**

The appropriate focus under § 7 of the Clayton Act, *15 U.S.C.S. § 18*, is on a merging firm's probable future ability to compete, rather than its past production. Under the "failing" or even "flailing" company defense a presumption of illegality based on market concentration alone can be rebutted if defendants can prove that the acquired firm's current market shares overstate its future competitive significance due to its weak financial condition. A weak financial condition, or limited reserves, may mean that a company will be a far less significant competitor than current market share, or production statistics, appear to indicate. The evidence of financial or other weakness must genuinely undercut the statistical showing of anticompetitive market concentration. Indeed, financial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger, and certainly cannot be the primary justification for permitting one. Thus, financial difficulties are relevant only where they indicate that market shares will decline in the future and by enough to bring a merger below the threshold of presumptive illegality.

Mergers & Acquisitions Law > Mergers > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN27[] **Mergers & Acquisitions Law, Mergers**

A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: (1) the allegedly failing firm will be unable to meet its financial obligations in the near future; (2) it will not be able to reorganize successfully under Chapter 11 of the federal Bankruptcy Act; (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and (4) absent the acquisition, the assets of the failing firm will exit the relevant market.

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > General Overview

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN28[] **Remedies, Injunctions**

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C.S. § 53(b), provides for the grant of a preliminary injunction where such action will be in the public interest, as determined by a weighing of the equities and a consideration of the Federal Trade Commission's likelihood of success on the merits. 15 U.S.C.S. § 53(b). The primary public interest favoring preliminary injunctive relief in a § 13(b) case is the effective enforcement of the antitrust laws. Absent a likelihood of success on the merits, however, equities alone will not justify an injunction.

Counsel: RHETT RUDOLPH KRULLA, FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION, WASHINGTON, DC. MARC I. ALVAREZ, FEDERAL TRADE COMMISSION, WASHINGTON, DC, Counsel for Plaintiff, FEDERAL TRADE COMMISSION.

ANNE E. SCHNEIDER, OFFICE OF THE ATTORNEY GENERAL, STATE OF MISSOURI, JEFFERSON CITY, MO, Counsel for Plaintiff, STATES AND STATE OF MISSOURI.

BRADFORD J. PHELPS, OFFICE OF THE ATTORNEY GENERAL, LITTLE ROCK, AR, Counsel for Plaintiff, STATE OF ARKANSAS.

KARL R. HANSEN, OFFICE OF THE KANSAS ATTORNEY GENERAL, TOPEKA, KS, Counsel for Plaintiff, STATE OF KANSAS.

ROBERT W. PRATT, ILLINOIS OFFICE OF THE ATTORNEY GENERAL, CHICAGO, IL, Counsel for Plaintiff, STATE OF ILLINOIS.

THOMAS J. MILLER, IOWA DEPARTMENT OF JUSTICE, DES MOINES, IA, LAYNE M. LINDEBAK, IOWA DEPARTMENT OF JUSTICE, DES MOINES, IA, Counsel for Plaintiff, STATE OF IOWA.

REBECCA FISHER, OFFICE OF THE ATTORNEY GENERAL OF TEXAS, AUSTIN, TX, Counsel for Plaintiff, STATE OF TEXAS.

STEPHEN WEISSMAN, HOWREY SIMON ARNOLD & WHITE, LLP, WASHINGTON, DC, WILLIAM BRADFORD REYNOLDS, HOWREY SIMON ARNOLD & WHITE, LLP, WASHINGTON, DC, Counsel for Defendant, ARCH COAL, INC.

CHARLES EDWARD BACHMAN, **[**2]** O'MELVENY & MYERS, LLP, NEW YORK, NY, RICHARD G. PARKER, O'MELVENY & MYERS LLP, WASHINGTON, DC, Counsel for Defendants, NEW VULCAN COAL HOLDINGS, LLC AND TRITON COAL COMPANY, LLC.

KENNETH GEORGE STARLING, PIPER RUDNICK LLP, WASHINGTON, DC, Counsel for Movant, PETER KIEWIT SONS, INC.

Judges: JOHN D. BATES, United States DISTRICT JUDGE.

Opinion by: JOHN D. BATES

Opinion

[*114] **MEMORANDUM OPINION**

Coal is the primary fuel that produces electric power for residential and business consumers across the United States. It is mined in various regions across the country, in either surface or underground mining operations, after which the coal is transported by rail, truck or barge to electrical generating plants. One-third of the coal produced annually in the United States -- over 360 million tons -- is produced from large-scale surface mining operations in the Southern Powder River Basin ("SPRB") region of Wyoming. Seven companies operate fourteen mines in the SPRB at this time.

In May of 2003, Arch Coal, Inc. ("Arch"), the owner and operator of two SPRB mines (Black Thunder and Coal Creek) as well as other mining operations across the United States, and New Vulcan Coal Holdings, LLC ("New Vulcan"), **[**3]** the owner of two SPRB mines (North Rochelle and Buckskin), which it operates through its subsidiary Triton Coal Company, LLC ("Triton"), entered into a merger and purchase agreement under which Arch would acquire Triton and its two SPRB mines. Hart-Scott-Rodino pre-merger notification was provided to the Federal Trade Commission ("FTC"), which in august 2003 requested additional information from Arch and New Vulcan. Arch subsequently informed the FTC that it intended to divest one of the acquired mines (Buckskin) to Peter Kiewit Sons, Inc. ("Kiewit"), a large company with some mining interests outside the SPRB, and in January 2004 a firm asset purchase agreement was entered by Arch and Kiewit.

After a nine-month review, the FTC voted on March 30, 2004, to commence this action seeking to enjoin the proposed acquisition under section 13(b) of the Federal Trade Commission Act, *15 U.S.C. § 53(b)*, as violative of section 7 of the Clayton Act, *15 U.S.C. § 18*. The FTC seeks to preliminarily enjoin Arch's proposed acquisition of Triton until an administrative FTC proceeding challenging the transaction under *Section 7* can be completed. A parallel **[**4]** suit was also filed on April 1, 2004, by the states of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas (the "States") seeking both preliminary and permanent injunctive relief. The two actions were consolidated by this court on April 21, 2004. [1]

The court held a two-week trial commencing on June 28, 2004, during which it heard from more than twenty witnesses and received hundreds of exhibits, many of them lengthy, including deposition and affidavit testimony of several additional witnesses. The parties have submitted well over 700 pages of post-hearing proposed findings of fact and briefs. The court has reviewed that substantial body of evidence and argument in assessing the FTC's challenge **[**5]** to the proposed acquisition of the **[*115]** North Rochelle and Buckskin mines by Arch, and the simultaneous transfer of Buckskin to Kiewit, and the probable effect of those transactions on competition in the SPRB. [2] **[**6]** The case is complex, and represents an attempt by the FTC to enjoin transactions that do not reduce the number of competitors and only modestly increase the concentration in what has been a very competitive market. Moreover, the case rests on a novel FTC theory of likely future "tacit coordination" among competitors to restrict production, as opposed to direct coordination of prices. In the end, the court concludes that the FTC and the States have not met their burden under *Section 7 of the Clayton Act and* (for the FTC) *Section 13(b)* of the FTC Act to show a likelihood that the challenged transactions will substantially lessen competition in the SPRB. The requested preliminary injunctive relief will therefore be denied. [3]

I. APPLICABLE LAW

Section 7 of the Clayton Act, *15 U.S.C. § 18*, ***HN1***[] prohibits a merger between two companies "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition …may be substantially to lessen competition, or tend to create a monopoly." The Supreme Court has observed that *Section 7* "deals in probabilities, not certainties." *United States v. General Dynamics Corp., 415 U.S. 486, 505, 39*

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[1] Hereinafter, the plaintiffs in the two actions will collectively be referred to as "plaintiffs" or as "the FTC," unless specific reference to the states is necessary. The defendants in these actions are Arch, Triton and New Vulcan (collectively "defendants"), while Kiewit is participating only as an *amicus curiae*.

[2] On July 7, 2004, the court issued a decision concluding that Arch's sale of the Buckskin mine to Kiewit would be considered as part of the challenged transactions along with Arch's acquisition of Triton.

[3] The renewed motion of defendants to consolidate the request for preliminary and permanent injunctive relief will also be denied at this time. This opinion was provided to the parties in final form on August 13, 2004, but public release was delayed to ensure that no confidential business information that had been submitted under seal was being released. Based on defendants' input, some minor adjustments to the opinion have been made.

L. Ed. 2d 530, 94 S. Ct. 1186 (1974); see also Brown Shoe Co. v. United States, 370 U.S. 294, 323, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962); United States v. El Paso Natural Gas Co., 376 U.S. 651, 658, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964). **[**7]** as defendants also correctly stress, however, "section 7 deals in probabilities not ephemeral possibilities." FTC v. Tenet Health Care, Inc., 186 F.3d 1045, 1051 (8th Cir. 1999). To warrant injunctive relief under the Clayton Act, the challenged acquisition must be likely substantially to lessen competition. Although certainty is not required, section 7 does demand that a plaintiff demonstrate that the substantial lessening of competition will be "sufficiently probable and imminent" to warrant relief. United States v. Marine Bancorporation, 418 U.S. 602, 618, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974); see United States v. Baker Hughes, Inc., 285 U.S. App. D.C. 222, 908 F.2d 981, 984 (D.C. Cir. 1990) (" Section 7 involves *probabilities*, not certainties or possibilities.").

HN2[] Congress has empowered the federal trade commission to seek preliminary injunctive relief preventing parties from consummating a merger until the FTC has had an opportunity to adjudicate the merger's legality. Section 13(b) of the FTC Act "provides for the grant of a preliminary injunction where such action would be in the public interest -- as determined by a weighing of the **[**8]** equities and a consideration of the commission's likelihood of success on the merits." FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 714 (D.C. Cir. 2001); see 15 U.S.C. § 53(b). The FTC "is not required to prove, nor is the court **[*116]** required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act." FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997) (citations omitted); see FTC v. University Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991) (court's task is to make preliminary assessment of impact on competition). Rather, the FTC "need only show that there is a 'reasonable probability' that the acquisition may substantially lessen competition." Staples, 970 F. Supp. at 1072. proof of actual anticompetitive effects is not required; instead, the FTC must show "an appreciable danger" of future coordinated interaction based on a "predictive judgment." HEINZ, 246 F.3D at 719 (quoting Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)). While proof of prior cooperative behavior is relevant, it is not **[**9]** a necessary element of likely future coordination in violation of Section 7. The FTC, then, must raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the court of appeals." id. at 714-15 (citations omitted).

Given the stakes, the FTC's burden is not insubstantial, and "[a] showing of a fair or tenable chance of success on the merits will not suffice for injunctive relief." Tenet Health Care, 186 F.3d at 1051; see Fruehauf Corp. v. FTC, 603 F.2d 345, 351 (2d Cir. 1979) ("mere possibility" will not justify preliminary injunction). **HN3**[] because the public interest in effective enforcement of the antitrust laws is of primary importance, a showing of likely success on the merits will presumptively warrant an injunction. see Heinz, 246 F.3d at 726; University Health, 938 F.2d at 1225; Staples, 970 F. Supp. at 1091. Conversely, absent a likelihood of success on the merits, equities alone will not justify an injunction. see FTC v. PPG Indus., Inc., 255 U.S. App. D.C. 69, 798 F.2d 1500, 1508 (D.C. Cir. 1986). **[**10]**

This circuit has articulated an analytical approach by which **HN4**[] the FTC may establish a Section 7 violation. First, the FTC must show that the merger would produce a firm controlling an undue share of the relevant market and would result in a significant increase in the concentration of the market. Heinz, 246 F.3d at 715 (citations omitted). "Such a showing establishes a presumption that the merger will substantially lessen competition." Id. (citing Baker Hughes, 908 F.2d at 982). Defendants can then rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition in the relevant market. Id.; See also United States v. Citizens & S. Nat'l bank, 422 U.S. 86, 120, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975). "If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion which remains with the government at all times." Heinz, 246 F.3d at 715 (quoting Baker Hughes, 908 F.2d at 983). **[**11]** Accordingly, plaintiffs have the burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined.

The Supreme Court has observed that **HN5**[] "'only examination of the particular market -- its structure, history, and probable future -- can provide the appropriate setting for judging the probable anticompetitive effects of the merger.'" General Dynamics, 415 U.S. at 498 (quoting Brown Shoe, 370 U.S. at 322 n. 28). Hence, antitrust theory and speculation cannot trump facts, and even *Section 13(b)* cases must be resolved on the basis of the record evidence relating **[*117]** to the market and its probable future. See *Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 460-67, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)*; *FTC v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1080 (D.C. Cir. 1981)* ("Hearings on preliminary injunctions [under *Section 13(b)*] necessarily look to the future and decisions must rest on comparative, tentative assessments of the course of events if the injunction is issued, and if it is not."); *Verizon Communications., Inc. V. Law Offices of Curtis V. Trinko, 540 U.S. 398, 157 L. Ed. 2d 823, 124 S. Ct. 872, 882 (2004)* **[**12]** (focus on actual rather than theoretical guards against false condemnation that may chill conduct that antitrust laws are designed to protect). Analysis of the likely competitive effects of a merger requires determinations of (1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the relevant product and geographic markets. See *Marine Bancorporation, 418 U.S. at 618-23*; *General Dynamics, 415 U.S. at 510-11*.

II. ANALYSIS

A. The Coal Industry

Coal is the base fuel for over fifty percent of the electricity generated in the United States. Bales Tr. (6/21 afternoon) at 33:7-8. [4] It is mined from underground or surface mining operations, depending on the location and reserves, then delivered by truck, barge, or rail to generating sites where it is typically stored and then fed into boilers to generate electricity. Id. at 33:6-13. The coal available in the United States falls into three general categories: lignite, subbituminous, and bituminous. Subbituminous coal has a Btu [5] content that typically **[**13]** ranges from 8000 to 9500 Btus per pound, and is principally located in Montana and Wyoming. It has become the fuel of choice for a large number of electric utility companies in the United States. Id. at 33: 14-25.

The Powder River Basin ("PRB") refers to a large coal-bearing geological formation located in Montana and Wyoming. DX 9007 at 001. Coal in the Southern Powder River Basin ("SPRB") **[**14]** of northeastern Wyoming is located close to the surface, and can be mined by largescale surface operations as opposed to underground mining techniques. Lang Tr. (6/24 afternoon) at 46:6-49:2; See DX 1024 at 24648; DX 9000. The estimated reserves of coal in the SPRB exceed 7.8 billion tons. DX 9005 at 002. Currently, approximately 360 million tons of coal are produced annually in the SPRB, which represents approximately one-third of the coal produced annually in the United States. FTC Compl. P 13; States Compl. P 15.

SPRB coal is known for its low sulfur content. Bales Tr. (6/21 afternoon) at 35:7-9. Sulfur content first became a critical factor when the *Clean Air Act* was passed in 1970. Id. at 35:2-9. SPRB coal is the most economical source of fuel that complies with Clean Air Act sulfur limitations. Id. SPRB coal also has a moderately high heat content and low ash content. **[*118]** heat content (measured in Btu) affects the amount of energy a user can extract from a unit of coal; ash content affects the grindability of the coal and the performance of air quality equipment, and thus customers prefer coal with low ash content. The SPRB provides a critical source of plentiful, inexpensive **[**15]** coal having a strong combination of these important characteristics. PX 0021 p 8 (Rea Decl.); PX 0042 pp 4-11; PX 0012 pp 5, 11-15 (Panzarino Decl.); PX 0010 pp 3-7 (flippin Decl.).

Coal resources in the SPRB are controlled primarily by the federal government, and the vast majority of SPRB production is from lands subject to federal coal leases, with a small amount from state and private lands. DX 1024-

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[4] Citations to the trial record are in the following form: for testimony -- "[Witness] Tr. (date) at page: line"; for plaintiffs' exhibits -- "PX ____"; for defendants' exhibits --"DX ____"; for plaintiffs' proposed findings of fact -- "PFF ____"; for defendants' proposed findings of fact -- "DFF ____." the following abbreviations are employed in citations: "Decl." for declaration, "Dep." for deposition, "I.H." for investigational hearing, and "W.D." for written direct testimony.

[5] A British Thermal Unit (Btu) is the amount of heat required to raise the temperature of one pound of water one degree Fahrenheit.

24648. The SPRB mines can be divided into three tiers based on coal quality, heat content, and mine location. Bales Tr. (6/21 afternoon) at 40: 1-41:2; PX 0312 at 018; DX 1024 at 24648. Tier 1 mines typically produce a high Btu (8600-8900) coal and include the Antelope, Black Thunder, Jacobs Ranch, North Antelope/Rochelle, and North Rochelle mines. Bales Tr. (6/21 afternoon) at 40: 2-7; PX 0011 at 013-014; PX 0012 p 5 (Panzarino Decl.); DX 1024 at 24650. Tier 2 mines produce coals ranging from 8300 to 8550 Btu, and include Belle Ayr, Caballo/North Caballo, Coal Creek, and the Cordero Rojo complex. PX 0772 at 36, 66; PX 0011 at 013-014; PX 0012 p 5 (Panzarino Decl.); DX 1024 at 24650. Tier 3 mines produce relatively low Btu coal (7900-8450) and **[**16]** include the Buckskin, Dry Fork, Eagle Butte, Fort Union, Rawhide, and Wyodak mines. PX 0011 at 013-014; PX 0012 p 5 (Panzarino Decl.); DX 1024 at 24650.

Seven companies currently operate the fourteen mines in the SPRB. DX 1024 at 24670. Four companies, each operating a Tier 1 mine, are considered the major producers of SPRB coal: Arch, Triton, Kennecott Energy Co. ("Kennecott"), and Peabody Holding Co. ("Peabody"). Arch operates the Black Thunder and Coal Creek mines; Triton operates the North Rochelle and Buckskin mines; Kennecott operates the Antelope, Jacobs Ranch and Cordero-Rojo mines; and Peabody operates the North Antelope/Rochelle, Caballo, and Rawhide mines. PX 5675 at 002. RAG American ("RAG") is another significant producer in the SPRB, but it only operates mines in Tiers 2 and 3 (Belle Ayr And Eagle Butte). PX 3308 at 002. Two small mining entities, Western Fuels and Wyodak, generally do not compete for business in the region and, therefore, are not recognized by most customers as feasible supply alternatives to the five larger producers. PX 0010 pp 8-9 (Flippin Decl.); PX 0042 p 10 (Luksan Decl.); PX 0022 p 3 (Stolwyk Decl.); PX 0012 p 14 **[**17]** (Panzarino Decl.).

Virtually all SPRB coal is purchased by electric power companies for use in their coalfired steam generating units. FTC Compl. P 13; States Compl. P 15. There are approximately 150 generating plants that presently consume coal from the SPRB, DX 0086 p 21, located throughout the United States ranging from Montana to Texas, and Washington to New York, DX 9007 at 004. SPRB coal is shipped via railroad for the most part, and the SPRB is served by two railroads: the Union Pacific ("UP") and the Burlington Northern/Santa Fe ("BNSF"). Shalah Tr. (6/25 afternoon) at 28:13-18. The "joint line" is a railroad line that is jointly owned by BNSF and the UP. It is dispatched by the BNSF and serves the SPRB mines south of Gillette, Wyoming: Antelope, North Antelope/Rochelle, North Rochelle, Black Thunder, Jacobs Ranch, Coal Creek, Cordero-Rojo, Belle Ayr, and Caballo. Id. at 22:2-6. The "single line" is a railroad line owned and operated by the BNSF, **[*119]** which serves the mines north and east of Gillette: Buckskin, Eagle Butte, Dry Fork, Fort Union, and Wyodak. Id. at 22:7-20.

The SPRB is the fastest growing coal producing region in **[**18]** the United States, with demand projected to grow from a present level of over 360 million tons per year to over 500 million tons per year during the next ten years. PX 8605 at 005-006; DX 1024 at 24756. Industry analysts attribute the expectation for growth in demand for SPRB coal to low-cost production and compliance with recent environmental legislation. PX 0123 at 002-003. The SPRB coal industry has experienced some consolidation in recent years, as the number of SPRB producers has decreased. PX 8605 at 005-006.

B. The Coal Market

HN6[] The definition of the relevant market is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal monopolistic or oligopolistic position. See *Marine Bancorporation, 418 U.S. at 618* (determination of relevant market "necessary predicate" to deciding whether *Section 7* violation). A relevant market has two dimensions. first, the "relevant product market" identifies the product and services with which the defendants' products compete. Second, the "relevant geographic market" identifies the geographic area in which the defendant competes in marketing its products or service. **[**19]** the FTC bears the burden of proof and persuasion in defining the relevant market. *United States v. Sungard Data Sys., 172 F. Supp. 2d 172, 182-83 (D.D.C. 2001)*.

1. Relevant Product Market

HN7[] In determining relevant product markets, courts have traditionally emphasized two factors: "the reasonable interchangeability of use [by consumers] and the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe, 370 U.S. at 325; See also United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). The general question is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." Staples, 970 F. Supp. at 1074 (quoting Hayden Publ'g Co. v. Cox Broad. Corp., 730 F.2d 64, 70 n. 8 (2d Cir. 1984)). Relevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other. See Smithkline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978); Staples, 970 F. Supp. at 1075. **[**20]**

Determining interchangeability is relatively straightforward. Courts compare the use or function of defendant's product with other products, and assess "the degree to which buyers are willing to substitute those similar products for the [test] product." Sungard Data, 172 F. Supp. 2d at 182. If consumers can substitute the use of one for the other, then the products in question will be deemed "functionally interchangeable." See, E. G., Staples, 970 F. Supp. at 1074 (finding that office supplies sold by an "office superstore" like staples are functionally interchangeable with office supplies sold at "mass merchandisers" like Wal-Mart); E.I. du pont de Nemours, 351 U.S. at 399 (recognizing "functional interchangeability" between cellophane and other flexible wrappings). Courts will generally include functionally interchangeable products in the same product market unless factors Other than use indicate that they are not actually part of the same market. See, E. G., United States v. Archer-Daniels-Midland Co., **[*120]** 866 F.2d 242, 246 (8th Cir. 1988) (even though beet sugars and high-fructose corn sugars **[**21]** were functionally interchangeable, they did not belong to the same product market because government price support for beet sugars meant that prices for corn sugars could be raised substantially without feeling the competitive impact of beet sugar prices).

HN8[] After finding interchangeability, courts look for cross-elasticity of demand. If a slight decrease in the price of product A causes a considerable number of customers of product B to switch to A, that would indicate that a cross-elasticity of demand exists between A and B and that they compete in the same product market. See E.I. du Pont de Nemours, 351 U.S. at 400. In defining relevant product markets, courts should "exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." Times-picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n. 31, 97 L. Ed. 1277, 73 S. Ct. 872 (1953). HN9[] the FTC's Horizontal Merger Guidelines set forth an analytical framework for considering the issues of interchangeability and cross-elasticity of demand by defining a product market as "a product or group of products such that a hypothetical profit-maximizing firm that was **[**22]** the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price" (SSNIP). U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (hereinafter "Merger Guidelines § ____"). In most contexts, the FTC considers a price increase of five percent to constitute a SSNIP. Id. Courts have also relied on several "practical indicia" to help identify the relevant product market. [6] these indicia include: industry or public recognition of a submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized venders. Brown Shoe, 370 U.S. at 325. Examination of such factors is helpful to augment the assessment of interchangeability and cross-elasticity of demand when determining the relevant product market.

[23]** HN10[] Relevant market analysis is based on the "narrowest market" principle. Guerin-Calvert Tr. (6/30 afternoon) at 44:5-7. The analysis begins by examining the most narrowly-defined product or group of products sold by the merging firms to ascertain if the evidence and data support the conclusion that this product or group of products constitutes a relevant market. If not, the analysis shifts to the next broadest product grouping to test whether that is a relevant market. This process continues until a relevant market is identified. Id. at 44:8-17. In a relevant market analysis, the hypothetical monopolist test is generally used to identify whether a small but

[6] In Brown Shoe, the Supreme Court found that a relevant product market could exist within a larger market. Although courts have sometimes referred to this as a "submarket," the term "submarket" can be used interchangeably with "relevant product market" and the analysis is the same regardless of which term is used. Staples, 970 F. Supp. at 1080 n. 11.

significant price increase for the product tested would be profitable. [7] Morris Tr. (6/23 afternoon) at 48: 24-49: 9; **[*121]** Guerin-Calvert Tr. (6/30 afternoon) at 44:24-45:11.

[24]** The parties agree that SPRB coal is a relevant product market within which to examine the competitive effects of the proposed transactions. DFF 57; PFF 60. Plaintiffs' expert concluded, after applying the hypothetical monopolist test, that the relevant market is no broader than SPRB coal. Morris Tr. (6/23 afternoon) at 43:11-25; Morris Tr. (6/24 morning) at 56. Plaintiffs also argue that 8800 Btu SPRB coal is a distinct and narrower relevant product market within which to assess the proposed transaction. Defendants' expert, applying the same test, concluded that the relevant market is no narrower than SPRB coal. Guerin-Calvert Tr. (6/30 afternoon) at 40:13-15. However, defendants have not set forth a viable argument, supported by evidence, for consideration of all PRB coal as a broader relevant market. The court, therefore, rejects the proposition that the entire PRB coal market is the relevant product market for analysis of the proposed transactions.

With respect to plaintiffs' contention that the relevant product market is narrower than SPRB coal, plaintiffs' expert did state his belief that 8800 Btu SPRB coal is a distinct relevant market, but did so only very reluctantly when **[**25]** pressed by the court. Dr. Morris first stated that he was unable "to state with a reasonable degree of certainty that 8800 Btu coal is a relevant antitrust market," PX 4300 p 39; Morris Tr. (6/23 afternoon) at 44:19-21, then testified that "the relevant market …could be as narrow as 8800 Btu coal," Morris Tr. (6/24 morning) at 56:9-15. Later, he opined that "8800 Btu coal is likely to be a relevant market," and finally, when prompted by the court, asserted that 8800 Btu coal is a separate relevant market. Id. at 57:16-58:7. Nonetheless, the clear impression left by Dr. Morris is that he is not entirely sure that 8800 Btu SPRB coal is a relevant product market, and that he would prefer to undertake further analysis before so concluding. The court thus finds unconvincing his reluctant conclusion that 8800 Btu SPRB coal is a relevant product market.

In order for 8800 Btu coal to be considered a separate relevant market, plaintiffs must show that 8800 Btu coal is not interchangeable with 8400 Btu coal. The testimony of dr. Morris does not satisfy that burden, because he does not account for the substantial evidence regarding the purchasing practices of **[**26]** utilities, which establishes that 8800 and 8400 Btu coal are substitutable. In both trial testimony and depositions, virtually all the utilities acknowledged that they can and do purchase and consume both 8800 and 8400 Btu coal, and that they actively solicit and consider both in their coal bidding procedures. Guerin-Calvert Tr. (6/30 afternoon) at 57:18-58:5, 60:5-11; DX 0086 at p 22; DX 2006 at pp 19-20; Holloway Tr. (6/22 afternoon closed) at 77:24-78:14 (OG&E's facilities were designed to burn, and have burned coals ranging from 8400 to 8800 **[*122]** Btu); Freund Tr. (6/21 afternoon) at 80:25-81:2 ("Q: Are you able to burn both 8,400 and 8,800 SPRB coal at your facilities? A: Yes we are."); Orme Tr. (6/22 morning) at 13:18-14:9; Kelly Tr. (6/22 morning) at 56:17-20; Herndon Tr. (6/22 afternoon) at 23:13-18; Carr Tr. (6/23 afternoon) at 10:17-20; Thede Dep. at 43:11-22; Rackers Dep.. at 105:16-106: 22; Flippin Dep. at 105:25-107:3 (LCRA has purchased both 8400 and 8800 coal in the past five years); McGowan Dep. at 155:3-10, 167: 4-9, 180:21-24; Stolwyk Tr. (6/23 morning) at 67:20-24; DX 0919; DX 0920; DX 0921; DX 0926; Werner Tr. (6/23 morning) at 8:19-9:10, 26:9-11; Lapplander Tr. (7/7 morning) **[**27]** at 8:7-18; Stuchal Tr. (7/7 morning) at 67:21-22; DX 0919 at 0022359; DX 0853 at 0021480-504; DX 0951 at 0023232; DX 0953 at 0023389-90; DX 0955 at 0023399; DX 0897; DX 0898; DX 0899; DX 0716 at 0018525. Some customers did indicate that they prefer 8800 Btu coal to 8400 Btu coal, but the evidence also shows that customers having that preference nonetheless can use and have used other Btu coals, and benefit from the competition between 8800 and 8400 Btu coal. Kelly Tr. (6/22 morning) at 48:1-5, 62:10-13; Stuchal Tr. (7/7 morning) at 73:21-74:3 (the Nebraska Public Power District's plant

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[7] The test assumes a five to ten percent price increase on the identified test product in the hands of a hypothetical monopolist, and examines whether, in such circumstances, there would be a sufficient diversion or loss of sales to producers of another product to make that price increase unprofitable. Morris Tr. (6/23 afternoon) at 49:2-9; Guerin-Calvert Tr. (6/30 afternoon) at 44:24-45:16. If so, the market is too narrowly delineated. The market is appropriately defined when the price increase would be profitable to the hypothetical monopolist. Morris Tr. (6/23 afternoon) at 48:24-49:9; Guerin-Calvert Tr. (6/30 afternoon) at 44:24-45:11. To measure the volume of diverted sales needed to make a particular price increase unprofitable under the hypothetical monopolist test, economists generally perform a critical loss analysis. Morris Tr. (6/23 afternoon) at 49:16-50:11; Guerin-Calvert Tr. (6/30 afternoon) at 46:20-47:1; DX 0086 p 28 n. 24. The critical loss analysis is mathematically informative of the percentage of lost sales needed to defeat the hypothetical price increase. Guerin-Calvert Tr. (6/30 afternoon) at 47:2-5.

managers prefer 8800 Btu coal but purchase 8400 to 8800 Btu coal depending on which coal has the best evaluated price); Guerin-Calvert Tr. (6/30 afternoon) at 73:15-20. Plaintiffs do not dispute that for most SPRB customers "purchasing decisions [between 8800 Btu and 8400 Btu SPRB coal] are based on economics." Bales Tr. (6/21 afternoon) at 42:17-43:21. The evidence also shows, however, that some customers can only purchase either 8800 or 8400 Btu SPRB coal, but not both, regardless of the economics. Rahm Tr. (6/21 morning) at 89:7-90:11; Orme Tr. (6/22 morning) at 7:11-20. [8] The Supreme Court **[**28]** has stated that ***HN11***[] the "[d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another." *E.I. Du Pont de Nemours, 351 U.S. at 393*. in determining interchangeability, therefore, the court must consider the degree to which buyers treat the products as interchangeable, but need not find that all buyers will substitute one commodity for another.

Plaintiffs contend that defendants, in arguing against 8800 Btu coal as a relevant market, have failed to consider both the extent to which buyers are unwilling to substitute between 8800 and 8400 Btu coal and the extent of the price increase that would be necessary before significant substitution would occur. Pls. Post-Hearing Reply Br. at 20. The burden, however, is squarely on plaintiffs to establish **[**29]** that 8800 Btu coal is a separate relevant market. See *Sungard Data, 172 F. Supp. at 182-83*. Based on the reluctance of plaintiffs' own expert to conclude that 8800 Btu SPRB coal is a separate relevant market, and the evidence of significant interchangeability between 8800 Btu and 8400 Btu coal, the court declines to find that 8800 Btu coal is a separate relevant market. Both Dr. Morris and Ms. Guerin-Calvert concluded, after applying the hypothetical monopolist test and critical loss analysis, that SPRB coal is a relevant market. Plainly, SPRB coal is considered a unique and preferred product by customers. See Kelly Tr. (6/22 morning) at 41:21-25; Holloway Tr. (6/22 afternoon) at **[*123]** 76:1-7; Werner Tr. (6/22 afternoon) at 116:1-22. The court therefore concludes that the relevant product market is no broader and no narrower than SPRB coal. Defendants' half-hearted argument for a market of all PRB coal is totally unpersuasive, and plaintiffs have not carried their burden of establishing that 8800 Btu SPRB coal is a distinct relevant product market.

2. Relevant Geographic Market

HN12[] The relevant geographic market in which to examine the effects of a merger is "the **[**30]** region in which the seller operates, and to which the purchaser can practicably turn for supplies." *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 49 (D.D.C. 1998)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961))*. The Supreme Court has emphasized that the relevant geographic market must both "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe, 370 U.S. at 336-37* (internal citations omitted). The Merger Guidelines also provide guidance for determining the relevant geographic market. the geographic market should be delineated as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." Merger Guidelines § 1.21. If buyers would respond to the SSNIP by shifting to products produced *outside* the proposed geographic market, and this shift were sufficient to render the SSNIP unprofitable, **[**31]** then the proposed geographic market would be too narrow. Id.

As with the relevant product market, the relevant geographic market depends on interchangeability and cross-elasticity of demand. Here, however, because the relevant product market is defined in geographic terms as SPRB coal, which is produced and sold in that region, the product market and geographic market analysis are really the same. See Morris Tr. (6/23 afternoon) at 67:14-22. The parties agree that the relevant geographic market has the same scope as the relevant product market -- the SPRB -- and hence the court concludes that the SPRB is the relevant geographic market.

C. Market Concentration

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[8] Specific boilers may be constructed or configured to burn 8800 rather than 8400 coal, or vice versa.

As recognized by the D.C. Circuit in Heinz, *HN13*[] the theory of merger law is that in a market with few rivals, firms are able to coordinate behavior, "either by overt collusion or implicit understanding," to restrict output and achieve anticompetitive profits. *246 F.3d at 715*; See also *PPG Indus., 798 F.2d at 1503*. The FTC has the burden of showing that the challenged transactions will result in "undue concentration in the market." *Baker Hughes, 908 F.2d at 982*. Increases **[**32]** in concentration exceeding certain levels raise a likelihood of "interdependent anticompetitive conduct." *Heinz, 246 F.3d at 715-16* (quoting *General Dynamics, 415 U.S. at 497*).

Market concentration is a function of the number of firms in a market and their respective market shares. Merger Guidelines § 1.5. Market shares are calculated by the department of justice and the FTC using the best indicator of firms' future competitive significance. Dollar sales, shipments, and unit sales can be used to calculate market shares, depending on the nature of the firms and their products. Physical capacity or reserves generally will be used as an indicator of firms' future competitive significance if these are the **[*124]** measures that most effectively distinguish those firms. Id. § 1.41. Assessing the coal industry in the late 1960's, which was then dominated by long-term supply contracts, the Supreme Court in General Dynamics rejected statistical evidence of coal production as a valid measure of competitive power in the market: "a more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's **[**33]** uncommitted reserves of recoverable coal." *415 U.S. at 502*.

HN14[] other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. Merger Guidelines § 2.0. The Herfindahl-Hirschman Index ("HHI") of market concentration is used by the FTC to interpret market data. The HHI is calculated by summing the squares of the individual market shares of all the participants in the market. See *Heinz, 246 F.3d at 716 n. 9*.

The spectrum of market concentration as measured by the HHI is divided into three regions. A market with an HHI of less than 1000 is "unconcentrated," a market with an HHI between 1000 and 1800 is "moderately concentrated," and a market with an HHI above 1800 is "highly concentrated." Merger Guidelines § 1.5. An increase in HHI of greater than 100 points in a post-merger moderately concentrated market potentially raises significant competitive concerns. Likewise, an increase in the HHI of 50 points or more in a post-merger highly concentrated market may raise significant competitive concerns. It is presumed that mergers producing an increase in HHI of greater **[**34]** than 100 points in a highly concentrated market are likely to create or enhance market power or facilitate its exercise. Merger Guidelines § 1.51; see generally *Heinz, 246 F.3d at 716* & n. 9. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues. Merger Guidelines § 1.5.

HN15[] If HHI figures are sufficiently large, they will establish a prima facie case of an anticompetitive merger. See *Heinz, 246 F.3d at 716*; *Baker Hughes, 908 F.2d at 982-83* & n. 3. Thus, where the HHI calculation potentially raises significant competitive concerns or indicates a merger to be presumptively illegal, the factors set forth in sections 2 through 5 of the Merger Guidelines become relevant in undertaking a more comprehensive and holistic assessment of whether the proposed merger is likely to create or enhance market power or facilitate its exercise. these factors broadly include: the potential adverse competitive effects of a merger, entry analysis, efficiencies, and failure and exiting assets.

1. Competitors in the SPRB

There are currently five significant producers of SPRB **[**35]** coal: Peabody, Kennecott, Arch, RAG, and Triton. PX 5675 at 1; PX 1040 at 1; Morris Tr. (6/23 afternoon) at 44:6-7; Morris Tr. (6/24 morning) at 16:12-15. Post-merger, there will still be five significant producers of SPRB coal, with Kiewit replacing Triton as an SPRB producing entity. The percentages of the firms' market shares will change, to be sure, as Arch will acquire the North Rochelle mine and Kiewit will take over only Triton's Buckskin mine. However, Arch will remain third among the five producers. PX 5675 at 3-4.

Based on the HHI calculation for the current SPRB coal market, it is highly concentrated. Morris Tr. (6/23 morning) at 43: 11-44:7, 67:23-68:9. Whether market concentration is measured in terms of practical capacity, loadout capacity, production, or reserves, the post-merger market **[*125]** remains highly concentrated. PX 5675 at 3. [9] the post-merger increase in HHI ranges from 49 points to 224 points, depending on which measure is used to calculate market concentration. Set forth in the table below is an abridged summary of the different market concentration measurements derived from PX 5675 at 3, based on Arch's acquisition of the North Rochelle mine and Kiewit's acquisition **[**36]** of Buckskin:

SPRB coal market concentration (HHI)

HHI	Practical	Loadout	Production	Reserves
Current market	2152	2068	2201	2054
Post-merger	2346	2292	2365	2103
Post-merger Increase	193	224	163	49

[37] 2. Proper Basis to Calculate Concentration**

HN16[] Market shares are calculated by the department of justice and the FTC using the best indicator of firms' future competitive significance. In General Dynamics, the Supreme Court stated that evidence of market shares and market concentration should provide a "proper picture of a company's future ability to compete." *415 U.S. at 501*. Defendants urge the court to use reserves as the basis for calculating concentration,

Reserves are a valid measure of market concentration, albeit an imperfect one. According to defendants' expert, the conclusion that recoverable reserves are the best measure of a producer's future capability is consistent with the economic literature on exhaustible resources. Guerin-Calvert Tr. (6/30 afternoon) at 97:3-15. at current production rates, Triton's North Rochelle mine, for example, has only seven-and-a-half years of reserves and has long-term contracts already in place that commit a significant percentage of the mine's production over that period. Hake Tr. (6/29 closed) at 28:19-20; 29:2-8; DX 9005 at 002; DX 0274; DX 0281. The Supreme Court in General Dynamics rejected statistical evidence **[**38]** of coal production as a valid measure of competitive power in the market in favor of a company's uncommitted reserves of recoverable coal. The court reasoned that

> the bulk of the coal produced is delivered under long-term requirement contracts, and such sales thus do not represent the exercise of competitive power but rather the obligation to fulfill previously **[*126]** negotiated contracts at a previously fixed price. The focus of competition in a given time frame is not on the disposition of coal already produced but on the procurement of new long-term supply contracts. ... a more significant indicator of a company's power effectively to compete with other companies lies in the state of a company's uncommitted reserves of recoverable coal.

415 U.S. at 502.

Here, however, the reserves data defendants urge the court to use include both committed and uncommitted reserves of coal. Closing Argument Tr. (7/20) at 37:17-21. Those are the reserves that plaintiffs present as well. Id. at 37:20-21. Furthermore, the long-term contracts under which coal was sold before 1974, when*General Dynamics* was decided, extended for many years and mines effectively could not **[**39]** obtain additional reserves. Morris Tr. (6/23 afternoon) at 74:23-75:8. The current contracting trend in the SPRB is towards contracts of shorter duration,

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[9] Capacity may be an appropriate measure of market share because expanding a mine's capacity can be expensive, slow, and difficult. PX 0347 at 002; PX 8302 at 202:10-204:20 (Lien Dep.); PX 0016 p 10 (Conn Decl.). Practical capacity is considered by customers to be the measurement used to determine a mine's ability to supply them with coal. PX 8601 p 8 (Bales W.D.). It refers to the capacity available given the current physical equipment at the mines and the expected overburdens in mine plans. PX 8611 at 15. Loadout capacity refers to the capacity while the FTC argues that the court should look to other factors as well, and to loadout capacity in particular, to measure concentration. To process coal that has been removed from the pit, crush it, accumulate it for shipment, and load it onto trains. PX 8611 at 15. Current production (whether by mine or by mine operator) may not be a stable predictor of future competitiveness, or a producer's ability to deliver in the future in the form of sales or contracts. Guerin-Calvert Tr. (6/30 afternoon) at 88: 7-21; Lang Tr. (6/24 afternoon) at 62:11-63:19. Producers recognize that current production can lead to mistaken perceptions regarding a mine or mine operator's competitive significance. DX 0162.

PX 8623 at 001, often lasting three years or less, Morris Tr. (6/23 afternoon) at 75:9-10; PX 8611 at 021 p 68 (Morris W. D.); See also Stuchal Tr. (7/7 morning) at 74:9-14, although they can also be longer. Rahm Tr. (6/21 afternoon) at 7:25-10:1 (Westar has supply agreements through 2020 for most of its coal and other supply agreements through 2007 and 2009); Kelly Tr. (6/22 morning) at 44:2-10; PX 8606 at 3-4; Lien Dep at 195:1-14 (RAG has signed recent contracts of 2 to 3 year duration and utilities sometimes ask for longer terms); Herndon Tr. (6/22 afternoon) at 5:10-6:23, 42:21-43: 5; PX 8604 at 3; Stuchal Tr. (7/7 morning) at 74:9-14 (NPPD's typical coal purchase agreements are 3 to 5 years in length; NPPD has 9-year contracts currently). Contracts that last over three years, which still exist, often include re-opener clauses, PX 4613 at 003, 004-007; Guerin-Calvert Tr. (7/1) at 67:14-17, that allow a customer at certain points over the course of the contract period to solicit competing bids from other suppliers **[**40]** and afford the existing supplier an opportunity to match the competitor's bid. Morris Tr. (6/24 morning) at 48:7-16. Furthermore, in the SPRB today, mines have the ability to acquire more reserves. Morris Tr. (6/23 afternoon) at 75:19-21; PX 8611 at 017 p 57 (Morris W.D.). When SPRB mines need to acquire more reserves, they apply to the Bureau Of Land Management ("BLM") to lease additional reserves. Id. at 73:16-75:21. All the major mine owners in the SPRB today have applications (known as "LBAs") pending with the BLM to acquire additional reserves. Id. at 75:15-18; See PX 8446; PX 8447. Today in the SPRB, mines can even make sales for periods beyond the life of the mine based on current reserves because they are able to acquire these additional reserves. Morris Tr. (6/24 morning) at 89:25-90: 13. These considerations, in combination, undermine exclusive reliance on reserves to measure market concentration.

Nevertheless, in other contexts the federal antitrust agencies still espouse the view that reserves provide the proper measure for determining concentration levels in the coal industry. See DX 0033 at 000295 (Federal Trade **[**41]** Commission Staff Report on the Structure of the Nation's Coal Industry) (concluding that "a company's holdings of coal reserves are an important indicator of its present and future competitive position, and coal reserve concentration ratios are a very important measure of market power"); DX 0034 (United States department of justice, Competition in the Coal Industry). In 1996, in connection with amendments to the *Hart-Scott-Rodino Act*, the FTC recognized that, in assessing acquisitions in the coal industry, concentration levels are **[*127]** impacted by firms' reserves. See DX 0035 (commenting that "holdings of [coal] reserves ... are widely dispersed, and individual acquisitions have had minimal effect on concentration"). The FTC points out, however, that when using reserves to measure concentration, the DOJ has stated that a market share of 15 percent or more is prima facie inconsistent with the antitrust laws; Arch currently has 16 percent of SPRB reserves and acquiring North Rochelle would increase Arch's SPRB reserves to almost 20 percent. See PX 8611-018 p 59 (Morris W.D.).

Notwithstanding the Supreme Court's reliance on reserves in General Dynamics, exclusive **[**42]** reliance on that measure to determine market concentration in the SPRB today does not appear warranted. The present SPRB coal market is different from the relevant coal market in General Dynamics -- particularly in the use of more short-term contracts. [10] Moreover, the parties have presented statistics based on all reserves, but only uncommitted reserves were considered in General Dynamics and are particularly relevant to assessing future competitiveness. The greater availability of additional reserves through LBAs has also not been fully accounted for in the parties' presentations based on present reserves. Hence, although the court will look primarily to market concentration as measured by reserves, it will also consider other measures. Plaintiffs agree that it is appropriate to do so. See Closing Argument Tr. (7/20) 53:16-54:1. Those other measures can also be expected to provide some indication of the projected increase in market concentration resulting from the challenged transactions.

[43]** Loadout capacity is a helpful measure of market concentration, but it is likewise imperfect. As discussed above, plaintiffs argue that loadout capacity is the most appropriate measure of future competitiveness and thus market concentration because expanding a mine's capacity can be an expensive, slow, and difficult process. See PX 0347 at 002 (expanding Arch's Black Thunder mine by an additional 10 million tons would cost $ 55 million and take two years); PX 8302 at 202:10-204:20 (Lien Dep.); PX0016 at p 10 (Conn Decl.) (to expand RAG's Eagle Butte mine beyond its current capacity of 28 million tons would require the addition of another rail loop, the installation of crushers, conveyor, and silos and would cost approximately $ 45 to $ 50 million and take up to two years). But it

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[10] The continued use of longer-term contracts in the SPRB market does, however, support the use of reserves as one important measure of market concentration.

has been demonstrated that loadout capacity can also be expanded fairly quickly and inexpensively. Arch steadily expanded Black Thunder's capacity from 50 million to 70 million tons per year without any significant capital expenditure, Leer Tr. (6/28 morning) at 20:17-21:16; Lang Tr. (6/24 afternoon) at 60:17-62:10, and RAG expanded loadout capacity by 6 million tons between 2000 and 2002, DX 2006 at **[**44]** p 25. Moreover, as a static measure that does not reflect future capacity, Guerin-Calvert Tr. (6/30 afternoon) at 93: 12-95:3, loadout capacity does not take into account the constraints that limited reserves may place on a mine's ability to compete in the future. For example, regardless of the loadout capacity at the North Rochelle mine, given the present rate of production, it currently has reserves of only approximately seven-and-a-half years, which will make North Rochelle less of a competitive player in the future unless it acquires additional reserves. [11] **[*128]** Still, loadout capacity does provide some insight as to competitiveness, and thus is of some value in measuring market concentration.

Production and practical capacity are less useful measures, although they can still **[**45]** be informative. Both are, like loadout capacity, static measures that are not stable predictors of a producer's ability to deliver in the future in the form of sales or contracts. Guerin-Calvert Tr. (6/30 afternoon) at 88: 7-21; Lang Tr. (6/24 afternoon) at 62:11-63:19. The Supreme Court specifically rejected past production figures as a measure of future ability to compete in General Dynamics: "[i]n a market where the availability and price of coal are set by long-term contracts rather than immediate or short-term purchases and sales, reserves rather than past production are the best measure of a company's ability to compete." *415 U.S. at 502*. And practical capacity is not generally as sound a predictor of future competitiveness in the SPRB coal market as is loadout capacity.

Because these different measures of concentration are all informative to some degree, yet remain imperfect indicators of future ability to compete, the court has considered all of the measures in assessing whether plaintiffs have established a prima facie case of an anticompetitive merger. See *Heinz, 246 F.3d at 716*; *Baker Hughes, 908 F.2d at 982-83* & n. 3. **[**46]** plaintiffs agree with that approach, See PFF p 239, which is also consistent with the general admonition that all aspects of the relevant market should be examined to determine whether a proposed transaction is likely to produce any anticompetitive effects.

3. Post-Merger Increase in HHI

The court concludes, however, that reserves remain the best of these imperfect measures, and that using reserves as the primary tool to assess concentration and calculate post-merger increases in HHI is also consistent with the Supreme Court's analysis in General Dynamics. The reserves data provided to the court, See PX 5675 at 3, establish that the current market concentration (HHI) is 2054, and that post-merger it will be 2103, for an increase in HHI of 49. According to the Merger Guidelines, an increase in HHI of 50 points or more in a post-merger highly concentrated market raises "significant competitive concerns." Merger Guidelines § 1.51(c). Although the HHI increase calculated on the basis of reserves is only 49, the Merger Guidelines state that: "the numerical divisions suggest greater precision than is possible with the available economic tools and information. **[**47]** other things being equal, cases falling just above and just below a threshold present comparable competitive issues." Id. § 1.5. Based on reserves, then, the proposed transaction may raise significant competitive concerns -- although just barely.

Loadout capacity is a novel but fairly logical basis for calculating market concentration and assessing future competitiveness because it does act as a constraint, although perhaps not as rigid a constraint as plaintiffs have asserted, on a coal company's ability to compete for future contracts. The post-merger increase in HHI based on loadout capacity is 224. In a highly concentrated post-merger market, according to the Merger Guidelines, with an increase in HHI above 100 it is "presumed that … [the merger is] likely to create or enhance market power or facilitate its exercise." Id. § 1.51(c). The post-merger increases in HHI calculated based on production and practical capacity are **[*129]** 163 and 193 respectively, both of which also trigger a presumption of the likelihood of creating or enhancing market power or facilitating its exercise.

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[11] The uncommitted reserves at North Rochelle are even less, since a significant percent of reserves are already committed through long-term contracts. Hake Tr. (6/29 closed) at 28:19-20; 29:2-8; DX 9005 at 002; DX 0274; DX 0281.

The various measures of market concentration in the SPRB presented by the parties thus **[**48]** reflect an increase in HHI ranging from 49 to 224. Considering all these measures of market concentration, therefore, at a minimum the proposed transactions raise significant competitive concerns and if, as the court believes may be appropriate, one departs from a strictly reserves based approach adopted in General Dynamics because of changes that have occurred in the coal market over the last thirty years, then there may even be a presumption of an anticompetitive increase in market power. Ignoring altogether the other measures of market concentration in favor of an exclusively reserves-based assessment seems unwarranted. The FTC has, therefore, satisfied its prima facie case burden.

Nevertheless, it is important to note that this case is not one in which the post-merger increase in HHI produces an overwhelming statistical case for the likely creation or enhancement of anticompetitive market power. Indeed, the single best available measure of market concentration -- reserves -- produces an increase in HHI of only 49, which is actually below the level for significant concern in the highly concentrated SPRB market. The measure plaintiffs urge -- loadout capacity -- only produces **[**49]** an HHI increase of 224. Such HHI increases are far below those typical of antitrust challenges brought by the FTC and DOJ. For example, in Heinz the HHI increase was 510 based on a pre-merger HHI of 4775. See *246 F.3d at 716*. In Baker Hughes the HHI increase was 1425, from 2878 pre-merger to 4303 post-merger. See *908 F.2d at 983 n. 3*. In Staples the average HHI increase in the several markets under consideration was 2715. See *970 F. Supp. at 1082*. And in *FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 51 (D.D.C. 2002)*, the impact of the original merger agreement (used by the court for its analysis) was an HHI increase of 1052. all of these levels of HHI increase dwarf even the highest increase arguably present here. [12] Indeed, between 1999 and 2003, only twenty-six merger challenges out of 1,263 (two percent) occurred in markets with comparable concentration levels to those argued here. See DX 0833 (Federal Trade Comm'n & United States Dep't of Justice, Merger Challenges Data, Fiscal Years 1999-2003 (Dec. 18, 2003)).

[50]** Thus, although the FTC has satisfied its prima facie case burden, the FTC's prima facie case is not strong. ***HN17***[] certainly less of a showing is required from defendants to rebut a less-than-compelling prima facie case. See *Heinz, 246 F.3d at 725*; *Baker Hughes, 908 F.2d at 991* ("[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully"). Even assuming that the FTC's showing of an increase in HHI, and thus market concentration, warrants a presumption that the transactions will lessen competition, defendants have pointed out the shortcomings of statistics based on capacity or production, rather than on reserves, in providing the best assessment of the proposed merger's likely future effect on competition. Defendants have, therefore, successfully rebutted the presumption that the merger will substantially lessen competition and the court will proceed to examine the issue of the likely competitive effects of the proposed merger **[*130]** in the relevant market, for which plaintiffs bear the ultimate burden of persuasion. *Heinz, 246 F.3d at 715* (citing *Baker Hughes, 908 F.2d at 983*). **[**51]** as discussed below, an analysis of the SPRB market confirms that defendants have produced sufficient evidence to further rebut the FTC's prima facie case and that, ultimately, plaintiffs have not carried their burden of persuasion. See *Baker Hughes, 908 F.2d at 985* (rebuttal evidence may include factors relating to competition in relevant market and financial or market weakness of acquired company.) [13]

[52] C. Likelihood of Coordinated Interaction In This Market**

In General Dynamics, the Supreme Court cautioned that, ***HN19***[] although significant, statistics concerning market share and concentration are "not conclusive indicators of anticompetitive effects." *415 U.S. at 498*; See also

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[12] So, too, do the pre-and post-merger market concentration figures present in those cases far exceed the figures for the SPRB market, which barely place the SPRB market in the "highly concentrated" market range.

[13] In Heinz the court noted that ***HN18***[] rebuttal evidence may take the form of nonstatistical market evidence raising doubts about the persuasive quality of the FTC's statistics or, as was the case in General Dynamics, economic circumstances undermining the predictive validity of the government's statistical presentation. See *246 F.3d at 715 n. 7*. Here, defendants have produced both types of rebuttal evidence -- as in General Dynamics, an alternative statistical assessment based on reserves undermines plaintiffs' prima facie case, and in addition a close examination of competition in the relevant market (both presently and post-merger) undermines the claim of significant anticompetitive effects.

Brown Shoe, 370 U.S. at 321-22; *Heinz, 246 F.3d at 717 n. 12*. Indeed, this circuit has cautioned against relying too heavily on a statistical case of market concentration alone, and that instead a broad analysis of the market to determine any effects on competition is required. "that the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." *Baker Hughes, 908 F.2d at 984*; see Merger Guidelines § 2.0. Judge Posner has described the need to examine the evidence relating to competition in the market as follows:

> … the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, **[**53]** rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws …. Applied to cases brought under *Section 7*, this principle requires the district court … to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Hosp. Corp. of Am., 807 F.2d at 1386.

Plaintiffs may seek to show that a merger will diminish competition by showing that it will facilitate coordinated interaction. That is, in fact, the thrust of plaintiffs' case here. ***HN20***[] the Merger Guidelines define coordinated interaction as "actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself." Merger Guidelines § 2.1; See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (tacit coordination is a "process, not in itself **[**54]** unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level **[*131]** by recognizing their shared economic interests and their interdependence with respect to price and output decisions"). [14] Indeed, antitrust policy seeks particularly to inhibit "the creation or reinforcement by merger of … oligopolistic market structures in which tacit coordination can occur." *Heinz, 246 F.3d at 725* (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, ***Antitrust Law*** p 901b2, at 9 (rev. ed. 1998)).

A market is conducive to tacit coordination, then, where producers recognize their "shared **[**55]** economic interests and their interdependence with respect to price and output decisions." *Brooke Group, 509 U.S. at 227*. Successful coordination requires two factors: (1) reaching terms of coordination that are profitable to the firms involved and (2) an ability to detect and punish deviations that would undermine the coordinated interaction. Merger Guidelines § 2.1. coordination need not be complex or complete -- "[i] nstead, the terms of coordination may be imperfect and incomplete … and still result in significant competitive harm." Id. at § 2.11. The Merger Guidelines provide, moreover, that the punishment of deviation will not always be direct and specific: "credible punishment … may not need to be any more complex than temporary abandonment of the terms of coordination by other firms in the market." Id. at § 2.12. But "where detection or punishment is likely to be slow, incentives to deviate are enhanced and coordinated interaction is unlikely to be successful." Id.

1. The FTC's Novel Theory

The FTC brings this action for a preliminary injunction under the theory that the mechanism of tacit coordination that is most strongly **[**56]** supported by the evidence is a form of output restriction in which the major coal producers in the SPRB market would constrain their production so that increases in supply would lag behind increases in demand, thereby creating an upward pressure on price. See, e.g., Pls. Post-hearing Br. at 8. What this means is

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[14] The FTC has stressed that its challenge here, based on concerns that the major firms in the SPRB may coordinate to restrict output, is founded on the premise that output would be less than it would be absent the merger. FTC post-hearing reply brief at 6 n. 8; See *Staples, 970 F. Supp. at 1082 n. 14*.

that the FTC must show projected future tacit coordination, which itself may not be illegal, which is speculative and difficult to prove, and for which there are few if any precedents.

As defendants have noted, prior coordinated effects challenges to mergers based on alleged output coordination have invariably been accompanied by a coordinated effects theory grounded on Price coordination. See, e. g., *Univ. Health, 938 F.2d at 1219*; *FTC v. Elders Grain, Inc., 868 F.2d 901, 905-06 (7th Cir. 1989)*; *Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1387 (7th Cir. 1986)*; *FTC v. Bass Bros. Enterprises, Inc., 1984 U.S. Dist. LEXIS 16122, 1984-1 Trade Cas. (CCH) P 66,041 at 68,612 (N.D. Ohio 1984)*. Similarly, although not a merger case, *In re High Fructose Corn Syrup, 295 F.3d 651 (7th Cir. 2002)*, involved a coordinated **[**57]** effects theory where the product was highly standardized, completely fungible, and did not vary from producer to producer. See *295 F.3d at 656-57*; *In re High Fructose Corn Syrup, 156 F. Supp. 2d 1017, 1021 (C.D. Ill. 2001)*, rev'd mem., *295 F.3d 651 (7th Cir. 2002)*, cert. denied, *537 U.S. 1188, 154 L. Ed. 2d 1019, 123 S. Ct. 1254 (2003)*. There, coordination among producers needed to take account of only one fact -- price -- see *295 F.3d at 657*, and price transparency was virtually complete, with producers publishing prices in advance of **[*132]** their becoming effective, See *156 F. Supp. at 1037*. Deviations from coordination were immediately detectable, the other producers could quickly deprive the cheater of any benefit, and there was evidence of a history of anticompetitive behavior in the market. *295 F.3d at 666*. as discussed further below, none of these factors is present here. SPRB coal has a wide range of heat level (8800 to 8400 Btu), quality (e. g., sulfur and ash content) and ultimately price, information regarding prices is far from transparent, there is no historical evidence of actual price or output coordination, **[**58]** and the SPRB market does not lend itself to ready detection and punishment of deviations from coordination. Moreover, the number of competitors in the SPRB pre-and postmerger remains the same.

The novel approach taken by the FTC in this case makes its burden to establish anticompetitive effects in the post-merger SPRB market more difficult. In support of their case, plaintiffs cannot simply seek to show that the proposed transactions will decrease production in the SPRB market. As plaintiffs have noted, a coordinated restriction in production will not necessarily decrease total SPRB coal production, but rather, will likely cause the output of SPRB coal to be "less than it would have been absent the [a]cquisition." Pls. Post-hearing br. at 8. Instead, plaintiffs must establish that the proposed transactions will increase the risk of coordinated output restriction and decrease the likelihood of deviation in the SPRB market. This requires a sophisticated attempt to show a developing propensity towards this form of tacit coordination in the SPRB market supported by an ability of the SPRB firms to monitor each other's behavior.

Plaintiffs thus seek to demonstrate that the proposed **[**59]** transactions will substantially increase the risk that SPRB producers will engage in coordinated output-constraining behavior because the transactions will: increase the gains from coordination; place most of the excess capacity in the hands of firms most likely to restrict production; eliminate a significant, independent competitor (Triton); substantially weaken the post-merger competitive fringe (RAG and Kiewit); and generally enhance Arch's ability to lead the industry toward an anticompetitive outcome. The court will proceed by examining the competitive state of the SPRB market today, determining whether coordinated interaction is feasible and, if so, whether there is evidence that actual or tacit coordination has occurred, and then examining the structure and dynamics of the SPRB market, the competitive strength of Triton, and the likely roles that RAG and Kiewit would play in a post-merger market. This broad analysis of the SPRB market is necessary to determine whether the FTC has carried its burden to persuade the court that the proposed transactions increase the risk of coordinated interaction that will likely substantially lessen competition in the SPRB market.

2. Competition [60] in the Current Market**

HN21[] An oligopolist market is one having a modest to a relatively few number of players and is distinguished from either perfect competition or monopoly. Guerin-Calvert Tr. (6/30 afternoon) at 113:20-114:18. The SPRB coal market, with five significant producers, is an oligopoly. A non-cooperative oligopolist market (or non-coordinated oligopolist market) is recognized in the economic literature to be a market characterized by competitive outcomes even though there are relatively few firms. Guerin-Calvert Tr. (6/30 afternoon) at 113:20-114:18. The evidence shows that the SPRB market is currently a competitive non-cooperative oligopolist market.

[*133] SPRB producers appear to follow different competitive strategies depending on their own economic self-interest. DX 9004 at 003; DX 0154; DX 0155; DX 0158. Numerous witnesses from electric utilities testified that the SPRB marketplace presently is "competitive" and that recent bid processes have been "competitive." Rahm Tr. (6/21 afternoon) at 5:12-18, 11:5-7; Holloway Tr. (6/22 afternoon) at 88:5-8; Luksan Tr. (7/7 morning) at 42:5-8; Stuchal Tr. (7/7 morning) at 67:14-20; PX 8309 at 164:12-15 (Panzarino Dep.); PX 8303 at **[**61]** 136:22-137:2 (Richards Dep.); PX 8302 at 208: 22-209:1 (Lien Dep.)("the Powder River Basin is extremely competitive."). When a utility issues a request for proposal ("RFP"), all five major SPRB producers typically respond. Bales Tr. (6/21 afternoon) at 62:14-63:5. Responses by SPRB producers to rfps evidence the absence of any coordinated behavior. As one customer testified, there is almost always one "surprise" SPRB producer -- invariably a different one -- that offers a price lower than expected as a result of unique circumstances facing that particular producer at the time of the bid. Bales Tr. (6/21 afternoon) at 63:15-64: 3; See PX 8601 at 8. Customers have the ability to solicit bids from more than the five main SPRB producers, and they often do, soliciting and receiving spot bids from brokers/traders. Herndon Tr. (6/22 afternoon) at 16:3-18:5; DX 0951 at 023232; DX 0953 at 233390; Luksan Tr. (7/7 morning) at 42:1-4; Stuchal Tr. (7/7 morning) at 64:24-65:3; PX 8307 at 107:12-109:15 (Rackers Dep..). Defendants' economic expert concluded, based on her thorough analysis of the SPRB market, that the market is competitive today. Guerin-Calvert Tr. (6/30 afternoon) at 109:12-14; **[**62]** DX 0086 p 36. The FTC's economic expert was not asked to analyze the current state of competition in the SPRB and testified that he therefore had no opinion on the competitiveness of the SPRB today. Morris Tr. (6/24 morning) at 58:22-25. Hence, the FTC does not contend that the current SPRB market is not competitive because there has been actual coordination on price or supply by producers in the SPRB market in the past.

a. The 2001 Price Spike

In 2001, spot prices for SPRB coal spiked. See Bales Tr. (6/21 afternoon) at 44:21-46:11; Rahm Tr. (6/21 afternoon) at 17:23-18:2; *DX 0935 at 7 Colo. 100, 2 P. 5*. Rather than being an indication of anticompetitive coordination, however, the 2001 price spike was a short-term phenomenon that is largely explained by several factors other than tacit coordination in the marketplace, including reduced stockpiles, severe weather conditions, and higher prices for natural gas, all of which unexpectedly increased the demand for coal. Guerin-Calvert Tr. (7/1) at 13:5-24; Rahm Tr. (6/21 afternoon) at 17:22-20: 7; Luksan Tr. (7/7 morning) at 39:1-40:6; DX 0935 at 2. buyers reacted to these various factors by resorting to **[**63]** panic buying, primarily in the over-the-counter market, which drove up spot prices. Rahm Tr. (6/21 afternoon) at 19:4-9; DX 0086 p 11. Coal prices in other regional markets across the country also rose in 2001 for the same reasons. Prices for SPRB coal are well below prices for coal from other regions and have remained stable over the last several years following the 2001 spike in spot prices. See PX 4309.

Utility stockpiles were unusually low in 2001. Rahm Tr. (6/21 afternoon) at 18:25-19:23; PX 8303 at 243:15-245:3 (Richards Dep.); DX 0935 at 2. Weather also played a significant role in the spike; the summer and fall of 2000 were mild, Bales Tr. (6/21 afternoon) at 46:19-47:9; PX 8306 at 256:21-257:12 (McGowan Dep.), but the winter of 2000-2001 was unusually cold, causing **[*134]** over-utilization of coal reserves and leaving inventories depleted going into the spring and summer of 2001, Rahm Tr. (6/21 afternoon) at 18:23-20:1; DX 0935 at 2.

The price spike was also preceded by a run-up in the prices of alternative fuels. DFF 112. There was a shortage of supply for eastern coal due in part to several mine closures and bankruptcies. Rahm Tr. (6/21 afternoon) at 18:6-19; **[**64]** 19:17-19; Freund Tr. (6/21 afternoon) at 111:13-15. Demand and prices for coal increased in all regions, with eastern coal prices increasing even more than SPRB prices. Luksan Tr. (7/7 morning) at 38:16-21; PX 8306 at 256:21-257: 12 (McGowan Dep.). Natural gas prices also increased in the winter of 2000-2001. Rahm Tr. (6/21 afternoon) at 20:2-7; Luksan Tr. (7/7 morning) at 39:21-23; PX 8302 at 58:19-59:12 (Lien Dep.); DX 0935 at 2. at the time, California was experiencing an energy crisis. Luksan Tr. (7/7 morning) at 39:14-16; DX 0935 at 2. The price adjustment for so 2 emission allowances also increased during this time period. PX 8306 at 257:24-258:4, 258:21-259:21 (McGowan Dep.).

These factors explain the 2001 price spike without any anticompetitive or coordinated activity by SPRB producers. SPRB spot prices following the 2001 price spike have declined to near pre-spike levels, and have shown no signs of climbing again. See DX 9007 at 013-014; PX 1510; PX 1511; PX 1514. This is consistent with the pattern for prices for coal in other regions. See PX 4309. Moreover, to the extent a difference can be seen in the spot prices before and after the spike, increased costs largely **[**65]** account for those differences. Guerin-Calvert Tr. (7/1) at 13:25-14:9; 14:22-15:1; Luksan Tr. (7/7 morning) at 40: 7-10. A comparison of price levels in other regions shows that, in general, prices in the SPRB are at the same level as they would be if they had increased at the rate of other coal regions. Guerin-Calvert Tr. (7/1) at 14:10-21.

b. Reduced Output and Mine Closures

Plaintiffs contend that SPRB producers have been moving in the direction of industry-wide production discipline since 1999-2000. According to plaintiffs, Peabody and Kennecott have, at various times, recognized the utility of constraining production in order to obtain improved pricing, and have issued public announcements stating that they curtailed production or delayed expansion because current prices did not provide adequate returns. However, defendants have offered evidence of credible, legitimate reasons for the reduced output among SPRB producers in 1999-2000, including the closure of the Cordero-Rojo mine by Kennecott, the closure of the Rawhide mine by Peabody, and Arch's closure of the Coal Creek mine.

Arch idled its Coal Creek mine beginning in mid-2000. Lang Tr. (6/24 afternoon) at 69: **[**66]** 5-10. Coal Creek had been closed by its previous owners more than once, and was losing money when the mine was acquired by Arch. Lang Tr. (6/24 afternoon) at 68:5-12. Arch tried to make the mine profitable by expanding production but that effort failed. Leer Tr. (6/28 morning) at 21:17-22: 6; Lang Tr. (6/24 afternoon) at 67:13-68:4, 70: 3-12. Arch managers and its board of directors carefully considered the options available for Coal Creek. DX 1066; DX 0803; DX 0782; DX 0783. Mr. Lang and his staff prepared detailed economic analyses regarding idling Coal Creek. See DX 0774; DX 0088; DX 1067. at the time that Coal Creek was struggling, Arch had implemented several changes to the Black Thunder mine that increased the efficiency of that mine and expanded its production. **[*135]** Lang Tr. (6/24 afternoon) at 68:13-69: 4. Entering 2000, Arch was exceeding its production operations at Black Thunder. Id. at 71:17-72: 4; DX 0783 at 020276. Arch management determined that it could supply the volume of coal committed by contract for the balance of the year for both mines from the Black Thunder mine alone. Lang Tr. (6/24 afternoon) at 72:22-73:8; DX 0783.

Ultimately, the court finds **[**67]** Arch's decision to idle the Coal Creek mine in 2000 was prompted by legitimate business reasons, not anticompetitive motives. Many of plaintiffs' witnesses testified that they understood the Coal Creek closing to be for legitimate business reasons and did not regard it as an attempt at coordination. Freund Tr. (6/21 afternoon) **[*136]** at 113:24-114:7; Bales Tr. (6/21 afternoon) at 48:5-10; PX 8302 at 72:22-73:4; 151:10-154: 17, 160:20-22 (Lien Dep.); Carr Tr. (6/23 afternoon) at 18: 14-17; Warner Tr. (6/23 morning) at 31:11-19, 34:10-14; PX 8304 at 111:16-112:12 (Flippin Dep.). The few customers who speculated otherwise acknowledged that they had no knowledge regarding the financial performance of the mine and were unable to say how Coal Creek's closure affected prices and production at other mines. Orme Tr. (6/22 morning) at 33:6-34:1.

In 1999, Kennecott reduced production at its Cordero-Rojo mine due to geological problems. PX 7141 at 15:4-16:10 (Randen Dep.); DX 1024 at 024799. The decision was an independent one based on Kennecott's operational needs and circumstances. PX 7141 at 32:18-24 (Randen Dep.). In April 1999, Peabody idled its Rawhide mine due to production failures and a lack **[**68]** of customer demand. DX 1024 at 024836. at that time, Peabody switched its Rawhide customers to its North Antelope or Caballo mines and continued to serve them without any shortfall in production. Id.

Thus, the evidence shows that there were independent, legitimate business reasons for the mine closures by Arch, Kennecott and Peabody in 1999 and 2000. Like the factors that credibly explain the price spike of 2001, these reasonable explanations for the mine closures by the "big three" SPRB producers preclude the reduced output during this period from serving as evidence of coordinated or anticompetitive activity in the SPRB market.

c. Increased Production Over Time

SPRB production has increased consistently over the past ten years even though the number of SPRB producers has declined. [15] DX 9007 at 016; PX 4335 at 001; Carr Tr. (6/23 afternoon) at 23:24-24:12; Shalah Tr. (6/25 afternoon) at 35:9-25; Luksan Tr. (7/7 morning) at 47:8-15; Kelly Tr. (6/22 morning) at 63:20-25. Defendants' expert examined the competitive environment and found that the decisions made by the different producers as to production levels, the contracts on which they bid, and the costs they elected **[**69]** to incur were independently derived based on each producer's particular business strategy. See Guerin-Calvert Tr. (7/1) at 12:18-13:4. For example, Arch's "market driven" strategy was adopted to minimize costs without sacrificing customer contract needs, and the closure of Coal Creek was an independent decision based on a legitimate business assessment. See Leer Tr. (6/28 morning) at 25: 13-18, 26:17-22, 27:17-28:1, 50:2-6; Lang Tr. (6/24 afternoon) at 80:4-12; Freund Tr. (6/21 afternoon) at 113:24-114:7; See also Bales Tr. (6/21 afternoon) at 48:5-10 (decision was independent of other mine closures and intended to cut costs); PX 8302 at 72:22-73:4, 151:10-154:17, 160:20-22 (Lien Dep.)(market would need to improve before opening Coal Creek would make sense; SPRB producers were losing money in 2000 and needed to change business practices); Carr Tr. (6/23 afternoon) at 18:14-17 (closure not due to agreement among competitors); Warner Tr. (6/23 morning) at 31:11-19, 34:10-14 ("we did not view [closure] as a signal to the market at the time"); PX 8304 at 111:16-112: 12 (Flippin Dep.)(in mid-2000, LCRA was informed by an Arch representative that the Coal Creek mine was being **[**70]** idled due to high operating costs). [16]

[71]** Peabody's business strategy for the last several years has been actively to expand production at its several mines without taking into account the decisions and activities of the other SPRB producers. DX 0154; Rahm Tr. (6/21 afternoon) at 15:19-16: 5; DX 0150 at 5533. Kennecott brought production at the Cordero-Rojo mine back to near pre-2000 levels, when it temporarily reduced the mine's operations, and is also expanding production at its Antelope and Jacobs Ranch mines. PX 7141 at 11:5-24, 13:20-24, 15:4-16:10, 16:19-17:17, 19:17-25, 20:10-21:10, and 32: 18-24 (Randen Dep.); DX 1024 at 024799; Guerin-Calvert Tr. (7/1) at 12:4-17; PX 0090 at 2. RAG also claims to be poised to expand and it pays no attention to either the actual production or the announcements relating to production of its competitors. PX 8302 at 37:2-8, 42:19-22, 314:12-13; 229:15-230:1, 180: 16-185:3, 42:12-18, 61:18-62: 15,316:22-317:7, 317:11-318: 4, 85:3-87:22, 328:2-18 (Lien Dep.); DX 0163.

Based on the sealed bid system in place for SPRB coal contracts, the views of customers who solicit bids from the SPRB producers, the conclusions of the experts, the fact that legitimate reasons other than the existence **[**72]** of production coordination account for the 2001 price spike and for the decisions of certain producers to close mines between 1999 and 2000, and the fact that production has been consistently increasing in the SPRB, the court finds that the SPRB market is currently competitive. Indeed, it is fair to say that the speb has in the past operated as a very competitive market for the sale of coal to electric utility customers. The next question, however, is whether, notwithstanding the historical and present competitiveness of the SPRB market, coordinated interaction in the form of tacit output reduction is likely to occur in this market as a result of the proposed transactions.

3. Possibility of Coordinated Interaction

a. Interest in Production Discipline

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[15] SPRB production has increased from 230 million tons ten years ago to 360 million tons today. Rahm Tr. (6/21 afternoon) at 16:24-17:21; PX 8306 at 123:7-18 (McGowan Dep.); PX 8304 at 213:24-214:3 (Flippin Dep.); See PX 1040 (production increases over the last five years).

[16] Arch is unlikely to coordinate in reducing production if it would jeopardize the reopening of its Coal Creek mine. Arch is required under its federal lease to resume production at Coal Creek by 2007, Lang Tr. (6/24 afternoon) at 76:5-12; DX 0803 at 0020521, and stands to lose a very substantial investment if it forfeits that lease, DX 2001. Based on current mine planning, Arch anticipates restarting production at Coal Creek before the 2007 deadline. DX 2002. Arch intends to produce enough coal at Coal Creek before the end of 2007 to recoup much of its investment. Lang Tr. (6/24 afternoon) at 75:15-76:4, 91:31-92:2; DX 2000. Mr. Lang testified that he is confident that Coal Creek will again be up and running before the November 2007 forfeiture date. Id.

Producers in the SPRB have certainly evinced some past interest in price or production discipline. On April 25, 2000, Irl Engelhardt, Chairman and CEO of Peabody, gave a speech before the Western Coal Transportation Association, a meeting **[*137]** attended by SPRB coal producers and customers, in which he remarked on disciplining production in the coal industry. PX 0658 at 001. Engelhardt noted that "[o]ne example [of approaches **[**73]** in the coal industry] is making capital investments to improve productivity and lower costs. Nothing wrong here. Lower costs mean higher margins, right? They do unless the incremental production that results contributes to an oversupply situation." PX 0658 at 002. Engelhardt then commented that "[i]f coal producers would use growth in returns as their performance metric, we believe more discipline would be applied to investments that would otherwise lead to oversupply situations." Id. Engelhardt detailed the actions that Peabody was taking to address oversupply in the market:

> Peabody is focusing on profitability and high return investments in the powder river basin. Here are some recent steps that they have taken:
>
> . In early 1999, Peabody suspended the 10-million-ton-per-year Rawhide mine, one of the most productive mines in the United States;
>
> . Also in 1999, the company delayed a 30-million-ton-per-year capacity expansion at North Antelope/Rochelle until margins generate the proper returns; and
>
> . In April 2000, it idled a truck/shovel fleet at Caballo, producing 8 million tons per year, until market conditions improve.

Id. at 004.

[74]** A month later, on May 23, 2000, Steven Leer, chairman and CEO of Arch, addressed the Western Coal Council's 2000 Spring Coal Forum, attended by SPRB coal producers and customers. PX 0253; PX 0795; PX 0603. Leer posed the question "what can we do about oversupply?" his answer was "produce less coal." in identifying a response to low coal prices, he provided the following information:

> subliminal messages
>
> . If you produce it, they will buy it
>
> . Outcome: prices have suffered
>
> . Solution: produce less coal.

PX 0253 at 013; PX 0795 at 012; PX 0603 at 012; Leer Tr. (6/28 morning) at 84:20-21 (citing DX 1069). Leer also identified "produce less coal" as the solution to low prices resulting from the evaporating export market and huge stockpiles. PX 0253 at 013; PX 0795 at 012; PX 0603 at 012; Leer Tr. (6/28 morning) at 84: 20-21 (citing DX 1069).

Plaintiffs view these statements from SPRB producers as strong evidence of the type of production coordination that is likely if Arch's acquisition of Triton is allowed. Defendants have explained, however, that Leer's comments are simply an articulation of Arch's "market driven" business strategy, under which Arch will restrict **[**75]** its production when it believes that, due to oversupply, it cannot obtain returns it considers adequate. Leer Tr. (6/28 morning) at 62:21-63:7; 86:11-15. This approach is consistent with the accepted business objective of obtaining an adequate rate of return to fund expansion. Nonetheless, statements of the type made by Leer and englehardt in 2000 are indicative of possible producer coordination to limit production, and warrant close scrutiny in an assessment of the likelihood of anticompetitive coordination in the SPRB market.

b. Feasibility of Coordinated Interaction

There is evidence that coordination in the SPRB market is Feasible. The differences that distinguish coal produced at one SPRB mine from that at another SPRB mine, such as Btu content, sulfur content, moisture and ash content, are similar to **[*138]** differences that distinguish crude oil produced from different wells. Guerin-Calvert Tr. (7/1) at 95:5-23. Standard adjustments are made in pricing to account for any specific differences that do exist in the coal from different SPRB mines. Orme Tr. (6/22 morning) at 20:4-17; Bales (6/21 afternoon) at 41:9-22; Freund Tr. (6/21 afternoon) at 102:4-103:22. Furthermore, **[**76]** plaintiffs' expert concluded that the demand for SPRB coal is inelastic, i.e., the elasticity of demand is less than one. Morris Tr. (6/23 afternoon) at 50:21-51:14. This means that a modest price increase in the highly concentrated SPRB market would be very profitable to producers because it would increase revenues, and therefore profits, even before taking into account the additional profits that would be realized from reductions in total costs as a result of any reduction in output. Id at 51:6-14.

Barriers to entry into the SPRB coal market increase the likelihood of coordinated interaction. Morris Tr. (6/23 afternoon) at 117: 15-21. Certainly there are appreciable start-up costs associated with becoming an SPRB coal producer. The small and frequent transactions for SPRB coal also increase the likelihood of coordinated interaction, decrease the incentive to deviate from coordinated interaction, and increase the likelihood that deviations from coordinated interaction will be quickly detected. Morris Tr. (6/24 morning) at 6:13-8:21, 49:5- 24. A typical transaction size in the SPRB coal market is less than one percent of the total market. Id. at 6:23-24.

Key market information **[**77]** relating to the other competitors in the SPRB coal market is available from numerous sources, which would theoretically permit the sharing of information among producers. These sources include: trade reports and conferences, PX 5614 at 001, industry analysts and consultants who publish reports containing annual production, production capacity, and cost-of-production by mine information for the SPRB coal market, DX 1024 at 24662, 24698; PX 0012 pp 22-23 (Panzarino Decl.); governmental filings such as the form 423 monthly reports required by the federal energy regulatory commission ("FERC") stating the quantity and quality of coal purchased and the delivered price for each source, PX 1424 at 007 at 012; PX 0012 p 23 (Panzarino Decl.); PX 0005 p 16 (Rackers Decl.); coal company announcements that inform the public on market conditions, production costs, mine productivity, and whether a company is gaining an adequate return for its coal, PX 1821 at 001; PX 1035 at 021; PX 1408 at 014-016; PX 0097 at 020; PX 5614 at 001; PX 7141; the bidding process which, even though sealed under confidentiality provisions, nevertheless allows some information to be transmitted **[**78]** to producers from customers regarding how their bids compared to other bids from producers, PX 0118; PX 0161; PX 1433 at 015; PX 3307 at 005; PX 3316 at 004; and merger and joint venture negotiations which may allow for limited transfer of certain competitive information between producers, PX 0118 at 001; PX 0161; PX 0609 at 002; PX 0660 at 004; PX 0633 at 001; PX 1405 at 003.

Given a stated interest by some SPRB producers in production discipline, these general features of the SPRB market would not appear to preclude coordinated interaction having anticompetitive effects. However, even though these factors and conditions make post-merger coordinated activity to limit production in the SPRB market feasible, whether anticompetitive coordination is likely requires closer examination of such factors as the past history of coordinated interaction, the SPRB market structure and dynamics, and the roles of "fringe" or "maverick" producers.

[*139] ***c. Existence of Actual Coordinated Interaction***

There is insufficient evidence to conclude that express or even tacit coordination has taken place in the SPRB market. Traditional factors that industrial organization economists consider when **[**79]** assessing the susceptibility of a market to coordinated interaction include whether producers recognize their mutual interest in competing less aggressively and whether producers with incentives to compete less aggressively communicate their intentions to one another. PX 8611 p 62. Plaintiffs' expert concluded that he would need to do additional analysis before he could offer conclusive testimony on whether coordinated interaction is occurring in the SPRB coal market. Morris Tr. (6/24 morning) at 15:3-20. Plaintiffs have not produced sufficient evidence that such coordination to limit production has actually occurred.

Based on a review of the evidence over time, it is unlikely that coordination has taken place in the SPRB, especially since the evidence through which the FTC attempts to show the existence of coordination is focused primarily on 2000 and 2001. The lynchpin of the FTC's position is the comments and actions of Arch with respect to "production discipline." through 1999, Arch sold coal on an incremental basis, which meant it sold coal for anything more than the cost of producing it. Leer Tr. (6/28 morning) at 57:15-58:5. Under what Arch calls its "market driven" **[**80]** approach, however, Arch will restrict its production when it believes that, due to oversupply, it cannot obtain returns that it considers adequate. Leer Tr. (6/28 morning) at 62:21-63:7; 86:11-15. On May 17, 2000, Arch announced that it planned to reduce production at its Coal Creek mine by as much as 10 million tons annually. PX 0214 at 001. Arch announced that it would no longer expand capacity to keep pace with growing demand for SPRB coal until SPRB price and margin increased to an acceptable level. Id. at 002. Arch informed the industry that "moves such as the one we are taking today … should have a positive impact on prices," in light of the "supply/demand fundamentals" for SPRB coal. Id.

On May 23, 2000, Arch's CEO Steven Leer drew attention to the fact that "Arch has been conscientious" and illustrated the statement by observing that Arch was idling the Coal Creek mine and had limited expansion at Black Thunder. PX 0253 at 014; PX 0795 at 013; PX 0603 at 013. Jon Kelly of Tuco (a utility) recalled that he found Leer's comments disturbing because there were representatives from Triton, Peabody, and Kennecott in the room. PX 8606 p 12 (Kelly W. D.); PX **[**81]** 5303. The speech was reported by the trade press to the coal industry as calling for reductions in coal production. See PX 5680 at 003. A year later, on April 17, 2001, Leer gave an address at the western coal transportation association in Santa Fe, New Mexico, during which he presented a slide depicting the following information:

What's different today?
Supply/demand balance
Southern PRB
. Fewer producers, so greater potential for discipline
. Loadout and rail capacity create constraints
. Adding incremental production more expensive.

PX 0656 at 015. The next year, Arch announced in a March 17, 2002 press release that it had recently cut production by seven percent. See PX 0602 at 001. Arch announced the production cuts in 2002 despite the fact that the cuts would have a negative impact on earnings: "we are committed to being a market-driven producer. **[*140]** we believe it would be a mistake to sell coal into an oversupplied market, at prices that will not provide an adequate return." Id.

Although Arch made public announcements about cutting production and its commitment to being a market-driven producer, other SPRB producers chose not to follow Arch's **[**82]** strategy. Other producers may have contemplated following suit, but there is no evidence that any of them chose to adopt Arch's approach. Indeed, between 2001 and 2003, Arch itself believed that it detected indications that its competitors (Kennecott, Peabody and Triton) were selling coal at incremental costs, and thus not on the same basis that Arch was advocating. PX 0090 at 002 (Kennecott); PX 0165 at 002 (vulcan/Triton); PX 0105 (Peabody). Leer testified that public statements by various SPRB producers regarding their mining operations were made to advise the investor community and customers of independent and unilateral business decisions being taken by each company in response to general supply and demand conditions and to the unique business challenges faced by each company -- not to signal any sort of coordinated activity. Leer Tr. (6/28 morning) at 8:20-9:10, 42:15-22. Consistently, SPRB producers have denied that there has been any effort among suppliers to coordinate production output. PX 8302 at 149:4-14 (Lien Dep.); PX 7141 at 32:3-24 (Randen Dep.); Leer Tr. (6/28 morning) at 52:19-53:10; hake Tr. (6/29 morning) at 10:21-11: 22. Over the past ten years, SPRB production **[**83]** has expanded considerably even though the number of SPRB producers has declined. DX 9007 at 016; PX 4335 at 001; Carr Tr. (6/23 afternoon) at 23:24-24:12; Shalah Tr. (6/25 afternoon) at 35:9-25; Luksan Tr. (7/7 morning) at 47:8-15; Kelly Tr. (6/22 morning) at 63:20-25.

Furthermore, there is no evidence that Arch sought to "punish" the producers who declined to restrict production, even if it had the means to do so. According to defendants' expert, public announcements about production made by Peabody, Kennecott, and Arch did not trigger a coordinated output reduction by coal producers, Guerin-Calvert Tr. (7/1) at 9:10-25, and were instead followed by enhanced output in the SPRB market, Id. at 10: 20-11:2; DX 9007 at 031; See also DX 9007 at 022-030. The totality of the evidence, then, establishes that although production restrictions were advocated and even practiced by Arch during 2000-2002, and broader coordination by SPRB producers to limit supply was feasible, no express or tacit coordination to limit production has actually occurred among the major SPRB coal producers.

d. Market Structure and Dynamics

That observed conclusion is consistent with an assessment **[**84]** of the SPRB coal market. The structure and dynamics of the SPRB market may permit coordination, but do not make coordination likely. While barriers to entry into the SPRB market exist, PX 8611 p 119 (Morris W.d.), and such barriers may facilitate the creation or enhancement of market power or its exercise, Merger Guidelines § 3.0, a substantial number of firms actively compete in the marketplace. Furthermore, heterogeneity of products and producers limit or impede the ability of firms to reach terms of coordination. See Merger Guidelines § 2.11. The evidence establishes that products in the SPRB market are heterogeneous; SPRB coal is different from one mine to another, Rahm Tr. (6/21 afternoon) at 12:13-15, 22:8-23:1; Freund Tr. (6/21 afternoon) at 103:9-16; DX 0853 at 7; Orme Tr. (6/22 morning) at 19:16-22; DX 0199 at 000342, and the SPRB mines and coal companies differ in many important **[*141]** respects, including their production costs, cost structures, contractual commitments, level of reserves, and financial viability, Guerin-Calvert Tr. (7/1) at 6:21-7:3, 6:25-7:10; DX 1024 at 0024728; PX 4353 at 001.

It is true that industry publications make some market **[**85]** information available among producers. However, the information published in those sources is limited, imperfect, and largely unreliable and untimely. Public data on coal pricing, capacity, and production levels are historical, not particularly comprehensive, and tend to lag behind the market by several months, if not more. Guerin-Calvert Tr. (7/1) at 15:8-21; DX 2006 at p 38. MSHA data is a good example. It provides on a quarterly or annual aggregated basis a snapshot of historic shipments, but provides no information about future shipments, long-term mine commitments, or the nature of any contracts a supplier may have with utilities, let alone the nature or date of the specific contract under which the reported shipments were made. Guerin-Calvert Tr. (7/1) at 15: 22-16:12; Lapplander Tr. (7/7 morning) at 10:11-19; DX 0935 at p 4. FERC 423 reports suffer similar deficiencies in that they, too, report only historic shipments, and the data only become available months after the reported shipments were made. Hake Tr. (6/29 open) at 13:1-8; Guerin-Calvert Tr. (7/1) at 16:13-20; Lapplander Tr. (7/7 morning) at 10:9-17; Stuchal Tr. (7/7 morning) at 66:3-6; PX 1255 at 152:20-153:9 (Pettibone **[**86]** I. H.); PX 8302 at 122:8-12 (Lien Dep.); PX 8303 at 194:10-195: 13 (Richards Dep.); PX 8307 at 247:6-247:22 (Rackers Dep..); PX 8309 at 221:4-221:17 (Panzarino Dep.). Moreover, the shipments reflected in FERC reports are (like MSHA data) tied to contracts that were entered into years earlier. Carr Tr. (6/23 afternoon) at 11:15-25; Hake Tr. (6/29 open) at 13:1-8. Thus, if a supplier signs a contract today for deliveries commencing in 2005, FERC data will not be reported until several months after the first shipment is sent in 2005. Guerin-Calvert Tr. (7/1) at 16:21-17:4. [17] FERC data are reported on a delivered basis (i.e., the combined cost of the coal and transportation) and do not break out the cost of the coal alone. Hake Tr. (6/29 open) at 13:1-12; Kelly Tr. (6/22 morning) at 40:24-41:8; Carr Tr. (6/23 afternoon) at 11:7-14; PX 8302 at 122:3-7 (Lien Dep.); Stuchal Tr. (7/7 morning) at 66:1-7. Because utilities treat their transportation costs as confidential, Herndon Tr. (6/22 afternoon) at 25:19-24; Kelly Tr. (6/22 morning) at 40:5-8, 75:15-19, it is impossible accurately to determine the cost of the coal at the mine-mouth.

[87]** FERC statistics (and MSHA data) also do not address a number of critical items and provide no information on most of the competitively significant terms and conditions of coal contracts. Guerin-Calvert Tr. (7/1) at 17:2-4. For example, FERC data do not capture the various terms and conditions of coal contracts that affect the overall value of the contract to the producer. PX 8302 at 114:10-115:14, 117:8-16, 119:7-122:7 (Lien Dep.)(" I would say that the FERC price represents the - the cost that the utility has incurred by purchasing and transporting the coal. I don't think anything else would be in there."). Also, unregulated utilities (representing twenty percent of SPRB customers) are not even required to report their data, and hence will not show up in the FERC reports. Hake Tr. (6/29 open) at 13:1-12; Guerin-Calvert Tr. (7/1) at 17:5-7. For these **[*142]** many reasons, it simply is not possible to estimate current coal prices by looking at FERC (or MSHA) data. Hake Tr. (6/29 open) at 13: 1-21; Freund Tr. (6/21 afternoon) at 107:17-21 ("it won't tie to what they would be bidding today"); Stuchal Tr. (7/7 morning) at 65:25-66:6; PX 8307 at 248:6-9 (Rackers Dep..) (stating that he would not **[**88]** look to FERC data to determine what market prices should currently be). [18]

Available spot market data (OTC data) also are of only marginal usefulness. OTC data are based on a few transactions, primarily coal purchases for delivery within one year, and do not include sales made pursuant to long-

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[17] Pricing data that is even three months old is considered "stale" in the industry. Freund Tr. (6/21 afternoon) at 107:8-13.

[18] COALdat data are no more useful, relying heavily on FERC data and, while attempting to derive some fob mine prices from delivered prices, suffering from the same shortcomings as FERC data. Guerin-Calvert Tr. (7/1) at 17:8-19. Information that mine operators provide to the railroads for planning purposes concerns short-term shipments and provides no insight into a mine's future contracting plans. Guerin-Calvert Tr. (7/1) at 17:20-18:8. The resulting data from the national coal transportation association (total tonnage and total trains for the upcoming month) is provided on an aggregated basis -- no mine specific data are available to customers or producers. Lapplander Tr. (7/7 morning) at 10:20-12:1.

term contracts. **[**89]** Leer Tr. (6/28 morning) at 35:23-36:4; Hake Tr. (6/29 open) at 13:13-21; Hake Tr. (6/30 closed) at 9:20-10:2; Kelly Tr. (6/22 morning) at 65: 8-22; PX 8306 at 261:2-24 (McGowan Dep.)(stating only 10% of coal trades are reported). Producers and customers alike testified that they would not be able to estimate coal prices for long-term contracts by looking at current OTC prices. Hake Tr. (6/29 open) at 13:13-21; Hake Tr. (6/30 closed) at 9:20-10:2; Freund Tr. (6/21 afternoon) at 107:22-108:1; Orme Tr. (6/22 morning) at 26:13-19; Carr Tr. (6/23 afternoon) at 12:1-20; PX 8307 at 125:20-127:16 (Rackers Dep..). Moreover, OTC prices do not dictate the prices producers bid. PX 7741 at 43:5-19 (Pettibone dep.). In fact, at the time of the price spike in 2001, there was little change in the negotiated price for long-term coal contracts. See DX 9007 at 013-014.

HN22[] A market is conducive to tacit coordination where producers recognize their "shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group, 509 U.S. at 227*. Successful coordination requires both that firms reach terms of coordination that are profitable and that they **[**90]** be able detect and punish deviations from the coordinated interaction. See Merger Guidelines § 2.1. in order for producers to be able to coordinate production, they would need a reliable reference point to attain agreement as to a lag in production. Supply and demand estimates in this marketplace, however, have been historically inaccurate and uncertain.

Demand for SPRB coal is not predictable either in the short-or the long-term. Guerin-Calvert Tr. (7/1) at 37:19-38:10; DX 9008a. The two largest demand drivers for coal consumption are the weather and the economy, and neither can accurately be predicted. Hake Tr. (6/29 open) at 11:6-13; Kelly Tr. (6/22 morning) at 66:10-20. Unexpected weather and changes in economic conditions can result in utilities delaying receipt of coal under contract, advancing receipt of coal, choosing to increase or decrease inventories, or buying and selling coal on the spot market to meet immediate, unanticipated demand. PX 8304 at 159:3-14 (Flippin Dep.).

The opaqueness of utility inventories also makes it difficult to predict the demand for SPRB coal from year to year. When utilities draw down inventories, they **[*143]** defer coal purchases, resulting in **[**91]** reduced demand; conversely, when utilities build up inventories, they drive up demand. Utilities do not disclose their inventory levels to suppliers. Luksan Tr. (7/7 morning) at 38:6-15. There are thus many different forecasts of future inventories, none of which is very accurate. Hake Tr. (6/29 open) at 11:7-12:1. As a result, predictions of future demand for coal vary dramatically, with no real consensus as to what future usage of electricity might be. See Guerin-Calvert Tr. (7/1) at 22:25-23:9, 25:5-16; Leer Tr. (6/28 morning) at 38:18-22; Lapplander Tr. (7/7 morning) at 12:12-20; DX 0848 at 0021359. Customers are no better at projecting demand. As mr. Bales testified, he takes his own company's estimates of coal consumption "with a grain of salt." Bales Tr. (6/21 afternoon) at 71:19-72:1. Demand estimates, particularly as they relate to coal prices, "would be pure speculation." Orme Tr. (6/22 morning) at 31:16-21; See also Carr Tr. (6/23 afternoon) at 22:20-23:7; DX 0506 at 3 (coal prices "are extremely difficult to predict"); DX 0937 at p 20 ("future coal pricing is difficult to predict."). Long-term, variable contracts further complicate efforts to forecast the demand **[**92]** for coal from year to year. Guerin-Calvert Tr. (6/30 afternoon) at 109:21-110:1; DX 0086 at p 49.

Similarly, supply is hard to predict because suppliers and other would-be sources of supply side intelligence seldom publicize reliable statistics regarding production levels and decisions. Most public statements made by suppliers contain little meaningful information about actual market conditions or the likely actions of market participants. For instance, RAG does not make public its decisions regarding pricing or production and does not reveal its uncommitted tonnage or its proprietary mine models. PX 8302 at 46:22-47:15, 137:17-20, 259:14-260:2, 291:14-292:14 (Lien Dep.). Similarly, Triton does not discuss its committed and uncommitted sales with third parties. PX 7785 at 202:17-24 (Wilkerson dep.). Buckskin's mine manager has never seen committed or uncommitted sales figures for Arch or Peabody. Id. at 202:25-203:6. Kennecott, likewise, testified that the limited "hearsay" about other mines is generally related to safety issues, not production decisions. PX 7141 at 35:6-17 (Randen Dep.). Arch, too, shares such information with no producer, and receives it from none. Leer Tr. **[**93]** (6/28 morning) at 50:2-6, 50:25-51:5; Lang Tr. (6/24 afternoon) at 80:4-7.

Statements made in analyst calls and at industry conferences, or contained in financial reports, are of little informative value as they tend to be infrequent, not systematic, and purposefully vague and incomplete. When coal producers make statements as to their uncommitted future tons, they "very rarely" provide data specific to the

SPRB but rather provide their position company-wide. PX 8302 at 256:16-257:2 (Lien Dep.); Leer Tr. (6/28 morning) at 31:10-32:4; DX 1068; DX 0972. As midamerican's representative explained, "they're pretty clever at hiding how much of it's PRB versus eastern coal." Freund Tr. (6/21 afternoon) at 106: 24-107:4. In addition, the statements usually differ greatly from actual performance. For example, publicly available reports do not accurately reflect RAG's expansion plans or mining costs. PX 8302 at 34:1-7, 34:19-36:11 (Lien Dep.). And as one utility explained, "I've heard producers tell me they're going to increase production in the past and then ultimately don't." Freund Tr. (6/21 afternoon) at 115:3-4. [19]

[94]** **[*144]** The emphasis on sealed bids and confidentiality is an important aspect of the market structure and dynamics that would frustrate coordination among producers. Utilities purchase the great majority of their coal through the issuance of an RFP. Kelly Tr. (6/22 morning) at 55:3-8; Carr Tr. (6/23 morning) at 81:19-22; Luksan Tr. (7/7 morning) at 35:15-19; Stuchal Tr. (7/7 morning) at 64:12-15; PX 8306 at 214:8-13 (McGowan Dep.). The RFP bidding process is conducted on a strictly confidential basis. Rahm Tr. (6/21 afternoon) at 6:25-7:14; Bales Tr. (6/21 afternoon) at 63:6-14; Kelley Tr. (6/22 morning) at 55:3-12; Herndon Tr. (6/22 afternoon) at 13:20-14:16; Werner Tr. (6/23 morning) at 19:16-22; Lapplander Tr. (7/7 morning) at 10:6-8; Stuchal Tr. (7/7 morning) at 65:12-24; Luksan Tr. (7/7 morning) at 10:6-8; DX 0940; PX 8302 at 106:21-107:17 (Lien Dep.); PX 8303 36:17-19, 37: 3-6, 37:10-38:2, 38:10-39:8 (Richards Dep.); PX 8306 215: 21-216:10 (McGowan Dep.); PX 8307 at 20:17-20, 83:2-6 (Rackers Dep..); PX 8304 at 169:2-17 (Flippin Dep.); PX 8309 at 160: 2-22 (Panzarino Dep.). Hence, producers are not aware of who else is bidding or the bids of the other producers. Rahm Tr. (6/21 afternoon) **[**95]** at 7:6-11; Bales Tr. (6/21 afternoon) at 63: 6-14; Kelly Tr. (6/22 morning) at 55:25-56:5; Werner Tr. (6/23 morning) at 19:23-20:2; Luksan Tr. (7/7 morning) at 37:11-19; Stuchal Tr. (7/7 morning) at 65:12-24; PX 8302 at 160:10-20 (Lien Dep.); DX 0001; DX 1038; DX 0935. Triton, like other SPRB producers, has never told another producer what it bid; nor has it been told by another producer what that company bid. Hake Tr. (6/29 open) at 12:17-25. Confidential bidding gives an incentive to producers to offer a low price because "the vendors have the understanding that those offers that they turned in will not be viewed by their competition." Kelly Tr. (6/22 morning) at 55:20-24; DX 0026.

Even after the bidding process is completed and there is a winner, utilities typically do not reveal the successful bidder, the winning bid price, exactly how far off the other bidders were, the ranking of the bids or how the utility determined the winner. Bales Tr. (6/21 afternoon) at 64:4-6; Freund Tr. (6/21 afternoon) at 105:11-15; PX 8302 at 19:18-20:3 (Lien Dep.); PX 8306 223:12-16 (McGowan Dep.); Luksan Tr. (7/7 morning) at 37:20-24. Confidentiality provisions typically included in coal supply contracts **[**96]** prohibit the winner from revealing the terms as well. Hake Tr. (6/29 open) at 12:17-21; Rahm Tr. (6/21 afternoon) at 7:15-21; Stuchal Tr. (7/7 morning) at 66: 25-67:9; PX 8303 at 234:1-237:15 (Richards Dep.); PX 8307 at 83:7-84:3 (Rackers Dep..); DX 0016; DX 0896 p 18. The few references to specific contracts in the trade press are highly generalized and do not include specific contract terms. Guerin-Calvert Tr. (7/1) at 18:24-19:2.

Utilities are careful not to divulge other information that might be useful to suppliers. For example, utilities treat their transportation costs as confidential. Herndon Tr. (6/22 afternoon) at 25:19-24; Kelly Tr. (6/22 morning) at 41:5-8, 75:15-19; PX 8309 at 29:4-20 (Panzarino Dep.). They also keep their inventory levels confidential. Luksan Tr. (7/7 morning) at 38:6-15; DX 0523 at 1 ("little real time data exists relative to utility coal inventory"). They frequently do not publicize the results **[*145]** of test burns. Herndon Tr. (6/22 afternoon) at 26:23-27:7. Utilities divulge even less information today than they did in the past because, as a result of deregulation, virtually all utilities compete with each other, and they therefore are particularly **[**97]** intent on guarding information about how much coal they are purchasing and at what price. PX 1255 at 149:22-151: 2 (pettibone i.h.). Utilities generally solicit bids without disclosing in the RFP the particular plant for which they are purchasing the coal so as to protect themselves against price discrimination. Carr Tr. (6/23 afternoon) at 6:1-7; PX 8306 at 232:21-233:15 (McGowan Dep.). They may also

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[19] Information from coal industry news services varies from source-to-source and is frequently unreliable. As one customer put it, the coal rags are of limited usefulness because they are known to "have bollixed up some of [their] stories." PX 8307 at 101:1-6 (Rackers Dep..). As explained above, industry consultants vary in their assessments of supply and demand. Hake Tr. (6/29 open) at 11:6-13; PX 8302 at 35:3-36:1 (Lien Dep.). Information provided by consulting firms, forecasting supply and demand, are similarly not regarded as reliable. PX 8307 at 250:14-18 (Rackers Dep..).

wait to decide the plant to which they send the coal until after seeing the bids or even after the contract is signed. Carr Tr. (6/23 afternoon) at 6:8-19; Freund Tr. (6/21 afternoon) at 104:22-105:4.

Tacit agreement would also be difficult to coordinate in this marketplace because the terms of agreement would be hard to communicate between producers, even though tacit agreement only requires producers to adopt a uniform strategy that is consistent with less aggressive competition. Moreover, there is no effective mechanism in the SPRB to discipline any producer that would deviate from the terms of coordination. Plaintiffs' economic expert posited no theory for punitive discipline among producers. Due to the nature of the confidential bidding and contracting process that gives producers **[**98]** incentives to submit aggressive bids to capture long term contracts, cheating would not be detected until well after the fact, if ever, and any punishment would come well after the fact as well. Guerin-Calvert Tr. (6/30 afternoon) at 42:19-23. Such delays in detection or punishment generally mean that deviations are likely and that coordinated interaction is unlikely to succeed. See Merger Guidelines § 2.12.

Finally, plaintiffs rely heavily on testimony from utility customers expressing concern about the increased consolidation in the SPRB market that will result from the proposed transaction. Herndon Tr. (6/22 morning) at 74:9-16 ("we think that a continuation of a consolidation of the number of suppliers in the powder river basin is not beneficial to the customers who use that coal"); PX 0030 p 9 (Herndon Decl.); Holloway Tr. (6/22 afternoon) at 54:18-25 ("my biggest concern is that I will have one less person to do contract business with to purchase coal from in the southern powder river basin" and that "concentration of ownership in the PRB coal market would translate to higher prices."); Bales Tr. (6/21 afternoon) at 55:5-13 (concern about "the concentration **[**99]** of market power, the consolidation and the fear that I had that by having one less competitor in the market we would see prices rise"); Freund Tr. (6/21 afternoon) at 96:4-24 ("my biggest concern just ties to fewer suppliers. It's my belief that as you reduce the number of suppliers, it will have a negative impact on price ...."); Werner Tr. (6/22 afternoon) at 122: 4-25; Orme Tr. (6/22 morning) at 12:13-22; PX 0003 at 013-014 (Richards Decl.); PX 0010 pp 11-12 (Flippin Decl.); PX 0021 pp 14-17 (Rea Decl.); PX 0012 pp 24-26 (Panzarino Decl.); PX 0005 pp 21-24 (McGowan Decl.); PX 0036 pp 17-18 (Kotara Decl.). In many contexts, however, antitrust authorities do not accord great weight to the subjective views of customers in the market. See 2a Areeda, et al., ***Antitrust Law*** p 538b, at 239 ("[l]east reliable [evidence] is 'subjective' testimony by customers ...though not irrelevant, such statements are often unreliable."); *FTC. v. Owens-Illinois, Inc., 681 F. Supp. 27, 38 (D.D.C.)*, vacated as moot, *271 U.S. App. D.C. 1, 850 F.2d 694 (D.C. Cir. 1988)* ("opinions of purchasers must be viewed in light of their actual behavior"). furthermore, while the court does not **[**100]** doubt the sincerity of the **[*146]** anxiety expressed by SPRB customers, the substance of the concern articulated by the customers is little more than a truism of economics: a decrease in the number of suppliers may lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to state what will happen in the SPRB market, and none have attempted to do so. The court therefore concludes that the concern of some customers in the SPRB market that the transactions will lessen competition is not a persuasive indication that coordination among SPRB producers is more likely to occur.

Having concluded that the structure and dynamics of the SPRB market are not conducive to an increased likelihood of tacit coordination as a result of the proposed transaction, the court proceeds to a consideration of whether there will be an increased likelihood of coordination because a significant and independent competitor will be eliminated from the SPRB market.

e. Triton as a Market "Maverick"

HN23[] "'An important consideration when analyzing possible anticompetitive effects' is whether the acquisition 'would result in the elimination of a particularly **[**101]** aggressive competitor in a highly concentrated market ....'" *Libbey, 211 F. Supp. 2d at 47* (quoting *Staples, 970 F. Supp. at 1083*). For purposes of a coordinated effects analysis, the Merger Guidelines define a "maverick" firm as one possessing a greater economic incentive to deviate from the terms of coordination than those of its rivals. Merger Guidelines § 2.12. FTC officials have noted that, in the context of an auction market, to be a maverick a firm must "consistently compete aggressively when it bids, causing other firms to bid more aggressively when it is present." David T. Scheffman & Mary Coleman, Quantitative Analyses of Potential Competitive Effects from a Merger, June 9, 2003 at 6, available at *www.ftc.gov/be/quantmergeranalysis*. pdf. The "loss of a firm that does not behave as a maverick is unlikely to lead to increased coordination." William J. Kolasky, deputy Assistant Attorney General, Antitrust Division, United States

Dep't of Justice, Coordinated Effects in Merger Review: from Dead Frenchmen to Beautiful Minds and Mavericks, Address Before the ABA Section of ***Antitrust Law*** Spring Meeting (Apr. 24, 2002), available **[**102]** at *http://www.usdoj.gov/atr/public/speeches/11050*. htm (citing Jonathan B. Baker, former Director, Bureau of Economics, FTC, Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws, *77 N.Y.U.L. Rev. 135 (2002)*).

The evidence here does not support the proposition that Triton is, or will likely become, a maverick in the SPRB market. Triton is not presently a maverick in the market, particularly not over the last two to three years. Triton's North Rochelle mine is one of the highest cost mines in the SPRB. DX 1024 at 24708-24709; Hake Tr. (6/29 closed) at 51:20-22. As a consequence, Triton has been forced to adopt a "last mine standing" sales strategy for its North Rochelle coal. Hake Tr. (6/29 closed) at 50:23-51: 5, 51:20-23. Pursuant to this strategy, Triton bids its North Rochelle coal at a price that covers its cost plus a profit and waits for the market to come to that price as other mines in the SPRB sell out. Hake Tr. (6/29 closed) at 50:23-51:10. ("we have to wait until others sell out of their production until we get the price which would cover our cost at a profit."). This strategy is driven for the most part **[**103]** by Triton's debt financing obligations, which require Triton to obtain a sufficient return on its coal sales to meet bank commitments as they come due. Id. at 22:18-23:6. Thus, Triton would rarely **[*147]** deviate from the "last mine standing" strategy. Id. at 52:1-13; See also DX 0510 (Triton "intends to hold to its strategy, which is to be 'the last man standing'" despite market weakness).

Because of these circumstances, Triton is wholly indifferent to competitors' production levels or their likely uncommitted tonnage in pricing its North Rochelle coal. Hake Tr. (6/29 closed) at 51:15-25. Triton's goal is not to increase its market share by pricing under its competitors. Hake Tr. (6/29 open) at 9: 18-10:2. Rather, Triton seeks to cover its cost and make a profit on each sale by waiting out the competition and obtaining the highest price possible. Hake Tr. (6/29 open) at 9:18-10:2, 50:23-51:10, 86:5-87:5; PX 0623; DX 0644 at 17417 (" Triton's marketing strategy… is to hold its unsold tonnage as long as possible"). Given North Rochelle's high cost structure, therefore, Triton has been unable in recent years to be at all competitive on contract bids. Guerin-Calvert Tr. (7/1) at **[**104]** 33: 17-25; See also DX 9005 at 003. The result, the court concludes, is that Triton does not lead or even influence pricing in the market, does not compete aggressively, and does not have a history of bidding on contracts consistent with the behavior of a maverick in the SPRB market.

Nor does Triton's excess production or loadout capacity provide a significant constraint on the market because Triton is unable effectively to deploy that capacity at a reasonable cost. Guerin-Calvert Tr. (7/1) at 34:1-5. If Triton remains an independent company, its continuing high production costs will eliminate all prospects that it can become a more competitive bidder in the marketplace in the future, let alone operate as a maverick. Hake Tr. (6/29 closed) at 57:20-24; Guerin-Calvert Tr. (7/1) at 33:7-16; DX 2006 p 36. The testimony of utility customer witnesses established that, in bid after bid, Triton was not competitive and often finished "dead last" in terms of competitiveness for the contract. Rahm Tr. (6/21 afternoon) at 11:20-24; Bales, Tr. (6/21 afternoon) at 50:5-13; 64:24-65:4, 67:6-8; Kelly Tr. (6/22 morning) at 62:14-20, 63:2-6, 70:14-24; DX 0107; PX 8606 at 8; Herndon **[**105]** Tr. (6/22 afternoon) at 19:18-23:11; DX 0955 at 23399; DX 0953 at 23389; Stolwyk Tr. (6/23 morning) at 61:23-62:21; 77:3-6; DX 0919; Lapplander Tr. (7/7 morning) at 16:7-9; Stuchal Tr. (7/7 morning) at 76:14-18, 77:1-6. There is no convincing evidence that the situation would change in the future given Triton's high costs and very weak financial condition, which is discussed further in section II-E Infra. Triton is the only SPRB producer not to increase production over the past five years, and its financial condition and other weaknesses, including the high strip ratio at North Rochelle and its need for extensive loans and increased reserves (the satisfaction of which are highly questionable), make it unlikely that Triton will become any more competitive in the marketplace than it is right now. It has no pricing strategy available to it that would increase competition in the marketplace and no other likely buyer for Triton has been identified. See discussion in section ii-e Infra.

4. RAG and Kiewit in the Post-Merger Market

It is defendants' burden to show that the "fringe" of the SPRB market would expand sufficiently to defeat any merger-induced price increase. **[**106]** See *FTC v. H.J. Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 715*. RAG and Kiewit fall in the category of fringe producers in the SPRB market. both are strong companies with credible plans to expand production significantly and lessen the risk of coordination in the market. The record evidence establishes that they could, and likely would, **[*148]** expand production to meet any production constraint by the major SPRB producers.

Given sufficient future demand, Kiewit intends to increase production at Buckskin by several million tons per year. DX 1089. Kiewit will promptly begin the permitting process required to effect that expansion if the proposed transaction is consummated and Kiewit will reach out to customers to determine demand for this new coal on "day one" after the acquisition goes through. Id. at 52:3-18.

In valuing the Buckskin mine, Kiewit used the same sophisticated modeling techniques the company uses for all of its major investments. These models showed that increasing production by several million tons was "very, very attractive" financially. Id. at 49: 2-51:5; DX 2011. Mr. Grewcock testified that he was "very pleased" to see the results of these models, and that the **[**107]** company "absolutely" intends to pursue the avenue of significant expansion once the acquisition is complete. Grewcock Tr. (6/28 afternoon) at 50: 21-23, 52:3-7. Kiewit believes that it could achieve this expansion, which would increase Buckskin's loadout capacity, within two years of the acquisition. Id. at 52:19-24; DX 1089.

Kiewit sees the acquisition of additional reserves through the west hay creek LBA as a further significant expansion opportunity. Grewcock Tr. (6/28 afternoon) at 51:6-23. The West Hay Creek LBA offers 150 million recoverable tons of coal, which will last 7.5 years at current production rates, and is not near any other existing mines. The acquisition of this lease would allow Kiewit to continue to operate a very low cost coal mine because of the favorable overburden ratios in the West Hay Creek area. Kiewit also plans to upgrade Buckskin's loadout, plant and equipment, which will significantly improve Buckskin's productivity and facilitate future expansion. Id. at 54: 16-55:11; DX 1089 at 3. With Buckskin's increased production, overall production within the SPRB would be virtually the same as it is today even if Arch were to refuse to mine a single ton **[**108]** of North Rochelle's uncommitted coal. This expansion would also represent twice the projected estimated growth for SPRB coal of 7.7 million tons per year. See Morris Tr. (6/24 afternoon) at 16:13-18:14. Whether Kiewit operates Buckskin with or without the west hay creek reserves, Kiewit's plans to upgrade Buckskin's loadout, plant, and equipment will likely significantly improve Buckskin's productivity and facilitate future expansion, allowing Buckskin to become a more active competitor in the SPRB market.

RAG, under its new management, is a viable competitor that also intends to expand its operations in the SPRB. RAG currently has detailed plans to expand its output from 44 to 60 million tons per year by january 1, 2006. PX 8302 at 37:2-8, 42:19-22, 314:12-13 (Lien Dep.); DX 0163. Referring to its intention to expand, RAG noted in a recent business document that

> We are positioned and ready to act swiftly. Belle Ayr is the PRB's sleeping giant which has been written off by our competition and the outside consultants reports, such as hill because of our issues in 2000-2001. They flat line us going forward for the next ten years and they are as wrong as they can be.

DX **[**109]** 0162 at 2. According to its plans, RAG intends to expand Belle Ayr from 19 to 30 million tons and Eagle Butte from 25 million to 30 million tons without requiring "a major capital investment." PX 8302 at 29:22-30:6, 37:2-8; 59:20-60:1, 314:6-13 (Lien Dep.); DX 0162; DX 0163. This expanded output represents more than the entire uncommitted output of the North Rochelle mine. Hake Tr. (6/29 closed) at 52:19-22. The only regulatory **[*149]** prerequisite for RAG's expansion is the need to submit a new mine plan to the Wyoming department of environmental quality ("DEQ"), which RAG does not consider to be an obstacle. PX 8302 at 128:14-130:8 (Lien Dep.). This is because RAG's mines are "fully permitted, with respect to having gone through all the archeological, wildlife, vegetation, air quality, all those issues." Id. at 183: 8-16. RAG has already engaged in "preliminary discussions" with the deq regarding its expansion plans. Id. at 229:15-230: 1. As a result, RAG expects that it would receive approval to expand its mines to 60 million tons of annual production within a year, even if subjected to a formal review by the state. Id. at 180:16-185:3. Indeed, RAG could accelerate the date **[**110]** for its planned expansion to a date earlier than january 2006. Id. at 187:4-189:15, 215:14-216:9, 225:1-12. "the time frames are relatively short. We're not talking about having to develop a new mine. That's essentially expanding existing operations that have had a successful performance record for three decades." Id. at 232:13-17. RAG has sufficient reserves to implement this plan and "the company views the plans positively." Id. at 42:15-43:14, 130:9-20, 232:5-12 (quotation), 263:2-5.

RAG's expansion plan derives from its overall strategy in the SPRB. RAG designs its mines to have the ability to expand quickly as market opportunities develop. Id. at 49:19-50: 1, 52:5-9. Its SPRB mines thus can rapidly expand to their permitted capacity of 70-80 million tons of annual production. Id. at 92:11-93:16. Mr. Lien testified that he would be comfortable ordering equipment and signing contracts even before a new permit is approved, Id. at 302:7-303:4, and that RAG has the ability to shift assets and workers between its mines for immediate increases in production, Id. at 81: 21-83:3. Thus, RAG can and would expand production in response to a price increase. **[**111]** Id. at 42:12-18, 61:18-62:15, 316: 22-317:7, 317:11-318:4. RAG has a demonstrated history of expanding production in response to market demand. In 2001, RAG responded to higher demand by bidding for contracts and expanding production. Id. at 85: 3-87:22. RAG was able to expand production in 2001 even though the equipment needed was not in the budget. Id. at 172: 9-176:22. Consummation of the proposed transaction would not affect RAG's decision to expand if attractive coal prices were available. Id. at 328:2-18.

The presence in the marketplace of RAG and Kiewit, strong companies with concrete plans to expand production significantly, lessens the risk of anticompetitive coordination in the SPRB market. Defendants have shown that the post-merger fringe capacity in the SPRB would be more than sufficient to absorb any increase in demand caused by any production lag coordinated by the "big three" producers -- Peabody, Kennecott, and Arch -- over the next three years. The profitability model of defendants' expert economist establishes that, based on a published demand forecast, available fringe expansion would be sufficient to defeat any output restriction, thereby resulting **[**112]** in no demand shortfall or price increase in the post-merger scenario. Guerin calvert Tr. (7/1) at 28:4-24; DX 9015. Hence, fringe expansion by Kiewit and RAG would be enough to cover a demand shortfall (assuming coordinated output limitation by the three large producers) and defeat any price increase. Id. RAG and Kiewit would both be better able to play the role of maverick in the post-merger market than would Triton if no merger occurred, even though neither will possess 8800 Btu coal, which tends to lead prices in the SPRB.

* * * * *

[*150] the court therefore concludes that the SPRB market is competitive today. Although producers have shown an interest in production discipline and coordination is feasible, there is no evidence that express or tacit coordination has occurred in the SPRB market. Furthermore, an examination of the structure and dynamics of the market, including the significant number of competitors, the heterogeneity of SPRB coal and the mines and firms that produce the coal, the imperfection of pricing information available in the market, the difficulty in obtaining accurate or current supply and demand information, the emphasis on confidentiality in the bidding system, **[**113]** and the difficulty firms would face in identifying and punishing cheaters, leads the court to conclude that this market is not one in which coordination would be likely if Arch acquires North Rochelle and Kiewit acquires Buckskin. Moreover, Triton is not, nor is it likely to become, a maverick in the SPRB market and, therefore, the proposed transactions will not make coordination more likely by eliminating Triton from the marketplace. Finally, the evidence also establishes that the fringe in the SPRB (consisting of RAG and Kiewit) will be a viable constraint on producer coordination in the post-merger SPRB market.

D. Efficiencies

HN24[] the Supreme Court has not sanctioned the use of an efficiencies defense in a case brought under *Section 7 of the Clayton Act*. See *FTC v. Procter & Gamble Co., 386 U.S. 568, 580, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967)* ("possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."). However, "the trend among lower courts is to recognize the defense." *Heinz, 246 F.3d at 720* (citing **[**114]** cases). In *Univ. Health, 938 F.2d at 1222*, the court held that "a defendant may rebut the government's prima facie case with evidence showing that the merger would create significant efficiencies in the relevant market." similarly, in Staples the court considered the defendant's claimed efficiencies, even though it ultimately decided that they were not sufficient to rebut the FTC's case. *970 F. Supp. at 1090*. Likewise, this circuit in Heinz examined (but rejected) evidence of efficiencies, requiring "proof of extraordinary efficiencies" in light of the highly concentrated market there. See 246 F.3d at 720-21.

In 1997, the department of justice and the FTC revised their HN25[] Horizontal Merger Guidelines to recognize that "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction." Merger Guidelines § 4. Hence, "[e]fficiencies generated through merger can enhance the merged firm's ability and incentive to compete, **[**115]** which may result in lower prices, improved quality, enhanced service, or new products." Id. However, the government will only consider those efficiencies that are merger-specific and verifiable by reasonable means. Id. The higher the market concentration present in a given case, moreover, the more extraordinary the efficiencies that a defendant must show. See Univ. Health, 938 F.2d at 1223; Merger Guidelines § 4 ("[e]fficiencies almost never justify a merger to a monopoly or near-monopoly"). When there are high market concentration levels, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' **[*151]** represent more than mere speculation and promises about post-merger behavior." Heinz, 246 F.3d at 721. However, even where evidence of efficiencies in the relevant market will not support an outright defense to an anticompetitive merger, such evidence is relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition. See Tenet Health Care, 186 F.3d at 1054; **[**116]** Staples, 970 F. Supp. at 1088.

Defendants claim that the proposed transaction will realize between $ 130 and $ 140 million in efficiencies over the 2004-2008 period. Mr. Lang, president and general manager of thunder basin coal company, was admitted as an expert in these proceedings on the subjects of surface mining operations, mine engineering, and mine planning. Lang Tr. (6/24 afternoon) at 107:11-14. He prepared a series of mine plans, including a 2004 budget and a five-year plan, based on a combination of the North Rochelle and Black Thunder mines, as well as with Black Thunder as a stand-alone mine. Lang Tr. (6/25 morning) at 10:25-11:21; DX 1123; DX 1124; DX 2004. In Mr. Lang's supplemental report, he claims that the acquisition will realize $ 134.8 million in savings over the 2004-2008 time period. DX 1111 at 25758. Of this amount, $ 27.4 million is general and administrative expenses, which mr. Lang himself acknowledges is not merger-specific because "another coal company" without an adjacent mine could achieve it. Lang Tr. (6/25 morning) at 18:11-16. This leaves $ 107.4 million in claimed merger-specific savings from the combination. See DX 1111 at 25758.

[117]** Even as to that remaining amount, however, defendants have not made a strong case on efficiencies. Plaintiffs have systematically pointed out deficiencies in defendants' estimates of efficiencies and shown that defendants have not been able to quantify with precision the savings netted by the proposed transaction. Some of the efficiencies identified by defendants are not merger-specific while others are undercut or reduced on the basis of the evidence.

For example, Arch claims that it can recover 8.9 million tons of upper seam coal at North Rochelle for a five-year efficiency of $ 15.2 million. DX 1111 at 25773. Triton, historically, has chosen not to recover that coal because of the thin seam and poor quality of the coal. However, the quality has improved substantially as Triton has moved further into the north roundup lease area, PX 7875 at 115, and Triton is now mining it, See Kostic Tr. (6/25 afternoon) at 82. Accordingly, Triton intends to recover all that coal. PX 7875-031 at 115-117 (deppe dep.). Mr. Lang concedes that if Triton were to recover this upper seam coal at North Rochelle on its own accord, independent of the merger, then the alleged efficiency would not exist **[**118]** and its value would be zero. Lang Tr. (6/25 morning) at 63-64.

Arch also claims that it will save $ 11.5 million over the 2004-2008 time period and recover an additional 3.8 million tons of coal by moving a dragline from the current Black Thunder west pit to the adjacent north roundup lease area of the North Rochelle mine. The relocated dragline would operate in its new location for a two-year period, running in an eastwest orientation, before returning to the west pit. It would operate in addition to Triton's existing north-south oriented dragline. However, Arch concedes that Triton will recover this coal on its own accord, independent of the merger -- just not as quickly as Arch would be able to in the combined operation. Lang Tr. (6/25 morning) at 66; Kostic Tr. (6/25 afternoon) at 84-85; PX 4405 at 133-34 (Lang dep.); painter Tr. (7/7 **[*152]** afternoon) at 33. Arch did not attempt to adjust the value of the savings from reconfiguring Triton's dragline pits to reflect the fact that Triton would likely mine this coal at a later time. Lang Tr. (6/25 morning) at 65-66; Kostic Tr. (6/25 afternoon) at 99. The correct value of this savings, therefore, is simply the time value of money, which **[**119]** would be only a fraction of the $ 11.5 million claimed by Arch. PX 4501 p 62 (painter report). This saving is therefore overstated. Id.; See painter Tr. (7/7 afternoon) at 33. Moreover, there is no indication that actual sales will increase to reflect the additional production resulting from this efficiency. To the contrary, the combined output of Black Thunder and North Rochelle is projected at a constant 93.5 million tons, which is merely the sum of the pre-merger planned output of the mines. DX 1123.

Arch claims that it received quotes for insurance to cover Triton's property, including the risk of business interruption, at no additional cost to it, and thus that savings would be achieved. Arch alleges that this efficiency flows from its size, diversified portfolio of assets and excellent safety record. DX 0770 at 19715 p 8 (Lang report). Only a fraction of these savings are merger specific, however. Insuring Triton's property under Arch's policy would change the coverage terms of the insurance, and had Triton accepted those same terms, it would be able to realize over 80% of those savings on its own. Painter Tr. (7/7 afternoon) at 36. Arch's claimed **[**120]** savings, therefore, represent merely the assumption of the additional risk of self-insurance. Id. at 36:19-23. Moreover, another potential purchaser of Triton might be able to achieve the same savings, and therefore they are not merger specific. Id. at 37.

Arch also claims a one-time $ 3.5 million inventory reduction from the combination of Arch and Triton based on the elimination of North Rochelle's repair parts inventory. DX 0770 at 19715 p 10. But this claim is really just a conversion of an inventory asset to a cash asset. Painter Tr. (7/7 afternoon) at 38. Mr. Lang also claims carrying cost savings of $ 1.6 million for the period 2004-2008, for the alleged reduction of duplicate parts inventory from the combination of Arch and Triton. DX 0770 at 19776 (Lang report). These savings derive from the elimination of Triton's entire stock of repair parts, but no evidence was submitted comparing the pre-merger repair parts inventories of Arch and Triton and, therefore, there is insufficient evidence that the acquisition will enable Arch to eliminate all of North Rochelle's supply inventory. PX 4656 at 007 p 16 (painter w.d. **[**121]**).

Arch further claims that $ 26.2 million in savings will flow from the elimination of one tractor, one drill, one grader, and one loader as a result of the merger. The claimed savings are derived from more fully utilizing existing capital equipment. Mr. Lang concedes that he estimated equipment needs based in part on his subjective opinion. Lang Tr. (6/25 morning) at 75; PX 1009 at 34 (Lang I. H.); PX 4501 at 012 p 24 (painter report). Mr. Kostic testified that a quantitative study could have been done in three weeks, but it was not. Kostic Tr. (6/25 afternoon) at 68:6-15. The claimed savings amount, therefore, is questionable.

According to Arch, another $ 18.8 million in savings can be effected over five years because three fewer haul trucks will be needed than would be required had the North Rochelle mine remained with Triton. However, no documents support mr. Lang's estimates regarding these savings. See PX 1009 at 37, 42. The document on which mr. Lang's estimate purports to be based, the combined mine plan, contains **[*153]** no haul truck detail. DX 1123; Painter Tr. (7/7 afternoon) at 44:11-14. Another plan (which assumes a close three months later) does contain such **[**122]** detail, PX 4654 at 37, but predicts a significantly larger number of trucks for 2006-2008 than the number estimated by Mr. Lang. Compare DX 770 at 19766 With PX 4654 at 37. No explanation has been provided as to why pushing the closing date back three months would significantly change the savings calculation.

The court concludes that most -- perhaps $ 100 million -- of the purported savings from the acquisition originally claimed by Mr. Lang have been called into question as either nonexistent or overstated. Hence, defendants' efficiencies defense cannot by itself defeat plaintiffs' claim of anticompetitive effects resulting from the transactions. It is apparent, nonetheless, that Some efficiencies will naturally result from the transactions, particularly in the area of lower costs because North Rochelle is adjacent to Black Thunder, which Arch already owns and operates. It also appears that some savings from dragline efficiencies, inventory reduction, and equipment sharing between the two mines will be realized. The realized efficiencies are more likely to be in the $ 35 to $ 50 million, rather than the $ 130 to $ 140 million, range over the five year period from 2004 **[**123]** through 2008.

Such savings do not, the court concludes, provide a complete defense to plaintiffs' prima facie case, and defendants have failed to carry their burden of proving a specific amount of efficiencies or showing the impact of the alleged savings on competitiveness in the market. Nevertheless, even if the savings are neither as great as defendants have claimed nor capable of precise quantification based on the evidence presented by defendants, it is apparent that combining the adjacent Black Thunder and North Rochelle mines will inevitably allow Arch to achieve some measure of lower costs and higher productivity. The existence of such efficiencies, therefore, remains relevant to an assessment of the post-merger market and the potential benefits to consumers from cost reductions and increased competition. Efficiencies resulting from the transactions, then, provide some limited additional evidence to rebut the claim of post-merger anticompetitive effects.

E. Failing Firm Defense

A "failing" or even "flailing" company defense has evolved from the Supreme Court's decision in General Dynamics. There, the court observed that ***HN26***[] the appropriate focus under *Section 7* is on **[**124]** the merging firm's "probable future ability to compete -- rather than … [its] past production." *415 U.S. at 503*. As crystallized here by the FTC, under the defense "a presumption of illegality based on market concentration alone can be rebutted if defendants can prove that the acquired firm's current market shares overstate its future competitive significance due to its weak financial condition." FTC post-hearing br. at 42. A weak financial condition, or limited reserves, may mean that a company will be a far less significant competitor than current market share, or production statistics, appear to indicate. See *General Dynamics, 415 U.S. at 503*; *Dr. Pepper/Seven-Up Cos. v. FTC, 301 U.S. App. D.C. 150, 991 F.2d 859, 864-65 (D.C. Cir. 1993)*. Following General Dynamics, several courts have relied on the weak and worsening position of the proposed acquired company as a significant factor in declining to enjoin a proposed merger. See, e. g., *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th cir. 1981)*; *FTC v. National Tea Co., 603 F.2d 694, 699-700 (8th Cir. 1979)*.

[*154] However, the evidence **[**125]** of financial or other weakness must genuinely undercut the statistical showing of anticompetitive market concentration. As the eleventh circuit has noted:

> [w]e view General Dynamics as standing for the unremarkable proposition that a defendant may rebut the government's prima facie case by showing that the government's market share statistics overstate the acquired firm's ability to compete in the future and that, discounting the acquired firm's market share to take this into account, the merger would not substantially lessen competition. The weakness of the acquired firm is only relevant if the defendant demonstrates that this weakness undermines the predictive value of the government's market share statistics.

Univ. Health, 938 F.2d at 1221 (citations omitted; emphasis added); See also *FTC v. Warner Communications, Inc., 742 F.2d 1156, 1164 (9th Cir. 1984)*. indeed, "[f]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger," and "certainly cannot be the primary justification" for permitting one. *Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324, 1339, 1341 (7th Cir. 1981).* **[**126]** thus, financial difficulties "are relevant only where they indicate that market shares would decline in the future and by enough to bring the merger below the threshold of presumptive illegality." 4 Areeda, et al., ***Antitrust Law*** p 963(a)(3), at 13.

HN27[] A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market. Merger Guidelines § 5.1. Defendants concede that Triton's financial condition is not so weak as to support a failing company defense under these requirements. See defs. Post-Hearing Reply Br. at 13. Instead, they offer evidence of Triton's **[**127]** shaky financial status and future prospects as part of the overall record that must be examined in determining whether substantial anticompetitive effects are likely from the transactions. See *Weyerhaeuser Co., 665 F.2d at 1080* ("hearings on preliminary injunctions [under *Section 13(b)*] necessarily look to the future and decisions must rest on comparative, tentative assessments of the course of events if the injunction is issued, and if it is not."). They stress that "'only examination of the particular market -- its structure, history, and probable future -- can provide the appropriate setting for judging the probable anticompetitive effects of the merger.'" *General Dynamics, 415 U.S. at 498* (quoting *Brown Shoe, 370 U.S. at 322 n. 28*). even if not weakened or failing to the point of constituting a full defense, then, defendants contend that the financial condition of the prospective acquired company may reveal that its future competitive significance in the relevant market has been overstated.

The FTC contends that Triton is a strong company, citing Triton's showings of positive EBITDA (earnings before interest, taxes, depreciation, **[**128]** depletion, and amortization), the viability of both of its mines in the present marketplace, and its plans to continue seeking refinancing options and acquiring additional reserves **[*155]** should the proposed transaction be enjoined. The FTC points out that Triton's mines have posted "operating profits" in each of the past two years. In 2002, for example, Triton had ebitda of $ 53.4 million and profits from operations of $ 31.4 million. PX 0881 at 004. In 2003, Triton's ebitda was $ 51 million and its operating income was $ 23.2 million. Hake Tr. (6/29 afternoon) at 61:25-62:12; PX 0882 at 003. Triton's first quarter 2004 consolidated earnings reveal a consolidated ebitda of $ 9.9 million and operating income of $ 5 million. PX 0902 at 010; hake Tr. (6/29 afternoon) at 65:12-23.

Nevertheless, EBITDA is not cash and, for a mining company, ignores a significant factor affecting a mine's financial performance -- depreciation/depletion. Hake Tr. (6/29 closed) at 18:15-20: 03. Unlike other corporate settings where depreciation is primarily an accounting and tax proposition and does not affect the actual productive capacity of the subject asset, depletion at a mining company directly reduces its **[**129]** future earnings capacity. Id. at 19: 17-20:03. Once depleted, reserves are gone and if not replaced will terminate a mine's operation; thus, any earnings measure such as ebitda that does not account for depletion seriously misstates the financial performance of a mining company such as Triton. Id. at 18:15-20:03. A mining company with positive EBITDA but negative net income is not sustainable for the long-term. Hake Tr. (6/30 open) at 29:10-14. Since its inception in 1998, Triton has consistently lost money; total losses to date are between $ 100 and $ 150 million. Hake Tr. (6/29 closed) at 15: 17-16:24; DX 9002; DX 1093. The only year in which Triton made money, 2002, resulted from contracts signed during the 2001 price spike. Hake Tr. (6/29 closed) at 16:13-18. Without the benefit of the long-term higher price contracts it signed during the 2001 price spike, Triton would have lost much more. Id. at 49:10-50:4.

Still, the FTC contends that Triton's mines are viable in the market today and will likely remain so over the upcoming years. The "viability" of the mines, however, is not inconsistent with the difficulties Triton faces in owning and operating its mines. The mines **[**130]** may continue to operate, but Triton may become less and less of an active competitor in the SPRB market. For example, Buckskin currently produces approximately 20 million tons, but its output will soon begin to decline unless the mine receives additional capital. Hake Tr. (6/29 closed) at 29:19-20. Buckskin's mining operations are moving away from the loadout facility and will eventually move to a higher overburden area. Id. at 29:21-30:8. Without additional trucks and an overburden loader, which Triton cannot afford, annual production will drop to 16-18 million tons. Id. at 29:21-30:16, 57:2-6; See also PX 7785 at 205:21-208:13.

Triton's North Rochelle mine is one of the highest cost mines in the SPRB. DX 1024 at 24708-24709; hake Tr. (6/29 closed) at 51:20-22. The cash cost to mine a ton of North Rochelle coal today is significantly greater than the current spot market price for that coal ($ 5 to $ 5.50 per ton). Hake Tr. (6/29 closed) at 31:2-7; DX 9005. As North Rochelle's mining operations continue to move away from its loadout facility, its costs will continue to increase even though the overburden ratio may improve somewhat over the next few years. Hake Tr. (6/29 closed) **[**131]** at 83:19-84:11.

North Rochelle is also currently facing a significant shortfall in sales. The mine's budgeted production for 2004 is just 24 million tons. Id. at 20:4-7. In the first six months of 2004, North Rochelle's sales were two million tons under budget. Id. at 20:8-10, 21:4-6. That volume cannot be **[*156]** made up later in the year because of the capacity of the mine and its current equipment. Id. at 21:7-15. North Rochelle also has a few million tons of coal as yet unsold for the second half of the year, and Triton is not optimistic about selling that remaining tonnage in the current marketplace. Id. at 21:16-18, 22:2-5. If North Rochelle ends the year under budget, Triton's budgeted net income for 2004 will turn into a loss. Id. at 21:19-22:1; DX 1092 at 25623. North Rochelle faces a similar sales shortfall for 2005. Hake Tr. (6/29 closed) at 52:14-22. Even these 14 million tons are uncertain, because two contracts representing 5.2 million tons in 2005 production are currently undergoing reopeners, which could result in the termination of the contracts or reduced revenues going forward. Id. at 29:9-13, 50:5-22.

Although Triton has represented that it is **[**132]** seeking additional funds for capital expenditures and reserve lease acquisitions, PX 7859 at 11:2-8, 82:2-13 (hake dep.); Hake Tr. (6/30 afternoon) at 12:12-24, Triton faces substantial hurdles in obtaining those additional funds. North Rochelle will exhaust its reserves in seven and a half years and, absent refinancing, Triton will be unable to acquire additional reserves. DFF 192. To date, Triton's prospects for refinancing are questionable. Hake Tr. (6/29 closed) at 56: 18-57:6, 58:3-13; DX 0506 at 5. Triton has nominated an LBA contiguous to the North Rochelle mine called west roundup and an LBA contiguous to Buckskin called West Hay Creek. Hake Tr. (6/29 closed) at 31:23-32:12. The BLM will put these leases up for bid at the end of 2004. Id. at 32:13-20. Triton estimates that it would need over $ 50 million in cash the first year to bid and win both LBAs. Id. at 32:21-34:5. But Triton does not have the money to acquire these LBAs and would need to obtain additional capital, either through further borrowings or equity infusions, in order to do so. Id. at 34:6-15, 58:3-6.

Because of Triton's credit profile, it cannot obtain bank financing and must instead look to **[**133]** the junk bond markets for financing. DFF 203. Triton has approached two financial institutions to discuss such an offering. Hake Tr. (6/29 closed) at 34:16-35: 1. To float a junk bond offering, however, Triton would need to have a moody's rating above a ccc, which it has never been able to achieve. Id. at 35:2-23. Despite ongoing discussions, Triton has received no commitment for a refinancing. Id. at 35:24-36:1. Triton also has no commitment from its investors for additional capital to fund the LBAs. Id. at 36:2-7. Even if Triton were to obtain the requisite financing, there is no guarantee that it would win the West Roundup LBA, and even if Triton were to acquire west roundup, its production costs would be substantially more than for the original North Rochelle reserves. Hake Tr. (6/29 closed) at 39:21-40:16; DX 0506 at 4. at the end of the second quarter of 2004, Triton failed to satisfy the fixed charge ratio, which is a covenant in Triton's current loan agreement that measures the ability to repay that loan out of current cash flow. Hake Tr. (6/29 closed) at 46:22-47:16; DX 1092 at 25624.

Although the FTC insists that other buyers exist for Triton's mines, the prospects **[**134]** for identifying and securing another buyer are dim. Over the past three years, Triton has engaged in a comprehensive search for a buyer of its two mines, retaining rothschild, inc., the preeminent investment banking firm in the coal industry. Oehlberg Tr. (6/28 afternoon) at 89:2-12, 91:23-92:5. Vulcan had engaged Rothschild in late 2000 or early 2001 to create a transaction that would permit the investors to exit the investment in whole or in part. Id. at 94:24-95: 25. After discussions **[*157]** with the four parties submitting final bids, vulcan selected the most attractive proposal because it created the most value to the vulcan investors. Id. at 105: 2-106:3, 151:23-152:5. Despite a four-to-five month effort, the necessary capital could not be raised and the transaction was terminated in july 2002. Id. at 107:7-108:4.

Vulcan re-engaged Rothschild in the fall of 2002 for a similar effort. Oehlberg Tr. (6/28 afternoon) at 109:8-25, 152:18-153: 1. The firm contacted potentially interested parties, provided an information memorandum to companies that signed a confidentiality agreement, solicited preliminary indications of interest, and opened a data room. Id. at 110:1-116: **[**135]** 3. Ultimately, three companies submitted binding proposals: Arch, Peabody and Kiewit. Id. at 116:4-11; Hake Tr. (6/29 closed) at 48:13-20. Peabody and Arch proposed to acquire all of Triton; Kiewit proposed to acquire Buckskin only. Oehlberg Tr. (6/28 afternoon) at 116: 4-18; Hake Tr. (6/29 closed) at 48:13-20.

For both sales efforts, rothschild developed a list of, and then contacted, every potential purchaser worldwide, including SPRB coal companies, other coal companies, utilities and foreign mining companies and private equity investors. Oehlberg Tr. (6/28 afternoon) at 96:1-99:3, 99:4-15, 108:11-109:1, 110: 1-114:19, 115:10-12, 146:8-147:8; DX 0941. Triton's interest in a sale or refinancing was also publicized in various coal industry publications. Oehlberg Tr. (6/28 afternoon) at 108: 17-109:1, 120:25-122:7. As a result of rothschild's extensive contact efforts, "it's highly unlikely" that any potentially interested party was unaware of the opportunity to acquire Triton from 2001 to 2003. Id. at 108:5-109:7, 122:14-24, 167:16-20.

Although not a failing firm in the technical sense, Triton is plainly a relatively weak competitor in the current SPRB market, with no convincing **[**136]** prospects for improvement. The evidence establishes that it faces high costs, has low reserves, has at best uncertain prospects for loans or new reserves, is in a weakened financial condition, and has no realistic prospects for other buyers. The evidence also suggests that Kiewit, as owner and operator of the Buckskin mine, will be a stronger competitive force in a post-merger market than Triton has been or will be if no merger occurs. See section ii-c-4 Supra at xx. Although defendants cannot avail themselves of a failing firm defense to defeat the FTC's antitrust challenge, Triton's weak competitive status remains relevant to an examination of whether substantial anticompetitive effects are likely from the transactions. The court concludes that based on the evidence before it, plaintiffs' claims of Triton's past and future competitive significance in the SPRB market has been far overstated.

F. Plaintiffs Have Not Met Their Burden on the Likelihood of Success

To repeat, in this action under *Section 7* of the Clayton Act and *Section 13(b)* of the FTA act, plaintiffs bear the burden of showing a "reasonable probability" that the challenged transactions may substantially **[**137]** lessen competition, but they need not prove an actual *Section 7* violation -- instead, they must raise such "serious, substantial, difficult and doubtful" questions going to the merits that further investigation and deliberation by the FTC and the court of appeals are warranted. *Heinz, 246 F.3d at 714-15*. Once plaintiffs have established a prima facie case that there will be a significant increase in market concentration, close examination of the particular market -- here the SPRB -- is required to assess the likely anticompetitive **[*158]** effects of the challenged transactions. Id.; *Baker Hughes, 908 F.2d at 982-83*.

The court has found that plaintiffs have shown a prima facie case, but that defendants have successfully rebutted, in two ways, the resulting presumption that the transactions will substantially lessen competition. First, plaintiffs' statistical case of increased market concentration is far from compelling, and indeed is much weaker than other FTC antitrust challenges, when, consistent with General Dynamics and as urged by defendants, reserves are used to calculate the HHI increase that reflects the likely increase in SPRB market concentration. **[**138]** this case, then, begins as a fairly weak prima facie case, which requires less of a rebuttal showing by defendants. See *Heinz, 246 F.3d at 725*; *Baker Hughes, 908 F.2d at 991*. second, and more importantly, the considerable evidence before this court with respect to the particulars of the SPRB coal market confirms that it is unlikely that the challenged transactions will substantially lessen competition, and thus rebuts plaintiffs' marginal prima facie case of increased market concentration and the accompanying presumption that the transactions will substantially lessen competition in the SPRB.

Among the conclusions reasonably drawn from an examination of the record evidence relating to the operation of the SPRB coal market are the following. Although the tacit coordination on production by major SPRB producers feared by the FTC is feasible, and some producers have indicated an interest in greater production discipline in the market, the SPRB has been (and remains) a competitive market with no historical evidence of actual express or tacit anticompetitive coordination. Production in the SPRB has increased steadily over the past decade. Neither the 2001 **[**139]** price spike (which is explained by factors other than tacit coordination to limit production) nor occasional mine closures in 1999 and 2000 (which are explained by legitimate, independent business reasons) constitute evidence of anticompetitive coordination among SPRB coal producers. When Arch made statements in 2000 supporting production discipline in the SPRB and thereafter curtailed its coal production, other coal producers did not adopt Arch's approach, and instead continued to produce and sell coal at incremental cost. The absence of evidence of tacit coordination to limit production is fully consistent with the structure and dynamics of the SPRB market, in which sufficient supply and pricing information to facilitate coordination is generally not available, and which is dependent upon an extremely competitive sealed bid contracting process. These features of the SPRB market make tacit agreement difficult to coordinate and demonstrate both that it would be hard to identify deviations from any agreement to limit production and that there is no effective mechanism in the SPRB to discipline producers who deviate from the terms of coordination.

Although defendants have not presented **[**140]** sufficient evidence to support a full defense based either on efficiencies from the proposed transactions or on Triton's weak financial and competitive condition, these are relevant considerations supporting the conclusion that the transactions are not likely to substantially lessen competition in the SPRB. Defendants' evidence on efficiencies does not sustain the claimed savings in excess of $ 100 million, but does establish that some cost reductions, primarily related to the adjacent positions of the Black Thunder and North Rochelle mines, would benefit competition in the SPRB. Triton has not been, and is not likely to be, a maverick in the SPRB market, given its non-aggressive "last mine standing" bidding strategy, high production **[*159]** costs, and extremely weak financial condition. Although not technically a "failing" company, it is unlikely to be a strong competitor in the SPRB if the transactions are enjoined, having no concrete prospects for a needed cash infusion or a new buyer. Both RAG and Kiewit, on the other hand, would be strong "fringe" competitors in a postmerger SPRB market. Kiewit promises to expand production at Buckskin and compete vigorously, and has the financial strength **[**141]** and mining experience to do so, and RAG also pledges to expand production under its new management consistent with its strategy to expand quickly as market opportunities develop. Together, their fringe expansion is more than enough to cover any demand shortfall and defeat any price increase assuming coordinated output limitation by the three large SPRB producers, and each is better positioned to play the role of a maverick competitor in the SPRB market than Triton would be.

Based on these and the other findings and conclusions discussed above, the court concludes that defendants have successfully rebutted plaintiffs' fairly weak prima facie case of a *Section 7* violation. Plaintiffs have not shown a "reasonable probability" that the challenged transactions may substantially lessen competition in the SPRB. Moreover, the court concludes based on the record evidence that plaintiffs have not raised such serious and substantial questions going to the merits of the *Section 7* claim that a preliminary injunction is warranted under *Section 13(b)* of the FTA act to permit further review by the FTC. In short, plaintiffs are not likely to succeed on the merits of their claim of a Clayton Act violation **[**142]** based on the novel theory of prospective tacit coordination on production limits.

G. Weighing the Equities

Section 13(b) ***HN28***[] "provides for the grant of a preliminary injunction where such action would be in the public interest -- as determined by a weighing of the equities and a consideration of the commission's likelihood of success on the merits." *Heinz, 246 F.3d at 714*; See *15 U.S.C. § 53(b)*. The primary public interest favoring preliminary injunctive relief in a *Section 13(b)* case, which congress specifically contemplated, is the effective enforcement of the antitrust laws. *Heinz, 246 F.3d at 726*. Absent a likelihood of success on the merits, however, equities alone will not justify an injunction. See *PPG Indus., Inc., 798 F.2d at 1508*. therefore, here the requested preliminary injunction must be denied for that reason alone.

In any event, the equities here do not support enjoining the transactions in the public interest. Plaintiffs argue that a preliminary injunction would protect the public from antitrust injury in two ways: first, an injunction would ensure that an effective remedy is possible **[**143]** at the end of the case, and second, it would protect the public against the exercise of market power by the combined firms in the interim, until the permanent injunction proceeding before the FTC is decided. Plaintiffs point out that the merger will be difficult, if not impossible, to undo and that a preliminary injunction would prevent "scrambling the eggs" -- the transfer of trade secrets, degradation of the acquired firm's capabilities, combination of the Black Thunder and North Rochelle mines, and any other actions whose results would be difficult to reverse. Absent a preliminary injunction, Arch will sell Buckskin to Kiewit, which will be difficult to recover, Leer Tr. (6/28 morning) at 14:25-15:2, and will integrate Triton's North Rochelle mine with Arch's Black Thunder mine, which may be impossible to reverse after time passes. See DX 1111 at 757, 765, 767, **[*160]** 769, 770-71, 775-77. The FTC also argues that the public interest in the enforcement of the antitrust laws will be served by enjoining the proposed transaction because public utilities pass on fuel input increases to their utility customers. See PX 0007 at 9 p 17 (Rahm decl.) ("any increase in the price **[**144]** of wyoming PRB coal would immediately impact our electricity customers because we would need to pass on any price increase to end users of electricity generated with wyoming coal."). According to the FTC, an injunction will benefit all the utilities and consumers of electricity who rely on SPRB coal to provide electric power.

The court is skeptical that much harm would be incurred by denying the preliminary injunction, however, given the modest level of the projected increase in market concentration and the brief period (presumably less than a year) before FTC proceedings are completed. If this court issues a preliminary injunction, on the other hand, Arch and Triton will abandon the transaction rather than undergo an administrative proceeding, and any cost savings and output enhancements that the transactions will create will be lost. Hake Tr. (6/29 open) at 13:22-14:17 (Triton will abandon); Leer Tr. (6/28 morning) at 14:17-24 (it is "very likely" that Arch will abandon). Defendants therefore argue that a preliminary injunction would effectively deprive the market of pro-competitive savings, efficiencies, and a new strong competitor. Based on the evidence presented, the court concludes **[**145]** that the equities, which cannot alone justify an injunction, do not weigh strongly in favor of plaintiffs.

CONCLUSION

For all the reasons stated above, the requests for a preliminary injunction by the FTC and the states in these consolidated cases will be denied. A separate order has been issued on this date.

/s/ john d. Bates

John D. Bates

United States District Judge

date: August 16, 2004

ORDER - August 13, 2004

Upon consideration of the motions for preliminary injunction filed in these consolidated cases by plaintiffs Federal Trade Commission ("FTC") and the states of Missouri, Arkansas, Kansas, Illinois, Iowa, and Texas ("States")(together "plaintiffs") against the merger proposed by defendants Arch Coal, Inc., New Vulcan Holdings Co., LLC, and Triton Coal Co., LLC ("defendants"), the evidence and argument in support and in opposition submitted to the court through briefing and at the evidentiary hearing in this matter, which commenced on June 21, 2004, and the entire record herein, and upon consideration of the renewed motion of defendants to consolidate the preliminary and permanent injunction proceedings, it is this 13th day of August, 2004, for **[**146]** the reasons stated in the court's memorandum opinion issued on this date, hereby

Ordered that plaintiffs' request for a preliminary injunction is denied; and it is further

Ordered that defendants' motion to consolidate the preliminary and permanent injunction proceedings, renewed by defendants at the close of the hearing on July 7, 2004, is denied.

/S/ JOHN D. BATES

JOHN D. BATES

United States DISTRICT JUDGE

Thornberry Oil Field Servs. v. Gulf Coast Pipeline Ptnrs., L.P.

United States District Court for the Southern District of Texas, Houston Division

August 16, 2004, Decided; August 16, 2004, Filed, Entered

CIVIL ACTION NO. H-03-1458

Reporter

2004 U.S. Dist. LEXIS 30750 *; 2004 WL 5503774

THORNBERRY OIL FIELD SERVICES, INC., Plaintiff, v. GULF COAST PIPELINE PARTNERS, L.P., et al., Defendants.

Prior History: *Thornberry Oil Field Servs. v. Gulf Coast Pipeline Partners, L.P., 2004 U.S. Dist. LEXIS 8237 (S.D. Tex., Apr. 9, 2004)*

Core Terms

damages, antitrust, lease, Pipeline, cases, transportation, reliable, rates, methodology, defendants', gathering, argues, contends, market value, oil and gas, sale price, diminution, emphasizes, expert testimony, summary judgment, excessive rate, cost-of-service, consultant, overcharge, principles

Counsel: **[*1]** For Thornberry Oil Field Services Inc, Plaintiff: Jeffery L Hart, LEAD ATTORNEY, Cardwell Hart et al, Austin, TX; Leon V Komkov, LEAD ATTORNEY, Komkov PC, Austin, TX.

For Gulf Coast Pipeline Partners LP, Defendant: Keavin David McDonald, LEAD ATTORNEY, Law Office of Keavin D. McDonald, P.C., Houston, TX.

For Houston Pipeline Company, also known as Houston Pipe Line Company LP, Defendant: Layne Edwin Kruse, LEAD ATTORNEY, Fulbright and Jaworski, Houston, TX.

Judges: SIM LAKE, UNITED STATES DISTRICT JUDGE.

Opinion by: SIM LAKE

Opinion

MEMORANDUM AND ORDER

Pending before the court are Defendant, Gulf Coast Pipeline Partners, L.P.'s Motion to Exclude Testimony of Plaintiff's Expert, Thomas A. Graves (Docket Entry No. 81) and Defendant Houston Pipe Line's Motion to Exclude Evidence of Any Diminution in Sale Price Damages or, in the Alternative, to Exclude the Reports and Opinion Testimony of Stephen C. Collins (Docket Entry No. 84) For the reasons set forth below, both motions will be denied.

I. Relevant Procedural History

Plaintiff, Thornberry Oil Field Services, Inc. ("Thornberry"), brought this action against defendants, Gulf Coast Pipeline Partners, L.P. ("Gulf Coast"), Houston Pipeline Company a/k/a Houston Pipe Line **[*2]** LP ("HPL"), and

Danex Energy Company, Inc. ("Danex"), alleging a *per se* violation of *15 U.S.C. § 1*, the Sherman Antitrust Act, and breach of contract claims. [1] On April 9, 2004, the court entered an Order (Docket Entry No. 68) granting Plaintiff's Motion for Partial Summary Judgment on Antitrust Claim (Docket Entry No. 40) on the issue of antitrust liability, granting in part and denying in part Defendant Houston Pipe Line Company LP's Motion for Summary Judgment (Docket Entry No. 37), denying the Plaintiff's Motion for Summary Judgment Filed by Defendant Gulf Coast Pipeline Partners, L.P. (Docket Entry No. 36), and denying Plaintiff's Motion for Partial Summary Judgment: Breach of Contract Claim against Houston Pipe Line Co. (Docket Entry No. 39). The court also granted partial summary judgment in favor of Thornberry against Danex on Thornberry's breach of contract claim.

II. Defendants' Motions to Exclude

The defendants' motions to exclude the plaintiff's experts' testimony are based on the Supreme Court's holdings in *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* and its progeny, which require that opinion **[*3]** testimony meet all relevant requirements of *Federal Rule of Evidence 702*. The district court, therefore, must act as "gatekeeper," ensuring that expert testimony meets basic standards of relevance and reliability before a jury may use it in making factual determinations. *Daubert, 113 S. Ct. at 2795*; *Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 371 (5th Cir. 2000)*.

A. Antitrust Damages and the Relevance of Thornberry's Models

The court has already concluded that Gulf Coast and HPL are liable for a *per se* violation of section 1 of the Sherman Act, *15 U.S.C. § 1* as a result of an illicit agreement to fix the price paid for gathering gas at HPL Meter No. 4555 on the Marshall lease and transporting it less than two miles along the Humble Pipeline to HPL's large gas transportation system. The issue remaining at trial is the extent to which this illicit conduct damaged Thornberry.

Thornberry seeks damages based on two distinct models. First, Thornberry seeks the difference between the actual, excessive gathering rates that Gulf Coast charged Thornberry to transport its gas from HPL's meter over the Humble Pipeline to HPL's pipeline system, rates memorialized in the Gulf Coast/HPL contract, **[*4]** and what a "reasonable rate" would have been for performing that particular service during the relevant period (from May of 2001 through August of 2003). Second, Thornberry seeks the diminution of the value of its Marshall lease holdings that resulted from the excessive costs of transporting the gas produced from those holdings to market as of the date when that property was sold. [2]

The defendants argue that neither of these damages models is material in a price-fixing case. The threshold issue before the court, therefore, is whether Thornberry, as an antitrust plaintiff, is required to adopt a specific damages model.

The Fifth Circuit has repeatedly emphasized that damages in antitrust cases tend to be case-specific. See, e.g., *Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)*. Once a plaintiff has established "some 'element of actual damages caused by the defendant's violation of the antitrust laws[,]'" then "a more relaxed burden of proof obtains for the amount of damages than would justify an award in other civil cases." Id. (quoting *Eleven Line, Inc. v. North Texas State Soccer Assoc., Inc., 213 F.3d 198, 206-07 (5th Cir. 2000))*. **[*5]** Moreover, the Fifth Circuit instructs that

> the nature of an antitrust claim means that "some plaintiffs can only hypothesize about what the state of their affairs would have been absent the wrong," . . . and we have, therefore, declined to hold antitrust plaintiffs to the same burden of proof of damages as demanded of plaintiffs in other civil cases. . . . Such leniency

[1] See Plaintiff's Amended Complaint, Docket Entry No. 12 at PP 14-25.

[2] Thornberry sold its Marshall lease holdings in August of 2003.

> notwithstanding, an antitrust plaintiff may not merely rely on "guesswork or speculation" to establish damages. . . . Rather, our cases indicate that the plaintiff must provide a "just and reasonable estimate of the damage based on relevant data." . . . And we have accordingly rejected claims where the plaintiff's proposed method of calculating damages failed to reasonably approximate actual economic losses.

Bell Atlantic, 339 F.3d at 302 (citations omitted).

The court concludes that Thornberry's two theories of damages are neither wholly speculative nor divorced from Thornberry's alleged actual economic losses. The law does not require absolute precision in proving antitrust damages because of the inherent difficulty and uncertainty that generally exists in the antitrust context. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969) **[*6]** (explaining that damage issues in antitrust actions "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. [Thus, t]he Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the Plaintiffs.'") (citations omitted). In other words, "it is only necessary that plaintiff present reasonable evidence as to the amount of those damages." Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 984 (5th Cir. 1977).

The court is therefore not persuaded by defendants' relevance arguments. First, the issue of whether Gulf Coast's rates were excessive has already been resolved. [3] The issue remaining for trial is how and to what degree Thornberry was damaged by the fact that Gulf Coast and HPL illicitly agreed to set an excessive rate to gather gas that they knew in advance would be passed back to captive, **[*7]** upstream producers and that Gulf Coast knew would be exempt from the regulatory reach of the Texas Railroad Commission. Gulf Coast's argument that it was free to charge "whatever it wanted to" for use of the Humble Pipeline is simply erroneous. Gulf Coast could charge whatever it wanted to -- as long as in doing so it did not violate the antitrust laws. [4] A damages model that purports to measure the degree to which Gulf Coast's rate was excessive is therefore relevant.

Second, HPL incorrectly characterizes the diminution of the sales price for Thornberry's lease as equivalent to lost future profits or the "future value" of the lease. [5] The sales price of Thornberry's lease reflects the degree to which Gulf Coast's rates affected the present market value of that lease.

Moreover, HPL's reliance on Sciambra v. Graham News Co., 841 F.2d 651 (5th Cir. 1988) is misplaced. Sciambra involved a claim that the plaintiff had been illegally excluded from a market by the two defendants who were suppliers of products that plaintiff sold. The plaintiff had been awarded a preliminary **[*8]** injunction that enabled him to continue receiving supplies after only a 70-day hiatus; and "prevailing on the merits would have assured his future supplies as well." Id. at 657. Meanwhile, the plaintiff opted to enter into a settlement agreement with one of the antitrust co-conspirators. The settlement entailed an agreement that plaintiff would sell his business to that co-conspirator and covenant not to compete with that entity. Id.

The Fifth Circuit concluded that the district court had erroneously based its subsequent calculation of damages on the "going concern" value of the plaintiff's business because plaintiff's loss of the concern was the result of a voluntary sale, not of defendants' antitrust violations. Id. Indeed, Sciambra emphasizes that "[g]oing concern value is an alternative to lost profits as a measure of antitrust damages only in cases where the antitrust victim was actually forced out of business." Id. (citations omitted) (emphasis in original).

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[3] See Memorandum and Order, Docket Entry No. 68.

[4] See id. at p. 39.

[5] HPL's Motion to Exclude, Docket Entry No. 84 at p. 4.

Thornberry is not seeking damages based on the loss of a going concern per se. Instead, Thornberry argues that the inherent value of an asset, its land, was diminished because of Gulf Coast's excessive rates and that its land **[*9]** would have been worth more, on the date it was sold, "but for" the illegal contract between Gulf Coast and HPL. There is no categorical imperative in antitrust jurisprudence that damages in overcharge cases be based solely on the difference between the price charged and the fair market value for the product or service. See, e.g., ABA SECTION OF ***ANTITRUST LAW***, ***Antitrust Law*** *Developments* 874-75 (5th ed. 2002) ("The appropriate measure of damages depends on the nature of the violation shown. In price fixing cases and cases involving monopolistic overcharges, the measure of damages in a suit by a purchaser normally is the difference between the price the plaintiff paid and the price he would have paid absent the violation.") (emphasis added). [6]

None of the cases upon which HPL relies for the proposition that damages in a price-fixing case must be limited to the difference between the price paid and the fair market price, i.e., the overcharge, actually state such a proposition. [7] Each of these cases merely starts with the amount of overcharge as a logical measure of damages because it fits the facts of the particular case. Certainly, in **[*10]** antitrust cases involving a price-fixing conspiracy the most obvious measure of damages is the difference between the prices actually paid by a conspirator's customers and the prices that would have been paid absent the conspiracy. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 2228-29, 20 L. Ed. 2d 1231 (1968)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979)*, cert. denied, *444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)*; *Burlington Industries, Inc. v. Milliken & Co., 690 F.2d 380, 385-86 (4th Cir. 1982)*, cert., denied, *461 U.S. 914, 103 S. Ct. 1893, 77 L. Ed. 2d 283 (1983)*.

But neither these cases nor the cases cited in HPL's briefs suggest that it is impermissible to use other means to measure damages that are directly and reasonably related to defendants' antitrust violation against Thornberry. Moreover, none of the cases cited above or in HPL's briefs involved evidence that plaintiff owned a tangible asset (such as land) whose value was directly diminished as a result of the illicit price-fixing agreement in question. In fact, the cases cited by HPL actually support Thornberry's contention that it may seek damages for the overcharge and the present diminution in **[*11]** the value of its lease (to the extent that that diminution was directly caused by the fact of Gulf Coast's excessive rates). Both of Thornberry's proffered models of damages are built on the premise that, "but for" the Gulf Coast-HPL contract, Thornberry would have been in a different economic position.

Having concluded that Thornberry's two damages theories are both viable as a matter of law because they are relevant to determining the actual economic damages that Thornberry sustained as a result of defendants' antitrust conduct, the court next considers the defendants' specific objections to the qualifications and methodologies of two of Thornberry's experts.

B. Thomas A. Graves

Thornberry has offered Thomas Graves as an expert who will testify that the gas transportation rates that Gulf Coast charged HPL, which were ultimately passed back to Thornberry, were excessive, reflecting neither the market value nor the cost of the actual service provided. Graves was retained to opine about the degree to which the rates in question were excessive. [8] Graves contends that a reasonable rate would not have exceeded $ .05-.10 per MMBtu. [9]

Gulf Coast argues that Graves is not qualified and that his opinions are not based on a reliable foundation.

1. Sufficient Qualifications

[6] Cited in HPL's Reply, Docket Entry No. 98 at p. 8.

[7] See cases cited in id. at pp. 7-8.

[8] Thornberry's Response, Docket Entry No. 97 at P 17.

[9] Gulf **[*12]** Coast's Motion to Exclude, Docket Entry No. 81, Exhibit A, Report of Thomas A. Graves at p. 1.

The court should exclude the testimony of an expert witness who is not sufficiently qualified by knowledge, skill, experience, training, or education. *FED. R. EviD. 104 (a)* Gulf Coast objects that Graves is merely a "rate consultant" in the "narrow field of public utility and oil and gas matters." [10] Gulf Coast emphasizes that Graves' experience has been limited to rate consulting in matters regarding regulated utilities, not unregulated, non-utilities like Gulf Coast's pipeline. [11] Gulf Coast acknowledges that Graves "is no doubt a competent utility rate consultant[,]" but contends that the methodology he employed reveals that he is unqualified to address the reasonableness of rates affecting pipelines that are not utilities. [12]

Graves' report and curriculum vitae indicate that he has been professionally involved in the natural gas business since 1968 and that he has vast experience determining **[*13]** appropriate rates for gas gathering and transportation. [13] The court, therefore, concludes that Graves has sufficient credentials to testify. It will be up to the jury to decide what weight to give his testimony in light of those credentials.

2. Reliability of Methodology and Underlying Data

Even the testimony of a highly qualified expert may be excluded if the expert's conclusions are based on an unreliable methodology. See *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1175, 143 L. Ed. 2d 238 (1999)*; *Daubert v. Merrill Dow Pharm., Inc., 113 S. Ct. 2786, 2796-97 (1993)*. Courts are to use factors articulated in *Daubert* and subsequently incorporated into *Federal Rule of Evidence 702* to determine whether a given expert's testimony is admissible. These factors are whether the expert's testimony is (1) based on reliable facts or data, (2) the product of reliable principles and methods, and (3) the result of applying those principles and methods reliably to the facts of the case. *FED. R. EVID. 702*, see also *Black v. Food Lion, Inc., 171 F.3d 308, 311 (5th Cir. 1999)*.

Gulf Coast argues that "(i) [Graves] has not conducted any studies or analyses to substantiate **[*14]** his opinions, (ii) his opinions are not based on sufficient facts or data, (iii) his opinion contains only unsupported assertions as to his foundations, (iv) he assumed numerous facts that have no relationship to the actual facts of this case, (v) his opinion was generated solely for the pending litigation." [14] Gulf Gulf Coast does not, however, substantiate these conclusions with any specific citations to Graves' report or deposition. Gulf Coast merely emphasizes that Graves did not spend much time preparing his report (or billing for his time), and thus Gulf Coast concludes that his opinion is not based on "an informed analysis." [15] Gulf Coast also suggests that what it views as a scant analysis did not involve applying the cost-of-service model to the facts of this case. [16]

According to Gulf Coast, Graves' cost-of-service model is flawed because he does not discuss "what Thornberry would have paid for gathering, absent the contract between Gulf Coast and [HPL]." [17] Moreover, Gulf Coast contends that the "cost of service" model used in proceedings to set rates for utilities has no application to the unregulated pipeline business. **[*15]** [18] HPL adds that Graves' cost-of-service model fails to take into account

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[10] Id., Docket Entry No. 81 at p. 2.

[11] Id. at p. 3.

[12] Id. at p. 8.

[13] Id., Exhibit A, Report of Thomas A. Graves, Attachment 1.

[14] Id., Docket Entry No. 81 at p. 10.

[15] Id. at p. 11.

[16] Id.

[17] Id. at p. 2 (emphasis in original).

[18] Id. at p. 8.

specific market conditions, such as "the bargaining power of the participants in the market, or their actual negotiations[.]" [19]

Thornberry acknowledges that Gulf Coast is not a regulated utility, but emphasizes that the court has already concluded that Gulf Coast nevertheless performs a utility-like service. Thornberry contends that the rate that would have been charged in the utility context, which is indisputably based on a "cost-of-service" analysis, is a fair indicator of what a "reasonable rate" would have been for the service that Gulf Coast provided. [20] Furthermore, Thornberry argues that the "cost of service" methodology, used in the utility arena, is used to "secure a rate that fairly compensates the pipeline owner for its investment, while not destroying the value of the hydrocarbon producer's holdings." [21] In other words, both Thornberry and its expert contend that the "cost -of -service" methodology is based on the fair market principles for which defendants claim Graves did not account.

The court agrees that the cost-of-service model, upon which regulators and gas transportation consultants rely, incorporates market principles, including the desirability of balancing the economic interest of pipeline owners and captive gas producers. Defendants have not cited any case that suggests that analogizing from a method used to determine fair rates for regulated pipelines is unsound or unreliable. Furthermore, the court recognizes the unique nature of the Humble Pipeline and the circumstances that permitted Gulf Coast to acquire ownership of that pipeline and, with HPL's assistance, to charge excessive rates. It is unreasonable to suggest that the only qualified expert would be one familiar with gas gathering/ transportation rates in the unique circumstances presented by this case. Such an argument belies the fact that this dispute arose from, and this court's rulings rely upon, the peculiar confluence of facts that enabled the anti-competitive conduct for which defendants have been found liable. See *Tanner v. Westbrook, 174 F.3d 542, 548 (5th Cir. 1999)* (holding that, while admissibility of expert testimony is guided by Daubert factors, **[*17]** "[t] he test of reliability is flexible and bends according to the particular circumstances of the testimony at issue") (superseded by 2000 amendment to *FED. R. EvzD. 103(a)* on a different point of law).

C. Stephen Collins

Thornberry contends that when Thornberry was unsuccessful in enlisting the aid of the Texas Railroad Commission in restricting Gulf Coast's ability to charge excessive gathering fees, Thornberry sold its interest in the Marshall lease. Thornberry argues that the sales price it ultimately received had to be discounted because of the excessive gathering costs encumbering the lease. Thornberry has offered Collins as an expert as to the degree to which Thornberry, in selling its property, was damaged by the excessive rates.

Collins is the Senior Vice-President and Operations Engineer of Wellspring Partners, L.L.C. ("Wellspring"). [22] Wellspring is "a consultant in the oil and gas industry in the areas of oil and gas reserve and economic valuation, market value determinations, reservoir engineering studies and the sale of oil and gas prospects." [23] Thornberry originally retained Wellspring to evaluate and market Thornberry's Marshall lease. Collins, on behalf of Wellspring, **[*18]** ultimately concluded that "the transportation issues associated with the Gulf Coast line and the transportation charges imposed by Gulf Coast and HPL caused the ultimate fair market value" of Thornberry's property "to be reduced by $ 200,000 - $ 240, 000." [24]

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[19] HPL's Reply, Docket Entry No. 98 at p. 8.

[20] Thornberry's Response, **[*16]** Docket Entry No. 97 at P 16.

[21] Id. at P 17.

[22] HPL's Motion to Exclude, Docket Entry No. 84, Exhibit A at P. 1.

[23] Id.

[24] Id. at p. 2.

Aside from the relevance issue addressed above, HPL argues that Collins is unqualified and that his opinions lack reliability.

1. Sufficient Qualifications

HPL argues that Collins is not qualified because he is not an expert in the field of antitrust economic damages. [25] HPL emphasizes that Collins does not live in Harris County, nor has he ever operated properties in Harris County or along the Gulf Coast. [26] HPL also contends that Collins is unqualified because he is a seller of oil and gas properties, not a buyer. Therefore, "he has no special expertise relating to how buyers set about to determine value." [27] These features of Collins' history and experience of details that courts have cited as demonstrating that a proffered expert lacks sufficient specialized knowledge to mandate exclusion. See, e.g., *Pipitone v. Biomatrix, Inc., 288 F.3d 239, 247 (5th Cir. 2002)* **[*19]** (explaining that an expert may be sufficiently qualified as a result of personal observations, professional experience, education, and/or training).

Collins is a principal and owner of a firm that specializes in valuing oil and gas properties. His report indicate that he has over thirty years' experience in the oil and gas industry and that he has acted as an expert on oil and gas valuation in approximately 150 transactions. [28] The court concludes that he is sufficiently qualified to testify as to the value of Thornberry's lease when it was sold in August of 2003 and the degree to which its value was directly affected by Gulf Coast's gathering/transportation rates.

2. Reliability of Methodology and Underlying Data

Even if Collins is qualified to address the damages issues described above, his conclusions must be based on reliable methodology. *General Elec. Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 519, 139 L. Ed. 2d 508 (1997)*. In evaluating the reliability of a proffered expert's methodology the court must focus on the "reasonableness **[*20]** of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant." *Kumho Tire, 119 S. Ct. at 1177* (emphasis in original).

HPL argues that Collins' testimony should be excluded because his "analysis omitted salient facts[.]" [29] Specifically, HPL objects that Collins' analysis did not disaggregate the diminished value of Thornberry's property attributable to lawful conduct. [30] HPL does not, however, identify the lawful factors that Collins failed to account for. Second, HPL objects that Collins' methodology is not based on established principles of comparative data but relies instead on "imprecise rules of thumb and, at worst, mere gut instinct." [31] HPL further objects to Collins' failure to ground his 42-month rule of thumb analysis to a "yardstick comparative method or any other method recognized by the industry" or to provide any basis for his $ 1.1 million initial assessment of the value of Thornberry's lease. [32]

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[25] HPL's Motion to Exclude, Docket Entry No. 84 at p. 8.

[26] Id.

[27] HPL's Reply, Docket Entry No. 98 at p. 10.

[28] HPL's Motion to Exclude, Docket Entry No. 84, Exhibit A, Collins' Report at p. 1.

[29] Id., Docket Entry No. 84 at p. 9.

[30] Id.

[31] Id. at p. 10.

[32] Id. at p. 13.

Thornberry's response emphasizes that Collins was not **[*21]** initially engaged as a paid witness, but got involved with this matter a year before this action was filed. [33] Thornberry engaged Collins to prepare an evaluation study and to market Thornberry's Marshall lease. [34] Therefore, according to Thornberry, Collins' conclusions are particularly reliable because they were not reached with this litigation in mind, but were achieved to provide Thornberry with meaningful advice about marketing its property. [35]

Thornberry also notes that Collins relied on gas-pricing assumptions based on different gas transport fees, inferences regarding the present market value of the lease based on the PDP value and PVD value of the reserves, and actual monthly average gas sales. [36] What Collins refers to as a "rule of thumb" is a 42-month assumption regarding the reserve life of the lease, which Collins claims is commonly used in an industry in which he has extensive experience. [37] Thornberry also contends that Collins did not merely assume the **[*22]** $ 1.1 million starting point for the value of the Marshall lease as HPL suggests. Instead, Collins based that price on the sales price he believed that the lease could command in an arm's-length transaction by considering various reserve projections, commonly used PDP, PDNP, and PUD reserve variables, the production histories of the wells, lease operating expenses, and engineering logistics issues. [38]

Because Collins' testimony demonstrates that it is based on underlying data commonly employed in the oil and gas industry to valuate gas leases and because Collins' use of that data to arrive at his conclusions was not achieved through mere "ipse dixits," the defendants have not demonstrated that Collins' methodology is unreliable and that it must therefore be excluded under either *Daubert* or the Federal Rules of Evidence. See *Joiner, 118 S. Ct. at 519*.

III. Conclusion and Order

For the foregoing reasons, Defendant, Gulf Coast Pipeline Partners, L.P.'s Motion to Exclude Testimony of Plaintiff's Expert, Thomas A. Graves **[*23]** (Docket Entry No. 81) and Defendant Houston Pipe Line's Motion to Exclude Evidence of Any Diminution in Sale Price Damages or, in the Alternative, to Exclude the Reports and Opinion Testimony of Stephen C. Collins (Docket Entry No. 84) are **DENIED.**

SIGNED at Houston, Texas, on this the 16th day of August, 2004.

/s/ Sim Lake

SIM LAKE

UNITED STATES DISTRICT JUDGE

End of Document

[33] Thornberry's Supplemental Response, Docket Entry No. 100 at P 6.

[34] Id. (citing Collins Depo. at p. 33:7-10). The deposition is attached to Docket Entry No. 84 as Exhibit B.

[35] Id. (citing Collins Depo. at p. 31:20-21).

[36] Id. at PP 7-8.

[37] Id. (citing Collins Depo. pp. 100:14-17, 135:21-25, 136:15-23, 101:20-24, 104:2-5).

[38] Id. (citing Collins Depo. at pp. 116:6-8, 112:21-25, 120:8-13, 122:5-8).

United States v. Gosselin World Wide Moving N.V.

United States District Court for the Eastern District of Virginia, Alexandria Division

August 16, 2004, Decided ; August 16, 2004, Filed

Case No. 1:03cr551 (GBL)

Reporter

333 F. Supp. 2d 497 *; 2004 U.S. Dist. LEXIS 17008 **; 2004-2 Trade Cas. (CCH) P74,576

UNITED STATES OF AMERICA, v. GOSSELIN WORLD WIDE MOVING N.V. and THE PASHA GROUP, Defendants.

Subsequent History: Subsequent appeal at, Remanded by *United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 2005 U.S. App. LEXIS 11144 (4th Cir. Va., June 14, 2005)*

Related proceeding at *United States ex rel. Bunk v. Birkart Globistics Gmbh, 2009 U.S. Dist. LEXIS 145581 (E.D. Va., Dec. 2, 2009)*

Disposition: **[**1]** Defendant's Motion to Dismiss was granted in part. Court dismissed Count One of the Criminal Information.

Core Terms

immunity, transportation, Shipping, carriers, exempt, criminal information, ocean, anti trust law, Defendants', inland, rates, segment, tariff, holds, antitrust immunity, household goods, forwarders, military, freight, antitrust, common carrier, conspiracy, channels, lenity, me-too, motion to dismiss, marine terminal, Sherman Act, argues, violations

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

HN1[] **Pleadings, Rule Application & Interpretation**

A motion to dismiss tests whether a criminal information sufficiently charges an offense. A criminal information must contain a plain, concise and definite written statement of the essential facts constituting the offense charged.

Criminal Law & Procedure > ... > Dismissal > Grounds for Dismissal > Defective Instrument

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

HN2[] **Grounds for Dismissal, Defective Instrument**

In the context of a motion to dismiss, the court's analysis must extend beyond determining whether the criminal information contains the core elements of the charged crime. A criminal information should be dismissed if its factual allegations, even if proven beyond a reasonable doubt, fail to constitute the crimes charged. If the infirmity in the prosecution is essentially one of law, the court may, on a motion to dismiss, decide whether the criminal information charges a crime.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN3[] **Pretrial Motions & Procedures, Dismissal**

Ordinarily, in deciding a motion to dismiss, the indictment must be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

In interpreting a statute, the court must first begin with the text. The starting point for the interpretation of a statute is always its language. Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. In analyzing a statute, the court begins by examining the text, not by psychoanalyzing those who enacted it.

Governments > Legislation > Interpretation

Governments > Legislation > Interpretation > Rule of Lenity

HN5[] **Legislation, Interpretation**

The United States Supreme Court commonly interprets statutory terms according to their common meaning. If the plain language does not settle the question, then the court looks to other sources, such as the legislative history, to decipher the meaning of the ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Regulations & Statutes, Shipping Act**

See 46 U.S.C.S. app. § 1706(a)(4).

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Commercial Vehicles > Foreign Commerce

Transportation Law > Carrier Duties & Liabilities > Through Rates

HN8[] Regulations & Statutes, Shipping Act

"Through transportation" means continuous transportation between origin and destination for which a single rate is charged and which is performed by one of more carriers between the United States and a foreign port. 46 U.S.C.S. app. § 1702(24).

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Regulations & Statutes, Shipping Act

See 46 U.S.C.S. app. § 1706(a)(2).

Admiralty & Maritime Law > Maritime Contracts > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Transportation Law > Carrier Duties & Liabilities > Definitions

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN10[] Admiralty & Maritime Law, Maritime Contracts

46 U.S.C.S. app. § 1715 empowers the Federal Maritime Commission to exempt any class of agreements or any specified activity from application of the tariff.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN11[ ] Regulations & Statutes, Shipping Act

The Federal Maritime Commission, in rules entitled "Carrier Automated Tariffs," exempts used military household goods transported by ocean transportation intermediaries from publishing a tariff.

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

HN12[ ] Regulations & Statutes, Shipping Act

See *46 C.F.R. § 520.13(c)(3) (2003)*.

Admiralty & Maritime Law > Practice & Procedure > General Overview

Admiralty & Maritime Law > Maritime Contracts > General Overview

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN13[ ] Admiralty & Maritime Law, Practice & Procedure

46 U.S.C.S. app. § 1704(a) exempts the Federal Maritime Commission from filing agreements related to transportation to be performed within or between foreign countries.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

HN14[ ] Admiralty & Maritime Law, Maritime Contracts

The Shipping Act of 1984 cannot apply to certain agreements among only ocean common carriers and marine terminal operators.

Admiralty & Maritime Law > Practice & Procedure > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Admiralty & Maritime Law > Maritime Contracts > General Overview

Admiralty & Maritime Law > Shipping > Regulations & Statutes > Shipping Act

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN15[] Admiralty & Maritime Law, Practice & Procedure

46 U.S.C.S. app. § 1715 permits the Federal Maritime Commission to exempt from filing, by order or rule, any class of agreements between persons subject to this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The plain language of the statute states that the Federal Maritime Commission may issue this order or rule exempting a party from the tariff requirement.

Criminal Law & Procedure > Sentencing > Consecutive Sentences

Governments > Legislation > Interpretation

HN16[] Sentencing, Consecutive Sentences

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. The United States Supreme Court held that courts are to apply this rule of statutory construction to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > Elements

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Fraud Against the Government > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Conspiracy to Defraud > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN17[] Conspiracy to Defraud, Elements

The Sherman Act requires that the government show that defendants had an effect on interstate or foreign commerce but not an effect on the government. For fraud, under *18 U.S.C.S. § 371*, the government is required to show that defendants defrauded the government. *Section 371* does not require that the government show that the defendants alleged fraud had an effect on commerce.

Counsel: For Plaintiff: Hays Gorey, Jr. Esquire, Daniel L. Zelenko, Esquire, Mark W. Pletcher, Esquire, Craig Y. Lee, Esquire, United States Department of Justice, Washington, DC.

For Defense: Henry W. Asbill, Esquire, William B. Moffitt, Esquire, L. Barreett Boss, Esquire, Cozen O'Coneor, C. Allen Foster, Esquire, John F. Scalia, Esquire, Greenberg Traurig, Charles F. Rule, Esquire, Anthony V. Nanni, Esquire, Abram J.Pafford, Esquire, Franklin M. Rubinstein, Esquire, Tommy P. Braudreau, Esquire, Fried, Frank, Harris, Shriver & Jacobson, Washington, DC.

Judges: Gerald Bruce Lee, United States District Judge.

Opinion by: Gerald Bruce Lee

Opinion

[*498] **MEMORANDUM OPINION**

THIS MATTER is before the Court on Defendant Gosselin World Wide Moving N.V.'s ("Gosselin") Motion to Dismiss the Information for Failure to State an Offense, and Defendant Pasha Group's ("Pasha") Motion to Dismiss Criminal Information. This is a criminal case, **[**2]** which arises out of Defendants' alleged antitrust violations. The Government alleges that Defendants violated *15 U.S.C. § 1*, conspiracy to restrain trade (Count I), and *18 U.S.C. § 371*, conspiracy to defraud the United States (Count II). Both Gosselin and Pasha have entered into a plea agreement with the Government, conditioned upon the outcome of the Court's ruling on these motions.

Five issues exist before this Court. First, whether Defendants alleged conduct falls within an exception to the antitrust laws as specified in Section 1706(a)(4) (codified at 46 U.S.C. app. § 1706(a)(4)) of the Shipping Act of 1984 ("Shipping Act"). Second, whether the language of Section 1706(a)(4) of the Shipping Act is so ambiguous as to warrant the Court's application of the rule of lenity, mandating dismissal of the criminal information. Third, independent of the issues raised by Section 1706(a)(4) of the Shipping Act, does Section 7(a) (2) (codified at 46 U.S.C. app. § 1706(a)(2)) of the Shipping Act further exempt Defendants' conduct from the antitrust laws. Fourth, if the Court finds that antitrust **[**3]** immunity does not apply to Defendants in this case, whether Section 7(c)(1) **[*499]** (codified at 46 U.S.C. app. § 1706(c)(1)) of the Shipping Act provides Defendants retroactive immunity. Fifth, does the Government state an independent basis for fraud independent of the Sherman Act violation.

The Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" the foreign inland segment of through transportation. As such, Defendants alleged conduct is not within the purview of the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate dismissal of the pending criminal information.

Third, the Court holds that, independent of antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff **[**4]** filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

Therefore, the Court holds that Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED, and Defendant Pasha's Motion to Dismiss Criminal Information is PARTIALLY GRANTED. The Court DISMISSES Count One of the Criminal Information.

BACKGROUND

Basic **[**5]** Facts

This case arises out of an alleged antitrust "price-fixing" case that the Government has brought against two companies, Gosselin, a Belgian company headquartered in Antwerp, Belgium, and Pasha, a United States company headquartered in Corte Madera, California. Count I of the Indictment alleges conspiracy to restrain trade in violation of Title *15, United States Code, Section 1*. Count II of the Indictment alleges conspiracy to defraud the United States, in violation of Title *18, United States Code, Section 371*.

Gosselin and Pasha are both in the business of shipping the household goods of U.S. military personnel from their European homes to foreign ports. In November 2003, Gosselin and its Managing Director Marc Smet were indicted for violating the Sherman Act and conspiring to defraud the United States. The Government has since dismissed the Indictment against Mr. Smet. The November 2003 Indictment was superceded by a Criminal Information, which the Government filed on February 13, 2004. The Criminal Information charged Gosselin and its alleged co-conspirator, Pasha. Defendants entered a conditional plea of guilty to the Criminal **[**6]** **[*500]** Information, in which they expressly reserved the right to file this motion to dismiss.

The International Through Government Bill of Lading Program

The alleged price fixing conspiracy revolves around the International Through Government Bill of Lading ("ITGBL") program. The Department of Defense ("DOD") pays for this program, whose purpose is to transport military and civilian personnel household goods to and from foreign countries. The ITGBL is administered by the Military Traffic Management Command ("MTMC"). MTMC solicits bids from U.S. freight forwarders (also called carriers). Freight forwarders are the companies that shoulder the ultimate responsibility for the military household goods shipment between the U.S. and foreign countries. *See* Statement of Facts at 5.

Freight forwarders subcontract with other service providers for each component of the transportation. The other service providers are (1) local foreign moving and storage companies, (2) foreign port agents, (3) ocean carriers, (4) U.S. port agents, and (5) U.S. moving and storage companies. Criminal Information P 10; Statement of Facts P 7. Freight forwarders obtain rate commitments from the service providers **[**7]** for each of the components, add their own markup, and combine these bids into what is called a "through rate." In putting together their through rates, U.S. freight forwarders must consider the costs for each of these services, plus the costs of a booking agent to monitor shipments, physical inputs, such as liftvans and warehouses, and finally, overhead and profit. The through rate is then submitted to the MTMC.

The MTMC conducts bidding twice a year for six-month cycles in a two-step bidding process. *See* Statement of Facts PP 4, 13. In the first step, or "initial filing," U.S. freight forwarders file their "through rates" in each route - called a "channel." [1] The lowest bidder in the initial filing sets what is called the "prime rate." The carrier that sets the prime rate for a channel is guaranteed a predetermined percentage of the shipments for that particular channel. A carrier may instead file an "administrative high" rate to indicate its intent not to file competitively at the initial filing

[1] Each "channel" is a route to or from a particular state and a specific foreign country. For instance, a channel originating from a U.S. military base in Germany to the servicemember's new home in Virginia would be designated "Germany-Virginia."

stage, while reserving the right to file again at the second stage, known as the "me-too" stage. *See* Statement of Facts P 15.

[8]** After the initial filing, MTMC publishes a list of the lowest five bids received by MTMC for each channel. Statement of Facts P 16. During the "me-too" bidding period, carriers that did not set the "prime rate" may match, or "me-too" the lowest rate and receive a guaranteed fraction of the shipments moved on that particular channel. *Id.* Alternatively, carriers can file a rate higher than the low rate; however, MTMC will ship household goods using carriers with higher filed rates only after all carriers with lower rates on file exhaust their capacity.

Gosselin and Pasha have two roles within the ITGBL program. First, Pasha and Gosselin act as exclusive co-agents of an association of freight forwarders called the International Shippers' Association ("ISA"). Statement of Facts P 10. Pasha and Gosselin negotiate a "service contract" on behalf of ISA with the Trans Atlantic American Flag Line Operators ("TAAFLO"), an immunized conference of U.S. **[*501]** ocean common carriers. Statement of Facts PP 9-10. ISA members receive discounted ocean rates from TAAFLO in exchange for committing to ship a specified volume of cargo over a set period of time. As compensation for acting as ISA's agents, **[**9]** Pasha and Gosselin receive a set commission fee. Statement of Facts P 10.

Second, Pasha and Gosselin act as General/Booking Agents for many of their customers. MTMC requires each carrier to appoint a General/Booking Agent to serve as its local representative in Germany to receive bookings. Statement of Facts P 7. As a General/Booking Agent, Defendants offer their customers the option to purchase ocean transportation together with foreign inland services (packing, trucking, and port services) that the Defendants procure from local foreign agents. Statement of Facts P 12. Defendants then bill the carriers the rate fixed by the ISA-TAAFLO service contract for ocean transportation (which includes Defendants set commission) plus the rate for the foreign inland services. *Id.* This combined rate is referred to as the "landed rate." *Id.* A "landed rate" is essentially an offer to obtain foreign inland services for the carrier and then to bill those services together with the ISA-TAAFLO service contract rate for the ocean shipping. *Id.*

<u>The Alleged Price Fixing Conspiracy</u>

The Government states that in the initial filing for the summer of 2002 (which occurred in 2001), a **[**10]** U.S. freight forwarder (or carrier - referred to hereinafter as "FF-1") filed the prime rate in 26 of 52 channels from Germany to the United States. Statement of Facts P 18. FF-1 did not use the landed rate of either Defendant. *Id.* In 12 of these 26 channels, FF-1's through rates were at least $ 3.00 per hundredweight lower than those carriers using Defendants' landed rates. *Id.* In December 2001, MTMC published FF-1's bids, along with those of the next four lowest bidders. U.S. carriers then had until January 16, 2002 to file their second round "me-too" bids. Statement of Facts P 19.

On December 26, 2001, Gosselin's managing director sent an email to a landed rate competitor, an unindicted co-conspirator, identifying the 12 channels. Statement of Facts PP 20, 21. Gosselin's managing director prepared a spreadsheet targeting those channels for elimination and sent it to the unidentified co-conspirator, saying that, by "not taking the low into consideration we would increase the rate level with an average of 3.63 USD … This is the only thing that in my mind can happen." *Id.* The head of the unindicted co-conspirator organization responded, "Agree to your position … You **[**11]** know if we do not reach and give [the] industry a clear message which rate to base the m/2 [me-too] on, then everyone will use the low [prime] rate and later expect us [the landed rate providers] to reduce our rates so those carriers can work under their m/2 rates." *Id.*

Gosselin sent these emails to the chief executive of Pasha with the note, "I don't know where you are at this moment with [the landed rate to a Pasha freight forwarder] but what rate levels would you be able to support if those [12] states would go to the second level? I think it is important we move rather quickly now. Maybe when you have a chance we can talk in the next days." Statement of Facts P 21. Pasha thereafter allegedly agreed with Gosselin to act to eliminate the prime through rates in 12 of the 26 channels and replace them with higher rates at the second-low level. Statement of Facts P 24.

To implement the agreement, Gosselin's managing director agreed to pay a specified rate to twelve of the largest German packing and hauling agents in return for **[*502]** their agreement not to "handle business" for carriers in the 12 channels unless those carriers filed "me-too" rates at or above the second-low **[**12]** level. Statement of Facts P 22.

On January 8, 2002, in a fax letter edited and approved by Gosselin's managing director, the agents informed U.S. freight forwarders that they "will offer their capacity only to those carriers me-tooing the second rate level into the [enumerated 12] states .... It was emphasized strongly that business to these states will only be handled at the second low rate level, so, me-too can only happen at this level." Statement of Facts P 23. Gosselin sent a copy of this fax to Pasha on January 9, 2002. Id.

Through correspondence with FF-1 in the United States, Defendants agreed with FF-1 that it would cancel its prime rates in the 12 targeted channels, on the understanding that no other U.S. freight forwarder would me-too those prime through rates or file a rate below the second-low level. Statement of Facts P 27. To deliver on their promise to FF-1, Defendants obtained the agreement of most of the other U.S. freight forwarders not to me-too the prime through rates in those 12 channels, but instead to file me-too rates at or above the second-low level. *Id.* The carriers overwhelmingly filed me-too through rates at or above the second low level in the **[**13]** 12 targeted channels. Statement of Facts P 28. In the few instances where the carriers either ignored or misunderstood the instructions and filed me-too rates lower than the second-low level, Defendants directed them to agree to cancel those lower rates, and they did. Statement of Facts PP 29-30. Defendants also supplied misleading information to DOD personnel in Germany to ensure that DOD did not tender any shipments to a freight forwarder with a me-too rate on file below the second-low level. Statement of Facts PP 29, 31.

The Government contends that as a result of the Defendants alleged conspiracy, DOD overpaid for the transportation of military household goods by approximately $ 1 million during the summer of 2002. Statement of Facts P 33.

<u>The Parties Arguments</u>

The Defendants argue that the facts as stated above (as agreed to in the Statement of Facts) are a direct consequence of an initial agreement among local German agents to fix the terms and conditions under which they would provide packing services and local trucking services in Germany to U.S. carriers. According to Defendants, the German agents agreed among themselves, in advance of the ITGBL carriers' decision **[**14]** regarding what rates to file with MTMC, not to provide service for any carrier that filed rates with MTMC below a certain level. The German agents thereafter undertook to inform the industry of their agreement and acted to ensure that it would be carried out within the framework of MTMC's regulatory program. See Mem. of the Pasha Group in Supp. of Mot. to Dismiss Criminal Information (hereafter referred to as "Pasha Memorandum") at 6. Defendants contend that they had a duty to inform their ITGBL carrier customers of the German Agents' actions, which comprise the Government's charge of conspiracy.

Defendants maintain that Section 1706(a)(4) of the Shipping Act (46 U.S.C. app. § 1706(a)(4)) provides that the antitrust laws allow them an exemption, because their business "concerned the foreign trade segment of through transportation." Section 1706(a)(4) of the Shipping Act provides:

> The antitrust laws do not apply to -
>
> **[*503]** (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Defendants contend that this statutory language is broad, **[**15]** with little definition of the terms. Defendants further argue that United *States v. Tucor, 35 F. Supp. 2d 1172 (N.D. Cal. 1998)*, *aff'd,* *189 F.3d 834 (9th Cir. 1999)*, has facts analogous to those at hand, and supports the Defendants' statutory interpretation.

Regardless, even if the Court found that Section 1706(a)(4) of the Shipping Act did not apply to Defendants, because the statute is so ambiguous, Defendants were not given a "fair warning" of criminal conduct, and the statutory and common law rules of lenity mandate that the Court dismiss the pending Criminal Information. Defendants note that they relied upon the holding in *Tucor* in making the determination that their conduct was legal.

Defendants also assert that, independent of Section 1706(a)(4) of the Shipping Act, Section 1706(a)(2) of the Shipping Act also gives Defendants immunity from the antitrust laws. Section 1706(a)(2)(B) states that the antitrust laws do not apply to:

> "any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that … it is exempt under **[**16]** Section 1715 of this title from any filing or publication requirement of this chapter." See 46 U.S.C. app. § 1706(a)(2)(B).

Defendants contend that Subsection(a)(2)(B) references Section 1715 of the Shipping Act, which empowers the Federal Maritime Commission ("FMC") to exempt any class of agreements or any specified activity from application of the tariff filing requirements under the Shipping Act. Defendants opine that in order to show that the conduct in the Criminal Information is covered by Section 1706(a)(2)(B) immunity, they must show that (a) the FMC has exempted carriers such as Defendants from a filing or publication requirement pursuant to its authority under Section 1715 and (b) Defendants' conduct as described in the Statement of Facts constituted activities or agreements for which there was a reasonable basis to conclude that such activities or agreements fell within the scope of the Section 1715 exemption.

Defendants argue that one of the exemptions granted under Section 1715 covers the filing and publication requirements for tariffs in connection with "transportation of used military household goods and personal effects by ocean transportation **[**17]** intermediaries." *See* *46 C.F.R. § 520.13(c)*. "Ocean transportation intermediaries" include non-vessel owning common carriers ("NVOCC") and freight forwarders. *See* 46 U.S.C. app. § 1702(17). According to Defendants, they are classified in the Statement of Facts as a NVOCC and therefore they fall within the FMC's Section 1715 exemption from publishing tariffs for military household goods. Statement of Facts P 9. Based on their status as a NVOCC and the resulting exception from having to publish tariffs, Defendants are afforded by statute broad immunity against the antitrust laws.

Defendants also assert that they have immunity against the antitrust laws through Section 7(c)(1) of the Shipping Act. This Section reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) of this section shall not remove or alter the antitrust **[*504]** immunity for the period before the determination.

Defendants opine that if the Court were to find that they did not have immunity in this case, this section prevents the Government from prosecuting them for **[**18]** antitrust violations, because they had antitrust immunity for the period before the Court determined that immunity did not apply.

Defendants also assert that the alleged fraud violation is premised on the same conduct that allegedly constitutes the charged antitrust violation. Therefore, Defendants argue, if the Court finds that it has antitrust immunity, it must also dismiss the fraud count.

The Government argues that the Defendants story regarding the German agents conspiracy is outside the scope of the Criminal Information and the Plea Agreement, which all parties agreed to. Therefore, the Government maintains that the Court cannot consider any of these assertions by Defendants.

In addition, the Government contends that *Tucor* does not apply in this case. The Government argues that *Tucor* involved Filipino shippers who shipped only within the Philippines and thus concerned *only* the foreign inland segment of through transportation. The Government maintains that Defendants conduct constituted a conspiracy that not only focused on the foreign inland segment of the transportation - from military bases in Germany to the German port - but extended to the United States.

[19]** The Government argues that Defendants reading of the statute raises a perverse escape valve for many antitrust violators doing business overseas that Congress could not have intended. The Government opines that Defendants main argument - that even if they were involved in through transportation, their conduct did "[concern] the foreign inland segment of through transportation" - is over broad.

The Government also argues that the Shipping Act's 1706(a)(4) immunity does not apply to Defendants. The Government contends that the antitrust immunities provided for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. The Government submits that this case does not concern ocean common carriers or marine terminal operators. Therefore, the Government concludes, immunity is not applicable here.

The Government also opines that Defendants' argument for lenity is misguided. Specifically, the Government maintains that the Court should only adhere to the rule of lenity when a statute is so ambiguous that the Court can make no sensible interpretation of it. In addition, the Government argues that most statutes **[**20]** are ambiguous to a degree, and the Court would create bad precedent by finding this particular statute ambiguous.

In addition, the Government contends that the Court should fully read Section 1715 of the Shipping Act, which permits the FMC to exempt from filing, "by order or rule … any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." The Government opines that the agreement between Defendants referenced in the Criminal Information directly flies in the face of this rule because it fixes the market and is detrimental to both competition and commerce.

The Government also maintains that the exemption authority that Defendants cite, **[*505]** *46 C.F.R. §§ 531* and 536, only exempt Defendants from filing tariffs. It does not extend to any activity associated with the filing of that tariff - in this instance the antitrust violation. The Government contends that the FMC concluded that "existing tariff filings no longer served any regulatory purpose" because MTMC had its own competitive bidding **[**21]** program. 46 Fed. Reg. at 35092. The Government asserts that the FMC's reliance upon competitive bidding in its actions to exempt carriers such as Defendants from filing tariffs only proves that its intent was not to also exempt antitrust, anti-competitive behavior.

The Government also claims that Section 7(c) (1) immunity does not apply in this situation because Defendants never had any form of antitrust immunity. The Government further contends that Section 7(c) (1) applies to agreements that have been filed with the FMC, and have been effective under the Act or have otherwise been entitled to immunity. The Government asserts that Defendants agreements were never filed with the FMC, and thus, are not covered under this statutory provision. The Government further maintains that the legislative history states that the provisions of Section 7(c) (1) are to protect agreements filed in good faith and valid on their face, while a Court or other tribunal makes a determination as to whether immunity applies or not.

Finally, the Government opines that even if the Court grants antitrust immunity in this case, it can prosecute Defendants under the fraud statute. The Government **[**22]** postulates that where the same conduct violates two different criminal statutes, it can prosecute and punish under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

DISCUSSION

Standard of Review

HN1[] A motion to dismiss tests whether the Criminal Information sufficiently charges an offense. *United States v. Brandon, 150 F. Supp. 2d 883, 884 (E.D. Va. 2001)*, aff'd, *298 F.3d 307 (4th Cir. 2002)* (citing *United States v. Sampson, 371 U.S. 75, 78-79, 9 L. Ed. 2d 136, 83 S. Ct. 173 (1962))*. A Criminal Information must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged. *Id.* (citing *Fed. R. Civ. p: 7(c)(1))*.

HN2[] A Court's analysis must extend beyond determining whether the Criminal Information contains the core elements of the charged crime. *Brandon, 150 F. Supp. 2d at 885*. A Criminal Information should be dismissed if its factual allegations, even if proven beyond a reasonable doubt, fail to constitute the crimes charged. *Id.* If the "infirmity in the prosecution is essentially one of law," the Court may, on a motion **[**23]** to dismiss, decide whether the Criminal Information charges a crime. *United States v. Solomon, 266 F. Supp. 2d 1367, 1373 (M.D. Fla. 2003)*.

ANALYSIS

A) Defendants Version of the Alleged Conspiracy

The Court holds that it cannot consider in its analysis of this case the additional facts that Defendants supply, concerning an initial price-fixing agreement among German agents. This agreement was not within the Statement of Facts. All of the parties, Gosselin, Pasha, and the Government, have agreed that the Statement of Facts and the Criminal Information form the entire factual record for purposes of the Defendants' Motions to Dismiss. *See* Plea Agreement P 3.

HN3[] **[*506]** Ordinarily, in deciding a motion to dismiss, the "indictment must be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994)*; *accord* *Boyce Motor Lines v. United States, 342 U.S. 337, 343 n.16, 96 L. Ed. 367, 72 S. Ct. 329 (1952)*.

In this case before the Court, the parties have agreed upon a Statement of Facts. Defendants have, in their pleadings, suggested a number **[**24]** of facts involving another agreement with German agents that influenced their actions. These facts are outside the factual record and this Court cannot consider them in its analysis. *See also* *United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992)*.

B. 1706(a)(4) Immunity Under the Shipping Act and Lenity

Even without considering the additional facts that Defendants supply in their Motions to Dismiss, the Court holds that Section 1706(a)(4) of the Shipping Act gives antitrust immunity to the Defendants. In the alternative, the statute is so ambiguous, that the rule of lenity mandates that the Court construe the statute in favor of Defendants.

HN4[] In interpreting a statute, the Court must first begin with the text. "The starting point for [the] interpretation of a statute is always its language." *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739, 104 L. Ed. 2d 811, 109 S. Ct. 2166 (1989)*. "Courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992)*. "In analyzing a statute, we begin by examining **[**25]** the text, not by psychoanalyzing those who enacted it." *Carter v. United States, 530 U.S. 255, 271, 147 L. Ed. 2d 203, 120 S. Ct. 2159 (2000)* (Thomas, J.) (citing *Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, 120 L. Ed. 2d 379, 112 S. Ct. 2589 (1992))* and (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279, 133 L. Ed. 2d 635, 116 S. Ct. 637 (1996)* (Scalia, J., concurring in part and concurring in judgment)). Neither the Supreme Court nor any court in this judicial circuit, has interpreted the sections of the Shipping Act at issue here.

HN5[] The Supreme Court commonly interprets statutory terms according to their common meaning. *See generally* William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation* 253 (2000) (discussing ordinary meaning canons of statutory construction). If the plain language does not settle the question, then the Court looks to other sources, such as the legislative history, to decipher the meaning of the ambiguous language. In a criminal case, ambiguous language must be interpreted in defendant's favor under the rule of lenity. *See* *Bifulco v. United*

States, 447 U.S. 381, 387, 65 L. Ed. 2d 205, 100 S. Ct. 2247 (1980); **[**26]** United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir. 1993).

Examining the plain meaning of the statute, Section 1706(a)(4) of the Shipping Act states:

> ***HN6***[] The antitrust laws do not apply to -
>
> (4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

Unfortunately, "concerning" is not defined within the Shipping Act. However, ***HN7***[] "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." **[*507]** *Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979)*. The common definition of concerning, which Defendants cite, is "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004). A "foreign inland segment" is designed as the foreign non-ocean part of transportation. 46 U.S.C. app. § 1702 (12). ***HN8***[] "Through transportation" means continuous transportation between origin and destination **[**27]** for which a single rate is charged and which is performed by one of more carriers between the United States and a foreign port. 46 U.S.C. app. § 1702 (24) (2003).

Applying the plain meaning of the statute, the Statement of Facts is clear that Defendants' activity did "concern" the "foreign inland segment" of the through transportation. For example, Defendants provided local agent service in Germany. Criminal Information at P 3. Local German agents provided services in Germany. *Id.* at P 10. Defendants arranged for local German agent services, European port agent services, and ocean transport. *Id.* at P 12.

In addition, one other court, although not the Supreme Court and not a court within the Fourth Circuit, has interpreted this issue on a set of facts somewhat similar to those now before the Court. *United States v. Tucor Int'l, Inc., 35 F. Supp. 2d 1172 (N.D. Cal. 1998)*, *aff'd,* *189 F.3d 834 (9th Cir. 1999)*, remains the only judicial interpretation of the Shipping Act's antitrust exemption as applied to shipping household goods for Government personnel. In *Tucor,* the defendants transported military household goods **[**28]** in the Philippines. In that case, the Government charged the defendant with agreeing to eliminate the low prices bid by freight forwarders to the Government and to cause freight forwarders to cancel their low rates. The indictment at issue in *Tucor* charged that defendants "caused U.S. freight forwarders to cancel their low rates filed with the U.S. for the transportation of military shipments of household goods between the Philippines and the United States." *Tucor* Indictment P 4(c).

After reviewing the structure of the Shipping Act, the *Tucor* court concluded that Section 1706(a)(4) immunity "means what it says." *Tucor, 35 F. Supp. 2d at 1180*, and held that the antitrust laws do not apply to an agreement or activity to raise prices or boycott freight forwarders that *concerns* the foreign inland segment of through transportation.

The Court also reviewed the legislative history of the Act for any evidence of Congressional intent that might be contrary to the plain language of the statute. The *Tucor* court found none. *See* *id. at 1181-82*. Specifically, the *Tucor* court held

> "Most notably, there is no discussion in the 98th **[**29]** Congress of the scope of the foreign inland segment immunity. Accordingly, the Court is left to draw inferences from earlier legislative history on previous unenacted versions of the bill. Certainly these inferences, even if on balance they favored the government's position, which they do not, would be insufficient to overcome the plain meaning of the Act." *Id. at 1182*.

The Ninth Circuit unanimously affirmed the decision of the District Court. In particular, the court held that "section 1706(a)(4) clearly applies to any agreement - without limitation - concerning the foreign inland segment of through transportation." *United States v. Tucor Intern. Inc., 189 F.3d 834, 837 (9th Cir. 1999)*.

The Government argues that Defendants reliance on *Tucor* is unfounded. The Government argues that *Tucor* dealt **[*508]** with Filipino movers who moved items internally within the Philippines. The Government contends that because Defendants' alleged conspiracy involved contact with carriers and contacts with the United States, the holding in *Tucor* is inapplicable here. The Government also argues that 1706(a)(4) immunity does not apply to Defendants because the antitrust **[**30]** immunities provided for in Section 7 apply only to agreements "by or among ocean common carriers" and "marine terminal operators" as set forth in Section 4 of the Act. Government argues that this case does not concern ocean common carriers or marine terminal operators - therefore immunity is not applicable here.

The Government's arguments that this exemption only applies to ocean common carriers and marine terminal operators carries little weight. This is the exact same argument that the *Tucor* court addressed. *Tucor* recognized that section 1706(a)(4) clearly, on its face, was not limited to ocean-common carriers. *Tucor, 35 F. Supp. 2d at 1178, 1180*. Because the statutory language was clear, the court concluded that legislative history was necessary only "to determine whether there [was a] clearly expressed legislative intent that is contrary to the plain language." *Id. at 1181*. The court found that the Shipping Act's legislative history actually favored the defendants' position. *Id. at 1181-82*.

Under a basic reading of the statute, Defendants' actions do "concern" the foreign inland segment of through transportation and **[**31]** should be exempted. The case is somewhat similar to the facts in *Tucor.* In *Tucor,* the defendants transported military household goods in the Philippines, and the Government indicted them on violations of the Sherman Act, charging a price fixing conspiracy that affected the United States. The difference between*Tucor* and this case is that in *Tucor,* the Defendants' actions stopped at the edge of the Philippines. The *Tucor* defendants only moved goods within the country itself. In this case, Defendants' respective companies are involved in all aspects of the move - both the foreign inland segment as well as the entire trip. However, a basic reading of the statute concludes that Defendants' business "concerns" the foreign inland segment.

Even assuming *arguendo,* that Defendants were not immune from the antitrust laws pursuant to Section 1706(a)(4) of the Shipping Act, the rule of lenity mandates that the Court construe the statute in favor of the Defendants. *See United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir. 1993)* (holding that the court must decide ambiguities in the statute in the defendants favor).

The Court finds **[**32]** that this statute is clear. Defendants' behavior did concern a foreign inland segment of through transportation. However, the Court does acknowledge that different definitions of "concern" exist. This Court uses the common definition of concern, which means "to relate to; to be about; to bear on." Merriam-Webster Online Dictionary, available at *http://www.merriam-webster.com* (last visited August 1, 2004); *see also Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979)*.

The Government could argue that Congress's intent was a heightened definition of the word "concern" - such that in order to enjoy antitrust immunity Defendants' conduct would have needed to be exclusively - or significantly - relating to the foreign inland segment of through transportation. There is no indication in the legislative history that Congress meant this. In fact, there is no legislative discussion regarding the scope of the foreign inland segment immunity. *See Tucor, 35* ***[*509]*** *F. Supp. 2d at 1182*. However, this ambiguity, to the extent it even exists, only favors the Defendants.

Although the Government is correct in pointing out that all statutes, to an extent, are **[**33]** ambiguous, *see Muscarello v. United States, 524 U.S. 125, 138, 141 L. Ed. 2d 111, 118 S. Ct. 1911 (1998)*, the rule of lenity applies only if "after seizing everything from which aid can be derived … we can make 'no more than a guess as to what Congress intended." *Id.* This is the case here. Congress failed to define what "concerning" means. Specifically, whether "concerning" should be given a broad or narrow definition. This Court uses the common definition of the word. There is no doubt that *Tucor* held that any conduct dealing with the foreign inland segment of through transportation is immune under the Shipping Act. Based upon this holding, it is not unreasonable for the Court to conclude that Defendants conducted their business in accordance with the Ninth Circuit's holding. Therefore, to the extent that an ambiguity exists in the immunity clause under Section 1706(a)(4) of the Shipping Act, this Court must construe it in favor of the Defendants.

C. Shipping Act Immunization Under Section 1706(a)(2)

The Court holds that independent of the antitrust immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants shipping **[**34]** activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Once again, the Court's starting point in analyzing this statute is with its plain language. *See* *Community for Creative Non-Violence, 490 U.S. at 739*. Section 1706(a)(2) of the Shipping Act provides that ***HN9***[] the antitrust laws do not apply to:

> any activity or agreement within the scope of this chapter, whether permitted under or prohibited by this chapter, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place, or (B) it is exempt under section 1715 of this title from any filing or publication requirement of this chapter.

Subsection (a)(2)(A) is inapplicable to this case because Defendants' agreement is not on file with the Federal Maritime Commission. Within the scope of the chapter is Section 1707 of the Shipping Act, which requires common carriers to publish tariffs. [2] However, subsection (a)(2)(B) references Section **[**35]** 1715 of the Shipping Act, ***HN10***[] which empowers the Federal Maritime Commission to exempt any class of agreements or any specified activity from application of the tariff.

HN11[] The Federal Maritime Commission, in rules entitled "Carrier Automated Tariffs," exempts used military household goods transported by ocean transportation intermediaries from publishing a tariff. Defendants also fall within the definition of an ocean transportation intermediary. 46 U.S.C. app. § 1702(17). The exemption states:

> (c) ***HN12***[] The following cargo types are not subject to the requirements of this part [automated tariffs]: …
>
> **[*510]** (3) *Used military household goods.* Transportation of used military household goods and personal effects by ocean transportation intermediaries.

[36]**

46 C.F.R. § 520.13(c)(3) (2003) (emphasis in original)

The Court holds that Defendants have a "reasonable basis to conclude," based upon a reading of the above statutes, that they are immune from the antitrust laws because the publication exemption is explicit.

The Government argues two major points against this theory, both of which the Court finds unpersuasive. First, the Government argues that Section 1706(a)(2) immunizes only agreements "within the scope of this chapter." In turn, the Government contends that Section 4 of the Shipping Act "makes clear that the only agreements within the scope of this chapter are agreements among ocean carriers or marine terminal operators." Mem. of the United States in Opp. to Gosselin World Wide Moving N.V.'s and the Pasha Group's Mots. to Dismiss the Criminal Information at 22. The Government contends that neither Defendant is an ocean carrier or a marine terminal operator. This argument carries no weight, and is simply a rehash of the Government's argument before the District Court in Tucor.

Section 4 of the Shipping Act, entitled "Agreements Within Scope of Act," states that the Shipping Act applies to certain agreements "by or among **[**37]** ocean common carriers," and "among marine terminal operators and one

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[2] A common carrier is defined in the Shipping Act as including non-vessel operating common carriers, which both Gosselin and Pasha are. *See* Statement of Facts P 9; *see also* 46 U.S.C. §§ 1702(6) and(17)(B).

or more ocean common carriers." See 46 U.S.C. app. § 1702(a) (ocean common carriers), § 1702(b) (marine terminal operators). The Government's argument, in essence, is that this language means that the Shipping Act applies to certain agreements among only ocean common carriers and marine terminal operators.

As in Tucor, the Court finds that the Government has misinterpreted the "gap" filled by Section 1704(a) of the Shipping Act. Section1704(a) ***HN13***[] exempts Federal Maritime Commission from filing "agreements related to transportation to be performed within or between foreign countries ..." See 46 U.S.C. app. § 1704(a). As in Tucor, "the government's argument ignores the fundamental distinction between 'transportation to be performed within or between foreign countries' and 'the inland segment of through transportation.'" *Tucor, 35 F. Supp. 2d at 1180*. ***HN14***[] The Shipping Act cannot apply, as the Government argues, to certain agreements among *only* ocean common carriers and marine terminal operators because under such a theory, the statute under 1704(a) would **[**38]** be illogical. Ocean common carriers and marine terminal operators do not operate *within a* foreign country. It is obvious that this language deals with internal transportation, which would preclude ocean common carriers and marine terminal operators.

The Government also argues that Defendants' agreement is not exempted by Section 1715 of the Shipping Act. Section 1715 ***HN15***[] permits the Federal Maritime Commission to exempt from filing, "by order or rule," "any class of agreements between persons subject to this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." However, again the Government misinterprets the statute. The statute does not say that the only way Defendants could seek a tariff exemption is through an order or rule by the Federal Maritime Commission. The plain language of the statute states that the Federal Maritime Commission may issue this order or rule exempting a party from the tariff requirement. This Section does not reference Section 1706(a)(2) of the Shipping Act, which Defendants rely upon.

[*511] Based upon the above statutory and case law analysis, the Court holds that independent of antitrust **[**39]** immunity Defendants enjoy pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

D. Immunity Under Shipping Act Section 1706(c)(1)

The Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants already have immunity under a plain reading of Section 1706(a)(4), and alternatively under the statutory and common law rules of lenity.

As described above, Defendants have immunity from the antitrust laws. However, even assuming *arguendo,* that Defendants did not have immunity under the antitrust laws, Section 1706(c)(1) would grant Defendants retroactive immunity. Section 1706(c)(1) reads:

> Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust **[**40]** laws set forth in subsection (a) of this section shall not remove or alter the antitrust immunity for the period before the determination.

Once again, the Court's starting point in analyzing this statute is with its plain language. See *Community for Creative Non-Violence, 490 U.S. at 739*. In examining the plain language of this statute, it is apparent that the purpose of this section is to not penalize parties who in good faith believe that they have antitrust immunity, if a Court takes that immunity away.

The Court finds that, based upon the Ninth Circuit's decision in *Tucor,* that the Defendants acted in good faith in considering their actions immune from the antitrust laws. Based upon the Ninth Circuit's holding in *Tucor,* the Defendants could have reasonably concluded that they had antitrust immunity in their activities abroad. This statute expressly prohibits the retroactive application of the removal or denial of immunity under the statute. *Tucor, 35 F. Supp. 2d at 1181-82*. Based upon these factors, Defendants would enjoy retroactive immunity.

E. Independent Basis for Fraud

The Court holds that the Government states a basis **[**41]** for fraud against Defendants, independent of the Sherman Act violations. "The applicable rule is that ***HN16***[] where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932)*. In *Whalen v. United States, 445 U.S. 684, 691, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980)*, the Supreme Court held that courts are to apply this "rule of statutory construction," described in *Blockburger,* "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Id.*

In this case, the Sherman Act count and the fraud count both require proof of a fact that the other does not. ***HN17***[] The Sherman Act count requires that the Government show that Defendants had an effect on interstate or foreign commerce **[*512]** but not an effect on the Government. The fraud count, under *18 U.S.C. § 371*, requires that the Government show that Defendants defrauded the Government. *Section 371* **[**42]** does not require that the Government show that Defendants alleged fraud had an effect on commerce. *See generally* *United States v. Ashley Transfer & Storage Co., 858 F.2d 221, 223-24 (4th Cir. 1988)*. The Court has held that Defendants' conduct enjoys antitrust immunity under the Sherman Act. However, applying the *Blockburger* test, the Court concludes that Congress has provided that the Government can prosecute both the Sherman Act count and the fraud count cumulatively. The fact that the Court has found Defendants' conduct under the Sherman Act immune is irrelevant. The Government must, under the fraud count, prove that Defendants defrauded the United States. This is conduct that the Government need not prove under the Sherman Act count.

Defendants argue that conduct that is immune under one law cannot properly serve as the basis of a legal violation under another statute. Defendants contend that this principle is articulated in *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P., 129 F. Supp. 2d 578 (W.D.N.Y.)*, *aff'd, 229 F.3d 1135 (2d Cir. 2000)*, *cert. denied, 532 U.S. 1037, 149 L. Ed. 2d 1001, 121 S. Ct. 1998 (2001)*. The **[**43]** Court disagrees. *Bath Petroleum* was a civil action involving a claim against competitors for making false statements to federal and state administrative agencies that caused plaintiff's business venture to fail. The plaintiff in this case sued the defendants for violating*Section 2 of the Sherman Act* and the *Racketeer Influenced and Corrupt Organizations Act ("RICO").* The *Bath Petroleum* court dismissed the Sherman Act claim based on the Noerr-Pennington doctrine, which immunizes conduct from the antitrust laws that is directed toward influencing governmental action, such as lobbying or litigation. Defendants argue that since the RICO claim was based upon the same allegedly false statement immunized from antitrust liability by the Noerr-Pennington doctrine, the court also barred the RICO claim. This is not the holding of *Bath Petroleum.* In *Bath Petroleum,* that court held that the Noerr-Pennington immunity applies equally to RICO claims. *See also* *International Broth. of Teamsters v. Philip Morris, 196 F.3d 818, 825 (7th Cir. 1999)*. In other words, although the Noerr-Pennington doctrine originated in ***antitrust law***, its rationale is equally applicable to **[**44]** RICO suits. *Id. at 826*.

Defendants also rely on the Tenth Circuit's holding in *United States v. Beachner Constr. Co., 729 F.2d 1278, 1284 (10th Cir. 1984)*. In *Beachner,* the court held that the *double jeopardy clause* barred a second trial of mail fraud and antitrust claims against a defendant where the retrial involved the same conspiracy for which the defendant had already been acquitted. *Beachner* did not suggest that the Government would have been foreclosed from prosecuting defendants for mail fraud at the first trial if the antitrust charges had been dismissed. Therefore, the Court holds that the Government states a basis for fraud against Defendants, pursuant to *18 U.S.C. § 371*, that is independent of the Sherman Act count.

CONCLUSION

In conclusion, Defendant Gosselin's Motion to Dismiss the Information for Failure to State an Offense is partially granted, and Defendant Pasha's Motion to Dismiss Criminal Information is also partially granted.

First, the Court holds that under a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' activity does "concern" **[*513]** the foreign inland segment of through **[**45]** transportation. As such, Defendants' alleged conduct is immune from the antitrust laws pursuant to the Shipping Act's antitrust immunity provisions.

Second, even assuming *arguendo,* that Defendants' alleged conduct was not immune from the antitrust laws under a plain reading of Section 1706(a)(4), the Court holds that as a matter of law, the statutory and common law rules of lenity mandate partial dismissal of the pending criminal information.

Third, the Court holds that independent of Defendants' antitrust immunity pursuant to a plain reading of Section 1706(a)(4) of the Shipping Act, Defendants' shipping activity involving military household goods is exempt from the Federal Maritime Commission's tariff filing and publication requirements, and thus is immunized from antitrust scrutiny under Section 1706(a)(2) of the Shipping Act.

Fourth, the Court holds that under Section 7(c)(1) of the Shipping Act (codified at 46 U.S.C. app. § 1706(c)(1)), Defendants are entitled to retroactive immunity under the Shipping Act. However, this argument is moot because the Court finds that Defendants have immunity under a plain reading of Section 1706(a)(4), and alternatively **[**46]** under the statutory and common law rules of lenity.

Fifth, the Court holds that the Government states a basis for fraud against Defendants, independent of the Sherman Act violations. Where the same conduct violates two different criminal statutes, the Government can prosecute and punish it under both statutes, as long as each statutory provision requires proof of a fact which the other does not.

For the foregoing reasons, it is hereby ORDERED that Defendant Gosselin World Wide Moving N.V.'s Motion to Dismiss the Information for Failure to State an Offense is PARTIALLY GRANTED.

It is FURTHER ORDERED that Defendant Pasha Group Inc.'s Motion to Dismiss Criminal Information is PARTIALLY GRANTED.

The Court DISMISSES Count One of the Criminal Information.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 16th day of August, 2004.

Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

08/16/04

Blue Dot Energy Co. v. United States

United States Court of Federal Claims

August 18, 2004, Filed Under Seal *

No. 04-644C

Reporter
61 Fed. Cl. 548 *; 2004 U.S. Claims LEXIS 205 **

BLUE DOT ENERGY COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant, and WASTE MANAGEMENT OF WASHINGTON, INC., Defendant-Intervenor.

Subsequent History: Motions ruled upon by *Blue DOT Energy Co. v. United States, 2004 U.S. Claims LEXIS 330 (Fed. Cl., Dec. 13, 2004)*

Disposition: The Government's motion to dismiss was denied.

Core Terms

solid waste, Solicitation, protest, bid, certificate, waste management, regulation, substantial chance, procurement, sole-source, disposal, rates, show cause, parties, prices, motion to dismiss, post-award, antitrust, notice, convenience and necessity, federal agency, collection, bidder, solid waste management, fair and reasonable, collection company, pre-solicitation, Contracting, challenging, supervision

LexisNexis® Headnotes

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Public Contracts Law > Dispute Resolution > Jurisdiction

Administrative Law > Sovereign Immunity

Governments > Courts > Courts of Claims

Governments > Federal Government > Claims By & Against

Public Contracts Law > Dispute Resolution > Bid Protests

HN1[] **Agency Adjudication, Alternative Dispute Resolution**

* This Memorandum Opinion Regarding Plaintiff's Standing and Order to Show Cause was filed under seal on August 18, 2004. The court has redacted any price and/or business confidential information subject to a Protective Order entered in this case on August 18, 2004. Brackets in bold herein denote where such information has been redacted by the court.

Pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874-75 (1996), the United States Court of Federal Claims has jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract or to a proposed award or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. *28 U.S.C.S. § 1491(b)(1)*.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN2[] **Preliminary Considerations, Justiciability**

The lower federal courts are advised to decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that U.S. Const. art. III defines as the federal judiciary's business.

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN3[] **Standing, Burdens of Proof**

A party invoking federal jurisdiction has the burden of proof and persuasion to satisfy the constitutional requirements of U.S. Const. art. III standing.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

A court must grant a motion to dismiss for lack of subject matter jurisdiction when the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. Although the court is required to assume nonjurisdictional factual allegations to be true, the burden of establishing subject matter jurisdiction rests with the plaintiff.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

When deciding a motion to dismiss for lack of subject matter jurisdiction, pursuant to U.S. Ct. Fed. Cl. R. 12(b)(1), a court may examine relevant evidence in order to resolve any factual disputes.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN6[] **Justiciability, Standing**

The United States Court of Appeals for the Federal Circuit holds that, in bid protest cases, because the question of prejudice goes directly to the question of standing, the prejudice issue must be reached before addressing the merits. To establish prejudice, a plaintiff must show that, absent the error, there was a substantial chance it would have received the contract award.

Public Contracts Law > Dispute Resolution > Bid Protests

HN7[] **Dispute Resolution, Bid Protests**

When a party contends that the procurement procedure in a sole-source case involved a violation of a statute, regulation, or procedure, it must establish prejudice by showing that it would have had a substantial chance of receiving the award.

Contracts Law > Remedies > Equitable Relief > General Overview

Environmental Law > Solid Wastes > Disposal Standards

Governments > Legislation > Statute of Limitations > Time Limitations

Public Contracts Law > Dispute Resolution > Bid Protests

HN8[] **Remedies, Equitable Relief**

Bid protest suits filed after a written notice has been sent to the contract recipient are post-award protests.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN9[] Entitlement as Matter of Law, Appropriateness

Since standing inherently concerns facts relevant to the particulars of a case, it is more appropriately resolved at the summary judgment stage. A plaintiff must set forth by affidavit or other evidence specific facts, *Fed. R. Civ. P. 56(e)*, which for purposes of the summary judgment motion will be taken to be true. When the suit is one challenging the legality of government action, the nature and extent of facts must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is an object of the action at issue. If so, there is ordinarily little question that the action has caused him injury, and that a judgment requiring the action will redress it. When, however, the plaintiff's asserted injury arises from the government's allegedly unlawful regulation of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated third party to the government action. Thus, when the plaintiff is not the object of the government action, standing is not precluded, but is ordinarily substantially more difficult to establish.

Business & Corporate Compliance > ... > Environmental Law > Solid Wastes > Resource Recovery & Recycling

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Hazardous Wastes & Toxic Substances > Resource Conservation & Recovery Act > General Overview

Environmental Law > Solid Wastes > Permits > General Overview

HN10[] Solid Wastes, Resource Recovery & Recycling

Under the Resource Conservation and Recovery Act of 1976, specifically *42 U.S.C.S. § 6961*, federal agencies must comply with local solid waste management regulations. As such, exclusive franchise agreements, certificates, or authority granted by a state, county, or municipality to an entity prevents federal agencies from competing the contract requirements.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Hazardous Materials

Environmental Law > Solid Wastes > Disposal Standards

Transportation Law > Carrier Duties & Liabilities > Certificates of Public Convenience > Issuance

Environmental Law > Solid Wastes > Permits > General Overview

HN11[] Common Carrier Duties & Liabilities, Hazardous Materials

The Washington Utilities and Transportation Commission has the authority to grant companies certificates of public convenience and necessity, which grant them authority to operate solid waste collection services within a prescribed geographic area.

Business & Corporate Compliance > ... > Environmental Law > Solid Wastes > Resource Recovery & Recycling

Environmental Law > Solid Wastes > Disposal Standards

Environmental Law > Hazardous Wastes & Toxic Substances > Resource Conservation & Recovery Act > General Overview

Environmental Law > Solid Wastes > Permits > General Overview

HN12[] **Solid Wastes, Resource Recovery & Recycling**

The Resource Conservation and Recovery Act of 1976 requires that all federal agencies engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all federal, state, interstate, and local requirements, both substantiative and procedural, including any requirement for permits. *42 U.S.C.S. § 6961(a)*.

Environmental Law > Solid Wastes > Permits > General Overview

HN13[] **Solid Wastes, Permits**

See *Wash. Rev. Code § 81.77.040* (1996).

Environmental Law > Solid Wastes > Disposal Standards

Public Contracts Law > Bids & Formation > General Overview

Real Property Law > Construction Law > General Overview

Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards

Public Contracts Law > Bids & Formation > Sealed Bids > General Overview

Public Contracts Law > Bids & Formation > Sealed Bids > Invitations for Bids

Public Contracts Law > Costs & Prices > General Overview

HN14[] **Solid Wastes, Disposal Standards**

The Competition in Contracting Act, specifically *10 U.S.C.S. § 2305(b)(3)*, requires award of a federal contract to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation.

Environmental Law > Solid Wastes > Permits > General Overview

HN15[] **Solid Wastes, Permits**

The legal duties imposed by *Wash. Rev. Code § 81.77.040* apply exclusively to solid waste contractors and require only that a certificate of convenience and necessity be obtained and in hand at the time solid waste hauling commences operation.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN16[] **Justiciability, Standing**

The United States Court of Appeals for the Federal Circuit holds that if a bid protest is allowed because of an arbitrary and capricious responsibility determination by the contracting officer, the government is obligated to rebid the contract, and the challenging bidder can compete for the contract once again. Under these circumstances, the challenging bidder has a substantial chance of receiving the award and an economic interest and has standing to challenge the award.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Federal Government > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > State & Territorial Governments > Legislatures

HN17[] **Exemptions & Immunities, Parker State Action Doctrine**

The United States Supreme Court holds that a statute enacted by a state legislature is exempt from federal antitrust scrutiny under the state action doctrine, based on principles of federalism and state sovereignty. However, a two-part test clarifies that state action antitrust immunity is not absolute. In determining the applicability of the doctrine the state regulation must be clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN18[] **Exemptions & Immunities, Parker State Action Doctrine**

The purpose of the active supervision inquiry in apply the state action doctrine is not to determine whether a state has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the state has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the state's own.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Environmental Law > Solid Wastes > Permits > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Hazardous Materials

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

HN19[] **Public Enforcement, State Civil Actions**

Washington's solid waste collection law, *Wash. Rev. Code § 81.77.040*, creates a regulated monopoly, in which only one certificate holder can serve a given territory, unless the existing carrier will not serve to the satisfaction of the Washington Utilities and Transportation Commission.

Administrative Law > Agency Adjudication > Alternative Dispute Resolution

Governments > Courts > Courts of Claims

Administrative Law > Sovereign Immunity

Public Contracts Law > Dispute Resolution > Bid Protests

Public Contracts Law > Dispute Resolution > Jurisdiction

HN20[] **Agency Adjudication, Alternative Dispute Resolution**

28 U.S.C.S. § 1491(b)(1).

Headnotes/Summary

Headnotes

Post-Award Bid Protest; Standing; State Action Doctrine; Substantial Chance; *10 U.S.C. § 2305(b)(3)*, The Competition Contracting Act; *15 U.S.C. § 2*, The Sherman Act; *28 U.S.C. § 1491(b)(1)*, The Tucker Act; *42 U.S.C. § 6961*, The Resource Conservation and Recovery Act of 1976; *Wash. Rev. Code § 81.77.040*; *RCFC 12(b)(1)*; *28 C.F.R. § 50-9*.

Counsel: [1]** David J. Taylor, Tighe Patton Armstrong Teasdale, P.L.L.C., Washington, D.C., for plaintiff.

Kelly B. Weiss, United States Department of Justice, Washington, D.C., for defendant. Clarence D. Long, III, United States Air Force, Of Counsel.

William A. Shook, Preston Gates Ellis & Rouvelas Meeds, L.L.P., Washington, D.C., for defendant-intervenor.

Judges: Susan G. Braden, Judge.

Opinion by: Susan G. Braden

Opinion

[*549] MEMORANDUM OPINION REGARDING PLAINTIFF'S STANDING AND ORDER TO SHOW CAUSE

BRADEN, *Judge*

This post-award bid protest case presents what appears to be a simple jurisdictional issue:

> Whether plaintiff has standing to protest the award of a sole-source contract by the Air Force, even though the plaintiff did not have a certificate of convenience and necessity required by state law to perform the contract?

The more important and controlling questions, however, are:

> Whether the Air Force knowingly misconstrued and misapplied both federal and state statutes to avoid compliance with the congressionally established historically underutilized business zones program; and
>
> Whether the state law at issue has been utilized in violation of federal **[**2]** antitrust laws?

The contract at issue concerns a $ [] award that runs from April 1, 2004 - September 30, 2004, as well as approximately $ [] for four additional option years. *See* AR at 852, 856. The resolution of this case, however, has far ranging competitive significance, which one counsel for defendant-intervenor Waste Management of Washington, Inc. ("Waste Management-Washington"), [1] accurately has identified as whether:

> **[*550]** ***Any federal facility*** located in a territory for which Waste Management holds an *exclusive*. . . *franchise right* is ***required* to use** [**Waste Management**] for solid waste collection services.

AR at 486 (emphasis added).

[3] RELEVANT FACTS AND PROCEDURAL BACKGROUND** [2]

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[1] Waste Management, Inc. is a Delaware corporation with its principal office in Houston, Texas. *See United States and State of Florida* v. *Waste Management, Inc.*, No. 1:03CV02076 (D.D.C. Oct. 14, 2003) (complaint issued under *15 U.S.C. §§ 18*, *25* for injunctive relief to block the proposed acquisition of Allied Waste Industries, Inc. by Waste Management, Inc.) at P9. Waste Management, Inc. is the nation's largest waste hauling company, providing waste collection and disposal services throughout the United States. *Id.* In 2002, Waste Management, Inc. reported total revenues of approximately $ 11.1 billion. *Id.* Waste Management, Inc. is a holding company that conducts all of its operations through subsidiaries. *See* 2003 Waste Management, Inc. Annual Report at 32 (financial information at 1). Waste Management-Washington is one of those subsidiaries organized in 1999 under the laws of the State of Delaware.

It is a matter of public record that the Antitrust Division of the Department of Justice has filed four complaints during the period February 15, 1996 to October 14, 2003 in federal district courts alleging that Waste Management-Washington's parent and affiliated corporations in other states have engaged in actions that violated federal ***antitrust law***, including monopolization in violation of the Sherman Act, *15 U.S.C. § 2*. In three of these actions, State Attorneys General also were plaintiffs. *See United States* v. *Waste Management of Georgia, Inc., d/b/a Waste Management of Savannah, and Waste Management of Louisiana, Inc., d/b/a Waste Management of Central Louisiana, and Waste Management, Inc.*, No. CV496-35 (S.D. Ga. Feb. 15, 1996) (complaint alleging monopolization in violation of Section 2 of the Sherman Act, *15 U.S.C. § 2*, in small containerized hauling services in the states of Georgia and Louisiana); *United States, State of New York, Commonwealth of Pennsylvania, and State of Florida* v. *Waste Management, Inc., Ocho Acquisition Corp., and Eastern Environmental Services, Inc*., No. 98CV1768-FB-MDG (E.D.N.Y. Nov. 17, 1998) (complaint alleging that the acquisition of Eastern Environmental Services Inc. will lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, *15 U.S.C. § 7*, in municipal solid waste in the states of New York, Pennsylvania, and Florida); *United States and State of New Jersey* v. *Waste Management, Inc., and Allied Waste Industries, Inc*., No. 1:03CV01409 (D. D.C. June 27, 2003) (complaint alleging that the acquisition of Allied Waste Industries, Inc. will lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, *15 U.S.C. § 7*, in small container commercial waste collection service in Pitkin County, Colorado; Garfield County, Colorado; Augusta, Georgia; Myrtle Beach, South Carolina; Morris County, New Jersey; and Bergen and Passaic Counties, New Jersey and municipal solid waste in Bergen and Passaic Counties, New Jersey, and Tulsa and Muskogee, Oklahoma); *United States and State of Florida* v. *Waste Management, Inc*., No. 1:03CV02076 (D.D.C. Oct. 14, 2003) (complaint alleging that the acquisition of Allied Waste Management Industries, Inc. will lessen competition substantially and tend to create a monopoly in violation of Section 7 of the Clayton Act, *15 U.S.C. § 7*, in small container commercial hauling in Broward County, Florida).

[2] The relevant facts recited herein are derived primarily from documents in the April 21, 2004 Administrative Record ("AR") which, at the request of the Government and concurrence of plaintiff, is subject to an April 19, 2004 protective order. Certain of

A. 2002 Proceedings Before The Small Business Administration Concerning The Department Of Air Force's Solicitation F45613-02-Q-A027.

On May 29, 2002, the Contracting Officer for the 92d Civil Engineer Squadron of the United States Air Force ("Air Force") issued Solicitation F45613-02-Q-A027 to procure recycling and solid waste **[**4]** management services for Fairchild Air Force Base in the State of Washington ("Fairchild AFB"). *See* AR at 1-18, 187. Solicitation F45613-02-Q-A027 was set-aside for companies that are located within historically underutilized business zones ("HUBZone"). *See* AR at 1-7; see *also* 15 U.S.C. § 632(p)(3). Although Blue Dot Energy Company, Inc. of Junction City, Kansas ("Blue Dot") was the incumbent and prime contractor on Contract No. F45613-01-D-A001, the Air Force decided not to renew the first option year, because it was not satisfied with Blue Dot's performance. *See* AR at 212-21, 234-35. Nevertheless, Blue Dot decided to bid on Solicitation F45613-02-QA027 . *See* AR at 150-77.

Blue Dot and [] other firms submitted bids on Solicitation F45613-02-Q-A027. *See* AR at 234-36. The Government claims that Blue Dot submitted a technically marginal proposal and therefore was excluded from being a viable bidder. *See* Gov't Mot. to Dismiss at 5 (citing AR at 411-12); *see also* 212-21, 234-35. On August 22, 2002, the Air Force informed Blue Dot that Olgoonik Logistics, L.L.C. ("Olgoonik") was awarded Contract No. F45613-02D-A001. *See* AR at **[**5]** 241, 303. Blue Dot filed a timely protest with the Small Business Administration ("SBA") challenging Olgoonik's status as a small business and as a qualified HUBZone business. *See* AR at 322-34. On September 26, 2002, the SBA ruled that Olgoonik was a HUBZone business, but agreed with Blue Dot that it was not a "small business," because it turns out that Olgoonik was affiliated with Waste Management-Washington. *See* AR at 329-32, 340. On November 22, 2002, the Air Force advised Blue Dot that the contract with Olgoonik would be terminated, however, Blue Dot would not be substituted as the awardee because its bid was "not 'number two' or the best value offeror, as their technical proposal and past performance ratings were only marginal." AR 411-12. On December 12, 2002, the Air Force terminated the contract with Olgoonik. *See* AR at 483-84, 511.

B. 2002-2004 Proceedings Before The General Accounting Office Concerning The Department Of Air Force's Solicitations 45613-03-Q-A027 And 45613-03-Q-A028 And Sole-Source Solicitation No. FA5613-03-Q-A068.

On November 18, 2002, Waste Management-Washington faxed the Air Force page one and page eighteen of an undated certificate **[**6]** of convenience and necessity, apparently issued by the Washington Utilities and Transportation Commission ("WUTC"), indicating that Waste Management-Washington had an exclusive license to collect solid waste in the Fairchild AFB area. *See* AR at 407-10. [3] Thereafter, the Air Force awarded Waste Management-Washington a "short-term" **[*551]** sole-source contract for the period March 1, 2003 - September 30, 2003. *See* AR at 565-66.

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these documents, however, are necessary to explain the rationale of this memorandum opinion. Therefore, the court has issued herewith an order amending the April 19, 2004 protective order to place those documents on the public record. Herein, the court has deleted specific price information and any business information which legitimately is of a confidential nature.

[3] On December 14, 1999, Washington Waste Hauling & Recycling, Inc. of Kirkland, Washington was issued a certificate of convenience and necessity by the WUTC. *See* AR 489-510. This certification, however, "was obtained by transfer of Certificate No. G-140 from Waste Management of Seattle, Inc., d/b/a Waste Management of Ellensburg/Waste Management of Kennewick." *See* AR at 408, 489.

This appears to be the predecessor certificate of convenience and necessity issued to Waste Management-Washington, which also appears as well to apply to a number of other Waste Management-Washington related companies d/b/a: Washington Waste Hauling & Recycling Inc.; Recycle America; Rural Skagit Sanitation; Federal Way Disposal; Nick Raffo Garbage; R.S.T. Disposal; Tri-Star Disposal; Western Refuse; North Cascade Disposal; Stanwood Camano Disposal; Waste Management; Waste Management-Northwest; Waste Management-Rainier; Waste Management of Ellensburg; Waste Management of Greater Wenatchee; Waste Management of Kennewick; Waste Management of Seattle; Waste Management of Skagit County; Waste Management of Spokane; Waste Management of Yakima; Waste Management of Sno-King; Valley Garbage Service; and Olson's Sanitation Service. *See* AR at 408.

[7]** On December 2, 2002, Blue Dot filed a protest with the General Accounting Office ("GAO") challenging the Air Force's decision to cancel Solicitation 45613-03-Q-A027 and allow Olgoonik to continue to perform, rather than awarding the contract to Blue Dot. *See* AR at 414-23. On December 20, 2002, the Air Force requested that Blue Dot's protest be denied because Waste Management-Washington was the only company that possessed the certificate of convenience and necessity required under Washington state law to perform services required under the contract. *See* AR at 569-75. On February 13, 2003, the GAO dismissed Blue Dot's protest because the Air Force agreed to re-solicit the contract to HUBZone companies, rather than entering a sole-source contract with Waste Management-Washington. *See* AR at 679-80.

On March 13, 2003, the Air Force issued a pre-solicitation notice for HUBZone companies, but Waste Management filed a protest with the GAO. *See* AR at 688, 690-94. On May 27, 2003, GAO dismissed Waste Management-Washington's protest as premature because the solicitation had not been issued. *See* AR at 709-14. On June 19, 2003, the Air Force issued a pre-solicitation notice **[**8]** for a solid waste collection and disposal Contract No. F45613-03-Q-A028 and indicated that it was a HUBZone set-aside. *See* AR at 716-18; *see also* *48 C.F.R. § 19.1305(a)*. On July 23, 2003, the Air Force issued Solicitation F45613-03-Q-A028 for HUBZone qualified companies. *See* AR at 719-46. Again, Waste Management protested. *See* AR at 747-54. On August 6, 2003, the Air Force announced that it was taking "corrective action" by cancelling the pre-solicitation and suspending the due date. *See* AR at 756, 758. Waste Management-Washington then withdrew its protest. *See* AR at 759.

On September 22, 2003, the Air Force cancelled Solicitation No. F45613-03-Q-A028 and issued a pre-solicitation notice No. F45613-03-Q-A068 announcing that it intended to sole-source the solid waste collection and disposal services contract to Waste Management-Washington. *See* AR at 764-65. On December 2, 2003, the Air Force issued a "modification" to the pre-solicitation notice requiring that the awardee have a certificate of convenience and necessity issued pursuant to *Wash. Rev. Code § 81.77.040*. *See* AR at 772-73. On December 18, 2003, the **[**9]** Air Force awarded a sole-source solicitation to Waste Management-Washington. *See* AR 779-820. On December 29, 2003, Blue Dot filed a protest with GAO arguing that Solicitation F45613-03-Q-A068 was not awarded in compliance with the requirements of the HUBZone set-aside. *See* AR at 779-80, 829-35. On March 1, 2004, the GAO dismissed Blue Dot's protest as untimely. *See* AR at 846-48. [4] On March 24, 2004, Waste Management-Washington was awarded Contract No. FA4620-04-D-A2003, based on Solicitation F45613-03-Q-A068, to provide solid waste collection and disposal services for Fairchild AFB. *See* AR at 850. Waste Management-Washington commenced performance on April 1, 2004. *See* AR at 857, 884.

[10] C. Proceedings Before The United States Court Of Federal Claims.**

On April 12, 2004, Blue Dot filed a complaint in the United States Court of Federal **[*552]** Claims alleging a "violation of statute and regulation [and] arbitrary and capricious action by [a] contracting officer." Compl. (Count I). In this court, Blue Dot seeks: "preliminary and permanent injunctions enjoining the Air Force from awarding a sole-source contract to Waste Management, Inc.," *see* Compl. P1 (Prayer for Relief); and an "order that the Air Force award the contract to Blue Dot Energy Company," *see* Compl. P3 (Prayer for Relief), or an "order that the solicitation be re-opened and that the procurement be set-aside for HUBZone small business concerns only." *See* Compl. P4 (Prayer for Relief).

On April 20, 2003, Waste Management-Washington filed a motion to appear as defendant-intervenor in this case. On April 21, 2004 the Administrative Record was filed with the court. A telephone status conference was convened by the court on April 22, 2004, at which time the parties agreed to first address the issue of standing. During that conference, the court orally granted Waste Management's motion to intervene, **[**11]** which was confirmed by a written order on April 27, 2004.

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[4] Blue Dot was required to protest Solicitation 45613-03-Q-A028 within 10 days after the basis of the protest was known or should have been known, *i.e.*, the date of the pre-solicitation notice issued on September 22, 2003. *See* AR at 848; *see also* *4 C.F.R. § 21.2 (a)(2) (2004)*.

On May 3, 2004, the defendant ("the Government") filed a motion to dismiss, pursuant to *RCFC 12(b)(1)*. On May 18, 2004, Waste Management-Washington filed a "supplement" to the Government's motion to dismiss. On May 27, 2004, Blue Dot filed a response. On June 14, 2004, the Government filed a reply. On July 1, 2004, Blue Dot filed a notice of supplemental filing. The Government filed a response on July 19, 2004. [5]

DISCUSSION

A. Jurisdiction.

HN1[] Pursuant to the *Tucker Act*, as amended by the Administrative Dispute Resolution Act of 1996, *Pub. L. No. 104-320 § 12, 110 Stat. 3870, 3874-75 (1996)*, the United States Court of Federal Claims has "jurisdiction **[**12]** to render judgment on an action by an interested party *objecting to a solicitation by a Federal agency* for bids or proposals for a proposed contract or to a proposed award . . . or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." *28 U.S.C. § 1491(b)(1)*; *see also Khan v. United States, 201 F.3d 1375, 1377 (Fed. Cir. 2000)* (requiring the plaintiff to identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages for the court to have jurisdiction).

The court has determined that Blue Dot's complaint properly alleges a claim over which the court has jurisdiction. *See* Compl. at PP4, 34-42.

B. The Requirements Of Article III Standing.

HN2[] The lower federal courts have been advised to "decide standing questions at the outset of a case. That order of decision (first jurisdiction then the merits) helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business." *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 111, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)* **[**13]** (Breyer, J. concurring). ***HN3***[] As the party invoking federal jurisdiction, the plaintiff has the burden of proof and persuasion to satisfy the constitutional requirements of Article III standing. *See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)*.

C. Relevant Standards Of Review.

1. *RCFC 12(b)(1)*-Motion To Dismiss.

HN4[] The court must grant a motion to dismiss for lack of subject matter jurisdiction when plaintiff "can prove no set of facts in support of [the] claim which would entitle [plaintiff] to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. Although the court is required to assume nonjurisdictional **[*553]** factual allegations to be true, the burden of establishing subject matter jurisdiction rests with plaintiff. *See McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)*. ***HN5***[] When deciding a motion to dismiss for lack of subject matter jurisdiction, pursuant to *RCFC 12(b)(1)*, the court may examine relevant evidence in order to resolve any factual disputes. *See, e.g., Moyer v. United States, 190 F.3d 1314, 1318 (Fed. Cir. 1999)*; *Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1584 (Fed. Cir. 1993),* **[**14]** *cert. denied sub nom.*, *Cedars-Sinai Med. Ctr. v. O'Leary, 512 U.S. 1235, 129 L. Ed. 2d 859, 114 S. Ct. 2738 (1994)*.

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[5] All of these documents were filed under seal. The court has determined that none of the information and legal analysis therein requires confidential treatment other than certain information on pages 5 (lines 2 and 5) and 9 (lines 10 and 12) of the Government's May 3, 2004 motion to dismiss.

2. The "Substantial Chance" Standing Test Applies To A Post-Award Bid Protest.

HN6[] The United States Court of Appeals for the Federal Circuit also has held that in bid protest cases "because the question of prejudice goes directly to the question of standing, the prejudice issue must be reached before addressing the merits." *Info. Tech. & Applications Corp. v. United States., 316 F.3d 1312, 1319*. To establish prejudice, a plaintiff must show that "absent the error, 'there was a substantial chance it would have received the contract award.'" *Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1086* (quoting *Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999))*; *see also* *Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004)* (post-award bid case); *Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996)* ("To establish competitive prejudice, a protestor must demonstrate that but for the alleged error, there was a *substantial chance* that [it] would receive **[**15]** an award -- that it was within the zone of active consideration.") (internal citations omitted).

In addition, our appellate court requires, *HN7*[] "when a party contends that the procurement procedure in a sole-source case involved a violation of a statute, regulation, or procedure, it must establish prejudice by showing that it would have had a substantial chance of receiving the award." *Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1370 (Fed. Cir. 2002)* (quoting *Statistica Inc., 102 F.3d at 1582*). Panels of the United States Court of Appeals for the Federal Circuit, however, have taken different approaches to what is required to evidence a "substantial chance." *Compare* *Info. Tech., 316 F.3d at 1319* (a protestor must establish "that its chance of winning the award was 'greater than . . . insubstantial . . . if successful on the merits of the bid protest.'"); *Data General Corp. v. Johnson, 78 F.3d 1556, 1562-63 (Fed. Cir. 1996)* (holding "the appropriate standard is that, to establish prejudice, a protestor must show that, had it not been for the alleged error in the procurement process, **[**16]** there was a reasonable likelihood that the protestor would have been awarded the contract. This is a refinement and clarification of the 'substantial chance' language[.]") *with* *United States v. Int'l Bus. Machines Corp., 892 F.2d 1006, 1011 (Fed. Cir. 1990)* ("Only the second-lowest bidder has a direct economic interest in the award of the contract. Therefore, only the second-lowest bidder is an interested party entitled to protest the award of the contract, . . . because only it stands to receive the contract in lieu of the challenged awardee[.]") (internal citation omitted).

D. Resolution Of The Government's Motion To Dismiss.

1. Blue Dot's Complaint Is A Post-Award Bid Protest.

On March 24, 2004, the Air Force executed a sole-source contract with Waste Management-Washington for "solid waste management services" at Fairchild AFB. *See* AR at 850. Blue Dot did not file suit in this court until April 12, 2004, after the contract had already been awarded. *See* *Coco Bros., Inc. v. Pierce, 741 F.2d 675, 677 (3d. Cir. 1984)* (holding *HN8*[] bid protest suits filed after a written notice has been sent to the contract recipient **[**17]** are post-award protests); *see also* *Advanced Seal Technology v. Perry, 873 F. Supp. 1144, 1149 (N.D. Ill. 1995)* (determining that the claim was post-award since it was filed one month after contract was awarded and plaintiff was seeking solely equitable relief). Therefore, despite plaintiff's allegation to the contrary, *see* Compl. at 1, this case concerns a post-award protest.

[*554] 2. Blue Dot's Standing Should Not Be Resolved On A Motion To Dismiss. *HN9*[]

Since standing inherently concerns facts relevant to the particulars of a case, it is more appropriately resolved at the summary judgment stage, as the United States Supreme Court instructed in *Lujan v. Defenders of Wildlife, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*:

> [plaintiff must] "set forth" by affidavit or other evidence "specific facts," *Fed. Civ. Proc. 56(e)*, which for purposes of the summary judgment motion will be taken to be true . . . When the suit is one challenging the

legality of government action . . . the nature and extent of facts must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is . . . an **[**18]** object of the action . . . at issue. If [so], there is ordinarily little question that the action . . . has caused him injury, and that a judgment . . . requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated . . . third party to the government action . . . . Thus, when the plaintiff is not . . . the object of the government action . . . standing is not precluded, but is ordinarily "substantially more difficult" to establish.

Id. at 561-62.

Likewise, the United States Court of Appeals for the Federal Circuit has examined plaintiff's standing, either in the context of reviewing a final decision on the merits or on a motion for summary judgment, but not on a motion to dismiss. *See, e.g., Information Technology & Applications Corporation v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)* (standing determined on summary judgment); *Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1086-88 n.14 (Fed. Cir. 2001)* **[**19]** (same); *Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333-34 (Fed. Cir. 2001)* (same). Therefore, Blue Dot's standing should not be resolved on a motion to dismiss, pursuant to *RCFC 12(b)(1)*.

3. The Parties Are Ordered To Show Cause Why The Court Should Not Rule That Blue Dot Has A "Substantial Chance" of Receiving Contract No. FA4620-04-D's Option Years, Since The Air Force Has Admitted That Its Interpretation Of *42 U.S.C. § 6961(a)* And *Wash. Rev. Code § 81.77.040* Knowingly Was Contrary To Law.

On December 10, 2003, the Air Force issued a "REVISED/FINAL JUSTIFICATION AND APPROVAL FOR OTHER THAN FULL AND OPEN COMPETITION" ("FINAL JUSTIFICATION") regarding a "new contract for solid waste and disposal service [to] be awarded on a restrictive basis to Waste Management of WA[.]" AR at 774. The FINAL JUSTIFICATION states at "Section 5 DEMONSTRATION THAT THE CONTRACTOR'S UNIQUE QUALIFICATIONS OR NATURE OF THE ACQUISITION REQUIRES THE USE OF ONLY ONE RESPONSIBLE SOURCE AUTHORITY:"

> ***HN10***[] Under Resource Conservation and Recovery Act of 1976 (RCRA), *42 U.S.C. § 6961* **[**20]** (Application of Federal, State, and local law to Federal facilities), federal agencies must comply with local solid waste management regulations. As such, exclusive franchise agreements, certificates, or authority granted by a state, county, or municipality to an entity prevents federal agencies from competing the contract requirements. ***HN11***[] The WUTC has the authority to grant companies certificates of public convenience and necessity, which grant them authority to operate solid waste collection services within a prescribed geographic area. Waste Management holds Certificate No. G-156 dated 12-14-99 for the area surrounding and including Fairchild AFB. In matter of: *Red River Service Corporation*, B-279250, May 26, 1998, 98-1 Comp. Gen. Proc. Dec. P142, at footnote 2, GAO specifically held that RCRA was an express requirement under *10 U.S.C. § 2304(c)(5)*. Although GAO cited *10 U.S.C. § 2304(c)(5)*, **[*555]** that authority does not identify the specific entity involved. Therefore, we are using *10 U.S.C. § 2304(c)(1)* as the statutory authority for this procurement.
> AR at 775.
>
> RCRA ***HN12***[] requires that all federal **[**21]** agencies "engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantiative and procedural (including any requirement for permits[.]" *42 U.S.C. § 6961(a)*.
> In 1961, the State of Washington enacted a law providing that:
>
> ***HN13***[] [*n]o solid waste collection company shall hereafter operate* for the hauling of solid waste for compensation without first having obtained from the commission a certificate declaring that public

convenience and necessity require such operation[.] . . . Issuance of the certificate of necessity shall be determined upon, but not limited to, the following factors: The present service and cost thereof for the contemplated area to be served; an estimate of the cost of the facilities to be utilized in the plant for solid waste collection and disposal; . . . a statement of prior experience, if any, in such field by the petitioner; . . . and sentiment in the community contemplated to be served as to the necessity for such a service.

Wash. Rev. Code § 81.77.040 **[**22]** (1996) (emphasis added).

The court is informed that, as of March 24, 2004, the date the contract at issue was awarded in this case, Waste Management-Washington was the only company that had a certificate of convenience and necessity to operate at the Fairchild AFB and adjacent area. *See* AR at 408-10.

There is no language in *42 U.S.C. § 6961(a)* or *Wash. Rev. Code § 81.77.040* which mandates that a federal agency must solicit bids only from or award a contract exclusively to a solid waste disposal contractor with a WUTC certification. Indeed, such a requirement would violate ***HN14***[] the Competition in Contracting Act, *10 U.S.C. § 2305(b)(3)* (requiring award of federal contracts "to the responsible bidder whose bid *conforms* to the solicitation and is most *advantageous* to the United States, *considering only price* and other price-related factors included in the solicitation[.]") (emphasis added). ***HN15***[] The legal duties imposed by *Wash. Rev. Code § 81.77.040* apply exclusively to solid waste contractors and require only that a certificate of convenience and necessity be obtained **[**23]** and in hand at the time solid waste hauling commences operation. *See* *Wash. Rev. Code § 81.77.040* ("[*n]o solid waste company* shall hereafter *operate*.") (emphasis added).

HN16[] The United States Court of Appeals for the Federal Circuit has held that if a "bid protest were allowed because of an arbitrary and capricious responsibility determination by the contracting officer, the government would be obligated to rebid the contract, and [the challenging bidder] could compete for the contract once again. Under these circumstances, the [challenging bidder] has a 'substantial chance' of receiving the award and an economic interest and has standing to challenge the award." *Impresa, 238 F.3d at 1334* (citing *Alfa Laval, 175 F.3d at 1367*). In this case, the Air Force has admitted that its interpretation of *42 U.S.C. § 6961(a)* and *Wash. Rev. Code § 81.77.040* (1996) knowingly was contrary to law. *See* AR at 757 ("Fairchild AFB agrees with Waste Management's position [that] *under RCRA, the contracting agency is required to use only Waste Management* for solid waste **[**24]** disposal . . . *This conclusion holds even though it conflicts with the Federal Acquisition Regulations (FAR), most specifically subpart 19.5, as well as the full and open competition requirements of the Competition in Contracting Act of 1984 (CICA)*.") (emphasis added). *See* AR at 235. [6] Therefore, under **[*556]** these circumstances, the

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[6] Solicitation F45613-03-Q-A028 stated that the contract would be awarded as a "competitive best value acquisition in which competing offeror's past and present performance history will be evaluated on a basis significantly more important than cost or price consideration." AR at 735. Although Blue Dot received a "marginal" overall performance rating for the period December 1, 2001-March 2002, almost all of the negative comments concerned the recycling center. *See* AR at 213-16, 218, 235 ("Although the refuse collection (subcontracted to Waste Management) is acceptable, their [Blue Dot's] overall performance rating is marginal."). On January 9, 2002, Blue Dot received a "cure notice." *See* AR at 219-21. The Integrated Assessment Best Value Decision for F45613-02-Q-A027 indicates that "[Blue Dot's] Improvement to the recycling center operation did not occur until 7 months into the contract performance, when a new management team assumed control." AR at 235. In addition, the Contracting Officer notes that Blue Dot received a satisfactory rating for refuse removal at McConnell AFB in Kansas and a very good rating for refuse removal from the Veterans Medical and Regional Office in Kansas. *See* AR at 235. The Contracting Officer, however, appears completely to have disregarded these favorable ratings, as well as Blue Dot's efforts to cure prior problems, in evaluating Blue Dot's performance history. *Id.*

Waste Management-Washington also argues that Blue Dot cannot satisfy the "responsible prospective contractor" requirements of the Competition in Contracting Act, *10 U.S.C. § 2305(b)(3)*, *(4)* and *48 C.F.R. § 9.103(a), (b)*, because Blue Dot does not have sufficient financial resources to perform the contract, evidenced by its apparent failure to satisfy a $ 261,326.32 judgment owed to Waste Management-Washington for subcontracting work. *See* Def.-Intervenor's Supp. at 4-5. The court is unable to discern from the record or briefs filed to date whether that judgment is final or subject to appeal or whether it concerned any of the parties are hereby ordered to show cause why the court should not rule that Blue Dot has a substantial chance of receiving Contract No. FA4620-04-D's option years commencing on September 30, 2004, particularly since Blue Dot submitted the [] on Solicitation F45613-02-Q-A027.

[25]**

4. The Parties Are Ordered to Show Cause Why The Court Should Not Rule That Blue Dot Has A "Substantial Chance" Of Obtaining Contract No. FA46020-02-04-D's Option Years, Since *Wash. Rev. Code § 81.77.040* Has Been Utilized In Violation Of Federal *Antitrust Law*.

In *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, ***HN17***[] the United States Supreme Court held that a statute enacted by a state legislature is exempt from federal antitrust scrutiny under the "state action doctrine," based on principles of federalism and state sovereignty. *Id. at 351*. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*, however, a unanimous Court established a two-part test to clarify that state action antitrust immunity is not absolute. In determining the applicability of the doctrine the state regulation must be "'clearly articulated and affirmatively expressed as state policy;'" second, the policy must be "'actively supervised'" by the state. *Id. at 105* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978))*. More recently, **[**26]** in *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*, the United States Supreme Court provided detailed guidance as to what is expected from the state to demonstrate the active supervision requirement:

HN18[] The purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Id. at 634-35.

On its face, *Wash. Rev. Code § 81.77.040* does not include a "clearly articulated and affirmatively expressed state policy" to displace competition with what in effect are geographic franchises that appear to have been **[**27]** granted in perpetuity. *See* AR at 625-26 ("The commission . . . may issue the requested certificate only if the existing solid **[*557]** waste collection company 'will not' provide service to the satisfaction of the commission.") In addition, the "sentiment of the community" standard in *Wash. Rev. Code § 81.77.040*, required before a second certificate will be issued within a geographic area appears to be sufficiently vague and arbitrary as to give rise to due process concerns under both federal and state constitutional law. Moreover, the record is devoid of any evidence that the state "has exercised sufficient independent judgment and control" over rates and prices, despite the Government's unsupported assertion that "WUTC strictly regulates solid waste collection companies, establishes rates and tariffs, requires compliance with local solid waste management plans, and monitors company performance." Gov't Mot. to Dismiss at 19. The fact that Blue Dot apparently was performing such work at Fairchild AFB under a prior contract without a certification best evidences that the state clearly does not "strictly regulate[] solid waste collection companies." *Id.* **[**28]** This apparent lack of active supervision is further evidenced by the fact that the certifications appear to be transferred from one company or related companies to another in perpetuity without any due diligence or significant inquiry. *See* AR at 407-10, 489. [7] Thus, the proposition

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services that were the primary focus of the Air Force's "marginal" performance rating regarding Blue Dot. The court notes that in evaluating Blue Dot's August 2, 2002 bid on F45613-02-Q-A027, however, the Contracting Officer did not indicate any concern about Blue Dot's financial ability to perform the contract. *See* AR at 234-35.

that WUTC "supervises and regulates every solid waste collection company in the state of Washington by fixing and altering its rates and charges . . . to use rate structures and billing systems consistent with local solid waste management priorities and plans" is an issue that is far from resolved to the court's satisfaction in this case. *See* AR at 768.

[29]**
For example, the Air Force's December 10, 2003 FINAL JUSTIFICATION regarding Contract No. FA4620-04-D provides:

It is anticipated that the *cost of the contract will be fair and reasonable*. Waste Management has performed solid waste collection and disposal at Fairchild AFB as the prime contractor from FY 97 through FY 01 and in FY 03, and also as a subcontractor in FY 02 and FY 03. The costs have remained relatively stable through competitive bidding from FY 97 through the award to Olgoonik in August 2002. In February 2003 when the sole source, seven (7) month, contract was awarded to Waste Management, the price was *determined fair and reasonable through price analysis comparing Waste Management prices with Olgoonik*, which was a competitive bid contract. Waste Management's prices in FY 03 [were] also compared to the then current Tariff Agreement No. 13 rates. The prices being charged by Waste Management for this short-term contract were actually lower [than] the allowable rates reflected in Tariff (allowable rates as reflected in the Tariff are actual costs plus a profit of 5 to 7%). Waste Management's prices for this sole source acquisition will be compared not only **[**30]** to past CLIN pricing, but also to the now current Tariff No. 14 rates *to ensure the Government is receiving a fair and reasonable price*. The costs Fairchild has paid for bulk containers per ton and collection of refuse costs per unit since FY 97 are illustrated in the following table:

[*558]

	WM	**WM**	**WM**	**WM**	**WM**	**Blue Dot**	**Olgoonik**	[8] **WM**
	FY97	**FY98**	**FY99**	**FY00**	**FY01**	**FY02**	**FY03**	**FY03**
							(5 month)	**(7 month)**
Bulk containers Price/ton	$	$	$	$	$	$	$	$
Housing price/ unit/month	$	$	$	$	$	$	$	$

[31]** AR at 776 (emphasis added).

The Air Force's due diligence comparing Waste Management's prices with Olgoonik's to determine whether they were "fair and reasonable" is plainly arbitrary and capricious--they are the same company, as the Air Force well knows. *See* AR at 483-84, 511. Second, a comparison of the base year with option years 1-4 does not evidence that the "cost of the contract [is] fair and reasonable." AR at 776. The cost for the estimated base year April 1, 2004 - September 30, 2004 is $ []**.** For October 1, 2004 - September 30, 2005, however, the cost is estimated at $ [], or

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[7] *See* Timothy H. Butler, 23 WASH. PRAC. ENVIRONMENTAL LAW AND PRACTICE § 13.22 (updated 2003 Pocket Part) ***HN19***[] ("The solid waste collection law [*Wash. Rev. Code § 81.77.040*] creates a regulated monopoly, in which only one certificate holder can serve a given territory, *unless the existing carrier will not serve to the satisfaction of WUTC*. This explains why so few certificates have been issued and why entry applications generally result in hotly-contested hearings.") (emphasis added).

[8] The Air Force admits: "The bulk container price per ton reflects a significant increase for the current contract between 2002 and 2003[, *i.e.*, []%]. A price fair and reasonable determination was accomplished on 27 January 2003 that identifies the cause for this increase. The factors included increases in disposal fees, labor, materials, equipment; and increases in cost of purchasing dumpsters." AR at 768.

an increase of []%, for one year, even though the unit increase is only approximately 51%. *Id.* Moreover, although the unit requirements remain essentially the same in the following three years, an additional price increase is built in for each year:

October 1, 2005 - September 30, 2006 -- $ [];

October 1, 2006 - September 30, 2007 -- $ []; and

October 1, 2007 - September 30, 2008 -- $ [].

Id. Therefore, the parties are ordered to show cause why the court should not rule that *Wash. Rev. Code § 81.77.040* has **[**32]** been utilized in violation of *15 U.S.C. § 2* under the circumstances presented in this case. *See* *28 U.S.C. § 1491(b)(1)* ***HN20***[] ("The United States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or *any alleged violation of statute*. . . in connection with a procurement or the proposed procurement.") (emphasis added).

5. The Parties Are Ordered To Show Cause Why The Court Should Not Enjoin The Air Force From Awarding Waste Management-Washington Option Years 1-4 On Contract No. FA4620-04-D-A2003, But Instead Be Required To Re-Solicit The Contract.

In light of the fact that the Air Force appears knowingly to have interpreted *42 U.S.C. § 6961(a)* and *Wash Rev. Code § 81.77.040* contrary to law, *Wash. Rev. Code § 81.77.040* appears to have been used to violate federal ***antitrust law***, and Waste Management-Washington appears to be on the verge of imposing **[**33]** monopoly rents on the public, albeit with the approval of the Air Force, the parties are hereby ordered to show cause why the court should not enjoin the Air Force from awarding Waste Management-Washington option years 1-4 on Contract No. FA4620-04-D-A2003, but instead be required to re-solicit the contract.

The parties' briefs are due to be filed no later than the close of business September 13, 2004. Such briefs will be filed on the public record, unless the sponsoring party files a motion for a protective order and can demonstrate that the information is appropriate for the entry of such an order. *See, e.g.,* *28 C.F.R. § 50.9* (Department of Justice Policy with Regard to Open Judicial Proceedings). A hearing will be conducted on September 17, 2004 at 10:00 a.m. EDT, at the United States Court of Federal Claims, 717 Madison Place, N.W., Washington, D.C., 20005, at which time the court will entertain oral argument and the proffering of testimony or other relevant evidence.

In addition, the Clerk of the Court will serve the following entities with a copy of this Memorandum Opinion Regarding Plaintiff's Standing and Order to Show Cause, **[*559]** together with notice **[**34]** of the above-referenced deadlines, in the event they may wish to participate as an intervenor or *amicus*:

International Resource Recovery, Inc. [9]

Selrico Services [10]

SI-NOR [11]

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[9] The Government is hereby ordered to provide the Clerk of the Court with the name of the CEO and address of this potential bidder. The Clerk will *only* serve a copy of the *published version* of this memorandum opinion on this company.

[10] The Government is hereby ordered to provide the Clerk of the Court with the name of the CEO and address of this potential bidder. The Clerk will *only* serve a copy of the *published version* of this memorandum opinion on this company.

[11] The Government is hereby ordered to provide the Clerk of the Court with the name of the CEO and address of this potential bidder. The Clerk will *only* serve a copy of the *published version* of this memorandum opinion on this company.

[35]** Robert S. Paccine, Area Director

U.S. Small Business Administration

Office of General Contracting-Area VI

455 Market Street, 6th Floor

San Francisco, California 94105

David Jaudon, General Counsel

John W. Klein, Associate Counsel

U.S. Small Business Administration

409 Third Street, S.W.

Washington, D.C. 20416-0005

The Honorable H. Hewitt Pate, Assistant Attorney General

Antitrust Division

U.S. Department of Justice

950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530-0001

J. Robert Kramer, II, Chief, Litigation II Section

Antitrust Division

U.S. Department of Justice

1401 H Street, N.W.

Suite 3000

Washington, D.C. 20530

The Honorable Christine O. Gregoire

Attorney General

State of Washington

1125 Washington Street, S.E.

P. O. Box 40100

Olympia, Washington 98504-0100

Tina Kondo

Antitrust Division Chief and

Senior Assistant Attorney General

Office of the Attorney General

900 Fourth Avenue, Suite 2000

MS TB 14

Seattle, Washington 98164-1012

CONCLUSION

For the foregoing reasons, the Government's May 3, 2004 motion to dismiss, pursuant to *RCFC 12(b)(1)*, is denied. The Clerk of the Court is hereby instructed to enter **[**36]** an order consistent with the court's show cause order and related rulings herein.

IT IS SO ORDERED.

Susan G. Braden

Judge

End of Document

Natsource LLC v. GFI Group, Inc.

United States District Court for the Southern District of New York

August 18, 2004, Decided ; August 20, 2004, Filed

03 Civ. 10071 (RWS)

Reporter

332 F. Supp. 2d 626 *; 2004 U.S. Dist. LEXIS 16696 **; 2004-2 Trade Cas. (CCH) P74,527

NATSOURCE LLC, Plaintiff - against - GFI GROUP, INC., PATRICK CURLEY, CHRISTOPHER M. D'AMBROSI, RICHARD G. HEFFERNAN, JOHN PRENDERGAST, ANGELO PRIMAVERA, JR., JOSHUA D. SLANSKY and GREGORY WOYSHNER, Defendants.

Disposition: Defendant's motion to dismiss complaint was denied, and motion for summary judgment was granted.

Core Terms

brokers, customers, electric power, competitor, discovery, market share, brokerage, summary judgment, market power, monopolization, antitrust, employees, hiring, relevant market, inter-dealer, monopoly power, summary judgment motion, barriers, allegations, prices, consumers, trade secret, probability, products, brokerage firm, two year, oppose, deals, best price, misappropriated

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Remedies**

In reviewing a Fed. R. Civ. P. 12(b)(6) motion, courts must accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader. However, legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness. The complaint may only be dismissed when it appears beyond doubt that the plaintiff can prove no set of facts in support or his claim which would entitle him to relief. This rule applies with no less force to a Sherman Act claim.

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

Evidence > Judicial Notice > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

In determining a motion to dismiss, only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered. A court's task in ruling on a *Fed. R. Civ. P. 12(b)(6)* motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence to which might be offered in support thereof.

Civil Procedure > Discovery & Disclosure > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN3[] **Civil Procedure, Discovery & Disclosure**

No heightened pleading requirements apply in antitrust cases. A short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules. The discovery process is designed to provide whatever additional sharpening of the issues is necessary. In antitrust cases in particular, the United States Supreme Court has stated that dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] **Attempts to Monopolize, Elements**

Section 2 of the Sherman Act makes it unlawful to attempt to monopolize any part of the trade or commerce among the several States. *15 U.S.C.S. § 2*. To establish a claim for attempted monopolization, a plaintiff must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

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

While the hiring of employees alone generally cannot give rise to antitrust liability, the hiring of a competitor's employees in conjunction with other wrongful acts, such as those alleged in the complaint, can constitute anticompetitive conduct in violation of the Sherman Act, *15 U.S.C.S. 1 et seq.*

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Regarding antitrust liability and the hiring of a competitor's employees, the evidence must be evaluated in the context of the pending employer/employee relationships between the competitor and plaintiff's former employees. As a general policy matter, one firm's hiring of its competitor's employees does not present a "compelling case for antitrust intervention."

Governments > Fiduciaries

Trade Secrets Law > Misappropriation Actions > General Overview

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Labor & Employment Law > Employment Relationships > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Trade Secrets Law > Federal Versus State Law > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

HN7[] **Governments, Fiduciaries**

The hiring of a competitor's employees alone generally cannot result in an antitrust violation, the hiring of a competitor's employees in conjunction with other wrongful acts - such as misappropriation of trade secrets or aiding or abetting breaches of loyalty - can result in such violations.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

When a motion for summary judgment is made an adverse party may not rest upon the mere allegations of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial, if the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. *Fed. R. Civ. P. 56(e)*.

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

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Governments > Courts > Rule Application & Interpretation

HN9[] **Entitlement as Matter of Law, Appropriateness**

U.S. Dist. Ct., S.D.N.Y. R. 56.1 provides that papers opposing summary judgment shall include a separate, short and concise statement the material facts as to which it is contended there exists a genuine issue to be tried. U.S. Dist. Ct., S.D.N.Y., R. 56.1(b). Accordingly, summary judgment is appropriate because the facts contained in defendant's statement of facts must be "deemed to be admitted. U.S. Dist. Ct., S.D.N.Y., R. 56.1(c).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN10[] **Monopolies & Monopolization, Attempts to Monopolize**

To withstand a motion for summary judgment, on an attempted monopolization claim, a plaintiff must identify a plausible antitrust market and establish that defendant has sufficient market power in that market to create a dangerous probability of obtaining monopoly power. The United States Court of Appeals for Second Circuit has consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power has been defined by the United States Supreme Court as the power to control prices or exclude competition.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] Regulated Practices, Market Definition

Absent an adequate market definition, it is impossible for a court to assess the anticompetitive effect of challenged practices.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

HN13[] Monopolies & Monopolization, Actual Monopolization

The United States Court of Appeals for the Second Circuit has laid out the standards for determining whether the relevant market has been adequately defined for monopolization purposes: The relevant market for purposes of antitrust litigation is the "area of effective competition" within which the defendant operates. The relevant market is composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered. Thus, products or services need not be identical to be part of the same market. In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN14[] Monopolies & Monopolization, Actual Monopolization

For monopolization purposes, the relevant market product must be identified, and the plaintiff must allege how the net economic effect of the alleged violation is to restrain trade in the relevant market, and that no reasonable alternate source is available' to consumers in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN15[] Monopolies & Monopolization, Actual Monopolization

The law in the United States Court of Appeals for the Second Circuit is clear that a 19 percent market share cannot sustain a monopolization or attempt to monopolize claim. Even market shares of approximately 50 percent are insufficient to demonstrate market power where other factors such as low barriers to entry and strong competition exist.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN16[] Monopolies & Monopolization, Actual Monopolization

Market share is just a way of estimating market power, which is the ultimate consideration for monopolization claims. When there are better ways to estimate market power, the court should use them. These ways include a contemporaneous rise in price with increased market share.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN17[] **Monopolies & Monopolization, Actual Monopolization**

Barriers to entry in the voice brokerage market are low, and as such, there can be no dangerous probability of monopolization. It is well-settled that market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power and other market characteristics must also be considered including the barriers to entry.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN18[] **Monopolies & Monopolization, Actual Monopolization**

The Department of Justice Antitrust Division's Merger Guidelines adopt a two-year test for determining whether there are barriers to entry in a market: if successful entry is likely within two years, there are no significant entry barriers and the government will not challenge mergers in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN19[] **Monopolies & Monopolization, Actual Monopolization**

There can be no violation of the antitrust laws unless the challenged conduct has harmed consumers, or at least has the potential to harm consumers, by increasing price and/or decreasing output. A showing of market power, while necessary to show adverse effect indirectly, is not sufficient. There must be other grounds to believe that a defendant's behavior will harm competition market-wide.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN20[] **Monopolies & Monopolization, Actual Monopolization**

Market power means the ability to injure consumers by curtailing output and raising price; no possible injury, no market power, no market power, no violation; injury to the consumers is therefore an essential ingredient of liability.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN21[] **Monopolies & Monopolization, Actual Monopolization**

In the context of monopoly analysis, when customers are not tied to particular sellers each seller may perceive the demand as highly elastic (meaning the customers will quickly switch if any one supplier raises price, which makes the increase unprofitable). The existence of price sensitive consumers prohibits any competitor from obtaining the power to control prices.

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN22[] **Entitlement as Matter of Law, Appropriateness**

The absence of discovery alone does not necessarily bar summary judgment. Where a non-movant simply relies on bare allegations, dismissal is appropriate prior to discovery. A bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment. An opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN23[] **Entitlement as Matter of Law, Appropriateness**

Regarding summary judgment, if the nonmoving party does not set forth specific facts showing there is a genuine issue of material fact summary judgment will be entered against him. Summary judgment may properly be granted in antitrust cases and regularly is, where there is no viable claim based on the undisputed facts.

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

HN24[] Summary Judgment, Supporting Materials

Pursuant to well-settled law, even a reference to *Fed. R. Civ. P. 56(f)* and to the need for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a *Rule 56(f)* affidavit, and the failure to file an affidavit under *Rule 56(f)* is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Pretrial Matters > Continuances

HN25[] Opposing Materials, Accompanying Documentation

If facts essential to support opposition to the summary judgment motion are not available, the nonmoving party may seek a continuance under *Fed. R. Civ. P. 56(f)* to permit affidavits to be obtained or discovery to be had, but may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the moving party's pleading.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN26[] Civil Procedure, Discovery & Disclosure

To be a sufficient affidavit for purposes of *Fed. R. Civ. P. 56(f)*, it must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant had made to obtain those facts; and why those efforts were unsuccessful.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN27[] **Jurisdiction, Jurisdictional Sources**

According to *28 U.S.C.S. § 1367(c)(3)*, a district court may decline to exercise supplemental jurisdiction over state law claims if the court dismisses all claims over which it has original jurisdiction.

Counsel: [1]** KASOWITZ, BENSON, TORRES & FRIEDMAN, Attorneys for Plaintiff, New York, NY, By: DANIEL B. GOLDMAN, ESQ., GARY W. DUNN, ESQ., Of Counsel.

EPSTEIN BECKER & GREEN, Attorneys for Defendants, New York, NY, By: PETER L. ALTIERI, ESQ., LAURI F. RASNICK, ESQ., Of Counsel.

Judges: ROBERT W. SWEET, U.S.D.J.

Opinion by: ROBERT W. SWEET

Opinion

[*629] Sweet, D.J.

The defendants have moved under *Fed. R. Civ. P. 12(b) (6)* to dismiss the complaint of Natsource LLC ("Natsource") and under *Fed. R. Civ. P. 56* for summary judgment. For the reasons set forth below, the motion to dismiss the complaint is denied, and the motion for summary judgment is granted.

The Parties

Natsource is an inter-dealer broker of electrical power.

GFI Group, Inc. ("GFI") is the parent of non-party GFI Brokers LLC, and is also an inter-dealer of electrical power. GFI Brokers LLC is the employer of Patrick Curley ("Curley") Christopher D'Ambrosi ("D'Ambrosi"), Richard Heffernan ("Heffernan"), John Prendergast ("Prendergast"), Angelo Primavera ("Primavera"), Joshua Slansky ("Slansky"), and Gregory Woyshner ("Woyshner") (collectively the **[**2]** "Individual Defendants") . The Individual Defendants are brokers of electrical power formerly employed by Natsource who have been hired by GFI.

Prior Proceedings

Natsource filed its complaint in this action on December 18, 2003, seeking redress for damages that it suffered as the result of, *inter alia,* GFI's unlawful attempt to monopolize the voice brokerage of electric power in the "Eastern Market," which includes the New England states, New York, Pennsylvania, New Jersey, Maryland and the "ANC business," which "involves the buying and selling of electrical line capacity, as it is conducted in the Eastern market and other markets." Complaint. P19. Natsource alleged that in an attempt to obtain monopoly power, GFI, through wrongful means, induced a large group of Natsource's brokers to leave the employ of Natsource and to join GFI, effectuating the transfer of the vast majority of Natsource's customers in the Eastern Market to GFI. Complaint P28-52.

To achieve its goal of attaining monopoly power, Natsource has alleged that GFI misappropriated confidential information from Natsource, see id. at PP 28-32), breached a confidentiality agreement with Natsource **[**3]** and used confidential information protected by that agreement in furtherance of its plan to co-opt Natsource's customers, see id., aided and abetted breaches of the fiduciary duties of Natsource's former brokers, see id. at PP 33-38, and tortuously interfered with the employment contracts between Natsource and such brokers, see id. at PP 33-38, 44-45.

As the result of this wrongdoing, GFI achieved a market share in excess of 60% of the Eastern Market, and Natsource, suffering millions of dollars in damages, can no longer effectively compete in that market. See id. at PP 39-43, 47-48.

No discovery has been conducted. The instant motion was heard and marked fully submitted on April 28, 2004.

The Facts

The facts are set forth in the *Rule 56.1* Statement of GFI and have not been challenged by Natsource and consequently are not contested except as noted.

GFI and Natsource are both inter-dealer brokerage firms which engage in voice-based **[*630]** brokerage, id. at P18, and function as intermediaries, matching the bids and offers for various products, including financial products and energy-related products. These bids and offers are made by institutions, primarily **[**4]** large banks and utility companies (the "dealers" or "customers"). Id. at P21.

Electric power, which is one of the products brokered by the Individual Defendants, is a highly homogeneous product, differentiated primarily by the region in which it is traded. Id. at P20. Customers of electric power do not necessarily use the power that is bought and sold. Id. at P21. Some customers, such as financial institutions, merely engage in speculative trading of the product. Other customers, such as utilities, may buy or sell electric power depending upon the needs of their respective companies. Id. at P20. Regardless of the purpose behind the purchase, customers of inter-dealer brokerage firms want one thing -- to efficiently get the best price for the purchase or sale of electric power. Id. at P18.

As the customers of inter-dealer brokerage firms which broker electric power are large financial institutions and utility companies, they are readily identifiable by all brokers of electric power and can be easily located in public sources such as OPIS/-Stalsby's Who's Who in Natural Gas & Power. Neither trade secrets nor proprietary information are involved in the identification **[**5]** of possible customers. The relationships between brokers and traders, by necessity, are personal, and they can only be developed over many years in both a business and, often, a non-business context. Id. at P4. Traders in the Eastern Market allow a select few brokers with whom they regularly do business to establish a direct phone line to traders, which operate like an intercom in which traders and brokers can instantly communicate with each other by simply touching a button and talking into a speaker. Id. at P25. The traders allow only a few of these lines to be installed at their desks. Only the brokers who have the closest relationship with them secure this privilege.

Each institutional customer routinely utilizes the services of competing inter-dealer brokerage firms simultaneously. No inter-dealer brokerage firm possesses a proprietary interest in any of these customers concerning the buying and/or selling of electric power. While an inter-dealer broker can act as an intermediary between or among customers regarding the negotiation of a price, the broker does not take a proprietary position during the transactional process, nor does (or can) he or she set the price or **[**6]** have any particular interest in whether prices of the electricity are higher or lower. In exchange for successfully completing transactions, inter-dealer brokerages earn commissions from both counter-parties to the trade.

The Motion To Dismiss The Complaint Is Denied

The complaint has stated a claim for attempted monopolization. ***HN1***[] In reviewing a 12(b) (6) motion, courts must "accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader." *Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993)* (citing *IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1052 (2d Cir. 1993)*. However, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *L'Europeene de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 122 (S.D.N.Y. 1988)*. The complaint may only be dismissed when it appears beyond doubt that the plaintiff can prove no set of facts in support or his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46,* 2 [*631] L. Ed. 2d 80, 78 S. Ct. 99 (1956); see also Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). **[**7]** "This rule applies with no less force to a Sherman Act claim . . . ."' McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980).

HN2[] In determining a motion to dismiss, "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken are considered." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993). "A court's task in ruling on a Rule 12(b) (6) motion is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence to which might be offered in support thereof.'" Levitt v. Bear Stearns & Co., Inc., 340 F.3d 94, 101 (2d Cir. 2003) (quoting Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998)).

HN3[] "No heightened pleading requirements apply in antitrust cases. ' [A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules.'" Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (quoting George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir.1977). **[**8]** "The discovery process is designed to provide whatever additional sharpening of the issues is necessary." George C. Frey, 554 F.2d at 554. "In antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" Todd, 275 F.3d at 198 (quoting George Haug Co. v. Rolls Royce Motor Cars Inc. 148 F.3d 136, 139 (2d Cir. 1998).

Natsource has pleaded a claim for attempted monopolization. HN4[] Section 2 of the Sherman Act makes it unlawful to "attempt to monopolize . . . any part of the trade or commerce among the several States . . . " 15 U.S.C. § 2 (1997). "To establish a claim for attempted monopolization, a plaintiff must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize [1] and (3) a dangerous probability of achieving monopoly power." Tops Markets, Inc. v. Quality Markets, Inc. 142 F.3d 90, 99-100 (2d Cir. 1998).

[9]** Natsource has alleged, *inter alia,* that GFI tortiously interfered with its contracts and business relationships, that it aided and abetted certain Natsource employees in breaching their fiduciary duties, that it intentionally breached a confidentiality agreement for the purposes of co-opting Natsource's business, and that it misappropriated Natsource's trade secrets. Id. at PP 28-65, 75-83).

HN5[] While the hiring of employees alone generally cannot give rise to antitrust liability, the hiring of a competitor's employees in conjunction with other wrongful acts, such as those alleged in the complaint, can constitute anticompetitive conduct in violation of the Sherman Act.

In Int'l Distribution Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786 (2d Cir. 1987), the Second Circuit reversed the denial of a motion for a judgment as a matter of law following a jury verdict in favor of plaintiff. The jury had found that plaintiff's competitor, Walsh, and certain of plaintiff's former employees conspired in restraint of trade when the former employees, prior to leaving plaintiff's employ for jobs with Walsh, met with Walsh and purportedly agreed to assist in Walsh's plan **[**10]** to wage a predatory **[*632]** price war. Id. at 794. Finding the jury's verdict with respect to this claim to have been improperly based on speculation, the court emphasized "thatHN6[] the evidence must be evaluated in the context of the pending employer/employee relationships between the competitor and plaintiff's former employees." Id. at 795. The court noted that "as a general policy matter, one firm's hiring of its competitor's employees does not present a 'compelling case for antitrust intervention.'" Id. at 795 n.7 (citing 3 P. Areeda & D. Turner, ***Antitrust Law,*** § 702b at 109 (1978)). Finding the plaintiff had not met its burden of proof, the court held that "the pre-employment meetings between [Walsh] and [plaintiff's employees] were just as likely held to discuss their future employment relationship as to hatch a predatory pricing scheme." Id. at 795. The court stated that:

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[1] GFI has not challenged Natsource's complaint on the grounds that Natsource has not sufficiently pleaded that GFI had a specific intent to monopolize.

> our conclusion might be altered had the [former employees] misappropriated trade secrets from [plaintiff] in the course of working for [the competitor]. The jury, however, found that [plaintiff] possessed no such trade secrets. **[**11]**

Id. at 795 n.7.

While Walsh Trucking states that ***HN7***[] the hiring of a competitor's employees alone generally cannot result in an antitrust violation, it supports the proposition that the hiring of a competitor's employees in conjunction with other wrongful acts -- such as misappropriation of trade secrets or aiding or abetting breaches of loyalty -- can result in such violations. *812 F.2d at 795 n.6* & 7; [2] see also 1 Callmann on Unfair Competition, Trademarks and Monopolies § 421 (4th Ed. West 2003) (Under *§ 2 of the Sherman Act*, 'procuring a breach of the fiduciary duty owed to a competitor by its employees can be a predatory tactic. So can conspiring with a competitor's employees to obtain the competitor's trade secrets.") (footnotes omitted). Since Natsource alleges, *inter alia,* that GFI aided and abetted breaches of fiduciary duty and that it misappropriated trade secrets, Natsource clearly has alleged the additional wrongdoing necessary to state a valid antitrust claim.

[12]** **Summary Judgment Is Granted**

HN8[] "When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations . . . of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial, if the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." *Fed. R. Civ. P. 56(e)*. Here, Natsource has relied solely on the allegations of the complaint and did not oppose GFI's motion for summary judgment, either by raising issues of fact or **[*633]** controverting the *Rule 56.1* Statement in any way.

HN9[] *Rule 56.1* provides that "papers Opposing [summary judgment] shall include a separate, short and concise statement the material facts as to which it is contended there exists a genuine issue to be tried." Local Civil *Rule 56.1(b)*. Accordingly, summary judgment is appropriate because the facts contained in defendant's statement of facts must be "deemed to be admitted." Local Civil *Rule 56.1(c)*. See *Dusanenko v. Maloney, 726 F.2d 82 (2d Cir. 1984)* **[**13]** (finding that facts set forth in movant's statement of undisputed facts were properly deemed admitted where the non-movant failed to serve any opposing statement); *Naantaanbuu v. Abernathy, 816 F. Supp. 218, 222 (S.D.N.Y. 1993)* (where the party failed to submit an opposing statement of material facts, "all facts in the defendants' [*Rule 56.1* Statement] [were] deemed admitted").

HN10[] To withstand a motion for summary judgment, on an attempted monopolization claim, a plaintiff must identify a plausible antitrust market and establish that defendant has sufficient market power in that market to create a dangerous probability of obtaining monopoly power. *PepsiCo., Inc. v. Coca-Cola Co., 315 F.3d 101, 106 (2d Cir. 2002)*; *Tops Mkts., Inc. 142 F.3d at 100*. The Second Circuit has "consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power." *Walsh Trucking, 812 F.2d at 791*.

HN11[] Monopoly power has been defined by the Supreme Court as "the power to control prices or exclude competition." *United States v. E.I. Du Pont de Nemours & Co. 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994*

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[2] Other cases cited by GFI are similarly unavailing. In *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884 (5th Cir. 1984)*, a case in which the court affirmed judgment as a matter of law, the court stated that a valid antitrust claim can be predicated "on the basis of evidence that the defendant had induced the plaintiff's employee to act disloyally . . ." *Id. at 884* (emphasis added). However, the court found that plaintiff's former employee did not act disloyally under the specific facts of this case. Id.

In *Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924 (4th Cir. 1990)*, the court considered the appeal of a grant of summary judgment dismissing an antitrust case predicated in part on the defendant's hiring of two of plaintiff's employees. *Id. at 930*. The court affirmed, finding, based on the unique facts of that case, that nothing suspicious taint[ed] the hiring of the two employees." Id. Thus in Abcor, after being allowed to conduct discovery, plaintiff failed to marshal evidence in support of its claim. Nothing in this case supports the proposition that Natsource's claims now should be dismissed as a matter of law.

(1956). **[**14]** Thus, to succeed on its "Attempted Monopolization" claim, Natsource must be able to demonstrate that GFI's hiring of former Natsource brokers has created a dangerous probability that GFI will be able to raise prices above competitive levels, or to exclude competition in the relevant market defined in the complaint.

Natsource has failed to establish that the hiring of seven employees gives GFI the ability to raise its commissions. Commission rates are established through negotiations with customers who use multiple brokers and who have other avenues for trading electric power. Natsource has not advanced any plausible antitrust theory to explain how GFI possibly could exclude competition as a result of the hires at issue, especially since Natsource, along with at least ten other entities, now compete with GFI in voice-brokering.

In assessing whether GFI has a dangerous probability of achieving monopoly power, four elements must be considered: (1) whether Natsource has adequately alleged the relevant market; (2) market shares within the market; (3) barriers to entry in the relevant market; and (4) whether market power has or can be obtained.

The Relevant Market

Natsource **[**15]** has defined the relevant market in relying on the "Eastern Market" as the applicable one. ***HN12***[] "Absent an adequate market definition, it is impossible for a court to assess the anticompetitive effect of challenged practices." *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., 812 F. Supp. 387, 392 (S.D.N.Y. 2001)* (citation omitted).

In *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, (2d Cir. 1999)*, ***HN13***[] the Second Circuit laid out the standards for determining whether the relevant market has been adequately defined:

> The relevant market for purposes of antitrust litigation is the "area of effective **[*634]** competition" within which the defendant operates. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. As the Court explained in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*: "The ... [relevant] market is composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered. *Id. at 404, 76 S. Ct. 994*. Thus, **[**16]** products or services need not be identical to be part of the same market. See *id. at 394, 76 S. Ct. 994* ("Where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others."). In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product.

Id. at 227. Further, ***HN14***[] "the relevant market product must be identified, and the plaintiff must 'allege how the net economic effect of the alleged violation is to restrain trade in the relevant market, and that no reasonable alternate source is available' to consumers in that market." *Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 58 F. Supp. 2d 228, 238 (S.D.N.Y. 1999)* (internal quotations and citations omitted).

Here, Natsource has alleged that the relevant market is limited to voice brokerage in a geographic area described as the "Eastern Market," which Natsource defines **[**17]** as including "the geographic regions known as NEPOOL (New England), New York, PJM (Pennsylvania, New Jersey and Maryland) and ANC." Complaint P16. Natsource does not explain what ANC is beyond stating that it involves the buying and selling of electrical line capacity, as it is conducted in the Eastern market and other markets." Complaint. P19. Natsource further asserts in a conclusory fashion "there is little or no cross elasticity of demand . . . between the Eastern Market and other voice brokerage markets." Id. at P23. Natsource has asserted that the power grids are physically distinct, and the individual brokers only have relationships with individuals who trade within their limited areas.

Notwithstanding Natsource's demarcation of the Eastern Market, many transactions are undertaken by national customers that do not trade electric power for their own use, see id. at P21, and accordingly are not bound by any grid system or otherwise limited geographically to when they can buy or sell electric power.

Although Natsource has alleged that there is no cross-elasticity of demand between voice brokerage and electronic brokerage because electronic brokerage is appropriate only **[**18]** for less complex deals, GFI has established by factual assertion that the majority of the deals completed through voice brokers are considered to be less complex deals.

Although Natsource claims that direct deals between customers are rare and confined to short term trades, see id. at P27, inter-dealer brokers are not privy to the internal deals conducted by and among the customers. Peter Wise ("Wise"), the head of the Energy Division at GFI, stated in a sworn affidavit that, based on his experience in the energy brokerage business, "some very complex deals are negotiated directly between customers." Wise Affidavit, P17. GFI has established as a factual matter that voice brokerage is used by customers of electric power when they believe it offers the best prices as a result of the efficiencies involved.

[*635] Even if it is assumed that Natsource had correctly defined the relevant market, it cannot demonstrate that GFI has or could obtain the necessary market share from which a finding of market power can be inferred. ***HN15***[] "The law in the Second Circuit is clear that a 19% market share cannot sustain a monopolization or attempt to monopolize claim." *Cohen v. Primerica Corp., 709 F. Supp. 63, 66 (E.D.N.Y. 1989)* **[**19]** (citing *Nifty Foods Corp. v. Great Atlantic and Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980))*. Even market shares of approximately 50% are insufficient to demonstrate market power where other factors such as low barriers to entry and strong competition, both of which are present here, exist. *U.S. v. Waste Mgmt., Inc., 743 F.2d 976, 984 (2d Cir. 1984)*; see also *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490 (5th Cir. 1984)*.

Natsource has alleged that GFI has obtained a 60% market share as a result of the employment of the Individual Defendants, but there are no publicly available figures to indicate the market shares of voice brokerage firms in any geographic area, calculated either by gross or net revenues, or even numbers of transactions.

In addition to GFI and Natsource, there are at least ten other competitors engaged in the voice brokerage of electric power and capacity within the area described by Natsource as the Eastern Market. In the aggregate, GFI's competitors collectively employ approximately sixty-five to seventy-five brokers in the so-called "Eastern Market." According to the evidence on the **[**20]** record, GFI's market share has not been established by the undisputed facts presented in this record. The rough measure of market share proposed by GFI is to determine the proportion of GFI's brokers in relations to the total number of brokers in the Eastern Market alleged by Natsource, which yields a figure of approximately 20%. As Natsource points out, this method is likely to be inaccurate because an accurate "calculation will include the volume of revenues or commissions generated by GFI and by its brokers." Natsource Opp. Brief at 21 n.10. However, Natsource has provided no evidence to show that the 60% figure could be established, and has only made the conclusory assertion that "GFI's brokers generate the vast majority of the revenues and commissions in the Eastern Market." Id. On a motion for summary judgment, this failure to present any evidence is dispositive.

In any event, ***HN16***[] "market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them." *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1336 (7th Cir. 1986)* (citing Waste Mgmt. **[**21]** , Inc.). These ways include a contemporaneous rise in price with increased market share. *Menasha Corp. v. News America Marketing In-Store, Inc., 354 F.3d 661, 666 (7th Cir. 2004)*. Natsource has not established showing market share sufficient to wield the market power required to raise prices to exclude competition.

In addition, ***HN17***[] barriers to entry in the voice brokerage market are low, and as such, there can be no dangerous probability of monopolization. *Tops Mkts., Inc., 142 F.3d at 99*. It is well-settled that "market share analysis, while essential, is not necessarily determinative in the calculation of monopoly power . . . [and] other market characteristics must also be considered . . . [including] the barriers to entry . . ." *Walsh Trucking, 812 F.2d at 791-92* (citations omitted). See *American Prof'l Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997)* **[*636]** (citing *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)* (stating " even if [defendant] has a high market share, neither monopoly power nor a **[**22]** dangerous probability of achieving monopoly power, can exist absent evidence of barriers to new entry or expansion. "); III P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 807g (2d ed. 2002).

To enter the voice brokerage market, there is little impediment, if any. There are no regulatory requirements, and very little capital is needed to engage in the voice brokerage of electric power, or other commodities. Nothing more is required than office space, telephone lines, and the brokers themselves, who can be employed at relatively low base salaries, as Natsource's contracts with the Individual Defendants amply demonstrate.

In contrast to Natsource's allegations, the undisputed facts establish that individual brokers are far from unique. Significantly, six of the seven Individual Defendants were employed at-will and could have left at any time, the majority with only a months' notice. Also, Natsource's employment agreements with six of the seven Individual Defendants did not specify that the brokers' responsibilities were limited to the brokerage of electric power in the so-called "Eastern Market," nor did they limit their employment responsibilities to the brokerage of electric power.

[23]** New brokers are hired, trained and are conducting business in a matter of months and experienced brokers have the ability to change product areas and can handle different trading responsibilities as the market dictates. Also, experienced brokers frequently are hired from one market competitor to another.

HN18[] The Department of Justice Antitrust Division's Merger Guidelines adopt a two-year test for determining whether there are barriers to entry in a market: if successful entry is likely within two years, there are no significant entry barriers and the government will not challenge mergers in that market. See generally, U.S. Dep't of Justice and FTC, 1997 Horizontal Merger Guidelines § 3.2; see also *F.T.C. v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 55-58 (D.D.C. 1998)* (recognizing the Merger Guideline's two year test); *U.S. v. Syufy Enters., 903 F.2d 659, 666 (9th Cir. 1990)* (recognizing that there were no barriers to entry where competitors entered market within two years). [3] Thus, to establish sufficiently high entry barriers, Natsource would have to show that it would take at least two years for a competitor to enter the market and compete **[**24]** with GFI once it had obtained monopoly power. Here, however, finding brokers to service this market, whether by training, switching product areas or hiring brokers, and establishing phone lines and customer relationships, can be done in a matter of months.

Natsource does not allege that it would take years to enter the market, and Natsource's own employment agreements make clear, "timing" is not a serious concern in this market. Specifically, **[**25]** Natsource's non-compete clauses in the employment agreements at issue are for far less than two years -- indicating that it takes less than two years to use experienced brokers hired from competitors or **[*637]** to train new brokers in order to enter or expand in the market.

HN19[] There can be no violation of the antitrust laws unless the challenged conduct has harmed consumers, or at least has the potential to harm consumers, by increasing price and/or decreasing output.

> Even assuming that [plaintiff's] market share evidence were sufficient to create a triable issue as to market power, [plaintiff's] claim could not withstand summary judgment. "[A] showing of market power, while necessary to show adverse effect indirectly, is not sufficient. There must be other grounds to believe that the defendant's behavior will harm competition market-wide . . . ."

CDC Technologies, Inc. v. IDEXX Laboratories, Inc., 186 F.3d 74, 81 (2d Cir. 1999) (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir.1995))*. As explained by Judge Easterbrook, ***HN20***[] "market power means the ability to injure consumers by curtailing output and raising **[**26]** price; no possible injury, no market power, no market power, no violation; injury to the consumers is therefore an essential ingredient of liability." *Flip Side Prods., Inc. v. Jam Prods., Ltd., 843 F.2d 1024, 1032 (7th Cir. 1988)* (citations omitted). See *F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* (stating that "'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market

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[3] Although the Merger Guidelines do not carry the force of law, the courts note that they are helpful in providing an analytical framework for evaluating antitrust cases. See *New York v. Kraft General Foods, Inc. 926 F. Supp. 321, 359 (S.D.N.Y. 1995)* (relying on the Merger Guidelines to determine the relevant product market); see also *Waste Mgmt., Inc. 743 F.2d at 982* (using Merger Guidelines to evaluate ease of market entry); *Ball Mem'l Hosp., Inc., 784 F.2d at 1336* (utilizing Merger Guidelines to calculate market share).

power, which is but a 'surrogate for detrimental effects.'" (quoting 7 P. Areeda, ***Antitrust Law*** P 1511, p. 429 (1986).

Here, there has been no reduction in output or change in price. There are multiple inter-dealer brokers currently doing business in the geographic market defined by Natsource, including Natsource. That has not changed by the movement of some brokers from one company to another. GFI has not increased prices, nor could it and still remain competitive. ***HN21***[] "When customers are not tied to particular sellers each seller may perceive the demand as highly elastic (meaning the customers will quickly switch if any one supplier raises price, which makes the increase unprofitable) **[**27]** *Ball Mem'l Hosp. Inc., 784 F.2d at 1332*. The existence of price sensitive consumers prohibits any competitor from obtaining the power to control prices. Id. In fact, in the complaint, Natsource concedes that the customers of "power brokers expect that brokers will attempt to match offers and bids as closely as possible to obtain what is known as the 'best price.'" Id. at P18). If customers purchasing electric power desire the best prices, their multiple relationships with a variety of inter-dealer brokers permits them to shop for the best prices for the underlying commodities and the commissions both before or after the employment of the Individual Defendants by GFI.

Significantly, Natsource does not allege that prices have increased, or that they will increase, as a result of the employment changes. Paragraph 46 of the Complaint alleges, upon information and belief, that GFI has hired the Individual Defendants "in expectation that it will be able to raise, directly or indirectly, the prices that it charges its customers in the Eastern Market," without conclusory and self-serving allegations are insufficient to withstand the instant motion. See e.g., *Three Crown Ltd. P'ship v. Salomon Bros., Inc., 906 F. Supp. 876, 887-88 (S.D.N.Y. 1995).* **[**28]**

Natsource has sought to resist summary judgment because there has been no discovery. However, ***HN22***[] the absence of discovery alone does not necessarily bar summary judgment. *Connecticut Nat'l Bank v. Trans World Airlines, Inc., 762 F. Supp. 76, 79 (S.D.N.Y. 1991)* (holding that the court was not precluded from **[*638]** entering summary judgment due to the fact that no discovery had been conducted). Where a non-movant simply relies on bare allegations, dismissal is appropriate prior to discovery. *Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 251 (2d Cir. 1985)*. For example, the Eastway court dismissed an antitrust claim, stating that "[a] bare assertion that evidence to support a fanciful allegation lies within the exclusive control of the defendants, and can be obtained only through discovery, is not sufficient to defeat a motion for summary judgment." *762 F.2d at 251* (citations omitted). An "opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." 6 J. Moore, Federal Practice P 56.15(3) at 56-486 to **[**29]** 65-487 (2d ed. 1976) (cited by *Contemporary Mission Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 n. 14 (2d Cir. 1981)*.

HN23[] "If the nonmoving party does not [set forth specific facts showing there is a genuine issue of material fact] summary judgment will be entered against him." *Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993)*. Here, Natsource not only admitted the facts contained in Defendants' *Rule 56.1* Statement, but failed to set forth any disputed substantial facts whatsoever, relying solely on allegations in an unverified complaint. Summary judgment may properly be granted in antitrust cases and regularly is, where, as here, there is no viable claim based on the undisputed facts. See *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 229-30 (2d Cir. 1999)*; *CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 81(2d Cir. 1999)*.

In any event, Natsource failed to submit a *Rule 56(f)* affidavit which is required where discovery is allegedly needed to oppose a summary judgment motion. See *Fed. R. Civ. P. 56(f)*. ***HN24***[] Pursuant to well-settled law, even "[a] reference to *Rule 56(f)* and to the need **[**30]** for additional discovery in a memorandum of law in opposition to a motion for summary judgment is not an adequate substitute for a *Rule 56(f)* affidavit, and the failure to file an affidavit under *Rule 56(f)* is itself sufficient grounds to reject a claim that the opportunity for discovery was inadequate." *Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)* (citations omitted); *Gurary v. Winehouse, 190 F.3d 37 (2d Cir. 1999)* (affirming Judge Stanton's grant of summary judgment and denying opportunity for discovery in securities case where plaintiff failed to satisfy *Rule 56(f)* test). This is clearly insufficient under the law:

> *HN25*[] If facts essential to support opposition to the summary judgment motion are not available, the nonmoving party may seek a continuance under *Rule 56(f)* to permit affidavits to be obtained or discovery to be had, but may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, or upon the mere allegations or denials of the moving party's pleading.

Gan, 996 F.2d at 532 (citations and quotations omitted).

HN26[] To be a sufficient **[**31]** affidavit, it "must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant had made to obtain those facts; and why those efforts were unsuccessful." *Paddington, 34 F.3d at 1138*. Nor does Natsource, even in its legal memorandum, explain how discovery would lead to evidence to create material issue of fact. See *Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989)* (denying request for discovery to oppose summary judgment because "even if plaintiffs had obtained what they **[*639]** stated would be uncovered, the information would have been insufficient to defeat summary judgment"). Accordingly, Natsource's request for discovery to avoid summary judgment must be denied.

Because Natsource has failed to allege a relevant market, has not shown that GFI has a sufficient market share to demonstrate market power, has not shown that there are significant barriers to entry, and has not shown that the challenged conduct would harm consumers, it has not demonstrated that GFI actions create a dangerous probability of obtaining **[**32]** monopoly power. Accordingly, Natsource's claim for attempted monopolization under *Section 2 of the Sherman Act* is dismissed.

Natsource's Remaining New York Law Claims Will Be Dismissed For Lack Of Subject Matter Jurisdiction

HN27[] According to *28 U.S.C. § 1367(c) (3)*, a district court may decline to exercise supplemental jurisdiction over state law claims if the court dismisses all claims over which it has original jurisdiction. See *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)* (holding "certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); *Jordan Inv. Co. v. Hunter Green Inv., Ltd., 154 F. Supp. 2d 682, 695 (S.D.N.Y. 2001)* (after dismissing RICO claim, dismissing state law claims without prejudice);*Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages, 2001 U.S. Dist. LEXIS 18831, No. 00 Civ. 5663, 2001 WL 1468168, at * 15 (S.D.N.Y. Nov. 19, 2001)* (after dismissing antitrust claim, dismissing state law claims without prejudice); *Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994).* **[**33]**

The Court declines to exercise supplemental jurisdiction over its New York law based claims, dismissing the complaint against all defendants in its entirety.

Conclusion

For the reasons stated above, GFI's *Rule 12(b) (6)* motion to dismiss Natsource's complaint is denied. The motion for summary judgment dismissing Natsource's claims for attempted monopolization under *Section 2 of the Sherman Act* is granted, and the remaining New York State law claims are dismissed without prejudice for lack of subject matter jurisdiction.

It is so ordered.

New York, NY

August 18, 2004

ROBERT W. SWEET

U.S.D.J.

JamSports & Entm't, LLC v. Paradama Prods.

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

August 19, 2004, Decided ; August 23, 2004, Docketed

Case No. 02 C 2298

Reporter

336 F. Supp. 2d 824 *; 2004 U.S. Dist. LEXIS 16508 **; 2004-2 Trade Cas. (CCH) P74,524

JAMSPORTS AND ENTERTAINMENT, LLC, Plaintiff, v. PARADAMA PRODUCTIONS, INC., et al., Defendants.

Subsequent History: Motion denied by *JamSports & Entm't, LLC v. Paradama Prods., 2004 U.S. Dist. LEXIS 23561 (N.D. Ill., Nov. 22, 2004)*

Prior History: *JamSports & Entm't, LLC v. Paradama Prods., 2003 U.S. Dist. LEXIS 6100 (N.D. Ill., Apr. 15, 2003)*

Disposition: The Court denied Plaintiff's motion for partial summary judgment on its antitrust claims. The court granted in part and denied in part Plaintiff's motion for summary judgment against defendant, AMA Pro/Paradama; defendant's, AMA Pro/Paradama motion for summary judgment and defendant's Clear Channel motion for summary judgment. Plaintiff's motion to strike venue affidavits and defendant's, Clear Channel motion to exclude the Baade's testimony were denied.

Core Terms

supercross, promotion, Stadium, letter of intent, antitrust, parties, summary judgment, facilities, argues, negotiate, consumers, venues, good faith, terms, sports, monopoly, anti trust law, anticompetitive, prices, relevant market, Counts, season, summary judgment motion, monopolization, competitors, cases, member of the board, sanctioning, Racing, Dome

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN1[] **Discovery, Methods of Discovery**

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN2[] **Summary Judgment, Evidentiary Considerations**

The court upon a motion for summary judgment evaluates admissible evidence in the record in the light most favorable to the nonmoving party. The court's function is not to weigh the evidence but merely to determine if there is a genuine issue for trial. The nonmovant will successfully oppose summary judgment only when it presents definite, competent evidence to rebut the motion. Neither the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN3[] **Antitrust & Trade Law, Sherman Act**

In complex antitrust cases, summary judgment should be used sparingly, unless the record is clear that the antitrust claims cannot succeed. If the claims cannot succeed, then judicial administration is served better by disposition prior to trial.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN4[] **Clayton Act, Claims**

Section 4 of the Clayton Act creates a right of action for any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. The United States Supreme Court has interpreted this to mean that for a private plaintiff to have a right of action under § 4, the plaintiff must prove the existence of antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. In other words, it is not enough for a plaintiff to show injury in fact; the plaintiff must show injury that reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The purpose of the antitrust injury requirement is to ensure that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN5[] **Clayton Act, Claims**

The antitrust injury requirement can be understood as an element of a private plaintiffs standing to sue under § 4 of the Clayton Act. A showing of antitrust injury is a necessary but insufficient condition of antitrust standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN6[] **Standing, Clayton Act**

The United States Court of Appeals for the Seventh Circuit has stressed that ***antitrust law*** is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business. Several Seventh Circuit opinions have provided that to show antitrust injury, the plaintiff must show harm to consumers in the form of decreased output or increased prices. To this end, the antitrust injury doctrine requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. These consistent statements that antitrust injury is limited to decreased output and increased prices finds support in the United States Supreme Court's understanding of why Congress created a private right of action in antitrust cases. The legislative history of the language codified as § 4 of the Clayton Act shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN7[] **Bad Faith, Fraud & Nonuse, Fraud**

The United States Court of Appeals for the Seventh Circuit has stated that for purposes of standing, conduct that merely shifts a lawful monopoly into different hands has no antitrust significance, although it hurts the lawful owner of the monopoly power.

Energy & Utilities Law > Antitrust Issues > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Utility Companies > Liability

HN8[] **Energy & Utilities Law, Antitrust Issues**

If no consumer interest can be discerned even remotely in a suit brought by a competitor - if, a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers - a court is entitled to question whether a violation of ***antitrust law*** is being charged.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Private Actions, Standing**

The United States Supreme Court has rejected the view that competition between parties to acquire a natural monopoly is not protected by the antitrust laws because substitution of one competitor for another would not injure competition. Specifically, the Supreme Court has held that use of monopoly power to preclude competition to acquire a natural monopoly violates the Sherman Act. While ***antitrust law*** may be moving in the direction of being construed as a "pure" consumer protection measure, in the natural monopoly area, at least, the Supreme Court has not embraced this approach. The antitrust laws seek to protect competition, as well as to protect those activities that will promote competition. The antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest. Part of the problem with requiring a plaintiff to pinpoint just how the public is harmed by a short-circuited competitive process is that the plaintiff has never been given an opportunity to compete freely and win the monopoly. The fact that the precise impact of a defendant's conduct on the broad consuming public has remained unfocused does not prevent a finding that the antitrust laws have been violated.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

The so-called "essential facilities doctrine" imposes upon a firm controlling an essential facility - that is, a facility that cannot reasonably be duplicated and to which access is necessary if one wishes to compete - the obligation to make that facility available to competitors on nondiscriminatory terms. A refusal to deal in the context of an essential facility violates *15 U.S.C.S. § 2* because control of an essential facility can extend monopoly power from one stage of production to another, and from one market into another.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

To establish *15 U.S.C.S. § 2* liability under the essential facilities doctrine, the plaintiff must show: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

Essential for purposes of ***antitrust law***, means essential; it does not mean the most economical. Nor does it mean "best" or "preferable." A facility is not essential for purposes of establishing liability under the Sherman Act, *15 U.S.C.S. § 2*, and the essential facilities doctrine, even if it is widely preferred by consumers and producers in the market, as long as there is an alternative (albeit inferior) venue.

Antitrust & Trade Law > Sherman Act > Penalties

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Sherman Act, Penalties**

The offense of monopoly under the Sherman Act, *15 U.S.C.S. § 2*, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN14[] **Market Definition, Relevant Market**

Determining whether a relevant market exists for antitrust purposes involves a deeply fact- intensive inquiry. The boundaries of a market or submarket are determined 'by examining such practical indicia as industry or public recognition of the submarket [or market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Scientific Evidence > Standards for Admissibility

Evidence > Types of Evidence > Testimony > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses

HN15[] **Expert Witnesses, Daubert Standard**

The United States Supreme Court has held that reliability is the touchstone for expert testimony based on "scientific, technical, or other specialized knowledge." *Fed. R. Evid. 702*. As such, the court must act as a gatekeeper to ensure that scientific testimony is supported by appropriate validation -- i.e., good grounds, based on what is known. The Supreme Court has extended this gatekeeping function to all expert testimony.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN16[] **Regulated Practices, Market Definition**

Though studies based on cross-elasticities of demand are certainly helpful in identifying a relevant market, they are not essential to demonstrating the existence of a relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN17[] **Sherman Act, Claims**

The United States Supreme Court has characterized the second element of a *15 U.S.C.S. § 2* claim as the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN18[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Firms "intend" to do all the business they can, to crush their rivals if they can. Intent to harm without more offers too vague a standard in a world where executives may think no further than "Let's get more business." Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms cut price unaware of what they are doing; price reductions are carried out in pursuit of sales at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive, without understanding the link among prices, your firm's success, and other firms' distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent," they run the risk of penalizing the motive forces of competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN19[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Supreme Court has found that intent should not be a basis for liability in predatory pricing cases. Rather the court favors a test that looks at the firm's possibility of recouping its profits from cutting prices.

Contracts Law > Personal Property > Personalty Leases > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN20[] **Personal Property, Personalty Leases**

The United States Court of Appeals for the Seventh Circuit has said that when it comes to liability under the Sherman Act, *15 U.S.C.S. § 2*, if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors is irrelevant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

HN21[] **Monopolies & Monopolization, Actual Monopolization**

Intent is relevant to the offense of monopolization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Monopolies & Monopolization, Actual Monopolization**

The "intent" to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly. Indeed, the goal of any profit-maximizing firm is to obtain a monopoly by capturing an ever increasing share of the market. Virtually all business behavior is designed to enable firms to raise their prices above the level that would exist in a perfectly competitive market. Economic rent -- the profit earned in excess of the return a perfectly competitive market would yield -- provides the incentive for firms to engage in and assume the risk of business activity. Monopolies achieved through superior skill are no less intentional than those achieved by anticompetitive means, so the intent relevant to a claim under the Sherman Act, 15 U.S.C.S. § 2, is only the intent to maintain or achieve monopoly power by anticompetitive means. Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN23[] Monopolies & Monopolization, Actual Monopolization

Conduct that tends to exclude competitors may survive antitrust scrutiny if the exclusion is the product of a "normal business purpose," for the presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process. But whether the defendant had "valid business reasons" for its conduct is a question of fact. And the trier of fact can look to the defendant's intent to determine whether its conduct had a purpose other than excluding competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN24[] Monopolies & Monopolization, Actual Monopolization

When courts consider the "intent" of a firm charged with monopolization, they look not to whether the firm intended to achieve or maintain a monopoly, but to whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively. Did the firm engage in the challenged conduct for a legitimate business reason? Or was the firm's conduct designed solely to insulate the firm from competitive pressure? Intent is relevant, then, because intent determines whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive." When courts speak of a firm's intent in a monopolization case, they refer to the legitimacy of the firm's conduct as measured by its intended effect on the competitive process.

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN25[] Summary Judgment, Partial Summary Judgment

Summary judgment is not contemplated or authorized for any portion of a claim less than the whole.

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

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

HN26[] Contract Conditions & Provisions, Conditions Precedent

A letter of intent is unenforceable as a contract when it specifically contemplates a later agreement as a condition precedent to a binding contract.

Contracts Law > Contract Conditions & Provisions > General Overview

HN27[] **Contracts Law, Contract Conditions & Provisions**

The parties' intent determines whether a letter of intent is an enforceable contract.

Contracts Law > Contract Conditions & Provisions > General Overview

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > Standards of Care

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Breach > General Overview

HN28[] **Contracts Law, Contract Conditions & Provisions**

A party might breach its contractual obligation to bargain in good faith by unreasonably insisting on a condition outside the scope of the parties' preliminary agreement, especially where such insistence is a thinly disguised pretext for scotching the deal because of an unfavorable change in market conditions.

Contracts Law > Contract Conditions & Provisions > General Overview

HN29[] **Contracts Law, Contract Conditions & Provisions**

The full extent of a party's duty to negotiate in good faith can only be determined from the terms of the letter of intent itself.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN30[] **Summary Judgment, Burdens of Proof**

Because a parties compliance with a contractual obligation of good faith is a question of fact, where compliance with this obligation is genuinely disputed, it can be resolved only at trial.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Lost Profits

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

HN31[] **Foreseeable Damages, Lost Profits**

Under Illinois law, as a general rule, a new business cannot recover lost profits. This rule appears to be a specific application of the general rule that speculative damages are not recoverable. There are, however, exceptions to the rule.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN32[] **Intentional Interference, Defenses**

Under the competitive privilege rule as applied to tortious interference claims, the privilege to engage in business and to compete allows one to divert business from one's competitors generally as well as from one's particular competitors provided one's intent is, at least in part, to further one's business and is not solely motivated by spite or ill will. But a defendant is entitled to the protection of this privilege only if it has not employed a wrongful means or is not motivated solely by malice or ill will.

Counsel: **[**1]** For JAMSPORTS AND ENTERTAINMENT, LLC, plaintiff: Bruce S. Sperling, Greg Shinall, Robert David Cheifetz, Thomas David Brooks, Sperling & Slater, Chicago, IL., James David Roberts, Piper Rudnick LLP, Chicago, IL., Jeffrey Singer, Segal, McCambridge, Singer & Mahoney, Ltd., Chicago, IL., Heather Elaine Ross, Legal Assistance Foundation of Chicago, Chicago, IL., Phillip Mark Crane, Paul E. Wojcicki, Segal, McCambridge, Singer & Mahoney, Ltd., Chicago, IL., Margaret Egan Lawler, Piper Rudnick LLP, Chicago, IL.

For PARADAMA PRODUCTIONS, INC. dba AMA Pro Racing, defendant: Steven F. Pflaum, Sandra A. Muhlenbeck, Matthew Boyd Steffens, McDermott, Will & Emery LLP, Chicago, IL., Kevin L Shoemaker, Shoemaker, Winkler, Howarth & Taylor, LLP, Columbus, OH., Timothy J Owens, Owens & Krivda CO., L.P.A., Columbus, OH.

Judges: MATTHEW F. KENNELLY, District Judge.

Opinion by: MATTHEW F. KENNELLY

Opinion

[*827] **MEMORANDUM OPINION AND ORDER**

MATTHEW F. KENNELLY, District Judge:

This case involves the promotion of Supercross, a championship dirt track stadium motorcycle racing. JamSports and Entertainment, LLC, a sporting events promoter, sued Paradama Productions, Which does business as AMA Pro Racing, **[**2]** for allegedly breaching a contract that would have given JamSports the right to produce and promote the AMA Supercross Series for 2003-2009. [1] JamSports also alleges that by entertaining a competing proposal from a subsidiary of Clear Channel Communications while negotiations were ongoing with JamSports and by imposing conditions for approval that had not been discussed with JamSports, AMA Pro breached a written

[1] "AMA" stands for the American Motorcyclist Association.

agreement to negotiate with JamSports exclusively and in good faith. JamSports also has Sued Clear Channel Communications and two subsidiaries (all of which will be referred to as Clear Channel) for tortious interference with contract for allegedly enticing AMA Pro to contract with Clear Channel to produce the AMA Supercross Series for the 2003-2009 seasons. Finally, JamSports alleges that Clear Channel's methods for obtaining the AMA contract constituted violations of *§§ 1and 2* of the Sherman Act.

More than a year ago, the Clear Channel defendants **[**3]** moved to dismiss JamSports' amended complaint. The Court dismissed Counts 9 and 10, which raised antitrust market allocation claims. *JamSports and Entertainment, LLC, v. Paradama Productions; Inc., 2003 U.S. Dist. LEXIS 6100, No. 02 C 2298, 2003 WL 1873563, at *14 (N.D. Ill. Apr. 15, 2003)*. The Court also dismissed Counts 5, 7, 11, 13 and 14 to the extent that they alleged monopolization or monopoly leveraging in a geographic submarket, as opposed to a national market for the promotion of Supercross. *2003 U.S. Dist. LEXIS 6100, 2003 WL 1873563, at *8, * 13*. JamSports then amended its complaint for a second time and restated Counts 5, 7, 9, 10, 11, 13 and 14. AMA Pro argues that the Court should dismiss Counts 9 and 10 of the Second Amended Complaint. These claims are identical to claims we dismissed in the Amended Complaint, and for this reason the Court dismisses them for the reasons previously stated. Clear Channel argues that Counts 7, 8, 11, 13 and 14 no longer remain in the case either because they allege monopolization of geographic submarkets only. Clear Channel Mot. for Summ. J. at n.2. JamSports has failed to respond to this argument. After reviewing the Second Amended Complaint, the Court **[**4]** agrees with Clear Channel that Counts 7, 8, 11, 13 and 14 are based on the geographic Submarket theory that we have rejected. Therefore, those Counts are dismissed and are no longer a part of this case.

Clear Channel now moves for summary judgment on all of JamSports' remaining claims. AMA Pro seeks summary judgment on the breach of contract claims. JamSports seeks summary judgment on two issues that are part of its antitrust claims and on its breach of contract claims against AMA Pro. For the reasons stated **[*828]** below, the Court denies JamSports' motion regarding the antitrust claims and grants in part and denies in part the remaining motions.

Background

AMA Pro began sanctioning supercross races in the 1970s. Clear Channel entered the supercross promotion market through acquisitions. In 1996, PACE Motor Sports promoted all but one of the races in the AMA-sanctioned supercross series. SFX Entertainment bought PACE in 1998, and Clear Channel acquired SFX in 2000, With the acquisition of PACE and SFX, Clear Channel succeeded to their contract to produce the AMA-sanctioned supercross series for the 1997 to 2002 seasons. The contract required Clear Channel to hold the races from January **[**5]** to May. Since 1998, sixteen supercross races have been held each year, except for in 2001, when only fifteen races were held.

In May 1999, AMA Pro and Clear Channel began negotiating a new promotion contract for the 2003 season and beyond. While these negotiations were in process, AMA Pro began discussions with three other promoters, including JamSports in 2001. On November 2, 2001, AMA Pro and JamSports signed a letter of intent regarding the promotion of the AMA- sanctioned supercross series for the 2003-2009 Seasons. The portions of the letter of intent that are relevant to the Court's decision read as follows:

> AMA Pro Racing, owner of the Supercross Series, and JamSports hereby express their intent to enter into an agreement to promote AMA Supercross events and undertake related sales and marketing matters....
>
> 1. Framework. AMA Pro Racing and JamSports shall agree to produce and promote nor less than fourteen (14) and up to a mutually agreed upon number of AMA Supercross events per season (currently January 1 through the first week of May) for a seven (7) year period beginning January 1, 2003, with an opportunity to extend the term based on criteria such as operating issues, **[**6]** financial issues, brand development and event attendance and such other criteria as to be further clarified by the parties hereto....
>
> 12. Confidentiality. AMA Pro Racing and JamSports each agree that the terms of this letter agreement, and, in particular, its financial terms, are private and confidential. Neither party hereto Shall divulge the terms of this

> letter of intent to any other persons in any manner, except each party may so inform its attorneys, accountants and financial consultants as reasonably necessary for the performance of its obligations hereunder and under the Promotion Agreement, who, however, shall be instructed not to divulge its terms to any other persons except and unless as they may be finally required by law or court process. In the event of a breach of the foregoing, the damaged party may seek recovery of all damages as allowed by law, including, without limitation, injunctive relief.
>
> 13. Exclusivity. Each of the parties agrees that for a period of ninety (90) days after the date this letter is fully executed by the parties hereto and for a period of [sic], AMA Pro Racing and JamSports shall negotiate exclusively and in good faith with one another, **[**7]** and neither party shall enter into any discussion or negotiations with any third party with respect to the subject matter hereof. If a party hereto shall receive any offer from a third party with respect to the subject matter hereof, the receiving party shall promptly notify the other party hereto of the offer, the name of the offeror and the terms thereof. The. **[*829]** parties shall use their best efforts, negotiating in good faith, to enter into the Promotion Agreement within thirty (30) days from the date this letter is fully executed by the parties hereto.
>
> 14. Final Contract. Except for the obligations set forth in Sections 12, 13 and 16, this letter of intent is not binding in any way upon the parties hereto. This letter of intent is expressly conditioned upon the parties entering into the Promotion Agreement. JamSports' counsel shall prepare and submit to AMA Pro Racing, and its counsel a draft of the Promotion Agreement as soon as is reasonably possible after the date upon which this letter of intent is fully executed by the parties hereto.
>
> 15. Closing. The transaction contemplated hereby shall close no later than ninety (90) days from the date this letter is fully executed **[**8]** by the parties hereto and at such time and place as the parties hereto shall agree upon, subject to the satisfaction or waiver of any conditions precedent to closing which are agreed upon by the parties.
>
> 16. Publicity. Neither party hereto shall issue any press releases or other announcements regarding this letter of intent or the transaction contemplated hereby unless such release or announcement first shall be approved by the other party or shall be: required by law.

2d Am. Compl., Ex. A.

Three days after signing the letter of intent, AMA Pro sent a letter to facilities managers advising them that AMA Pro "has entered into an agreement with JamSports, a division of Chicago-based Jam Productions, for the exclusive promotion of AMA Supercross events for the 2003-2009 seasons." 2d Am. Compl., Ex. B. The letter "authorized JamSports and/or Jam Productions to negotiate with your facility, on an exclusive basis, regarding the organization and production of future AMA Supercross events." *Id*. The following day, AMA Pro announced on its website that it had "selected JamSports and Entertainment as its new promoter partner for the AMA U.S. Supercross Championship Series commencing **[**9]** with the 2003 seasons and extending through the 2009 season." 2d Am. Compl., Ex. C. The website further explained that "the decision was made by the Board of Directors of AMA Pro Racing after evaluating proposals from several companies, including Clear Channel Entertainment, the current promoter of AMA Supercross events." *Id*. On November 21, 2001, AMA Pro's attorney, Kevin Shoemaker, sent JamSports' attorney, Vicki Baue, a draft of the sanctioning agreement, accompanied by a letter stating he had provided "a copy of this agreement to Tim Owens, counsel for the American Motorcyclist Association ("AMA")," stating that, "the final agreement is subject to approval by Timand the AMA." Defs.' Ex. Jam 23. Owens and AMA Pro CEO Scott Hollingsworth were "cc'd" on the letter.

In late December 2001, AMA Pro's website announced that the 2003 AMA supercross series would include events in New York, Los Angeles, Atlanta, Dallas, Houston, Phoenix, Indianapolis, Las Vegas, Washington, D.C., San Francisco, Boston, New Orleans, Charlotte, Tampa and Daytona. 2d Am. Compl., Ex. F. In the online press release, Hollingsworth was quoted as saying:

> I am delighted With the new relationship with JamSports. **[**10]** The next era of growth Of AMA Supercross is dependent upon live television and nationwide markets. We were excited to announce this month a live

> television package with Speed Channel, and now we have markets in place that will ensure AMA Supercross is seen by fans coast-to-coast.

[*830] Id. John Farris, AMA Pro Racing's vice president of commercial development, stated:

> The announcement of these markets comes as a result of extensive conversations with our participants our television parmers who help us promote the series and its stars, and current and prospective sponsors of both the Championship and the teams. . . . In 2003, we will deliver a superior marketing platform that will take AMA Supercross across the country into a great list of major markets.

Id.

Clear Channel, however, did not abandon its effort to keep the supercross series. According to the minutes from the November 12, 2001, meeting of the AMA Pro Board of Directors, Clear Channel had sent letters to all the Board members "just prior to the meeting" indicating it wanted to continue negotiations for the AMA contract. Pl.'s Ex. S at 2. "Mr. Hollingsworth reminded the Board that further negotiations **[**11]** with CCE were prohibited by the terms of a letter of intent between AMA Pro and JamSports. Those terms required the AMA not to talk with any other parties on this subject until either an agreement had been reached or a 90- day confidentiality period had elapsed." Id. But a week later, Clear Channel sent a proposal to P.J. Harvey, a member of AMA Pro's Board, accompanied by a letter, which stated in part:

> On November 9, 2001, we sent a letter to you expressing our interest in continuing negotiations with the AMA concerning a long-term agreement, provided that the AMA is still in a position to do so. As of this date, we have not received any response from the AMA, and we are uncertain as to whether the lack of response indicates an unwillingness to continue our negotiations.
>
> In our last communication with you, we indicated Clear Channel Entertainment - Motor Sports division's willingness to pay the increased financial consideration that you last requested on behalf of the AMA. In order to further clarify our position, I have revised the Proposal that was provided to you on October 5, 2001 to indicate the terms that Clear Channel is willing to accept. The revised Proposal incorporates **[**12]** all of the language changes requested by you along with confirmation of the requested increase in financial consideration. The Proposal, which has been signed by me on behalf of Clear Channel Entertainment - Motor Sports' division, is enclosed herein for your review.
>
> You should understand that we are only submitting this Proposal to you if the AMA is in a position to consider it. If not, please disregard the Proposal:
>
> While we are hopeful that there remains a window of opportunity for us to attempt to reach an agreement with the AMA we do not want to interfere with any binding agreement that the AMA may have reached with Jam or any third parties. Thus our Proposal is contingent upon AMA being free of contractual obligations that would restrict its ability to deal with Clear Channel at this point.

AMA-CCE Ex. 30. The letter also indicated that Clear Channel intended to produce a supercross series with or without AMA's sanctioning. The parties dispute whether Clear Channel knew at the time about the exclusivity clause of AMA Pro and JamSports' letter of intent.

When AMA Pro and JamSports failed to reach an agreement within the 90 day deadline set by the letter of intent, **[**13]** AMA Pro sent JamSports a letter extending the deadline to 12 a.m. February 6, 2002 and stating that "we look forward to continuing **[*831]** the good faith efforts both parties have shown in attempting to conclude the agreement contemplated under the Letter of Intent," 2d Am. Compl., Ex. G. On February 5, 2002, the AMA Pro Board of Directors met several times to discuss the proposed promotion agreement with JamSports. According to the minutes of the meeting, when the board convened for the first time that day, two board members - Harvey and Rick Gray - expressed their dissatisfaction with JamSports' insistence that the promotion agreement include a provision making its $ 3 million up-front payment to AMA Pro refundable even though the letter of intent described the $ 3 million payment as non-refundable. Defs.' Ex. Jam 55. Harvey and Gray said "they could not consider approval of the agreement as long as such language was included." Id. Another board member discussed that Clear Channel had obtained sanctioning of a supercross series from the Federation Internationale de Motocyclisme ("FIM") and Dorna, the firm that promotes FIM-sanctioned races. Id. The members then voted on accepting the revised **[**14]** language to the JamSports' agreement, but the motion was defeated 3 to 2. Id. "The remaining Board members directed Mr. Hollingsworth to go back to the negotiating table with JamSports and propose a deal based on the Letter of Intent that would include no refundability provision." Id. The meeting then adjourned.

After the meeting adjourned, Hollingsworth spoke with JamSports. As a result of that conversation, JamSports sent Hollingsworth a letter dated February 5, stating: "You have informed us of the requirement by your Board that the $ 3 million advance must be nonrefundable. We agree to a nonrefundable $ 3 million advance with terms consistent with the Letter of Intent." 2d Am. Compl., Ex. H. On the evening of February 5, the board reconvened. According to the minutes of the executive session of the meeting, one of the directors advised the others

> that the newly formed alliance between Clear Channel [("CCE")], Dorna and the FIM had serious' implications on the survivability of a JamSports-promoted AMA Supercross series running in direct competition with a CCE-promoted supercross series. He reminded the Directors that Dorna owns and operates the G.P. Road Race **[**15]** World Championships, which are series of critical importance to the motorcycle factories. He said that the close working relationship between Dorna and the manufacturers in that series could prompt a decision by the manufacturers, at the factory level, to compete in the CCE Supercross series rather than in the AMA/JamSports series. He asked the Directors if, given that possibility, they really wanted to attempt a Supercross series without participation by the OEMs, $ 3 million cash influx or not. He said that a Supercross series without OEM participation would be disastrous for the AMA and for the sport of motorcycling in general.

Defs.' Ex. Jam 56. The minutes reflect that the "Directors agreed that this was a serious issue warranting further discussion pending receipt of information arising from" a meeting the next day with representatives from Clear Channel, Dorna and the FIM. Id.

The meeting went back into regular session, at which time Hollingsworth informed the board that "he had gotten verbal confirmation from Jerry Mickelson of JamSports to agree to language that was more consistent with the Letter of Intent. This included the removal of all references to a refund **[**16]** of the $ 3 million up-front payment, as well as elimination of the Revised Marketing Plan and the Termination Clause." Defs.' Ex. Jam 57. The AMA's lawyer, Owens, and AMA Pro's lawyer; Shoemaker, **[*832]** joined the teleconference. After discussing whether AMA wanted to vote on the revised contract before the midnight deadline expired or wait for JamSports to make the changes in writing, the board moved to "call upon JamSports to provide, in writing, specific language that removed the aforementioned provisions and clauses, and that the Board agree to deliver a definite, final decision to JamSports in no more than 7 days." Id. When the clock struck midnight on February 6, an agreement between JamSports and AMA Pro had not been signed.

On February 8, JamSports' attorney sent a letter to AMA Pro reiterating JamSports' agreement that its $ 3 million advance to AMA Pro would be non-refundable and attaching a revised promotion agreement reflecting the change. 2d Am. Compl., Ex. I. But on February 6, AMA Pro had contacted Clear Channel to reopen negotiations, which Clear Channel agreed to do after receiving written assurance from AMA Pro that it was free to negotiate. Clear Channel sent a proposal **[**17]** to AMA Pro on February 14. At the AMA Pro board's February 14 meeting, the acting chairman asked the group to consider Clear Channel's latest proposal. Defs.' Ex. Jam No. 60. The group then debated the merits of the Clear Channel proposal in comparison with JamSports' proposal. Id. The board voted to "forward both the CCE and the JamSports proposals to the AMA Board, accompanied by a study of the pros and cons of both, with a recommendation by AMA Pro to ratify, the JamSports proposal." Id.

After the AMA Board met on February 16, it directed AMA Pro to enter into an agreement with Clear Channel. On April 12, 2002, AMA Pro announced on its website that it had signed a promotion agreement with Clear Channel for the 2003-2009 seasons. 2d Am. Compl., Ex. J. JamSports alleges that Clear Channel wrested the AMA Pro contract away from it by: requiring venues hosting Clear Channel supercross races to agree not to book other motor sports events within 60 to 90 days of a Clear Channel event; offering original equipment manufacturers ("OEMs") and supercross star athletes financial incentives for participating in Clear Channel's series; and seeking endorsement from an alternative sanctioning **[**18]** body (FIM) that could limit the AMA's sanctioning activities.

Analysis

HN1[] Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. HN2[] The Court evaluates admissible evidence in the record in the light most favorable to the nonmoving party. *Bennett v. Roberts., 295 F.3d 687, 694 (7th Cir. 2002)*. The Court's "function is not to weigh the evidence but merely to determine if 'there is a genuine issue for trial.'" Id. (citation omitted). "The nonmovant will successfully oppose summary judgment only when it presents 'definite, competent evidence to rebut the motion.'" *Vukadinovich v. Bd. of Sch. Trs. of N. Newton Sch. Corp., 278 F.3d 693, 699 (7th Cir. 2002)* (citation omitted). "Neither the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary **[**19]** judgment." *Chiaramonte v. FashiOn Bed Group, Inc., 129 F.3d 391, 395 (7th Cir. 1997)* (citations and internal quotation marks omitted). However, HN3[] "in complex antitrust cases, summary judgment should be used sparingly, unless the record is clear that the antitrust claims cannot succeed. If the claims cannot succeed, **[*833]** then judicial administration is served better by disposition prior to trial." *Wigod v. Chicago Mercantile Exchange, 981 F.2d 1510, 1514-15 (7th Cir. 1992)* (citations omitted).

Antitrust Claims

Clear Channel raises two general arguments for why JamSports cannot succeed on its antitrust claims. First, it argues that JamSports' cannot show that Clear Channel's allegedly anticompetitive behavior has caused the type of injury that the *Clayton* and Sherman Acts were intended to combat. Second, Clear Channel argues the claims based on the essential facilities doctrine (all the remaining antitrust claims except Count 15) must fail because the stadiums to which JamSports' access was blocked were not essential facilities. Clear Channel also argues it is entitled to summary judgment on Count 15 because JamSports cannot show that Clear Channel's conduct **[**20]** was anticompetitive. We will review each of Clear Channel's arguments in turn. 1.

Antitrust Injury

HN4[] Section 4 of the Clayton Act creates a right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. The Supreme Court has interpreted this to mean that for a private plaintiff to have a right of action under *§ 4*, the "plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)* (emphasis in original; quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977))*. In other words, it is not enough for a plaintiff to show injury in fact; the plaintiff must show injury that "reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp., 429 U.S. at 489*. The purpose of the antitrust **[**21]** injury requirement is to ensure that "the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief." *Atlantic Richfield Co., 495 U.S. at 342*. HN5[] The antitrust injury requirement can be understood as an element of a private plaintiffs standing to sue under *§ 4* of the Clayton Act. *Midwest Gas Services, Inc. v. Indiana Gas Co., 317 F.3d 703, 710 (7th Cir. 2003)* (citing *Brunswick Corp., 429 U.S. at 489*). See also, e.g., *City of Pittsburgh v. West Penn PowerCo., 147 F.3d 256, 265 (3d Cir. 1998)* ("[A] showing of antitrust injury is a necessary but insufficient condition of antitrust standing.").

HN6[] The Seventh Circuit has "stressed that ***antitrust [law***] is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business." *Ehredt Underground, Inc. v. Commonwealth Edison Co., 90 F.3d 238, 240 (7th Cir. 1996)* (citations omitted). Clear Channel reads this to mean that **[**22]** to show antitrust injury, the plaintiff must show harm to consumers in the form of decreased output or increased prices. Several Seventh Circuit decisions authored by Judge Easterbrook adopt this definition of antitrust injury. Writing for the court, Judge Easterbrook has explained that "the antitrust injury doctrine of *Atlantic Richfield Co. . . . ; Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*; and BrunsWick Corp . . . . ; requires every plaintiff to show that its loss comes **[*834]** from acts that reduce output or raise prices to consumers." *Chicago Professional Sports Ltd.Partnership v. Nat'l Basketball Ass 'n, 961 F.2d 667, 670 (7th Cir. 1992)* (citations omitted). See also *U.S. Gypsum Co. v. Indiana Gas Co., 350 F.3d 623,626-27 (7th Cir. 2003)*; *Stamatakis Industries, Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992)*; *Ball Memorial Hospital Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1334 (7th Cir. 1986)*. Judge Easterbrook's consistent statements that antitrust injury is limited to decreased output and increased prices finds support in the Supreme Court's **[**23]** understanding of why Congress created a private right of action in antitrust cases. The Court has explained that the legislative history of the language currently codified as *§ 4 of the Clayton Act* "shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 530, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (footnote Omitted).

Clear Channel argues that JamSports cannot show that reduced output or increased prices resulted from Clear Channel's conduct because the number of promoters of the AMA-sanctioned supercross series has remained unchanged. Clear Channel reasons as follows: JamSports claims Clear Channel kept it out of the market for promoting the AMA, sanctioned supercross series; because there is only one promoter of the AMA-sanctioned series, JamSports was attempting to replace Clear Channel as the sole promoter of the series; because there would be only one promoter of that series whether Clear Channel or JamSports won the **[**24]** AMA Pro contract, the award of the contract had no effect on output or prices. Clear Channel contends that as a matter of law, no antitrust injury can be found when one monopolist prevents another firm from replacing it as the monopolist.

This legal theory has support in the Seventh Circuit's cases. ***HN7***[] The Seventh Circuit has stated that conduct that "merely shifts a lawful monopoly into different hands.., has no antitrust significance, although it hurts the lawful owner of the monopoly power." *Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 266 (7th Cir. 1984)*. In Riegel Textile Corp., the plaintiff claimed that the defendant had violated *§ 2 of the Sherman Act* by fraudulently patenting the antistatic yarn that the plaintiff had invented and reaping the benefits of the patent-created monopoly to which the plaintiff thought it was entitled. Judge Posner said the court could not find the "consumer interest" in the case because consumers would not care who held the patent and thereby became a monopolist in the antistatic yarn market. The court concluded that ***HN8***[] "if no consumer interest can be discerned even remotely in a suit brought by a competitor - if, as here, **[**25]** a victory for the competitor can confer no benefit, certain or probable, present or future, on consumers - a court is entitled to question whether a violation of ***antitrust law*** is being charged." *Id. at 266-67* (citing Frank Easterbrook, The Limits of Antitrust, *63 Tex. L. Rev. 1, 33-39 (1984)*). See also *West Penn Power Co., 147 F.3d at 269* (merger of electric companies did not cause antitrust injury because regulation had prevented competition in the market for electricity prior to the merger).

But a case decided by the Seventh Circuit two years after Riegel Textile Corp. expressly rejects the legal theory on which Clear Channel's argument is based. In *Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986)*, the Seventh Circuit was asked to determine whether anticompetitive **[*835]** conduct in the vying for a natural monopoly could cause antitrust injury. Fishman involved the sale of the Chicago Bulls basketball franchise. The owner of the Bulls agreed to sell the team to the plaintiffs, but the NBA Board of Governors scuttled the deal when a competing bidder, who owned the Chicago Stadium, said that the Bulls could not play in **[**26]** the Stadium if sold to the plaintiffs. As a result, the defendants were able to buy the Bulls. After a bench trial, the judge concluded that the defendants had violated *§§ 1and 2* of the Sherman Act. On appeal, the defendants argued that the competition between the parties ***HN9***[] "to acquire a natural monopoly was not protected by the antitrust laws because substitution of one competitor for another would not injure competition." *Id. at 532*. The court rejected this view. Relying on *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*, the court said "use of monopoly power to preclude [competition to acquire a natural monopoly] violated the Sherman Act." *Fishman, 807 F.2d at 533*. The court similarly rejected the defendants' claim that "even if some natural monopoly cases are within the purview of the Sherman Act, this one is not because the plaintiffs have failed to articulate just how the ultimate consumers - Chicago fans - will be hurt by this violation," Id. at 535. The court explained:

> We have found no cases (and none has been cited to us) in which the Supreme Court has put the burden **[**27]** on a plaintiff to isolate and demonstrate the consumer impact of a particular purported antitrust violation not directed at the consumer level. While ***antitrust law*** may be moving in the direction of being construed as a "pure" consumer protection measure, cases such as Otter Tail strongly suggest that in the natural monopoly area, at least, the Supreme Court has not embraced this approach. The Court has instead stressed that the antitrust laws seek to protect competition, as well as to protect those activities that will promote competition. The antitrust laws are concerned with the competitive process, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest.

Id. at 536 (citations and footnotes omitted; emphasis in original). The court further stated that "the Court has never given us to believe that anything save unfettered competition is the key to consumer well-being" and that "part of the problem with requiring the plaintiff to pinpoint just how the public is harmed by a short-circuited competitive process is **[**28]** that the plaintiff has never been given an opportunity to compete freely and win the monopoly." Id. at 537-38 (citation omitted). The court distinguished Riegel Textile Corp. on the ground that "there would never have been competition between Brunswick or Riegel, with or without Riegel's misconduct" so the competitive process was never jeopardized. Id. at 538. In conclusion, the court stated that "the fact that the precise impact of defendants' conduct on the broad consuming public has remained unfocused here does not prevent a finding that the antitrust laws have been violated." Id

Judge Easterbrook dissented in Fishman, explaining that the defendant's "choice of tactics had no effect on consumers. ***Antitrust law*** condemns results harmful to consumers; it condemns bad means to the extent they have a tendency to bad results. Bad means that injure only business rivals - that is to say, business torts - are outside the scope of ***antitrust law***." Fishman, 807 F.2d at 564 (Easterbrook, J., dissenting in part) (emphasis in original). Clear Channel argues **[*836]** that the portion of Fishman discussed above is no longer good law **[**29]** because Judge Easterbrook's dissent in Fishman has been cited by the majority in subsequent cases. For example, in Flip Side Productions, Inc. v. Jam Productions, Inc., 843 F.2d 1024 (7th Cir. 1988), the court quoted Judge Easterbrook's Statement that "'injury to the consumers is therefore an essential ingredient of liability'" under §§ 1and 2 of the Sherman Act. Id. at 1032 (quoting Fishman, 807 F.2d at 568 (Easterbrook, J., dissenting in part)). And, as discussed above, Judge Easterbrook's position that antitrust injury is defined by decreased output or increased prices has certainly prevailed in the Seventh Circuit's more recent decisions discussing antitrust injury. But the Seventh Circuit has never explicitly overruledFishman, and we are reticent to find that it has done so sub silento. As Judge Flaum has noted:

> Whether harm to consumers is the sine qua non of antitrust injury is an issue over which there is currently a split in this circuit. Some of our cases hold that a plaintiff, to satisfy the antitrust injury requirement, must demonstrate that the challenged practice causing him harm also harms consumers **[**30]** by reducing output or raising prices.Stamatakis Indus., Inc., 965 F.2d [at 471]; Chicago Professional Sports Ltd. Partnership, 961 F.2d [at 670]. Others hold that application of the antitrust laws "does not depend in each particular case upon the ultimate demonstrable consumer effect." Fishman, 807 F.2d [at 536]; see also Chicago Professional Sports, 961 F.2d at 677 (Cudahy, J., concurring).

Banks v. NCAA, 977 F.2d 1081, 1097 (7th Cir. 1992) (Flaum, J.; concurring in part and dissenting in part). Ultimately however, we need not determine whether the Seventh Circuit would follow Fishman today or otherwise try to reconcile Fishman with the court's more recent cases, because a jury could find Clear Channel's conduct resulted in antitrust injury even under the narrower definition urged by Clear Channel.

If Clear Channel were correct that JamSports claims only that it was prevented from replacing Clear Channel as the monopolist in the relevant market, then whether JamSports could survive summary judgment would depend on whether Fishman was still good law. But that is an unfairly crabbed characterization of JamSports' theory **[**31]** of the case. Though it is true that JamSports did not continue to promote its supercross schedule after it lost the

AMA's endorsement, it is inaccurate to say that JamSports was trying to enter only the business of promoting the AMA-sanctioned supercross series. Rather, JamSports contends that it saw the AMA contract as a way of entering the wider market for promoting supercross events; it "was credibility, an established portal." Tr. of Oral Argument (Aug. 9, 2004) at 35. Though JamSports certainly would have liked for Clear Channel to stop promoting supercross entirely if JamSports won the AMA contract, a jury could find that Clear Channel would have promoted a supercross series to compete with JamSports' AMA-sanctioned series. [2] More pointedly, a reasonable jury could find that had Clear Channel not prevented JamSports from promoting the AMA-sanctioned supercross series, both firms would have promoted competing series, resulting **[*837]** in increased output and, potentially, decreased ticket prices. Accordingly, Clear Channel's conduct reasonably could be found to have harmed the competitive process (the Fishman definition of antitrust injury) and decreased output or increased prices **[**32]** (Clear Channel,s proposed definition of antitrust injury). Clear Channel has thus failed to show that JamSports cannot prove antitrust injury.

2. Essential Facilities

Counts 5, 6 and 12 of the Second Amended Complaint are based on the essential facilities doctrine. The Seventh Circuit has explained that

> ***HN10***[] the so-called "essential facilities doctrine" imposes upon a firm controlling an essential facility - that is, a facility that cannot reasonably be duplicated and to which access is necessary if one wishes to compete - the obligation to make that facility **[**33]** available to competitors on nondiscriminatory terms. A refusal to deal in the context of an essential facility violates *section 2* because control of an essential facility can "extend monopoly power from one stage of production to another, and from one market into another."

Fishman, 807 F.2d at 539 (citing *MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132 (7th Cir. 1983))*. ***HN11***[] "To establish liability under the essential facilities doctrine," the plaintiff must show: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications Corp., 708 F.2d at 1132-33* (citations omitted). Clear Channel argues that JamSports cannot satisfy any of the four elements necessary to establish an essential facilities case. Because the Court agrees with Clear Channel that JamSports has failed to show it was denied access to "essential" facilities, the Court need not inquire whether it can satisfy the remaining **[**34]** three-elements.

JamSports contends that Clear Channel denied it access to eleven venues: Edison Field (Anaheim), Rice-Eccles Stadium (salt Lake City), the Metrodome (Minneapolis), Bank One Ballpark (Phoenix); America's Center/Edward Jones Dome (St. Louis), Qualcomm Stadium (San Diego), Sam Boyd Stadium (Las Vegas), the Georgia Dome (Atlanta), Texas Stadium (Dallas), the Pontiac Silverdome (Detroit), and Reliant Stadium (Houston). JamSports and its expert witness, economist Robert Baade, argue these facilities taken together were essential to. promoting supercross. They contend that these facilities were preferred, by Clear Channel, AMA Pro and the OEMs that send teams to compete in supercross events because they are in communities with a proven fan base for supercross and are unlikely to be affected by inclement weather during the January through May supercross season. JamSports admits that no one facility is essential but argues that a combination of the above stadiums is essential to a profitable supercross series.

Clear Channel argues that even if it denied JamSports access to these stadiums, JamSports cannot prevail because these facilities are not essential to promoting supercross. **[**35]** Clear Channel challenges both the factual and legal assumptions on which JamSports and Baade's essential facilities arguments are based. As a factual matter, Clear Channel argues that the eleven facilities named by JamSports are not essential because they have substitutes. Both parties agree that the United States has at least 130 stadiums, not including speedways, that have a capacity of at least 35,000 spectators. The parties further agree that supercross events have **[*838]** been held in

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[2] Clear Channel contends that JamSports' expert witness has conceded that only one entity could survive promoting supercross. But what the expert actually said was that eventually a competitive market would resolve itself into a single series. This is not the same thing as saying competition could never occur. Even if the market were able to sustain competition for one year, that would benefit consumers by increased output during that year.

forty-three different venues in thirty-eight cities and thirty-two distinct metropolitan areas: Edison Field (Anaheim), the Georgia Dome (Atlanta), Turner Field (Atlanta), Rich Stadium (Buffalo), Memorial Stadium (Charlotte), Charlotte Motor Speedway (Charlotte), Browns Stadium (Cleveland), the Cotton Bowl (Dallas), Texas Stadium (Dallas), Daytona International Speedway (Daytona), Invesco Field (Denver), the Pontiac Silverdome (Detroit), Foxborough Stadium (Foxborough, Massachusetts), the Astrodome (Houston), Reliant Stadium (Houston), the RCA Dome (Indianapolis), Route 66 Motor Speedway (Joliet), Arrowhead Stadium (Kansas City), Sam Boyd Stadium (Las Vegas), Los Angeles Memorial Coliseum (Los Angeles), **[**36]** the Orange Bowl (Miami), Pro Player Stadium (Miami), the Metrodome (Minneapolis), Superdome (New Orleans), Giants Stadium (East Rutherford, New Jersey), Network Associates Coliseum (Oakland), the Oklahoma City Fairgrounds (Oklahoma City), the Citrus Bowl (Orlando), the Rose Bowl (Pasadena), JFK Memorial Stadium (Philadelphia), Bank One Ballpark (Phoenix), Pac Bell Park (San Francisco), Sun Devil Stadium (Tempe), Three Rivers Stadium (Pittsburgh), Sacramento Stadium (Sacramento), Rice-Eccles Stadium (Salt Lake City), Qualcomm Stadium (San Diego), Spartan Stadium (San Jose), the Kingdome (Seattle), the Edward Jones Dome (St. Louis), the Suncoast Dome (St. Petersburg), Alabama International Speedway (Talladega), and RFK Stadium (Washington, D.C.).

By our count, five of the metropolitan areas -Anaheim/Los Angeles, Atlanta, Dallas, Houston and Phoenix/Tempe - with venues from which JamSports claims to have been excluded had alternative venues where supercross races had been held. And even taking into account the problems inclement weather could pose to a series held during the winter, there are at least sixteen facilities [3] **[**38]** to which JamSports was not denied access that have hosted supercross **[**37]** races in the past and are either in warm-weather states or have domes. The Court also counts five stadiums [4] in cold-weather cities that have been used before and could be used during the last month of the supercross season when the weather has improved, even if the major league baseball season has started, because they do not house major league baseball teams. Furthermore, JamSports' expert Baade points out that there are seventeen domed stadiums [5] in the United States with seating capacity in excess of 35,000 -- and JamSports claims Clear Channel denied it access only to seven of them.

With so many venues that have been used for supercross events in the past, are located in communities with strong fan **[*839]** bases, and/or are relatively unaffected by weather, JamSports cannot show that it was denied access to facilities "essential" to its ability to put on a supercross series. JamSports' claim that it was denied access to essential facilities is further belied by the fact that as of January 24, 2002, it believed it had secured access for the 2003 season to the Georgia **[**39]** Dome (Atlanta), CMGI Field (Foxboro), Ericsson Stadium (Charlotte), the Cotton Bowl (Dallas), the RCA Dome (Indianapolis), Dodger Stadium (Los Angeles), Adelphia Coliseum (Nashville), Giants Stadium (East Rutherford), Network Associates Coliseum (Oakland), Sun Devil Stadium (Phoenix/Tempe), Safeco Field (Seattle), Raymond James Stadium (Tampa), and either FedEx Field or RFK Stadium (Washington, D.C.).

JamSports and Baade contend that the availability of substitutes does not necessarily defeat its essential facilities claim, because the facilities from which JamSports was allegedly barred were preferable to the facilities that were available to it. Clear Channel argues that JamSports and Baade's arguments are based on a misapprehension of the relevant law. The Court agrees. Accordingly to JamSports and Baade, the facilities to which Clear Channel denied JamSports access must be essential because Clear Channel has chosen repeatedly to hold its supercross

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[3] Turner Field (Atlanta), Memorial Stadium (Charlotte), the Cotton Bowl (Dallas), the Astrodome (Houston), the RCA Dome (Indianapolis), Los Angeles Memorial Coliseum, the Orange Bowl (Miami), Pro Player Stadium (Miami), the Superdome (New Orleans), Network Associates Coliseum (Oakland), the Citrus Bowl (Orlando), the Rose Bowl (Pasadena), Pac Bell Park (San Francisco), Sun Devil Stadium (Tempe), Spartan Stadium (San Jose) and the Suncoast Dome (St. Petersburg). The Court is not counting speedways or stadiums that are no longer in operation.

[4] Rich Stadium (Buffalo), Browns Stadium (Cleveland), Invesco Field (Denver), Arrowhead Stadium (Kansas City), and RFK Stadium (Washington, D.C.).

[5] The Astrodome (Houston), Texas Stadium (Dallas), the Superdome (New Orleans), the Silverdome (Detroit), the Carrier Dome (Syracuse), the Metrodome (Minneapolis), the RCA Dome (Indianapolis), Tropicana Field (St. Petersburg), the Georgia Dome (Atlanta), the Alamodome (San Antonio), Edward Jones Stadium (St. Louis), Bank One BallPark (Phoenix), Safeco Field (Seattle), Minute Maid Park (Houston), Miller Park (Milwaukee), Ford Field (Detroit) and Reliant Stadium (Houston).

series in them. This contention assumes that "essential" means "best," "most profitable" or "preferable." But that is not what essential means for purposes of ***antitrust law***. ***HN12***[] Essential means essential; it does not mean "the most economical. **[**40]** " *Midwest Gas Services, Inc., 317 F.3d at 714* (citing *Endsley v. City of Chicago, 230 F.3d 276, 283 (7th Cir. 2000))*. Nor does it mean "best" or "preferable." A facility is not essential even if it is widely preferred by consumers and producers in the market, as long as there is an alternative (albeit inferior) venue. In *Flip Side Productions v. Jam Productions, Ltd.,* Flip Side sued Jam (a related entity of JamSports) and Tempo, another promotion company, claiming they had excluded other concert promoters from producing shows at the facility then known as the Rosemont Horizon. Flip Side argued that even though it had access to the older International Amphitheatre and two newer venues, the Horizon was essential to the promotion of arena-level concerts in the Chicago area, because artists preferred to perform there and "the International Amphitheatre was more expensive and not suited for staging concerts in light of the fact that the 'Amphitheatre was considered a "toilet" by JAM itself.'" *Flip Side Productions, 843 F.2d at 1033*. The Seventh Circuit rejected this claim, reasoning that even if artists preferred to perform at the Horizon, at different **[**41]** times Flip Side had access to four other venues where concerts were held: the Ampitheatre, Pavilion, Chicago Stadium and Poplar Creek. *Id. at 1034*. Under the Seventh Circuit's reasoning in *Flip Side,* even if JamSports was denied access to the most desirable facilities, that is not enough to make out an essential facilities claim. Accordingly, the Court grants Clear Channel summary judgment on Counts 5, 6 and 12. [6] Because the Court previously dismissed Counts 7-11 and 13-14, of the antitrust claims, only Count 15 remains. [7]

[*840] *3. Monopolization*

In Count 15 of **[**42]** the Second Amended Complaint, JamSports alleges that Clear Channel monopolized the market for supercross promotion in violation of *§ 2 of the Sherman Act* by pressuring venues not to book JamSports' races, offering incentives to OEMs and athletes to participate in Clear Channel's series, seeking sanctioning from the FIM, and attempting to derail JamSports' deal with the Speed Channel, a cable television network. ***HN13***[] "The offense of monopoly under *§ 2 of the Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *MCI Communications Corp., 708 F.2d at 1106* (citing *United States v. Grinnell, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966))*. Clear Channel argues it is entitled to summary judgment on Count 15 because JamSports has failed to raise a genuine issue of fact that a relevant market exists and cannot show that Clear Channel's conduct was anticompetitive. We will discuss each contention separately.

a. Relevant Market

As the Court **[**43]** stated when confronted with Clear Channel's motion to dismiss JamSports' amended complaint, ***HN14***[] determining whether a relevant market exists "involves a deeply fact- intensive inquiry." *JamSports, 2003 U.S. Dist. LEXIS 6100, 2003 WL 1873563, at *6* (citations omitted). "The boundaries of a market or submarket are determined 'by examining such practical indicia as industry or public recognition of the submarket [or market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.'" *2003 U.S. Dist. LEXIS 6100, [WL] at *5* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. Clear Channel argues that JamSports has failed to raise a genuine issue of fact that a relevant market exists, because its only evidence of the market's existence is the report of an expert witness whose testimony should be excluded.

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[6] Because we do not rely on the affidavits of venue managers submitted by Clear Channel, JamSports' Motion to Strike Portions of Venue Affidavits is dismissed as moot.

[7] JamSports voluntarily dismissed Count 16. *See* JamSports' Consolidated Discovery Mot. (docket # 73) at n.15 ("JamSports has advised Clear Channel that it will not proceed with its alternative product market allegation of specialized motor sports.").

Clear Channel has grossly understated JamSports' evidentiary support for its claim that a national market for the promotion of supercross exists. JamSports filed a motion seeking partial summary judgment on the issue of whether a relevant **[**44]** market existed. Although we deny JamSports motion as procedurally improper, *see infra* at 33, and therefore pass no judgment on the merits of its arguments, we do recognize that it was chock full of facts in support of JamSports' position. But in any event, the Court rejects Clear Channel's argument that we should exclude the expert report and testimony of JamSports' expert witness Dr. Robert Baade, an economist who specializes in the economics of sports, on the relevant market issue. Baade arrived at the conclusion that a distinct market for supercross exists by comparing characteristics of supercross, such as ticket price, attendance, venue size, average revenue and elements of the competition, to those of related motor sports. He found that supercross had more than double the average attendance of motocross, which involves off-road motorcycle racing on natural terrain, and four times the average attendance of arenacross, which like supercross involves racing on indoor tracks with man-made obstacles but is held in significantly smaller venues with lesser known, regional competitors. Although he found that ticket prices for supercross and motocross were similar (but more than $ **[**45]** 10 higher than tickets for arenacross), the average revenue from supercross ticket sales was **[*841]** more that double what it was for motocross (and more than seven times what it was for arenacross). Baade also analyzed whether producers, riders, OEMs, track designers and builders, and sanctioning bodies regarded supercross as distinct from related motor sports, concluding that they did.

Clear Channel has moved to exclude Baade's testimony pursuant to *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*. In *Daubert*, ***HN15***[] the Supreme Court held that "reliability is the touchstone for expert testimony based on 'scientific, technical, or other specialized knowledge.'" *Elliott v. CFTC, 202 F.3d 926, 933 (7th Cir. 2000)* (quoting *Fed. R. Evid. 702*). The court must act as a gatekeeper to ensure that scientific testimony is "supported by appropriate validation -- i.e., good grounds, based on what is known." *Id.* (quoting *Daubert, 509 U.S. at 590*; internal quotation marks omitted). The Supreme Court has "extended **[**46]** this gatekeeping function to all expert testimony." *Id.* (citing *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999))*. "The focus, of course, must be solely on the principles and methodology, not on the conclusions that they generate." *Daubert, 509 U.S. at 595*. And adversary testing rather than exclusion may be the proper response to allegedly questionable testimony: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id. at 596* (citing *Rock v. Arkansas, 483 U.S. 44, 61, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987))*.

Clear Channel does not question Baade's qualifications. Rather, Clear Channel primarily questions Baade's methodology and conclusions relating to JamSports' essential facilities claims. Because the Court has rejected JamSports' essential facilities claims on other grounds, most of Clear Channel's motion to exclude is moot. But Clear Channel also argues -- albeit only briefly -- that Baade's conclusion that supercross constitutes a relevant market has not been **[**47]** reliably derived. Clear Channel contends Baade's analysis was not scientific enough because he did not conduct a study of the cross-elasticities of demand for various motor sports. In so arguing, Clear Channel attempts to belittle Baade's analysis with gratuitous comments such as, "one important feature of his analysis was to count the number of wheels on motorcycles and cars," and disregards his explanation for not performing a study of cross-elasticities. Clear Channel's Mot. to Exclude at 19. First of all, ***HN16***[] though studies based on cross-elasticities of demand are certainly helpful in identifying a relevant market. *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, they are not essential to demonstrating the existence of a relevant market. *Nobody in Particular Presents, Inc. v. Clear Channel Communications, 311 F. Supp. 2d 1048, 1082 (D. Colo. 2004)* (listing cases). Furthermore, Clear Channel's potshots do not raise a serious challenge to Baade's methodology, which involved analyzing characteristics of motor sports other than the number of wheels on the vehicles. Cross-examination, not exclusion, is the appropriate vehicle for **[**48]** advancing the sort of incredulity that Clear Channel urges. A genuine issue of fact exists regarding the parameters of the relevant market.

b. Anticompetitive conduct

HN17[] The Supreme Court has characterized the second element of a *§ 2* claim as "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman **[*842]** Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451,482-83, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* (citing *United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948))*. As with the antitrust injury requirement, the parties disagree on the law relevant to determining whether Clear Channel engaged in such behavior. Clear Channel argues that the intent of its principals to "lock up" the stadiums Clear Channel uses for supercross and their desire for JamSports to be regarded as "poison," *see* Ex. CCE 1106, are irrelevant to proving a *§ 2* claim. In support. Clear Channel relies primarily on *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989)*, in which the court stated:

> ***HN18***[] Firms "intend" to do all the business they can, to crush their rivals if **[**49]** they can. Intent to harm without more offers too vague a standard in a world where executives may think no further than "Let's get more business." Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. Few firms cut price unaware of what they are doing; price reductions are carried out in pursuit of sales at others' expense. Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it. You cannot be a sensible business executive, without understanding the link among prices, your firm's success, and other firms' distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden "intent," they run the risk of penalizing the motive forces of competition.

Id. Accordingly, the court found ***HN19***[] intent should not be a basis for liability in *predatory pricing* cases, favoring instead a test that looks at the firm's possibility of recouping its profits from cutting prices. Despite the decision's lengthy discussion of why focusing on intent can mislead the examiner, its rejection of intent evidence was limited to *§ **[**50]** 2* predatory pricing cases. Because JamSports does not allege Clear Channel engaged in predatory pricing,*A.A. Poultry Farms* is not directly on point.

Clear Channel points out that ***HN20***[] the Seventh Circuit has said more generally that when it comes to liability under *§ 2 of the Sherman Act*, "if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors. . . is irrelevant." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)* (citing *Ball Memorial Hospital, 784 F.2d at 1338-39*). In *A.A. Poultry Farms,* the court cited *Olympia Equipment Leasing* for the proposition that "liability under *§ 2* for abuse of monopoly power stems from anti-competitive effects and not intent." *A.A. Poultry Farms, 881 F.2d at 1402*. But Clear Channel is wrong to assume that*Olympia Equipment Leasing* should be read to mean evidence of intent to monopolize is always irrelevant to proving a *§ 2* claim. The Supreme Court has unambiguously stated that intent to monopolize is "relevant to the question of whether the challenged conduct is fairly characterized as 'exclusionary' **[**51]** or 'anticompetitive' -- to use the Words in the trial court's instructions -- or 'predatory, 'to use a word that scholars seem to favor." *Aspen Skiing Co. v. Aspen Highlands Siding Corp., 472 U.S. 585, 602, 86 L. Ed. 2d 467, 105 S. Ct. 2847* (1985). And *citing Aspen Skiing,* the Seventh Circuit, subsequent to *Olympia Equipment Leasing* and *A.A. Poultry Farms,* has recognized that ***HN21***[] '"intent *is* relevant to the offense of monopolization." *State of Illinois v. Panhandle Eastern Pipeline Co., 935 F.2d 1469, 1481 (7th Cir. 1991)* (emphasis in original; *citing* *Aspen Siding Co., 472 U.S. at 602*). The *Panhandle* court seemingly **[*843]** reconciled *Olympia Equipment Leasing* with *Aspen Skiing,* recognizing the continuing relevance of intent:

> ***HN22***[] The "intent" to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly. Indeed, the goal of any profit-maximizing firm *is* to obtain a monopoly by capturing an ever increasing share of the market. Virtually all business behavior is designed to enable firms to raise their prices above the level that would exist in a perfectly competitive market. Economic rent -- the profit **[**52]** earned in excess of the return a perfectly competitive market would yield -- provides the incentive for firms to engage in and assume the risk of business activity. Monopolies achieved through superior skill are no less intentional than those achieved by anticompetitive means (as Learned Hand observed, "no monopolist monopolizes unconscious of what he is doing"), so the intent relevant to a *§ 2 Sherman Act* claim is only the intent to maintain or achieve monopoly power by *anticompetitive means. Section 2* forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power.

Id. (emphasis in original; citations omitted).

Clear Channel maintains that its allegedly anticompetitive conduct had a legitimate business justification. ***HN23***[] "Conduct that tends to exclude competitors may . . . survive antitrust scrutiny if the exclusion is the product of a 'normal business purpose,' for the presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process." *Id. at 1481-82* (quoting *Aspen Skiing, 472 U.S. at 608-10*). But whether the defendant **[**53]** had "valid business reasons" for its conduct is a question of fact. *Id. at 1482*. And the trier of fact can look to Clear Channel's intent to determine whether its conduct had a purpose other than excluding competition. As the court explained in *Panhandle Eastern Pipeline:*

> ***HN24***[] When courts consider the "intent" of a firm charged with monopolization, they look not to whether the firm intended to achieve or maintain a monopoly, but to whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively. Did the firm engage in the challenged conduct for a legitimate business reason? Or was the firm's conduct designed solely to insulate the firm from competitive pressure? Intent is relevant, then, because intent determines "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'"*Aspen Skiing, 472 U.S. at 602*. When courts speak of a firm's intent in a monopolization case, they refer to the legitimacy of the firm's conduct as measured by its intended effect on the competitive process.

Panhandle Easter Pipeline Co., 935 F.2d at 1481. A jury ultimately may find that **[**54]** Clear Channel's conduct had a legitimate business justification, but as we explain, JamSports has raised a genuine issue that Clear Channel engaged in conduct aimed solely at hindering competition.

JamSports has presented evidence that Clear Channel threatened stadiums that it would pull all of its events (including non-supercross events) from the stadiums if they booked JamSports' supercross race. [8] On October 4, 2000, Charlie Mancuso, Clear Channel's president of the motor sports division, e-mailed Eric Cole, vice **[*844]** president of booking motor sports events, stating that Cole needed to quietly "lock up' our key supercross stadiums for 2002 through at least 2005" to protect Clear Channel in case the AMA began contacting "our stadiums." Ex. CCE 32561. Mancuso instructed Cole to get protection clauses -- that is, guarantees that the venues would not host other motor sports events within a certain number of days or months of Clear Channel's events -- in all the contracts. *Id.* In an e-mail to Mancuso on November 6, 2001, Cole wrote that he had "made it crystal clear" to the director of America's Center in St. Louis that Clear Channel "intended to produce a SX event as usual in 2003, **[**55]** 2004, 2005 and beyond in St. Louis." Ex. CCE 32070. Cole said that when the director said he would allow JamSports to book a race 45 days before or after Clear Channel's race, Cole "reminded him that another booking could cost him our events because we might consider it too crowded in the marketplace." *Id.* Clear Channel's booking notes for November 12, 2001 also indicate that when the America's Center suggested JamSports had a hold on a date, Clear Channel told the venue that any attempt to book another supercross event "would have serious implications not only for our supercross, but on our January monster truck event as well." Ex. CCE 39014.

JamSports also has presented evidence that Clear Channel took a threatening posture with the Astrodome and Reliant Field. The booking notes for November 20, 2001 and **[**56]** an e-mail to Mancuso state that when told that JamSports was inquiring about dates at the Astrodome and Reliant Park, Cole reminded the venues' general manager that "we have been producing motor sports s events in that facility for 30 years" and that it was "unacceptable" for the facility book a JamSports' race. Exs. 293-94 and 39017. Cole demanded 90 day protection periods for all Clear Channel motor events. *Id.* Cole followed up with a letter to the general manager, stating in relevant part:

> In response to our conversation yesterday, I am writing to inform you that I am deeply troubled by the way it appears our future business is being handled at Reliant Park and the Reliant Astrodome. Your booking practices are creating reasons for us to be very concerned about the future viability and profitability of our

[8] Although the Court has determined JamSports cannot proceed under the essential facilities doctrine. Clear Channel's alleged methods of preventing venues from hosting JamSports events are relevant to Count 15.

> events at these facilities. We have been producing our motorsports events in the Astrodome for over thirty years. The investment we have made in these events at your facility is measurable in the tens-of-millions of dollars and far exceeds our investment in any other stadium in the world. Your apparent concern for "missing out on future shows" that some brand new motorsports **[**57]** company alleges to be intending to produce raises considerable doubt as to your commitment to. protecting and growing our events -- and our investment -- in your stadiums. If you are even considering adding another event to what is already the most prolific stadium motorsports calender on earth, it will cause us to wonder whether the Reliant Astrodome and Reliant Park can remain as sustainable venues for Clear Channel Entertainment's touring motorsports events in future years.
> …
> To my even greater astonishment, you said you hoped to give a hold to another motorsports event on the January 11, 2003 date in question. That is entirely unacceptable….
>
> As I mentioned above, the 45-day "protection period" you typically offer is inadequate, especially in this unique market situation. . . . In the future, we require, at a minimum, 90 days protection for all motorsports events prior to **[*845]** any of our dates, and 60 days afterwards.

Ex. CCE 2713. Cole sought approval from Ken Hudgens, Clear Channel's vice president of marketing for the motor sports division, to send the letter. Hudgens approved the letter, stating: "we need to be scaring people -- not the other way around. We have done **[**58]** over 100 shows in this building. Probably 150." Ex. 2557. And in an e-mail to Mancuso on December 19, 2001, Cole said he had "made crystal clear" to a venue that if they allowed JamSports to hold a race that interfered with a Clear Channel Monster Jam, the venue "may be forcing [Clear Channel] to look elsewhere." Ex.CCE31718. Similarly, on August 13, 2002, Cole wrote "let's see after I threaten to move FMX" in response to a colleague's concerns that a venue would rent to JamSports if Clear Channel did not produce its supercross event at the venue. Ex. CCE 25535.

JamSports has presented evidence that Clear Channel tried to use its other motor sport events and concerts to entice venues to exclude JamSports. For example. Cole sent an e-mail to Mancuso on November 7, 2001, indicating that JamSports would approach Sun Devil Stadium and proposing to try to get an exclusive deal with the stadium for all events, using the fact that Clear Channel's music division was planning a concert there. Ex. CCE 2610. On December 3, 2001, Mancuso wrote an e-mail to Cole suggesting that he promise a venue one or two Monster Jam events in addition to supercross, explaining "we just might have to bite the **[**59]** bullet and do two more events in the market in 2003 than we want to protect ourselves." Ex. CCE 5397.

JamSports argues it had a legitimate business reason for seeking protection periods. Perhaps so, but that is for a jury to decide. A reasonable jury could conclude that Clear Channel used its market power to pressure stadiums not to host competing events with the sole intent of restraining the competitive process. JamSports argues Clear Channel employed several other tactics to suppress competition in the market, but we need not consider them at this time because the evidence regarding Clear Channel's conduct with venues is sufficient to create a genuine issue of fact. [9] Accordingly, the Court denies Clear Channel's motion for summary judgment as to Count 15.

4. JamSports' motion for partial summary judgment

JamSports **[**60]** has moved for "partial summary judgment" on its antitrust claims. Its motion seeks findings in its favor on three elements of its claims: the relevant market, Clear Channel's possession of market power, and Clear Channel's possession of monopoly power. The short answer is that this is not an appropriate basis for a motion for summary judgment under *Rule 56*. ***HN25***[] "Summary judgment is not contemplated or authorized for any portion of a claim less than the whole." *Biggins v. Oltmer Iron Works, 154 F.2d 214, 217 (7th Cir. 1946)*; *see also, e.g.. United States ex rel. Ramm Plumbing Co. v. Wil-Freds Construction, Inc., 1997 U.S. Dist. LEXIS 9614, No. 96 C 793, 1997 WL 391456, at *4 (N.D. Ill. July 7, 1997)*; *Arado v. General Fire Extinguisher Corp., 626 F. Supp. 506, 508-09 (N.D. Ill. 1985)*. This case is not controlled by *Wilson v. Sundstrand, 2003 U.S. Dist. LEXIS 14356, No. 99 C*

[9] If it wishes to seek an order excluding the other matters at trial, Clear Channel should file a motion *in limine* in connection with preparation of the final pretrial order.

6944, 2003 WL 21961359, at * 4 (N.D. Ill. Aug. 18, 2003), in which this Court permitted consideration of a summary judgment motion the goal of which was to eliminate certain affirmative defenses. In the circumstances **[*846]** of that case, the motion was, practically speaking, the equivalent of one seeking summary judgment on an entire **[**61]** claim. Largely for this reason, there is authority permitting consideration of such a motion in those circumstances. *See generally* Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co., 2002 U.S. Dist. LEXIS 16002, No. 00 C 5658, 2002 WL 1466806, at * 12 (N.D. Ill. July 8, 2002). The same is not true here. JamSports' motion for partial summary judgment is denied.

State law claims

1. Breach of contract (Count 1)

Count 1 is JamSports' claim against AMA Pro for breach of contract. It is based on two distinct theories of liability: a claim that the November 2001 letter of intent was a binding contract entitling JamSports to promote AMA Pro's supercross series and that AMA Pro breached the contract by later contracting with Clear Channel; and a claim that AMA Pro breached the letter of intent's terms requiring confidentiality and exclusivity. On the former claim, AMA Pro has moved for summary judgment. On the latter claim, JamSports has moved for summary judgment on liability; AMA Pro has not moved for summary judgment on liability but rather seeks summary judgment only as to certain aspects of JamSports' damage claim.

AMA Pro is entitled to summary judgment on **[**62]** JamSports' claim that the letter of intent was itself a binding promotion agreement. In this regard, the letter of intent could hardly be clearer: it stated that except for the confidentiality, exclusivity, and publicity provisions, "this letter of intent is not binding in any way upon the parties hereto" and that it was "expressly conditioned upon the parties entering into the Promotion Agreement" that they hoped to negotiate. 2d Am. Compl., Ex.A, P14. ***HN26***[] A letter of intent is unenforceable as a contract when it specifically contemplates a later agreement as a condition precedent to a binding contract. *See* Quake Construction, Inc. v. American Airlines, Inc., 141 Ill. 2d 281, 287-88, 565 N.E.2d 990, 993, 152 Ill. Dec. 308 (1990); Chicago Inv. Corp. v. Dolins, 107 Ill. 2d 120, 126-27, 89 Ill. Dec. 869, 481 N.E.2d 712, 715 (1985); Magnus v. Lutheran General Health Care System, 235 Ill. App. 3d 173, 181, 176 Ill. Dec. 209, 601 N.E.2d 907, 913 (1992).

JamSports has moved for summary judgment as to liability on its claim for breach of the letter of intent's exclusivity and confidentiality provisions. The exclusivity provision required AMA Pro to negotiate "exclusively, and **[**63]** in good faith" with JamSports for 90 days after the letter was signed; prohibited AMA Pro from entering into any discussion with any third party; and required AMA Pro and JamSports each to advise the other promptly if it received an offer, 2d Am. Compl. Ex. A, P13. The confidentiality provision prohibited both parties from divulging the letter of intent's terms to anyone other than its attorneys, accountants, and financial consultants. *Id.,* P12. As to these provisions, the letter of intent was indisputably a binding contract between JamSports and AMA Pro. ***HN27***[] "The parties' intent determines whether a letter of intent is an enforceable contract," Quake Construction, 141 Ill. 2d at 296, 565 N.E.2d at 998, and in this case, their intent that these terms be enforceable was clearly expressed.

JamSports contends that AMA Pro breached these provisions by failing to advise JamSports of a proposal AMA Pro received from Clear Channel in early November 2001, and by failing to negotiate in good faith with JamSports. JamSports' summary judgment motion addresses both of these contentions. We deal with each in turn.

[*847] AMA Pro does not dispute that Clear Channel representatives had **[**64]** a number of communications with members of AMA Pro's board after becoming aware that AMA Pro had signed a letter of intent with JamSports. There is evidence that one of AMA Pro's board members, Ray Blank, advised Clear Channel that certain board members favored Clear Channel over JamSports and urged Clear Channel to communicate with the board and make its proposal known. Clear Channel did so: it advised the board's members in writing in early November 2001 of its willingness to make an improved offer, and it sent two separate written offers to at least one board member. The board as a whole was advised on or about November 30, 2001 (and perhaps earlier) that Clear Channel had made a proposal, though it is unclear whether the entire board was advised of the proposal's terms. On that same date, one board member, Richard Gray, reminded the others that AMA Pro was obligated to share Clear Channel's proposal with JamSports: It is undisputed, however, that JamSports was not advised of Clear Channel's proposal.

Based on these undisputed facts, JamSports has established as a matter of law that AMA Pro breached its obligation under paragraph 13 of the letter of intent to advise JamSports of its **[**65]** receipt of the Clear Channel proposal. It remains to be seen, however, whether this breach entitles JamSports to recover any damages. AMA Pro contends that the Clear Channel proposal went nowhere, and as evidence it points to, among other things, the fact that even after receiving Clear Channel's proposal, AMA Pro's Board voted to recommend making a deal with JamSports. For its part, JamSports says that AMA Pro's breach of its obligation to disclose the Clear Channel offer, and the continued discussions that certain AMA Pro board members had with Clear, Channel representatives, permitted Clear Channel to keep its foot in the door, prevented JamSports from countering Clear Channel's efforts vis-a-vis AMA Pro, and ultimately enabled Clear Channel to carry the day. These contentions involve genuinely disputed factual issues. Thus although the Court finds, pursuant to *Federal Rule of Civil Procedure 56(d)*, that JamSports has established a breach of the exclusivity provision, final resolution of the claim will have to await trial.

JamSports also seeks summary judgment as to liability on its claim that AMA Pro breached its contractual obligation to **[**66]** negotiate in good faith toward the execution of a final promotion agreement. The letter of intent was a binding agreement to negotiate in good faith. *See, e.g., A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chemical Group, Inc., 873 F.2d 155, 158 (7th Cir. 1989)*. This obligation barred both sides from "'renouncing the deal, abandoning the negotiations, or insisting on conditions that [did] not conform to the preliminary agreement.'" *Id.* (quoting *Teachers Ins. and Annuity Ass'n v. Tribune Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987))*. "For instance, ***HN28***[] a party might breach its obligation to bargain in good faith by unreasonably insisting on a condition outside the scope of the parties' preliminary agreement, especially where such insistence is a thinly disguised pretext for scotching the deal because of an unfavorable change in market conditions." *Id.*

JamSports' claim, as argued in its motion for summary judgment, is that AMA Pro's breach of good faith consisted of its insistence that it obtain approval of the final deal from the board of trustees of AMA Pro's parent entity, the AMA. JamSports says that this condition was outside **[**67]** the scope of the letter of intent and essentially served as a smokescreen for AMA Pro's change of heart about making a deal **[*848]** with JamSports. AMA Pro argues that the issue of bad faith is genuinely disputed; among other things, it points to evidence that it advised JamSports around the time the letter of intent was signed, and afterward, that AMA's approval would be required.

HN29[] "The full extent of a party's duty to negotiate in good faith can only be determined . . . from the terms of the letter of intent itself." *A/S Apothekernes, 873 F.2d at 158*. In this case, the letter of intent included a provision that unambiguously stated that any prior representations and understandings were superseded:

> 18. Entire Agreement. This letter includes provisions which shall be included in any agreement between the parties and supercedes [sic] all prior oral or written agreements, understanding, representations and warranties, and courses of conduct and dealings between the parties on the subject matter hereof. Except as otherwise provided herein, this letter may be amended or modified only by a writing executed by each of the parties hereto.

2d Am. Compl., Ex. A, P **[**68]** 18. Based on this provision, AMA Pro's insistence on material contractual terms or conditions beyond those stated in the letter of intent could constitute a breach of its contractual duty to negotiate in good faith.

Determination of the precise contours of the duty to negotiate in good faith is complicated by the fact that there is precious little Illinois law on the subject. As Judge Posner noted for the court in *Venture Associates Corp. v. Zenith Data Systems Corp., 96 F.3d 275, 278 (7th Cir. 1996)*, most of the decisions purporting to describe Illinois law in this area have been issued by federal courts. But at least one Illinois court appears to have adopted *A/S Apothekernes'* formulation of the applicable standard, *see Milex Products, Inc. v. Alra Laboratories, Inc., 237 Ill. App. 3d 177, 189, 603 N.E.2d 1226, 1234, 177 Ill. Dec. 852 (1992)*, so for the time being we are comfortable following the federal formulation of the presumed Illinois standard.

Based on our reading of the decisional law on the topic, the fact that AMA Pro insisted upon a significant condition that was not included in the letter of intent is not by itself sufficient to **[**69]** demonstrate AMA Pro's lack of good faith. The concept of good faith appears also to require an inquiry into the breaching party's intent. As one Illinois court noted in a different context, a "practical, commonsense construction" of good faith is the absence of bad faith or bad intent. *See Dotson v. Former Shareholders of Abraham Lincoln Land & Cattle Co., 332 Ill. App. 3d 846, 855-56, 773 N.E.2d 792, 801, 266 Ill. Dec. 57 (2002)*; *cf. 810 ILCS 5/1-201(19)* (Uniform Commercial Code definition of good faith: "honesty in fact in the conduct or transaction concerned"). In *Venture Associates,* the court likewise equated the lack of good faith with bad faith and stated that "bad faith is deliberate misconduct." *Venture Assocs., 96 F.3d at 279*.

The evidence submitted by JamSports in support of its motion for summary judgment is insufficient to show AMA Pro's bad intent as a matter of law; the issue is genuinely disputed. JamSports argues that based on the parol evidence rule and the terms of the letter of intent, AMA Pro should be precluded from relying on evidence of the purported understandings and discussions regarding the AMA's approval that are **[**70]** said to have occurred around and after the time the letter of intent was executed. This argument is well taken to the extent that AMA Pro is contending that approval by AMA was an express or implied part of the parties' contract. *See* 2d Am. Compl., Ex. A, P 18; *J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc., 162 Ill. 2d 265, 269, 642 N.E.2d 1215, 1217,* ***[*849]*** *205 Ill. Dec. 98 (1994)* (parol evidence rule "generally precludes evidence of understandings, not reflected in a writing, reached before or at the time of its execution which would vary or modify its terms"). But the Court is less certain that this evidence is inadmissible on the issue of AMA Pro's intent. Because JamSports raised the parol evidence rule in its reply brief (in reply to AMA Pro's reliance on the alleged discussions and understandings), AMA Pro has not yet addressed the point. We can, however, safely defer final determination of the admissibility issue for a motion *in limine,* for in seeking summary judgment, JamSports has relied on nothing other than AMA Pro's insistence on AMA's approval, which as we have noted is an aspect of proof of bad faith but insufficient by itself to prove the point. **[**71]** ***HN30***[] Because good faith is a question of fact, *see Venture Assocs., 96 F.3d at 280*, and one that is genuinely disputed at this point, it can be resolved only at trial. JamSports' motion for summary judgment is therefore denied as to the claim of breach of the contractual obligation of good faith.

With regard to Count 1, AMA Pro seeks to bar JamSports' claim of lost profits, arguing that the so-called "new business rule" precludes JamSports, as a prospective new entrant into the supercross promotion business, from recovering the profits it claims it would have made. As the Court noted in ruling on the defendants' motions to dismiss, lost profits may, in appropriate circumstances, be recovered based on a party's breach of a contractual obligation to negotiate in good faith. *See Venture Assocs., 96 F.3d at 278-79*. ***HN31***[] Under Illinois law, as a general rule, a new business cannot recover lost profits. *See, e.g., Stuart Park Assocs. Ltd. Partnership v. Ameritech Pension Trust, 51 F.3d 1319, 1328 (7th Cir. 1995)*. This rule appears to be a specific application of the general rule that speculative damages are not recoverable. *See, e.g., Hill v. Brown, 166 Ill. App. 3d 867, 875, 520 N.E.2d 1038, 1043, 117 Ill. Dec. 687 (1988)* **[**72]** (cited in *Stuart Park*). There are, however, exceptions to the rule. *See, e.g., Malatesta v. Leichter, 186 Ill. App. 3d 602, 621, 542 N.E.2d 768, 782, 134 Ill. Dec. 422 (1989)*. The Court agrees with JamSports that because discovery on damages was deferred, a ruling that its not-yet-declared damages theory is legally inadequate would be premature. [10]

2. *Breach of contract (Count 2) and promissory estoppel (Count 17)*

In Count 2, JamSports says that it reached a final promotion agreement with AMA Pro but that AMA Pro refused to perform and instead granted the promotion rights for its supercross series to Clear Channel. Count 17 is an alternative claim of promissory estoppel in which JamSports alleges that it incurred significant expenses in

[10] Any attempt by the defendants to renew this issue following discovery on damages will have to come by way of a motion *in limine* to preclude evidence regarding lost profits, as the deadline for filing summary judgment motions has passed.

reliance **[**73]** on AMA Pro's allegedly unambiguous promise to confer on JamSports the right to promote the series. [11]

AMA Pro seeks summary judgment on both of these claims on the ground that the parties reached no final promotion agreement. **[*850]** Because the agreement contemplated by the parties was to cover a seven year period, *see* 2d Am. Compl., Ex. A, P 1, under Illinois' statute of frauds "the promise or agreement upon which [JamSports'] action shall be brought, or some memorandum or note thereof, [must] be in writing, and signed by the party to be charged therewith, **[**74]** or some other person thereunto by him lawfully authorized." *740 ILCS 80/1*. The statute of frauds likewise applies to JamSports' promissory estoppel claim. *See Fischer v. First Chicago Capital Markets, Inc., 195 F.3d 279, 284 (7th Cir. 1999)*; *McInerney v. Charter Golf, Inc., 176 Ill. 2d 482, 492, 680 N.E.2d 1347, 1352, 223 Ill. Dec. 911 (1997)*.

It is undisputed that AMA Pro did not execute a promotion agreement as such. In opposing summary judgment, JamSports relies on the rule that to satisfy the statute of frauds, the writing need not be a single document but rather may consist of several documents as long as they collectively contain a sufficient description of the agreement's subject matter and terms, one of the documents is signed by the party to be charged, and that document refers to the other writings or they are connected sufficiently to show that they relate to the same contract. *See, e.g., Prodromos v. Howard Savings Bank, 295 Ill. App. 3d 470, 474-75, 692 N.E.2d 707, 710, 229 Ill. Dec. 718 (1998)*. In arguing that this requirement has been met, JamSports relies on the red-lined version of the promotion agreement that its **[**75]** attorney sent after (JamSports claims) the parties had reached final agreement on all its terms; minutes from a meeting of AMA Pro's board of directors at which it is claimed to have approved that version of the agreement; and deposition testimony by an AMA Pro representative regarding the board's actions. Because the minutes in question were approved by the board and were signed by the corporate secretary, they are the types of documents that may suffice to constitute the signed writing required by the statute of frauds. *See Chapman v. Freeport Securities Co., 174 Ill. App. 3d 847, 854, 529 N.E.2d 6, 11, 124 Ill. Dec. 289 (1988)*. The deposition testimony in question was also signed and thus likewise may qualify as a signed writing. *See Bower v. Jones, 978 F.2d 1004, 1009 (7th Cir. 1992)*.

AMA Pro points out that neither the minutes nor the deposition testimony state that the agreement with JamSports was approved. Rather they reflect that AMA Pro's board recommended that the agreement be approved by AMA. JamSports, as noted earlier, contends that this action by AMA Pro constituted a breach of its obligations under the letter of intent, but for purposes **[**76]** of the statute of frauds, signed evidence that the board *recommended* the agreement to its parent entity does not satisfy the requirement of a signed writing evidencing that an agreement was reached.

JamSports argues, however, that AMA Pro is equitably estopped from asserting a statute of frauds defense. AMA Pro contends that this argument is barred because JamSports' equitable estoppel "claim" is not alleged in its complaint, but that contention stems from a misunderstanding of the role of equitable estoppel vis-a-vis the statute of frauds. In this context, equitable estoppel is not a separate claim; rather, it is a doctrine that may bar AMA Pro's assertion of a statute of frauds defense. Because the Federal Rules of Civil Procedure do not require a plaintiff to reply to a defendant's affirmative defense, *see Fed. R. Civ. P. 7(a)*, JamSports was not required to assert equitable estoppel in a pleading. Because this is AMA Pro's only response to the assertion of equitable estoppel, AMA Pro is not entitled to summary judgment based on its statute of frauds defense.

[*851] *3. Tortious interference claims (Counts 3, 4, and 18)*

JamSports has **[**77]** asserted three state law tort claims against Clear Channel: Count 3, a claim that Clear Channel tortiously interfered with the letter of intent between JamSports and AMA Pro; Count 4, a claim that Clear

[11] It is unclear whether success on a promissory estoppel theory would limit JamSports to recovery of the expenses it incurred in reliance on the alleged promise or whether JamSports would be able to seek lost profits. *See, e.g., Gerson Electric Constr. Co. v. Honeywell, Inc., 117 Ill. App. 3d 309, 312, 453 N.E.2d 726, 728, 72 Ill. Dec. 851 (1983)*; *see also Goldstick v. ICM Realty, 788 F.2d 456, 463-64 (7th Cir. 1986)*.

Channel tortiously interfered with the alleged final promotion agreement; and Count 18, an alternative claim for interference with prospective advantage. Clear Channel has moved for summary judgment on these claims.

Two of Clear Channel's arguments parallel those the Court has already addressed with regard to AMA Pro's and JamSports' summary judgment motions. Clear Channel argues that Count 3 cannot be sustained based on a theory that the letter of intent was itself an agreement for promotion of AMA Pro's supercross series; the Court agrees for the reasons previously discussed. Clear Channel argues that Count 4 is deficient because the statute of frauds bars JamSports from claiming there was a final promotion agreement; for the reasons previously discussed, summary judgment is denied on this claim.

Returning to Count 3, Clear Channel argues that JamSports has no evidence that Clear Channel knew about the exclusivity requirement contained in the letter of intent, an element of a claim **[**78]** of tortious interference with a contract. *See generally* *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 131 Ill. 2d 145, 154-55, 545 N.E.2d 672, 676, 137 Ill. Dec. 19 (1989)* (identifying elements of tortious interference claim). The Court disagrees. JamSports cites evidence from which a jury could find that one of AMA Pro's board members told at least one executive of Clear Channel about the particulars of the exclusivity requirement.

Clear Channel also argues that the proposal that it sent to AMA Pro during the exclusivity period stated that it was being made contingent on AMA Pro's right to consider it, and thus there could not have been an intentional inducement of a breach of the exclusivity clause. A jury reasonably could find that this statement, made at the end of the letter containing the offer - which was tendered only after Clear Channel was made aware of AMA Pro's agreement to deal only with JamSports - contained boilerplate language that was put in merely to cover Clear Channel's tracks rather than as a serious *caveat.* And we note that if the acquiescence of the contracting party were sufficient to defeat a tortious interference claim, **[**79]** for all practical purposes the tort would no longer exist - as a breach by the contracting party is *required* to prove such a claim. *See* *HPI Health Care Services, 131 Ill. 2d at 154-55, 545 N.E.2d at 676*.

Finally, Clear Channel argues that JamSports cannot prove damages arising from AMA Pro's rejection of a deal with JamSports because AMA Pro did not reject the deal, and, in any event, AMA Pro walked away for reasons unrelated to Clear Channel's making of a proposal. The latter point is genuinely disputed, making summary judgment inappropriate. The former argument makes no sense: JamSports' claim is that Clear Channel's alleged interference caused AMA Pro to impose AMA approval as a condition of a deal, knowing full well that the AMA would not approve. Thus the fact that AMA Pro "recommended" the deal to AMA does not defeat JamSports' claim.

Finally, Clear Channel seeks summary judgment on JamSports' claim of tortious interference with prospective advantage, based on the so-called "competition privilege." ***HN32***[] Under this rule, "'the privilege to engage in business and to compete allows one to divert business from one's competitors generally as well as from **[*852]** one's particular **[**80]** competitors provided one's intent is, at least in part, to further one's business and is not solely motivated by spite or ill will.'" *Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 398 (7th Cir. 2003)* (quoting *Soderlund Bros., Inc. v. Carrier Corp., 278 Ill. App. 3d 606, 615, 663 N.E.2d 1, 8, 215 Ill. Dec. 251 (1995))*. But a defendant is entitled to the protection of this privilege only if it "has not employed a wrongful means or is not motivated solely by malice or ill will." *Id. Soderlund Bros.* cites with approval *section 768* of the Restatement (Second) of Torts, which states that the privilege does not apply if the defendant "employ[s] wrongful means" or its action "create[s] or continue[s] … an unlawful restraint of trade." Restatement (Second) of Torts *§ 768*, at 39 (1979), *quoted in* *Soderlund Bros., 278 Ill. App. 3d at 616, 663 N.E.2d at 8*. Because the Court has ruled that JamSports' claim of monopolization must go to trial, and because there is evidence from which a jury could find that Clear Channel employed "wrongful means" - specifically **[**81]** the type of conduct relied upon to support the monopolization claim - summary judgment based on the competition privilege is inappropriate.

Conclusion

For the reasons stated above, the Court denies JamSports' motion for partial summary judgment on its antitrust claims [docket # 118]; and grants in part and denies in part JamSports' motion for summary judgment against AMA

Pro/Paradama [docket # 119], AMA Pro/Paradama's motion for summary judgment [docket # 123], and Clear Channel's motion for summary judgment [docket # 135]. JamSports' motion to strike venue affidavits [docket # 149] and Clear Channel's motion to exclude the Baade's testimony [docket # 110] are denied. Trial on the remaining claims (Counts 1, 2, 3, 4, 15, 17 and 18) remains set for November 15, 2004. The final pretrial order is to be filed by October 15, 2004, and the final pretrial conference is set for November 4, 2004 at 2:00 p.m. The case is set for a status hearing on September 8, 2004 at 9:30 a.m. for the purpose of discussing the format of the final pretrial order and setting an overall page limit for motions *in limine* and opposing memoranda.

MATTHEW F. KENNELLY

United States District **[**82]** Judge

Date: August 19, 2004

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M, G, & B Servs. v. Buras

United States District Court for the Eastern District of Louisiana

August 19, 2004, Decided ; August 19, 2004, Filed

CIVIL ACTION NO: 04-1512 c/w 04-1509 SECTION: "R" (1)

Reporter

2004 U.S. Dist. LEXIS 16624 *; 2004-2 Trade Cas. (CCH) P74,563

M, G, & B SERVICES, INC. VERSUS SCOTT BURAS, BARRETT McCREARY, TODD NIENABER, CARLOS RODRIGUEZ, JR., AND WAYNE TEDESCO

Subsequent History: Motion denied by *Lagniappe Logistics, Inc. v. Greenburg, 2004 U.S. Dist. LEXIS 18267 (E.D. La., Sept. 8, 2004)*

Sanctions disallowed by *M, G, & B Servs. v. Buras, 2004 U.S. Dist. LEXIS 18268 (E.D. La., Sept. 9, 2004)*

Disposition: [*1] Plaintiff's motion to remand to state court GRANTED and request for fees and costs DENIED.

Core Terms

removal, preemption, defendants', Sherman Act, counterclaim, federal question, preempt, federal court, state law, attorney's fees, anti trust law, costs, well-pleaded, regulation, federal law, state court, non-compete, contracts

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

HN1[] **Removal, Specific Cases Removed**

Generally, a defendant may remove a civil action filed in state court if a federal court would have had original jurisdiction. *28 U.S.C.S. § 1441(a)*.

Civil Procedure > ... > Removal > Procedural Matters > General Overview

HN2[] **Removal, Procedural Matters**

A removing party bears the burden of establishing that federal jurisdiction exists at the time of removal.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Removal > Procedural Matters > General Overview

HN3[] Specific Cases Removed, Federal Questions

Because the exercise of removal jurisdiction raises significant federalism concerns, a district court must construe the removal statutes strictly.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN4[] Jurisdictional Sources, Constitutional Sources

Federal district courts have jurisdiction over cases arising under the Constitution, laws, or treaties of the United States. *28 U.S.C.S. § 1331*. Whether a claim arises under federal law must be determined by referring to the "well-pleaded complaint." That means that the federal question must appear on the face of the complaint.

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN5[] Specific Cases Removed, Federal Questions

Because a defendant may remove a case to federal court only if the plaintiff could have brought the action in federal court from the outset, the question for removal jurisdiction must also be determined by reference to the "well-pleaded complaint." That a federal question arises in defense of the plaintiff's allegations is insufficient to establish removal jurisdiction. Likewise, that a federal question arises in a defendant's counterclaim also is insufficient to establish removal jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN6[] Subject Matter Jurisdiction, Federal Questions

For purposes of federal question jurisdiction, by unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN7[] Sherman Act, Defenses

A defendant cannot remove an action to federal court on the basis of a defense--even if that defense is anticipated by a plaintiff's complaint, and even if the defense is ultimately the only question in the case.

Antitrust & Trade Law > Sherman Act > Defenses

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

HN8[] Sherman Act, Defenses

For removal to be proper, a federal question must be presented by a plaintiff's complaint as it stands at the time the petition for removal is filed. It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN9[] Removal, Specific Cases Removed

A corollary to the well-pleaded complaint doctrine is the complete preemption doctrine. That doctrine permits removal where federal law so completely preempts a plaintiff's state law claims that the plaintiff's complaint is considered, from the outset, a federal claim arising under federal law.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN10[] **Removal, Specific Cases Removed**

Complete preemption by a federal law provides removal jurisdiction. Complete preemption is different from the more common "ordinary preemption," which does not.

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN11[] **Removal, Specific Cases Removed**

Ordinarily, the term federal preemption refers to ordinary preemption, which is a federal defense to a plaintiff's suit and may arise either by express statutory term or by a direct conflict between the operation of federal and state law. Being a defense, it does not appear on the face of a well-pleaded complaint, and, thus, does not authorize removal to federal court. By way of contrast, complete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Governments > Federal Government > Employees & Officials

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Governments > Legislation > Interpretation

HN12[] **Subject Matter Jurisdiction, Federal Questions**

Complete preemption is a narrow exception to the well-pleaded complaint rule. To establish complete preemption, defendants must show that (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear congressional intent that the federal action be exclusive. Few federal statutes can meet such an exacting standard. Also, the United States Supreme Court has sanctioned complete preemption in only two areas: ERISA and federal labor relations.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Transportation Law > Interstate Commerce > Federal Preemption

Transportation Law > Intrastate Commerce

HN13[] **Interstate Commerce, State Powers**

See 49 U.S.C.S. § 14501(b)(1).

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Transportation Law > Interstate Commerce > Federal Preemption

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN14[] **Interstate Commerce, State Powers**

See 49 U.S.C.S. § 14501(c)(1).

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Transportation Law > Interstate Commerce > Federal Preemption

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN15[] **Removal, Specific Cases Removed**

For purposes of removal, a private cause of action is a necessary element of complete preemption.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Transportation Law > Interstate Commerce > Federal Preemption

Transportation Law > Carrier Duties & Liabilities > Freight Brokers & Forwarders

HN16[] **Interstate Commerce, State Powers**

The Interstate Commerce Act provides only that states and their political subdivisions will not enact or enforce any law, rule, regulation, standard, or other provision that relates to certain areas of motor carrier and freight forwarder and broker services. There is no civil enforcement provision in the statute.

Antitrust & Trade Law > Sherman Act > Defenses

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > State Regulation

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN17[] **Sherman Act, Defenses**

The federal antitrust laws do not preempt state law.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN18[] **Costs & Attorney Fees, Costs**

A district court has discretion to award payment of just costs and any actual expenses, including attorney's fees, incurred as a result of removal under *28 U.S.C.S. § 1447(c)*.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN19[] **Costs & Attorney Fees, Costs**

28 U.S.C.S. 1447(c) applies only to those costs and expenses incurred in federal court as a result of removal.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

HN20[] **Removal, Postremoval Remands**

In applying *28 U.S.C.S. § 1447(c)*, a district court should consider the propriety of a removing party's actions based on an objective view of the legal and factual elements as they stood at the time of removal.

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

HN21[] **Removal, Postremoval Remands**

In applying *28 U.S.C.S. § 1447(c)*, a district court inquires only into the propriety of removal, not the alleged or apparent motive of a removing party.

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

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN22[] **Standards of Review, Abuse of Discretion**

In applying *28 U.S.C.S. § 1447(c)*, an award of fees is not an abuse of discretion when the basis for removal is expressly contrary to established precedent.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

Civil Procedure > Parties > Joinder of Parties > Misjoinder

HN23[] **Sherman Act, Jurisdiction**

A district court cannot assert its jurisdiction to sever claims when it does not have jurisdiction over the action at all.

Counsel: For MG&B SERVICES INC, plaintiff (04-CV-1512): Jude C. Bursavich, Michael Paul Fruge, Breazeale, Sachse & Wilson, Baton Rouge, LA.

For SCOTT BURAS, BARRETT MCCREARY, TODD NIENABER, CARLOS RODRIGUEZ, JR, WAYNE TEDESCO, defendants (04-CV-1512): Tommy Wood Thornhill, Chadwick William Collings, Thornhill Law Firm, LC, Slidell, LA.

Judges: SARAH S. VANCE, UNITED STATES DISTRICT JUDGE.

Opinion by: SARAH S. VANCE

Opinion

ORDER AND REASONS

Plaintiff moves the Court to remand this matter to the state court in St. Tammany Parish under *28 U.S.C. § 1447(c)*. Defendants oppose the motion. For the following reasons, the Court GRANTS plaintiff's motion to remand.

I. BACKGROUND

Defendants Scott Buras, Barrett Mccreary, Todd Nienaber, Carlos Rodriguez, Jr., and Wayne Tedesco are former employees of plaintiff M, G, & B Services. Defendants signed agreements not to compete with MGB after they stopped working for MGB. On April 29, 2004, MGB sued defendants in state court for breach of contract. MGB alleges that defendants violated the non-compete provisions **[*2]** in their employment contracts. On June 1, 2004, defendants removed the action to this Court. On May 28, 2004, defendants' new company, Laginappe Logistics sued MGB in this Court in Civil Action No. 04-1509. The cases were consolidated and are currently before this Court.

II. MOTION TO REMAND

HN1[] Generally, a defendant may remove a civil action filed in state court if a federal court would have had original jurisdiction. *See 28 U.S.C. § 1441(a)*. ***HN2***[] "The removing party bears the burden of establishing that federal jurisdiction exists" at the time of removal. *De Aguilar v. Boeing Co., 47 F.3d 1404, 1408 (5th Cir. 1995)*. ***HN3***[] Because the exercise of removal jurisdiction raises significant federalism concerns, the Court must construe the removal statutes strictly. *See Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 106 (5th Cir. 1996)*. Defendants removed the action under federal question jurisdiction and complete preemption.

A. The Well-Pleaded Complaint

(1) Law

HN4[] Federal district courts have jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331*. **[*3]** Whether a claim arises under federal law must be determined by referring to the "well-pleaded complaint." *Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986)* (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9-10, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983))*; *Howery v. Allstate Ins. Co., 243 F.3d 912, 916 (5th Cir. 2001)*. This means that the federal question must appear on the face of the complaint. *See* *Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997)*. ***HN5***[] Because a defendant may remove a case to federal court only if the plaintiff could have brought the action in federal court from the outset, "the question for removal jurisdiction must also be determined by reference to the 'well-pleaded complaint.'" *Merrell Dow, 478 U.S. at 808* (citation omitted). That a federal question arises in defense of the plaintiff's allegations is insufficient to establish removal jurisdiction. *Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 327 (5th Cir. 1998)*. Likewise, that a federal question arises in a defendant's counterclaim also is insufficient **[*4]** to establish removal jurisdiction. The *Holmes Group v. Vornado Circulation Sys., 535 U.S. 826, 831, 153 L. Ed. 2d 13, 122 S. Ct. 1889 (2002)*.

(2) Analysis

Defendants assert that MGB's complaint raises a federal question under the *Sherman Antitrust Act*. Defendants reason that MGB's attempt to enforce the non-compete agreements is an effort to restrain trade, and contracts to restrain trade are illegal under the Sherman Act. Therefore, defendants argue that MGB has to prove affirmatively that the non-compete agreements do not violate federal ***antitrust law*** as an essential element of their claim for breach of contract.

MGB's complaint presents a state-law claim for breach of contract. Contrary to defendants' reasoning, proving that the contracts do not violate the Sherman Act is not an essential element of MGB's breach of contract claim. As the Supreme Court has explained, ***HN6***[] "'by unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.'" *Franchise Tax Bd., 463 U.S. at 13* (quoting *Gully v. First Nat. Bank, 299 U.S. 109, 116, 81 L. Ed. 70, 57 S. Ct. 96 (1936))*.

That defendants **[*5]** plan to use the Sherman Act and the Constitution as defenses does not supply a basis for removal jurisdiction. *Metro Ford Truck, 145 F.3d at 327*. ***HN7***[] Defendants cannot remove the action to federal court on the basis of a defense-even if that defense is anticipated by the plaintiff's complaint, and even if the defense is ultimately the only question in the case. *Franchise Tax Bd., 463 U.S. at 14*. Likewise, defendants' counterclaim under the Sherman Act does not supply a basis for removal jurisdiction. *See* *Holmes Group, 535 U.S. at 830*; *Metro Ford Truck, 145 F.3d at 326-27* (explaining that ***HN8***[] for removal to be proper, "the federal question must be presented by the plaintiff's complaint as it stands at the time the petition for removal is filed … It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim"). *See also* *Metro. Life Ins. Co. v. Balinas, 2002 U.S. Dist. LEXIS 10830, 2002 WL 1298774, at *3 (E.D. La. June 10, 2002)* (remanding the action to state court because the defendant's Sherman Act counterclaim was an insufficient basis to support removal). Thus, defendants' federal law defense **[*6]** and counterclaim under the Sherman Act do not create federal removal jurisdiction. [1]

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[1] Defendants cite two federal cases for the proposition that the Sherman Act creates federal removal jurisdiction in this case. *See* *General Inv. Co. v. Lake Shore & M. S. R. Co., 260 U.S. 261, 67 L. Ed. 244, 43 S. Ct. 106, 1 Ohio Law Abs. 162 (1922)*; *Miller v. Granados, 529 F.2d 393 (5th Cir. 1976)*. Those cases are inapposite. The plaintiffs in both of those cases alleged violations of the Sherman Act. Therefore, federal claims arose on the face of the plaintiffs' complaints. *General Inv. Co., 260 U.S. at 270-71*; *Miller, 529 F.2d at 394-95*. Unlike the plaintiffs in *Lake Shore* and *Miller,* MGB has not alleged any violations of the Sherman Act. Defendants also cite two Louisiana case to support their argument that the Sherman Act provides a basis for removal jurisdiction. *See* *Loew's Inc. v. Don George, Inc., 237 LA. 132, 110 So. 2d 553 (La. 1959)*; *Burgess v. Hogan, 175 So.2d 924 (La. App. Ct. 1965)*. Neither of those cases dealt with removal jurisdiction. Instead, they addressed the state courts' inability to resolve Sherman Act claims because the Sherman Act gives federal courts exclusive jurisdiction over Sherman Act claims. *Loew's, 110 So.2d at 137-38*; *Burgess, 175 So.2d at 925*. A state court's lack of jurisdiction over certain claims does not create a

[*7] B. Complete Preemption

(1) Law

HN9[] A corollary to the well-pleaded complaint doctrine is the complete preemption doctrine. *Johnson v. Baylor University, 214 F.3d 630, 632 (5th Cir. 2000)*. This doctrine permits removal where federal law so completely preempts a plaintiff's state law claims that the plaintiff's complaint is considered, from the outset, a federal claim arising under federal law. *Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998)*. *See also Johnson, 214 F.3d at 632* (quoting *Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987))* (noting that "'Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character'"). Therefore, HN10[] complete preemption by a federal law provides removal jurisdiction. Complete preemption is different from the more common "ordinary preemption," which does not. *See Johnson, 214 F.3d at 632*. The Fifth Circuit has distinguished between the two types of preemption:

> HN11[] Ordinarily, the term federal preemption refers to ordinary preemption, **[*8]** which is a federal defense to the plaintiff's suit and may arise either by express statutory term or by a direct conflict between the operation of federal and state law. Being a defense, it does not appear on the face of a well-pleaded complaint, and, thus, does not authorize removal to federal court. By way of contrast, complete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense.

Id. (quoting *Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493, 500 (5th Cir. 2000)*, *overruled on other grounds by Arana v. Ochsner Health Plan, 338 F.3d 433, 440 (5th Cir. 2003))*.

HN12[] Complete preemption is a narrow exception to the well-pleaded complaint rule. *See id.* To establish complete preemption, defendants must show that "(1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional **[*9]** grant to the federal courts for enforcement of the right;" and (3) there is a clear Congressional intent that the federal action be exclusive. *Hoskins v. Bekins Van Lines, 343 F.3d 769, 775-76 (5th Cir. 2003)*. As the Fifth Circuit has noted, "'few federal statutes can meet such an exacting standard.'" *Johnson, 214 F.3d at 632*. Significantly, the Supreme Court has sanctioned complete preemption in only two areas: ERISA and federal labor relations. *Id.*

(2) The Interstate Commerce Act

Defendants argue that the ICA completely preempts MGB's state law claims. *See 49 U.S.C. § 14501*. The sections of the Interstate Commerce Act on which defendants rely provide:

> HN13[] No State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services.
>
> HN14[] [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having **[*10]** the force and effect of law related to a price, route, or service of any motor carrier … or freight forwarder with respect to the transportation of property.

49 U.S.C. § § 14501(b)(1),*14501(c)(1)*. As a threshold matter, defendants have neither explained how the ICA applies to an action to enforce non-compete agreements nor cited any authority to that effect. It is far from clear

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basis for federal removal jurisdiction. The Supreme Court and the Fifth Circuit have clearly established the standard for asserting removal jurisdiction.

how a state's enforcement of private contracts amounts to enactment or enforcement of a law, rule, regulation, standard, or other provision. The Airline Deregulation Act is similar to the ICA and prohibits States from enforcing any "law, rule regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305(a)(repealed 2004). The Supreme Court expressly held that state enforcement of private contracts did not amount to an enactment or enforcement of a law, rule, or regulation or other provision having the force of law under the ADA. *American Airlines, Inc. v. Wolens, 513 U.S. 219, 228-29, 130 L. Ed. 2d 715, 115 S. Ct. 817 (1995)*. Since the ADA and the ICA **[*11]** share much of the same language, the Supreme Court's interpretation of the ADA would be persuasive in this context. Additionally, it is likewise not apparent that an action for breach of a non-compete agreement "relate [s] to" prices, routes, or services.

Defendants fail to establish that the Interstate Commerce Act completely preempts MBG's claims. To begin with, the Act does not contain a civil enforcement provision that creates a private cause of action. ***HN15***[] A private cause of action is a necessary element of complete preemption. *See* *Hoskins, 343 F.3d at 775*. The ICA ***HN16***[] provides only that states and their political subdivisions will not enact or enforce any law, rule, regulation, standard, or other provision that relates to certain areas of motor carrier and freight forwarder and broker services. There is no civil enforcement provision in the statute. Without a civil enforcement provision, the ICA cannot completely preempt MGB's state law claims. *See* *Commercializadora Portimex, S.A. de C.V. v. Thionville Labs., Inc., 2004 U.S. Dist. LEXIS 10947, 2004 WL 1336407 at *6 (E.D. La. June 14, 2004)* (determining that the *Grain Standards Act* does not completely preempt state law because **[*12]** the statute does not create a private cause of action).

MGB's claim implicates the ICA only to the extent that defendants may use it as a defense to their breach of contract claim. As explained *supra,* "the assertion of a defense of federal preemption of state law is insufficient to invoke federal-question jurisdiction." *Beers v. North American Van Lines, Inc., 836 F.2d 910, 913 (5th Cir. 1988)*(holding that the defendant's assertion of a defense under the ICA was insufficient to support federal removal jurisdiction). Thus, defendants' possible assertion of a defense under the ICA does not create removal jurisdiction.

Accordingly, the Court concludes that the Interstate Commerce Act does not completely preempt the state law in this area, and MGB's complaint does not establish federal question jurisdiction on the ground of federal preemption.

(3) The Sherman Act

The defendants also argue that the Sherman Act preempts MGB's state law breach of contract claim. The defendants allege that MGB seeks to enforce a contract that restrains trade, which implicates federal ***antitrust law***. Defendants contend that since MGB in essence seeks to "enforce" an antitrust violation, **[*13]** the antitrust laws supply jurisdiction.

Defendants' argument that the contract plaintiff seeks to enforce is illegal under the federal antitrust laws is simply a defense. As noted, a defense does not confer removal jurisdiction. Further, ***HN17***[] the federal antitrust laws do not preempt state law. *See* *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc., 271 F.3d 186, 189 (5th Cir. 2001)* (holding that federal antitrust laws do not preempt state antitrust laws). Accordingly, the Court does not have jurisdiction by virtue of the Sherman Act.

C. Attorneys' Fees and Costs

MGB requests attorneys' fees and costs. ***HN18***[] The Court has discretion to award "payment of just costs and any actual expenses, including attorney's fees, incurred as a result of removal" under *28 U.S.C. § 1447(c)*. *See also* *Miranti v. Lee, 3 F.3d 925, 929 (5th Cir. 1993)* (noting that the district court has discretion to award fees only if defendant's removal was improper). *Section 1447(c)* ***HN19***[] applies only to those costs and expenses incurred in federal court as a result of removal. *W. H. Avitts v. Amoco Production Co., 111 F.3d 30, 32 (5th Cir. 1997)*. ***HN20***[] In applying **[*14]** *section 1447(c)*, "the court should consider the propriety of the removing party's actions based on an objective view of the legal and factual elements" as they stood at the time of removal. *Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290, 293 (5th Cir. 2000)*. ***HN21***[] The court inquires only into the propriety of removal, not the alleged or apparent motive of the removing party. *Id. at 292*. ***HN22***[] An award of fees is not an abuse of discretion when the basis for removal is expressly contrary to established precedent. *Garcia v. Amfels, Inc., 254 F.3d 585, 588 (5th Cir. 2001)*.

The Court declines to award attorney's fees and costs to MGB. Defendants' argument that their Sherman Act counterclaim and defense creates federal question jurisdiction is clearly contrary to established law. On the other hand, defendants' ICA preemption argument, while incorrect on the merits, presents a less clear-cut issue. Defendants' misguided reliance on preemption in this context is arguably reasonable in light of the complex nature of preemption. Therefore, their error does not justify an award of attorneys' fees and costs in this case. *See Valdes, 199 F.3d at 294* **[*15]** (affirming the district court's denial of attorney's fees when defendant removed on objectively reasonable, albeit incorrect, grounds). Accordingly, the Court denies MGB's request for attorneys' fees and costs.

III. SEVERANCE OF DEFENDANTS' SHERMAN ACT COUNTERCLAIM

The Court remands the action for lack of subject matter jurisdiction under *28 U.S.C. 1447(c)*. Defendants ask the Court to sever their Sherman Act counterclaim and consider it on its own merits. The Court does not have jurisdiction over this action. ***HN23***[] The Court cannot assert its jurisdiction to sever claims when it does not have jurisdiction over the action at all. *See Holmes Group, 535 U.S. at 831* (noting that counterclaims cannot serve as a basis for federal question jurisdiction). [2] Accordingly, the Court will not sever defendants' Sherman Act counterclaim. Defendants allege that they will be prejudiced if this Court does not hear their Sharman Act counterclaim. Defendants' argument is without merit. Pending before the Court is Civil Action number 04-1509 in which defendants' company, Lagniappe Logistics, sues MGB, among others, for Sherman Act violations.

[*16] IV. CONCLUSION

For the above reasons, the Court GRANTS MGB's motion to remand Civil Action No. 04-1512 to state court and DENIES MGB's request for fees and costs.

New Orleans, Louisiana this 19th day of August, 2004.

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

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[2] Defendants cite several cases for the proposition that the court can entertain their counterclaims if there is an independent basis of jurisdiction to support them. *See Pioche Mines Consol, Inc. v. Fidelity-Philadelphia Trust Co., 206 F.2d 336 (9th Cir. 1953)*; *Isenberg v. Biddle, 75 U.S. App. D.C. 100, 125 F.2d 741 (D.C. Cir. 1941)*; *Lion Mfg. Corp. v. Chi. Flexible Shaft Co., 106 F.2d 930 (7th Cir. 1939)*; *Jackson v. Simmons, 98 F. 768 (7th Cir. 1900)*. Defendants' cases are inapposite because none is in the removal context. All of those cases addressed the situation in which the courts dismissed the plaintiffs' claims for lack of jurisdiction, but retained the defendants' counterclaims when an independent basis for federal jurisdiction supported them. None of the actions was removed from state court.

Birdsong Tractor & Supply, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)

United States District Court for the District of Maryland

August 23, 2004, Decided ; December 16, 2003, Filed

MDL 1332, Civil No. JFM-03-3460

Reporter

332 F. Supp. 2d 890 *; 2004 U.S. Dist. LEXIS 17017 **; 2004-2 Trade Cas. (CCH) P74,525

IN RE MICROSOFT CORP. ANTITRUST LITIGATION, This document relates to: BIRDSONG TRACTOR AND SUPPLY, INC., on behalf of itself and all others similarly situated in the State of Arkansas, v. MICROSOFT CORPORATION

Subsequent History: Complaint dismissed at *In re Microsoft Corp. Antitrust Litig., 2005 U.S. Dist. LEXIS 6695 (D. Md., Apr. 18, 2005)*

Prior History: *Conway, Mackenzie & Dunleavy, P.C. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 218 F.R.D. 449, 2003 U.S. Dist. LEXIS 20242 (D. Md., 2003)*

Disposition: Plaintiff's motion to remand was denied. Plaintiffs motion for voluntary non-suit was granted.

Core Terms

federal jurisdiction, federal law, contends, state law, diversity jurisdiction, motion to dismiss, cause of action, antitrust, right of action, non-suit, damages

LexisNexis® Headnotes

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Removal > General Overview

Civil Procedure > ... > Removal > Postremoval Remands > Jurisdictional Defects

HN1[] **Removal, Specific Cases Removed**

Pursuant to *28 U.S.C.S. § 1441*, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant to the corresponding district court. The propriety of removal is determined as of the time of removal, and the party seeking removal bears the burden of proving that the requirements for federal jurisdiction have been met. Removal jurisdiction raises significant federalism concerns, and as a result, must be strictly construed. Where federal jurisdiction is doubtful, therefore, a remand is necessary.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2[] **Subject Matter Jurisdiction, Federal Questions**

Federal jurisdiction lies when an action falls within the provisions of either *28 U.S.C.S. § 1331* or *28 U.S.C.S. § 1332*.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN3[] **Federal Questions, Substantial Questions**

In deciding whether an action presents a federal question pursuant to *28 U.S.C.S. § 1331*, a court must first determine whether the cause of action is created by federal or state law. If the cause of action is created by federal law, federal jurisdiction unquestionably exists. If the cause of action is created by state law, the question is whether making a determination on plaintiff's claim necessarily depends on resolution of a substantial question of federal law.

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > Determination

Constitutional Law > The Judiciary > Jurisdiction > Diversity Jurisdiction

Civil Procedure > ... > Diversity Jurisdiction > Amount in Controversy > General Overview

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

HN4[] **Amount in Controversy, Determination**

In deciding whether diversity jurisdiction exists pursuant to *28 U.S.C.S. § 1332*, a court must determine whether the parties are completely diverse, and whether the amount in controversy exceeds $ 75,000.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN5[] **Public Enforcement, State Civil Actions**

Federal ***antitrust law*** does not completely preempt state antitrust statutes.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Legislation > Interpretation

Torts > ... > Proof > Violations of Law > Statutes

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN6[] **Jurisdiction, Subject Matter Jurisdiction**

The United States Court of Appeals for the Fourth Circuit has held that the mere reference to federal statutes that provide a private cause of action is not enough to show congressional intent to exercise federal jurisdiction. Federal jurisdiction may be properly exercised only when: (1) the federal statute cited in the complaint provides for a private right of action, and (2) the plaintiff is not barred from utilizing the private right of action.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Torts > ... > Proof > Violations of Law > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Torts > Procedural Matters > Commencement & Prosecution > Subject Matter Jurisdiction

HN7[] **Jurisdiction, Subject Matter Jurisdiction**

Where federal statutes provide only one of plaintiff's numerous theories of recovery for a particular claim, the federal issue raised thereby is not substantial.

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > Dismissal > General Overview

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

Civil Procedure > ... > Voluntary Dismissals > Notice of Dismissal > General Overview

Civil Procedure > ... > Pretrial Judgments > Nonsuits > Voluntary Nonsuits

HN8[] **Pleadings, Answers**

Fed. R. Civ. P. 41(a)(1) provides that a plaintiff may dismiss an action without order of the court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment.

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN9[] **Dismissal, Voluntary Dismissals**

A motion to dismiss is neither an answer, nor a motion for summary judgment, and does not, therefore, operate to terminate the right of dismissal by notice. The United States Supreme Court has held that courts must give the Federal Rules of Civil Procedure their plain meaning, so while it may be "especially tempting" to deny a plaintiff his right to dismiss in a given case, courts are obligated to adhere to the plain language of *Rule 41(a)(1)*.

Civil Procedure > ... > Class Actions > Class Members > General Overview

Governments > Fiduciaries

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > Special Proceedings > Class Actions > Voluntary Dismissals

Civil Procedure > Dismissal > General Overview

Civil Procedure > Dismissal > Voluntary Dismissals > General Overview

Civil Procedure > ... > Voluntary Dismissals > Court Order > General Overview

HN10[] **Class Actions, Class Members**

Fed. R. Civ. P. 41(a)(1) states that the right of voluntary dismissal is subject to the provisions of *Fed. R. Civ. P. 23(e)*, which requires court approval of the dismissal of any class action. The United States Court of Appeals for the Fourth Circuit, however, has held that *Rule 23(e)* does not apply to pre-certification dismissals. Nonetheless, the court must be alert to the possibility that a class representative might violate his fiduciary obligation to putative class members, and that dismissal and/or settlement might prejudice the rights of absent class members such that denial of the motion for dismissal or notice to putative class members might be required.

Counsel: **[**1]** For Birdsong Tractor and Supply, Inc., on behalf of itself and all others similarly situated in the State of Arkansas, Plaintiff.

For Microsoft Corporation, Defendant: Charles B Casper, Montgomery McCracken Walker and Rhoads, Philadelphia, PA. Daryl A Libow, Sullivan and Cromwell, New York, NY. David B Tulchin, Sullivan and Cromwell, New York, NY. Richard J Wallis, Microsoft Corporation, Redmond, WA. Steven J Aeschbacher, Microsoft Corporation, Redmond, WA.

Judges: J. Frederick Motz, United States District Judge.

Opinion by: J. Frederick Motz

Opinion

[*892] MEMORANDUM

Plaintiff Birdsong Tractor and Supply, Inc. ("Birdsong") has brought this action on behalf of itself and others similarly situated against defendant Microsoft Corporation ("Microsoft"). The complaint alleges: 1) monopolistic practices and price fixing in violation of the *Arkansas Deceptive Trade Practices Act* ("ADTPA"), 2) negligence, and 3) unjust enrichment. Pending before me are several motions briefed by the parties before this case was transferred to this district pursuant to *28 U.S.C. § 1407* in December 2003. Plaintiff has filed a motion to remand and a motion for voluntary non-suit. [1] **[**3]** Microsoft has filed **[**2]** a motion to dismiss. [2] For the reasons stated below, plaintiff's motion to remand is denied and plaintiff's motion for voluntary non-suit is granted. I need riot reach the merits of Microsoft's motion to dismiss.

I.

A.

Microsoft removed this case to federal court on June 18, 2003. Plaintiff filed a motion to remand on June 25, 2003, arguing that the case should be remanded because federal jurisdiction does not exist over its complaint. *28 U.S.C. § 1447*.

HN1[] Pursuant to *28 U.S.C. § 1441*, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to the corresponding district court. The propriety of removal is determined as of the time of removal, *Nolan v. Boeing Co., 919 F.2d 1058, 1064 n.5 (5th Cir. 1990)*, and the party seeking removal bears the burden of proving that the requirements for federal jurisdiction have been met. *St. Paul Reins. Co. v. Greenberg, 134 F.3d 1250, 1253-54 (5th Cir. 1998)*. Removal jurisdiction raises significant federalism concerns, and as a result, must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941).* **[**4]** Where federal jurisdiction is doubtful, therefore, a remand is necessary. *Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994)*.

HN2[] Federal jurisdiction lies when an action falls within the provisions of either *28 U.S.C. § 1331* or *28 U.S.C. § 1332*. ***HN3***[] In deciding whether an action presents a federal question pursuant to *28 U.S.C. § 1331*, a court must first determine whether the cause of action is created by federal or state law. *Id.* If the cause of action is created by federal law, federal jurisdiction unquestionably exists. *Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 809, 106 S. Ct. 3229, 3233, 92* ***[*893]*** *L. Ed. 2d 650 (1986)*. If the cause of action is created by state law, the question is whether making a determination on plaintiff's claim "necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28, 103 S. Ct. 2841, 2856, 77 L. Ed. 2d 420 (1983)*. ***HN4***[] In deciding whether diversity jurisdiction exists pursuant to *28 U.S.C. § 1332*, **[**5]** a court must determine whether the parties are completely diverse, and whether the amount in controversy exceeds $ 75,000.

B.

Plaintiff's complaint alleges three state law causes of action, and seeks relief in the form of damages and restitution. Microsoft contends that this action falls within the provisions of both *28 U.S.C. § 1331* and *28 U.S.C. § 1332*. First, Microsoft argues that the first two counts of plaintiff's complaint, the claim under the ADTPA and the negligence claim, "arise under" federal law and that jurisdiction therefore exists under *28 U.S.C. § 1331*. Secondly, Microsoft argues that this case qualifies for diversity jurisdiction under *28 U.S.C. § 1332*, as the parties are of diverse citizenship, and plaintiff's claim for restitution exceeds the required amount in controversy.

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[1] Plaintiff's motion to remand was filed on June 25, 2003. Plaintiff's motion for voluntary non-suit was filed on October 16, 2003. Plaintiff also filed two motions to amend its complaint on June 25, 2003 and July 3, 2003. Microsoft consented to, and the Arkansas District Court granted, the July 3rd motion to the extent it sought to add an additional named representative, however, the court declined to rule on any substantive changes. I need not reach these motions as I am granting plaintiffs motion for voluntary non-suit. However, I do note that, with the exception of the amendment noted above, it is plaintiff's original complaint that I have considered in connection with the motion to remand, because, as indicated below, the propriety of removal is determined at the time of removal, which, in this case, was June 18, 2003. *See* *Nolan v. Boeing Co., 919 F.2d 1058, 1064 n.5 (5th Cir. 1990)*.

[2] Microsoft's motion to dismiss was filed on June 25, 2003.

1.

In support of its contention that plaintiff's complaint arises under federal law, Microsoft first points out that complaints in Arkansas courts are construed in light of the "facts alleged," without regard to the legal theories set forth in the complaint. Therefore, Microsoft contends, plaintiffs **[**6]** express invocation of federal antitrust laws and reliance on the fact findings of the district court in the government cases brought under the *Sherman Act* demonstrate that plaintiffs complaint asserts claims under federal law. However, the sole case cited by Microsoft concerns exclusively state law. *See* *McQuay v. Guntharp, M.D., 331 Ark. 466, 963 S.W.2d 583 (Ark. 1998)*(considering whether the facts in a complaint stated a claim for outrage or battery). While it is conceivable that an Arkansas court might decide that plaintiff's facts more appropriately state a claim under state statutes other than the ADTPA [3], there is no case law to suggest that an Arkansas state court would construe plaintiff's complaint to state federal claims.

[7]** Secondly, Microsoft contends that no private right of action allowing indirect-purchaser recovery exists under Arkansas law "for the types of unilateral abuse of monopoly power alleged by Birdsong." The question of whether Arkansas law provides for such a right of action is "an issue of state law and does not involve a substantial question of federal law." *See* *Thorp v. Centura Bank, 200 F. Supp.2d 559, 560 (E.D. N.C. 2001)*. Moreover, even if plaintiffs indirect purchaser claim fails under state law, it cannot be recast as a federal claim. It is well-established that ***HN5***[] federal ***antitrust law*** does not completely preempt state antitrust statutes, *California v. Arc America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. [4]

[8]** **[*894]** Relying on my opinion in *In re Microsoft Corp. Antitrust Litigation, 127 F. Supp.2d 702, 722 (D.Md. 2001)*, Microsoft contends that because Arkansas law does not provide a private right of action for indirect purchasers, it is "inferable" that Birdsong is stating a federal claim. However the complaint at issue in the earlier case is distinguishable from the instant complaint There, the plaintiffs did not plead any specific causes of action, the state antitrust statute was clearly limited to intrastate conduct, and the prayer for relief requested treble damages and unjust enrichment, neither of which were available to plaintiff under the relevant state law. By contrast, Birdsong specifically pleads state law causes of action, and does not make any request for treble damages. Under these circumstances, I am not persuaded that it is "inferable" that plaintiff is stating a federal claim.

Finally, Microsoft contends that plaintiff's invocation of federal ***antitrust law*** as a basis for its negligence claim creates federal question jurisdiction. This contention is unavailing. ***HN6***[] The Fourth Circuit has held that the mere reference to federal statutes that provide a private cause **[**9]** of action is not enough to show congressional intent to exercise federal jurisdiction. *See* *Mulcahey, 29 F.3d at 153*. Federal jurisdiction may be properly exercised only when: "1) the federal statute cited in the complaint provides for a private right of action, and 2) the plaintiff is not barred from utilizing the private right of action." *Healthtek Solutions, Inc. v. Fortis Benefits Ins. Co., 274 F. Supp.2d 767, 774 (E.D. Va. 2003)*. In *Mulcahey*, the court concluded that no federal question was presented by plaintiffs' reference to federal environmental statutes in a state law negligence per se claim where: 1) the relief sought by plaintiffs, compensatory damages, was not available under the statutes, and 2) plaintiffs were procedurally or substantively barred from proceeding under any of the statutes. *29 F.3d at 153*. In the instant case, plaintiff would be similarly barred from proceeding under the federal antitrust laws by *Illinois Brick*. Accordingly, federal jurisdiction would not be proper.

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[3] Microsoft contends plaintiff's claims would be more appropriately brought under the Arkansas ***Antitrust Law*** of 1905 (codified at *Ark. Code §§ 4-75-301 to 4-75-320*) or the Arkansas Unfair Practices Act (codified at *Ark. Code §§ 4-75-201 to 4-75-217*) because these are the Arkansas laws governing alleged antitrust violations. Moreover, plaintiff's claims of price-fixing under the ADTPA must fail, Microsoft argues, because price-fixing requires action in concert with another party. *See* Black's Law Dictionary (5th ed. 1979). Of course, claims under the Arkansas antitrust laws would similarly fail, according to Microsoft, because the Arkansas Attorney General allegedly has the sole authority under both acts to sue on behalf of indirect purchasers.

[4] Of course, another reason that plaintiff's claim cannot be recast as a federal claim is that I have held that the *Illinois Brick* rule prevents persons situated like plaintiff from asserting a claim for monetary damages under federal law. *See* *In re Microsoft Corp. Antitrust Litig., 127 F. Supp.2d 702, 708-09 (D. Md. 2001)*.

The Fourth Circuit noted that its conclusion was further supported by the Supreme Court's decision in *Christianson v. Colt Industrial Operating Corporation, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988).* **[**10]** *Mulcahey, 29 F.3d at 153*. *Christianson*, the court said, "teaches" that ***HN7***[] where federal statutes provide "only one of plaintiff's numerous theories of recovery for a particular claim, the federal issue raised thereby is not substantial." *Id. at 154*. In the instant case, plaintiff alleges negligence by Microsoft based on violations of state and federal law. Therefore, federal law provides only an "alternative theory of negligence," and federal subject matter jurisdiction does not exist as to this claim. *Id.*

2.

Microsoft also contends that federal jurisdiction exists because diversity jurisdiction has been established. It is undisputed that plaintiff and Microsoft are completely diverse. The disputed issue is whether plaintiff's claims satisfy the amount in controversy requirement.

Microsoft asserts that plaintiff's claim for disgorgement of profits satisfies the amount in controversy requirement pursuant to my decision in *In re Microsoft Corp. Antitrust Litigation, 127 F. Supp.2d at 720-721*. In that case, I held that diversity **[*895]** jurisdiction was appropriate where plaintiffs claimed disgorgement in addition to their claims for **[**11]** damages, as plaintiff has done in the instant case. Plaintiff argues that the Eighth Circuit's decision in *Crawford v. F. Hoffman-La Roche, Ltd., 267 F.3d 760 (2001)*, holding that plaintiffs' restitution claims did not support diversity jurisdiction, should control. However, that case is not binding authority on this court, and although I respect its reasoning, I was aware of other cases which had reached the same conclusion when I reached my earlier decision. Plaintiff provides no compelling reason why I should depart from my view. Therefore, I find that the amount in controversy requirement has been met, and diversity jurisdiction exists in this case. Consequently, plaintiff's motion for remand is denied.

II.

Next, I must consider plaintiff's motion for voluntary non-suit. *Federal Rule of Civil Procedure 41(a)(1)* ***HN8***[] provides that a plaintiff may dismiss an action without order of the court by "filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment." Microsoft does not claim to have filed an answer or a motion for summary judgment. However, it contends that **[**12]** plaintiff's motion should be denied because since the filing of flu's action, plaintiffs have filed eight motions and Microsoft itself has filed a motion to dismiss that is fully briefed. According to Microsoft, to allow plaintiff to dismiss now would "not only condone plaintiff's blatant forum shopping, but would also waste judicial resources and prejudice both the class and Microsoft."

HN9[] A motion to dismiss is "neither an answer, nor . . . a motion for summary judgment," and does not, therefore, operate to "terminate the right of dismissal by notice." Federal Practice and Procedure § 2363. [5] The Supreme Court has held that courts must give the Federal Rules of Civil Procedure their plain meaning, *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp., 493 U.S. 120, 123, 107 L. Ed. 2d 438, 110 S. Ct. 456 (1989)*, so while it may be "especially tempting" to deny plaintiff his right to dismiss in a given case, courts are obligated to adhere to the plain language of *Rule 41(a)(1)*. *See* *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel, 2 F.3d 544, 547 (4th Cir. 1993)*.

[13]** Plaintiff seeks court approval of its motion because *Rule 41(a)(1)* ***HN10***[] states that the right of voluntary dismissal is subject to the provisions of *Rule 23(e)*, which requires court approval of the dismissal of any class action. The Fourth Circuit, however, has held that *Rule 23 (e)* does not apply to pre-certification dismissals. *See* *Shelton v. Pargo, Inc., 582 F.2d 1298, 1303-14 (4th Cir. 1978)*. Nonetheless, I must be alert to the possibility that a class representative might violate his fiduciary obligation to putative class members, and that dismissal and/or

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[5] A motion to dismiss may be converted into a motion for summary judgment when matters outside the pleading are presented to and not excluded by the court, however, this provision is not relevant to the instant case. *Fed. R. Civ. P. 12(b)(6)*.

settlement might prejudice the rights of absent class members such that denial of the motion for dismissal or notice to putative class members might be required. *Id.*

Although Microsoft posits that "the class" would be prejudiced by a voluntary dismissal, it does not offer any reasons why such prejudice would result Unlike*Shelton*, this case involves voluntary dismissal only, without an accompanying settlement of claims. Therefore, I need not be concerned, for example, that the class representative might be wrongfully leveraging **[*896]** putative class member's claims to achieve a more desirable settlement for himself. **[**14]** There is no indication that plaintiff has violated any fiduciary obligation to the putative class.

Likewise, there is no basis for finding that the voluntary non-suit would waste judicial resources, as Microsoft contends. The pending motions are the first ones I have been called upon to decide, and the work that was done in the Eastern District of Arkansas before this action was transferred to this court was not extensive in nature. As for the motion to dismiss that Microsoft has filed, no court has considered or decided it. Although the parties have expended their resources in briefing the motion, if this action is re-instituted, undoubtedly Microsoft will again move to dismiss and the work that was done in preparing the briefs here will be put to use.

For the foregoing reasons, plaintiff's motion to remand is denied. Plaintiffs motion for voluntary non-suit is granted. A separate order to that effect is being entered herewith.

Date: August 23, 2004

J. Frederick Motz

United States District Judge

Concur by: Assigned to: Judge J. Frederick Motz

Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers

United States District Court for the Central District of California

August 26, 2004, Decided ; August 26, 2004, Filed

CASE NO. CV 04-1292 AHM (CTx)

Reporter

2004 U.S. Dist. LEXIS 17330 *; 2004-2 Trade Cas. (CCH) P74,551

VERISIGN, INC., Plaintiff, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Defendant.

Prior History: [*1] ORDER DISMISSING ANTITRUST CLAIM WITH PREJUDICE AND DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION OVER REMAINING STATE LAW CLAIMS

Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers, 2004 U.S. Dist. LEXIS 29965 (C.D. Cal., May 18, 2004)

Disposition: Defendant's motion to dismiss the antitrust claim with prejudice granted; court declined to exercise supplemental jurisdiction over remaining state law claims. Defendant's renewed motion to strike claims two through six vacated.

Core Terms

competitors, alleges, registry, recommendation, organizations, constituent, antitrust, conspiracy, advisory, Bylaws, gTLD, motion to dismiss, domain name, compete, antitrust claim, state law claim, anti trust law, conspired, regulated, cause of action, district court, noticed

LexisNexis® Headnotes

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Motions to Dismiss, Failure to State Claim**

On a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, the allegations of a complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. On the other hand, dismissal is proper where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment.

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

HN2[] **Motions to Dismiss, Failure to State Claim**

Generally, a district court may not consider any material beyond the pleadings in ruling on a *Fed. R. Civ. P. 12(b)(6)* motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. Similarly, documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss without converting the motion to dismiss into a motion for summary judgment. If the documents are not physically attached to the complaint, they may be considered if their authenticity is not contested and the plaintiff's complaint necessarily relies on them. The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading.

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, states in part that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. The elements required to allege a *§ 1* violation are: (1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition. Although *§ 1* claims are not subject to a heightened pleading standard, a plaintiff must plead facts to support each element of the claim. The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust.

Antitrust & Trade Law > Clayton Act > Claims

Energy & Utilities Law > Pooling & Unitization > Compulsory Pooling

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN4[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, authorizes a private individual to bring suit under the antitrust laws if that individual has been injured in his business or property by reason of anything forbidden in the antitrust laws. The United States Supreme Court has interpreted this language to mean that plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes a defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. These requirements are referred to as "antitrust standing." There is no antitrust violation if the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition. An act is deemed anticompetitive only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.

Antitrust & Trade Law > Sherman Act > General Overview

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

There is nothing inherently conspiratorial about a "bottom-up" policy development process that considers or even solicits input from advisory groups. "Participation" is not enough to give rise to antitrust liability; control is required.

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

Evidence > Judicial Notice > General Overview

HN6[] **Motions to Dismiss, Failure to State Claim**

A district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

In determining whether a board as a whole may have acted in the anticompetitive interests of its members, the proper inquiry is whether decision-makers sharing substantially similar economic interests collectively exercised control of the organization under whose auspices they have reached agreements which work to the detriment of competitors.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN8[] **Declaratory Judgments, Federal Declaratory Judgments**

The Declaratory Judgment Act, *28 U.S.C.S. § 2201*, merely creates a remedy in cases otherwise within federal jurisdiction and is not an independent basis of federal question jurisdiction. The test is whether the underlying claim that a defendant has threatened to pursue in litigation and that a plaintiff seeks to avoid through a declaratory judgment arises under federal law.

Counsel: VeriSign Inc, a Delaware Corporation, Plaintiff: Brian A. Davis, VeriSign Inc, Litigation Department, Dulles VA; Laurence J. Hutt, Ronald L Johnston, Thaddeus Mason Pope, Arnold & Porter, Los Angeles, CA; Richard L. Rosen, Arnold and Porter, Washington, DC.

Internet Corporation for Assigned Names and Numbers, a California Corporation, Defendant: Christina D. Coates, Courtney M. Schaberg, Emma Killick, Jeffery A. LeVee, Sean W. Jaquez, Jones Day, Los Angeles, CA; Joe Sims, Jones Day, Washington, DC.

Judges: A. Howard Matz, United States District Judge.

Opinion by: A. Howard Matz

Opinion

INTRODUCTION AND PROCEDURAL HISTORY

On February 26, 2004, VeriSign filed a complaint against Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") alleging causes of action for: (1) violation of *Section 1 of the Sherman Act*, (2) injunctive relief for breach of contract, (3) damages for breach **[*2]** of contract, (4) interference with contractual relations, (5) specific performance of contract and injunctive relief, (6) damages for breach of contract, and (7) declaratory judgment. Subject matter jurisdiction was premised on federal questions arising under the *Sherman Act* and the *Declaratory Judgment Act.* Compl. P 8.

On May 18, 2004, the Court granted ICANN's motion to dismiss the Complaint. The Court held that VeriSign had failed to sufficiently allege an antitrust conspiracy and an injury of the type the antitrust laws were designed to protect. The Court stated that if VeriSign failed to plead a viable antitrust claim in any First Amended Complaint ("FAC") or chose not to file an FAC, the Court would dismiss the Sherman Act claim with prejudice and decline to exercise supplemental jurisdiction over the state law claims. The Court also vacated ICANN's special motion to strike the state law claims as strategic lawsuits against public participation, pursuant to *Cal. Civ. Proc. Code Section 425.15*, subject to renewal at a later date if VeriSign did file a FAC alleging a viable federal claim.

On June 14, 2004, VeriSign filed a FAC, adding nearly 30 pages **[*3]** of allegations to its Sherman Act claim, *see PP* 85-182. Now ICANN moves to dismiss claims one through six of the FAC pursuant to *Fed. R. Civ. P. 12(b)(6)*, and also renews its motion to strike the second through sixth claims. The Court GRANTS ICANN's motion to dismiss the antitrust claim, this time with prejudice, and declines to exercise supplemental jurisdiction over the remaining state law claims.

FACTUAL ALLEGATIONS

ICANN is a non-profit corporation that was organized in 1998 "in response to a plan by the [Department of Commerce] to introduce competition into the field of domain name registration, among other objectives." FAC P 17. The Internet is comprised of numerous top level domains ("TLDs"). Some are generic TLDs ("gTLDs") like .com, .net, .gov, and .biz, while others are country code TLDs ("ccTLDs") such as .uk and .ca. [1] *Id.* P 11. Each TLD has a "registry" or operator, a single entity responsible for keeping the records and a directory of all the domain names registered within that TLD. *Id. P* 14. A person seeking to register a domain name within any given TLD must do so through a "registrar" for that TLD. *Id.* **[*4]** P 15. There are approximately 250 TLDs throughout the world that compete with each other, through their respective registries, to attract registrars and registrants. *Id. PP* 11, 31.

One of ICANN's functions is to enter into registry agreements that authorize an entity to act as the registry for a particular gTLD. *Id. P* 19. The FAC describes how ICANN functions:

> ICANN is governed by and acts through an international Board of Directors that is elected by members of various constituent groups and supporting organizations within ICANN. As more specifically alleged below, among the members of these groups are operators of gTLDs that compete with each other and with VeriSign; domain name registrars that are present or potential competitors of each other and of VeriSign **[*5]** for certain services; and foreign governments and foreign registries that have ccTLDs that compete with the gTLD registries operated by VeriSign. ICANN frequently carries out its activities, including the conduct alleged herein, through the collective action of its supporting organizations (which, in turn, are comprised of various constituent groups). In fact, in certain circumstances, ICANN was bound by its By-Laws to follow the actions of its supporting organizations.

Id. P 17.

ICANN is an unusual organization. It is not like a typical association, because it has numerous "constituencies" that explicitly acknowledge that they have commercial interests that sometimes are at odds or in conflict with the interests of other constituents. Indeed, one of ICANN's rather formidable challenges is to promote coherent policies that accommodate, or at least take into account, the differing objectives of competing interests in the business of "cyberspace." ICANN is essentially comprised of a Board of Directors and three advisory bodies called "supporting organizations." Each of the supporting organizations has primary responsibility for developing and recommending policy in its area **[*6]** of expertise. Those areas are: (1) Domain Name Supporting ("DNSO"); (2) Address Supporting ("ASO"); and (3) Protocol Supporting ("PSO"). *Id. P* 91; Def.'s Supplemental Req. for Judicial Notice, Exh. L (Bylaws), Art. VI, §§ 1(a),2(b). [2]

In 2001, VeriSign and ICANN entered into a registry agreement authorizing VeriSign to act as the sole registry for the ".com" gTLD. FAC PP 21-22. Under the agreement, VeriSign must provide certain "registry services" to accredited registrars in accordance with ICANN's specifications. *Id. P* 23. The core of this dispute is that ICANN

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[1] ICANN does not claim to have any power to regulate ccTLDs. *Id.* P 78. Nonetheless, 11 of the approximately 240 ccTLDs have entered into registry agreements with ICANN. Id. P 81. "ccTLDs" compete with other TLD registries. Id. P 19.

[2] Over Plaintiff's objection, the Court takes judicial notice of Exhibit L, ICANN's bylaws. The bylaws are a proper subject of judicial notice because VeriSign references them in the FAC *(e.g., PP* 17, 86, 95, 102) and their authenticity is not disputed. *Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)*.

allegedly has taken actions to: (1) prohibit or otherwise restrict VeriSign from offering services valuable to Internet **[*7]** users, [3] (2) impose improper conditions on the offering of such services by VeriSign, (3) regulate and set the prices at which such services may be offered, and/or (4) delay the introduction of new services. *Id. P* 1. Because ICANN has allegedly blocked, delayed, and restricted the "value-added" services VeriSign has sought to offer its customers, VeriSign is "at a competitive disadvantage" since other TLD registries have been able to introduce similar services without restriction or delay. *Id. PP* 77-78. VeriSign claims that ICANN's various actions have breached their 2001 registry agreement, *id. PP* 188-200, 207-222; interfered with a contract VeriSign had with an unidentified third party, *id. PP* 201-206; and violated the antitrust laws, id. PP 83-187.

[*8] APPLICABLE LEGAL STANDARD

HN1[] On a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)*. A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Examiners, 777 F.2d 462, 464 (9th Cir. 1985)*. On the other hand, dismissal is proper where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; *Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9* Cir. 1989)* (employing *Conley v. Gibson* standard). Where a motion to dismiss is granted, a district court should **[*9]** provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)*.

HN2[] "Generally, a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion. . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)* (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch, 14 F.3d at 454 (9th Cir. 1994)* (*citing* *Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991))*. If the documents are not physically attached to the complaint, they may be considered if their "authenticity . . . is not contested" and "the plaintiff's complaint necessarily relies" on them. *Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998).* **[*10]** "The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading." 5C Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

DISCUSSION

I. First Cause of Action: Antitrust Violation

Verisign's antitrust claim is brought under *Section 1 of the Sherman Act*, ***HN3***[] which states, in pertinent part, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. The elements required to allege a *Section 1* violation are: "(1) an agreement or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually injures competition." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989)*. [4] Although

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[3] In particular, the services to which VeriSign refers are Site Finder (described at PP 32-33 of the FAC), Wait Listing Service PP 39-40), ConsoliDate (PP 47-49), Internationalized Domain Names (PP 55-57), and the Incentive Marketing Program (P65).

Section 1 claims are not subject to a heightened pleading standard, the plaintiff must plead facts to support each **[*11]** element of the claim. Von Kalinowski, Sullivan & McGuirl, ***Antitrust Law*** *and Trade Regulation* § 164.01 (Matthew Bender 2002). "The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs will get nowhere merely by dressing them up in the language of antitrust.'" *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)*.

Section 4 of the Clayton Act, pursuant to which VeriSign seeks to recover treble damages for the alleged Sherman Act violation, ***HN4***[] authorizes a private individual to bring suit under the antitrust laws if that individual has been "injured in his business **[*12]** or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. The Supreme Court has interpreted this language to mean that "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. These requirements are referred to as "antitrust standing." *See, e.g., Pool Water Prods, v. Olin Corp., 258 F.3d 1024, 1034 (9th Cir. 2001)*. There is no antitrust violation "if the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition . . . An act is deemed *anticompetitive . . .* only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality." *Rebel Oil Co., Inc. v. Atl Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*, *cert. denied*, *516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1995)* **[*13]** (emphasis in original).

VeriSign alleges that "the conduct of ICANN in restricting and purporting to 'regulate' non-Registry Services offered or proposed to be offered by VeriSign, and in delaying the introduction and setting the prices or terms of those services, represents the collective and conspiratorial acts of ICANN and existing and potential competitors of VeriSign, including competitors who are members of the constituent groups and supporting organizations of ICANN, in the relevant markets and submarkets as defined below." FAC P 84. The specific services to which VeriSign refers in its antitrust claim are the Wait Listing Service ("WLS"), the Site Finder Service ("SFS"), and Internationalized Domain Names ("IDN"). *Id. P* 88. VeriSign alleges that ICANN's conduct "has deprived consumers of a beneficial new service and VeriSign of revenues and profits it would generate . . ." *Id.* P 38; *see also PP* 46, 54, 64, 67. By making "the registration of domain names within the .com gTLD more desirable and attractive," these new services are alleged to be important to enable "VeriSign to compete more effectively with operators of competitive gTLD and ccTLD registries that are **[*14]** offering or intend to offer a similar service." *Id. P* 67; *see also P* 31. While VeriSign has been blocked, delayed, or restricted from offering these new services, other gTLD registries regulated by ICANN "have been allowed to offer and market similar, competitive services . . ." *Id. P* 77; *see also PP* 34, 44, 64, 67. In particular, VeriSign alleges that ICANN has facilitated ".museum," one of its gTLD competitors, in offering a service similar to Verisign's Site Finder. *Id.* P 34. In addition, most ccTLD registries, which constitute some 240 out of 250 of all TLDs, are not regulated by ICANN and "are free to offer, and are offering, new and improved services to registrars and registrants. . ." *Id. PP* 11, 19, 78.

A. Conspiracy Allegations

ICANN argues that VeriSign has not properly pled a conspiracy because it has not alleged that its competitors controlled the relevant ICANN decision-makers: the Board of Directors and ICANN's President.

VeriSign recognizes that in order to sufficiently plead a conspiracy, it must allege that ICANN's decision-making process was controlled by economic competitors who have conspired to injure VeriSign. But what VeriSign **[*15]** alleges is different: that certain named competitors have conspired to control *advisory groups* that report to ICANN's ultimate decision-maker, the Board of Directors. Paragraph 85 of the FAC alleges that "the constituent groups and supporting organizations of ICANN . . . are substantially controlled by existing and potential competitors of VeriSign

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[4] The parties both treat this case under the "rule of reason" standard rather than the "per se" rule reserved for presumptively illegal practices such as price-fixing, and the Court does the same. *See McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 n.3 (9th Cir. 1988)*.

. . ." *See, e.g., id. PP* 92-102 (Domain Name Supporting Organization ("DNSO") controlled by competitors and issued policy paper and report to Board regarding WLS), PP 130-135 (Security and Stability Advisory Committee ("SECSAC") controlled by competitors and issued recommendation to Board regarding regulation of SFS); PP 158-161 (Registry Implementation Committee ("RIC") controlled by competitors and proposed guidelines to Board for IDN).

Moreover, the FAC acknowledges that the final decision to regulate each of the VeriSign services at issue was made by either the Board or the President, not the advisory bodies. *See, e.g., id. PP* 98, 102 (Board adopted DNSO proposals to regulate WLS); P 138 (Board "never adopted a lawful resolution regulating Site Finder"); [5] P 163 (Board adopted IDN guidelines proposed by RIC).

[*16] Verisign's theory seems to be that the advisory bodies were the *de facto* decision-makers because the Board essentially rubber-stamped all of their recommendations. VeriSign alleges that Board approval was a foregone conclusion because of:

> . ICANN's unique bottom-up policy development process by constituency groups of competitors (P 86);. . .
> . . . .the requirement of ICANN's Bylaws that the constituency groups' policy decisions be followed by the Board of Directors of ICANN (PP 86, 95, 102);
> . . . .ICANN's dependence on Verisign's competitors for its funding (P 93). . .
> . . . .[and] specific admissions by ICANN's President that the policy development process at ICANN was subject to capture for precisely the reasons stated above and that competitors working through ICANN used its processes to "hamstring their competitors." (PP 86, 90, 95).

Pl.'s Opp'n, 2:7-19.

Verisign's contentions are deficient. First, ***HN5***[] there is nothing inherently conspiratorial about a "bottom-up" policy development process that considers or even solicits input from advisory groups. *See Hahn v. Or. Physicians' Serv., 868 F.2d 1022, 1029 (9th Cir. 1989) (en* **[*17]** *banc); Barry v. Blue Cross of Cal., 805 F.2d 866, 868-69 (9th Cir. 1986)* (advisory committee's comments and suggestions did not establish requisite control over Board's decisions). "Participation" is not enough to give rise to antitrust liability; *control* is required.

Second, the Bylaws in effect at the time of these events, which the Court judicially notices, do *not* require the Board to accept the advisory bodies' policy recommendations. Rather, the Bylaws provide that:

> the Board [of Directors] shall accept the recommendations of a Supporting Organization if the Board finds that the recommended policy (1) furthers the purposes of, and is in the best interest of, the Corporation; (2) is consistent with the Articles and Bylaws; (3) was arrived at through fair and open processes (including participation by representatives of other Supporting Organizations if requested); and (4) is not reasonably opposed by any other Supporting Organization. *No recommendation of a Supporting Organization shall be adopted unless the votes in favor of adoption would be sufficient for adoption by the Board without taking account of either the Directors selected by the* **[*18]** *Supporting Organization or their votes.* [6]

Exh. L, Art. VI, § 2(e) (emphasis added). If the Board rejects a policy recommendation, Section 2(f) provides the procedure for returning it to the Supporting Organization for further consideration. If after reconsideration the Supporting Organization still does not provide an acceptable recommendation, "the Board may initiate, amend or modify and then approve a specific policy recommendation" if prompt action is necessary. *Id.* § 2(f). Article VI, Section 2 of the bylaws does not "require" the Board to approve the proposals and ***HN6***[] "the district court will

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[5] ICANN's President, rather than the Board, sent VeriSign a letter requiring it to close its Site Finder Service ("SFS"). FAC P 36. The Court takes judicial notice of this October 3, 2003 letter, which VeriSign refers to as the "Suspension Ultimatum." Def.'s Req. for Judicial Notice, Exh. F. The letter is a proper subject of judicial notice because it is referenced in the FAC and its authenticity is not disputed. *Branch, supra.* Since the Board never took action regarding SFS, the allegation that one of the SFS "co-conspirators" held a seat on the Board is irrelevant. *Id. P* 138.

[6] According to these Bylaws, each of the three Supporting Organizations selects three Directors. Exh. L, Art. 5, § 4.

not accept as true pleading allegations that are contradicted by facts that can be judicially noticed . . ." *5C* Wright & Miller, *Fed. Prac. and Pro.* § 1363 (3d. ed. 2004).

Third, VeriSign alleges in Paragraph 93 that ICANN "has been seriously underfunded," that members of the **[*19]** Registrar Constituency "have provided the single largest source of ICANN's funding," and that "one or more of the WLS co-conspirators have offered to fund expenses of ICANN in defense of the claims made in this litigation." VeriSign alleges that the "WLS co-conspirators" are part of the Registrar Constituency, which provides the majority of ICANN funding. FAC P 93. There are approximately 175 registrars in the United States, *id. P* 15, yet only six are alleged to be "WLS co-conspirators." *Id.* P 90. Nowhere does VeriSign allege that these six conspirators provide the majority of ICANN's funding. Nor has VeriSign alleged that ICANN accepted the alleged offer to defray the cost of this litigation.

Fourth, VeriSign makes too much of the fact that the President of ICANN stated in his February 2002 report that ICANN's consensus decision-making process was "too exposed to capture by special interests" and that the supporting organizations pushed ICANN "to perform only those policy functions that hamstring their competitors." *Id.* P 86; *see also P* 95. That statement did not refer to any of the particular competitors or registry services at issue in this lawsuit. In addition, **[*20]** it was made several months before VeriSign was prepared to offer WLS, in August 2002 *(id. P* 44), well before VeriSign received the Suspension Ultimatum regarding SFS, in October 2003 *(id. P* 36), and before the Board., enacted IDN regulations harming VeriSign, in June 2003 *(id. P* 164). However applicable the President's concerns still may have been at those later times, what is most deficient about these allegations is that the President's statements were about lower-level processes. *Nowhere does the FAC allege that he admitted that the Board itself had been captured.* Moreover, there is no allegation (much less factual support for one) that the Board of ICANN actually conspired with any of VeriSign's competitors. VeriSign does not allege any specific facts to support its theory that the Board complied with the conspirators' alleged attempt to "hamstring" VeriSign -- no allegations regarding how much time the Board spent deliberating, how many meetings the Board held or how many objections or comments the Board considered. That the Board ultimately may have adopted an advisory group's policy recommendation, or that it was common practice for the Board to do so, does not **[*21]** mean that the Board merely "rubber stamped" the proposals and allowed itself to be controlled by Verisign's competitors. *See* *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1156-57 (9th Cir. 2001)* ("As the Eleventh Circuit has noted, simply because the 'board is likely to follow the recommendations of the medical staff does not establish, or even reasonably suggest, the existence of a conspiracy.' . . . Even though the Board has never disagreed with [the competitors'] recommendation . . . the Board did not merely 'rubber stamp' [the competitor's] recommendation.") (citation deleted; emphasis added).

In an attempt to overcome the foregoing defects in the FAC's factual allegations, VeriSign cites language from several cases that are either distinguishable or inapposite. The case VeriSign relies on most is *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. There, plaintiff was one of more than 90,000 members of defendant, a non-profit membership corporation that promulgated codes for engineering and manufacturing standards. Defendant sent a letter to a competitor of plaintiff. The letter was on the association's **[*22]** stationery and was signed by one of its employees. It basically declared plaintiff's product to be unsafe. The competitor then used the letter to dissuade third parties from buying plaintiff's product. The association's subcommittee that approved the letter had as its vice-chairman someone who just happened to be the vice-president of the competitor; indeed, that person orchestrated the preparation and mailing of the letter by the association. Plaintiff's *Sherman Act Section 1* case against the association-defendant went to trial. Plaintiff requested that the jury be instructed that defendant could be liable for its agents' conduct if they acted within the scope of their apparent authority. The court rejected plaintiff's request. Nevertheless, the jury returned a verdict for plaintiff and on appeal, the Supreme Court held that plaintiff's proffered instruction was sound.

VeriSign cites *Hydrolevel* for the propositions that "an organization could be liable for conspiring with plaintiff's competitor, notwithstanding that the organization itself did not compete with plaintiff and that "it did not matter that the decision-maker was not the Board of the association . . ." Pl's Opp'n, **[*23]** 13:10-25. *Hydrolevel* is really about the appropriate instruction for the derivative liability of an employer for antitrust violations committed by its employees. Moreover, *Hydrolevel* is distinguishable on its facts. First, unlike what is alleged here, the defendant-association's subcommittee was clearly "captured" by the plaintiff's competitor whose vice-president manipulated the association into approving and circulating the terribly injurious attack on plaintiff's product. Second, it is not correct that *Hydrolevel* holds that Board action is irrelevant. Indeed, if the association had not expressly delegated final decision-making authority to the subcommittee, the letter would not have been issued. In short, the association's conduct was a *sine qua non* to the case and the Supreme Court's opinion. Third, *Hydrolevel* went to trial; standards for pleading a conspiracy claim were not at issue.

In *Hahn, supra,* the district court granted summary judgment to defendant, an association of physicians. The issue on appeal was whether those members of the association's board who were physicians and who did not compete directly with the podiatrist-plaintiffs **[*24]** nevertheless "shared similar economic interests with [other] board members and . . . physicians who did compete directly," so as to permit the trier of fact to conclude that the "board as a whole may have acted in the anticompetitive interests of . . . [the] member physicians. . . ." *Hahn, 868 F.2d at 1030*. To answer that question the Ninth Circuit articulated this test: ***HN7***[] "The proper inquiry is whether [decision-makers] sharing substantially similar economic interests collectively exercised control of [the organization] under whose auspices they have reached agreements which work to the detriment of competitors." *Id. at 1029*. The court found that plaintiff had adduced enough such evidence. I apply the *Hahn* test here, yet reach the opposite conclusion, because *Hahn* is factually distinguishable in a critical respect. In *Hahn,* the plaintiff adduced evidence which established that physicians, many of whom competed with podiatrists, "formed a majority of the [defendant's] board." *Id. at 1029*. There is no such allegation here. *See Podiatrist Ass'n v. La Cruz Azul De Puerto Rico, Inc., 332 F.3d 6, 14 (1st Cir. 2003)* **[*25]** (upholding summary judgment for defendant in a *Sherman Act Section 1* case where plaintiffs could not establish that their competitors controlled the defendant's board and noting "The corporate bylaws make manifest that board action requires a majority vote and the . . . [competitors, who held eight out of nineteen seats on the board] simply do not constitute a majority.")

Finally, in *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988)*, the trade association involved in the underlying facts was not a party and the opinion does not even deal with the elements of a *Sherman Act Section 1* claim; the issue and the holding concern the scope of the *Noerr* doctrine. *Allied Tube* has no bearing here.

To summarize, VeriSign has not alleged, and cannot allege, that the co-conspirators comprised a majority of the ICANN Board of Directors. It has not alleged and, given that the bylaws provide otherwise, it cannot allege that the "supporting organizations" within ICANN's structure that do include competitors of VeriSign dominated the Board. *See Barry, supra.* Nor has VeriSign pled with requisite specificity facts that, even circumstantially, **[*26]** establish that ICANN's Board was a "rubber stamp." *County of Tuolumne, supra.* For all these reasons, VeriSign has not sufficiently alleged a *Section 1* conspiracy.

B. Antitrust Standing

Given the foregoing conclusion, which requires dismissal of the antitrust claim, I need not analyze whether VeriSign has pled facts establishing "antitrust injury" and standing, and I choose not to.

II. Second Through Seventh Causes of Action; Breach of Contract, Interference With Contractual Relations, and Declaratory Judgment

Because the Court dismisses Plaintiff's antitrust claim, the only cause of action arising under federal law, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. *28 U.S.C. § 1367(c)(3)*. Thus, the breach of contract causes of action (claims 2, 3, 5, and 6), the interference with contractual relations cause of action (claim 4), and the request for a declaratory judgment (claim 7) [7] are DISMISSED without prejudice to being

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[7] VeriSign also asserts that the Court has subject matter jurisdiction pursuant to *28 U.S.C. § 2201* (the Declaratory Judgment Act). FAC P 7. ***HN8***[] The Declaratory Judgment Act "merely creates a remedy in cases otherwise within federal jurisdiction," and "is not an independent basis of federal question jurisdiction." *See* Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:132 (The Rutter Group 2004); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-*

filed in state court. Judicial resources will not be wasted as the case is in its early stages and the Court has not had occasion to address any **[*27]** of the state law claims. Plaintiff will not be prejudiced since the statute of limitations is tolled during the time the state law claims were pending in federal court and for an additional period of at least 30 days. *28 U.S.C. § 1367(d)*; Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* § 2:161 (The Rutter Group 2004).

[*28] CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Defendant's motion to dismiss claim one of the FAC, with prejudice. [8] The Court declines to exercise supplemental jurisdiction and DISMISSES the second through seventh claims, without prejudice to their being filed in state court. The Court VACATES Defendant's renewed motion to strike claims two through six. [9]

In light of this ruling, the Court need not rule on the parties' various remaining requests for judicial notice and related disputes.

Within seven calendar days of this Order, Defendant shall serve and lodge a proposed judgment.

IT IS SO ORDERED.

DATE: August 26 2004

A. Howard Matz

United Stakes District Judge

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28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983). The test is whether the underlying claim that the defendant has threatened to pursue in litigation and that plaintiff seeks to avoid through a declaratory judgment arises under federal law. *Id.* Here, it does not. VeriSign merely seeks the Court's interpretation of certain key provisions of the parties' 2001 registry agreement, presumably to avoid a breach of contract claim from ICANN.

[8] Docket No. 70.

[9] Docket No. 69.

In re Linerboard Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

August 27, 2004, Decided ; August 27, 2004, Filed

MDL No. 1261

Reporter

223 F.R.D. 335 *; 2004 U.S. Dist. LEXIS 17161 **

IN RE LINERBOARD ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: All Actions (Civil Action Numbers 98-5055 and 99-1341)

Subsequent History: Request granted, Amended by *In re Linerboard Antitrust Litig., 223 F.R.D. 370, 2004 U.S. Dist. LEXIS 20995 (E.D. Pa., Sept. 2, 2004)*

Prior History: *In re Linerboard Antitrust Litig., 223 F.R.D. 357, 2004 U.S. Dist. LEXIS 17160 (E.D. Pa., 2004)*

Disposition: Defendants' motion to dismiss denied.

Core Terms

class action, tolling, statute of limitations, direct action, cross-jurisdictional, antitrust, amended complaint, plaintiffs', antitrust statute, federal court, Defendants', motion to dismiss, cases, suits, state law claim, class member, corrugated, courts, limitations, alleged wrongful conduct, class certification, court of appeals, Memorandum, conspiracy, contracts, lessen, tolling rule, reasons, opted, Box

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

In response to a pleading, a defense of failure to state a claim upon which relief can be granted may be raised by motion. *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss under *Rule 12(b)(6)*, a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. Only those facts alleged in the complaint may be considered in deciding such a motion. A complaint should be dismissed if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

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

Governments > Legislation > Statute of Limitations > General Overview

HN2[] **Motions to Dismiss, Failure to State Claim**

The United States Court of Appeals for the Third Circuit allows defendants to raise a limitations defense in a *Fed. R. Civ. P. 12(b)(6)* motion where the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Judgments > Pretrial Judgments > General Overview

HN3[] **Pretrial Judgments, Judgment on Pleadings**

A motion for judgment on the pleadings, made pursuant to *Fed. R. Civ. P. 12(c)*, is treated under the same standard as a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. A motion for judgment on the pleadings will only be granted where the moving party has established that no material issue of fact remains to be resolved, and that the movant is entitled to judgment as a matter of law. In determining whether a material issue of fact exists, the court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the nonmoving party.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Relation Back

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

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

See *Fed. R. Civ. P. 15(c)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Public Enforcement, State Civil Actions**

See *Colo. Rev. Stat. § 6-4-118*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

HN6[] **Public Enforcement, State Civil Actions**

The four year deadline for filing Colorado antitrust claims begins when the circumstances giving rise to the cause of action are discovered or should have been discovered in the exercise of reasonable diligence.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN7[] Public Enforcement, State Civil Actions

Under Indiana case law, the statute of limitations for claims under the Indiana antitrust statute, *Ind. Code § 24-1-1-1 et seq.*, is two years.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN8[] Statute of Limitations, Time Limitations

In Indiana, a cause of action accrues when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN9[] Public Enforcement, State Civil Actions

Kansas courts apply a three year statute of limitations for statutory claims under the Kansas Restraint of Trade Act, *Kan. Stat. Ann. § 50-101 et seq. Kan. Stat. Ann. § 60-512(2)*.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN10[] Statute of Limitations, Time Limitations

In Kansas, the statute of limitations begins to run when the plaintiff reasonably could have learned of its potential cause of action.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > General Overview

HN11[] Trade Practices & Unfair Competition, State Regulation

The South Carolina antitrust statute, *S.C. Code Ann. § 39-5-10 et seq.*, contains no express statute of limitations provision. Therefore, the general three year statute of limitations period for an action upon a liability created by statute other than a penalty or forfeiture is applicable. *S.C. Code Ann. § 15-3-530*. This three year statutory period is analogous to the three year statute of limitations for claims under South Carolina's Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. S.C. Code Ann. § 39-5-150.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN12[] **Statute of Limitations, Time Limitations**

In South Carolina, the statute of limitations begins to run when the plaintiff knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. This requires plaintiffs to act with promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN13[] **Public Enforcement, State Civil Actions**

Tennessee applies its general three year statute of limitations to claims under the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101 et seq. Tenn. Code Ann. § 28-3-105.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN14[] **Tolling of Statute of Limitations, Discovery Rule**

Under Tennessee law, the cause of action accrues and the statute of limitations begins to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered. The Tennessee Court of Appeals explains that the claim accrues upon discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor. Such facts include not only the existence of an injury, but the tortious origin of the injury.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Civil Procedure > Special Proceedings > Class Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN15[] Class Actions, Certification of Classes

Filing a federal class action tolls the federal statute of limitations on individual claims pending a decision on class certification in the same federal court based on the facts alleged in the class case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN16[] Class Actions, Prerequisites for Class Action

Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Special Proceedings > Class Actions > Notice of Class Action

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN17[] Class Actions, Certification of Classes

The American Pipe ruling, in which the filing of a federal class action tolls the federal statute of limitations on individual claims pending a decision on class certification in the same federal court based on the facts alleged in the class case, has been extended to cases in which class members file individual suits instead of intervening in the class action after the denial of class certification.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN18[] Class Actions, Certification of Classes

The American Pipe holding, in which the filing of a federal class action tolls the federal statute of limitations on individual claims pending a decision on class certification in the same federal court based on the facts alleged in the class case, is extended to situations in which a class is certified and putative class members choose to opt out of the litigation and file individual suits against the defendants.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Environmental Law > Hazardous Wastes & Toxic Substances > Asbestos > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN19[] Tolling of Statute of Limitations, Class Actions

In determining whether state statutes of limitations are tolled during the time that the defendant contests the issue of class certification, a federal district court examines: (1) the federal interest in tolling the state statutes of limitations: (2) whether the highest court of the state has or would adopt cross-jurisdictional class action tolling for antitrust class actions filed in federal court; (3) whether the plaintiffs' state law claims are sufficiently similar to the plaintiffs' federal claims to toll the state statutes of limitations; and (4) the prejudice suffered by the defendants if the court tolls the statutes of limitations.

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

HN20[] Federal & State Interrelationships, Erie Doctrine

In the absence of controlling state law, a district court must consider all available resources, including appellate court decisions of the individual courts in question, other state and federal decisions, and the general trend of authority, to determine how the highest courts of the various states in question would decide an issue.

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

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN21[] Federal & State Interrelationships, Erie Doctrine

A rule recognizing cross-jurisdictional class action tolling in antitrust class actions filed in federal court generates greater efficiencies than a rule declining to do so. A court considers this factor when analyzing whether a state, which has an interest in conserving judicial resources and reducing the cost of litigation, would adopt cross-jurisdictional class action tolling in the context of antitrust cases. The court also examines three additional factors to determine if a state's highest court would adopt cross-jurisdictional class action tolling: (1) whether that state has adopted class action tolling as to class actions filed in its own courts; (2) whether that state's class action rule was modeled on *Fed. R. Civ. P. 23*; and (3) whether the state antitrust statute is similar to the Sherman and Clayton Acts.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Class Actions

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN22[] **Class Actions, Certification of Classes**

Because Colo. R. Civ. P. 23 is virtually identical to *Fed. R. Civ. P. 23*, the Colorado Supreme Court relies on cases applying the federal rule. The commencement of a class action tolls the statute of limitations for all the members of the putative class, the portion of the limitations period that remained at the time the class action was commenced. The statute of limitations remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or intervene as plaintiffs in the pending action.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] **Public Enforcement, State Civil Actions**

Federal judicial interpretations of the Sherman and Clayton Acts are entitled to careful scrutiny in determining whether a particular business arrangement is a per se antitrust violation under the Colorado Antitrust Act. *Colo. Rev. Stat. § 6-4-104 et seq.* The only significant difference between plaintiffs' federal and state antitrust claims is that the Colorado Antitrust Act provides full consideration paid as a remedy. *Colo. Rev. Stat. § 6-4-121*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN24[] **Class Actions, Prerequisites for Class Action**

The Indiana Court of Appeals has adopted intra-jurisdictional class action tolling.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN25[] **Class Actions, Prerequisites for Class Action**

Indiana's class action rule, Ind. R. Trial P. 23, is based upon *Fed. R. Civ. P. 23* and the Indiana Supreme Court has ruled that it is appropriate for Indiana courts to consider federal court interpretations of the federal rule when applying the Indiana rule.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN26[] **Public Enforcement, State Civil Actions**

The Indiana antitrust statute is modeled after the Sherman Antitrust Act. The only significant difference between plaintiffs' federal and state law claims is that the Indiana statute provides full consideration paid as a remedy. Ind. Code § 24-1-5.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN27[] **Class Actions, Prerequisites for Class Action**

The Supreme Court of Kansas has adopted intra-jurisdictional class action tolling.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN28[] **Class Actions, Prerequisites for Class Action**

Kansas's class action rule is patterned after *Fed. R. Civ. P. 23*, although it is not identical, and the Kansas Supreme Court traditionally follows the federal courts' interpretation of the federal rule.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN29[] **Antitrust & Trade Law, Sherman Act**

The provisions of the Kansas antitrust act are very similar to the provisions of the Sherman Act. The only significant difference between plaintiffs' federal and Kansas state law claims is that the applicable state law provides full consideration paid as a remedy. *Kan. Stat. Ann. § 50-115*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN30[] **Class Actions, Prerequisites for Class Action**

South Carolina's class action rule is drawn principally from *Fed. R. Civ. P. 23*. Citations to federal case law and the federal rules are based on the principle that interpretations of the federal rule provide guidance in interpreting the South Carolina rule absent material differences in their wording.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN31[] **Antitrust & Trade Law, Sherman Act**

The South Carolina antitrust act is similar to the Sherman Act. The only significant difference between plaintiffs' federal and state law claims is that the South Carolina antitrust act provides full consideration paid as a remedy. *S.C. Code Ann. § 39-3-30*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN32[] **Class Actions, Prerequisites for Class Action**

The Tennessee Supreme Court describes Tennessee's class action rule as identical to *Fed. R. Civ. P. 23* and has ruled that federal authority is persuasive in Tennessee state courts interpreting Tennessee's class action rule.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN33[] **Antitrust & Trade Law, Sherman Act**

The Tennessee antitrust statute uses language very similar to the Sherman Act. The only significant difference between plaintiffs' federal and state law claims is that the Tennessee antitrust act provides full consideration paid as a remedy. *Tenn. Code Ann. § 47-25-106*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN34[] **Class Actions, Prerequisites for Class Action**

For tolling to apply, claims do not have to be identical but only substantially similar to those brought in the original class action.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN35[] **Public Enforcement, State Civil Actions**

The Maryland Antitrust Act, *Md. Code Ann., Com. Law § 11-201 et seq.*, contains a four year statute of limitations. *Md. Code Ann., Com. Law § 11-209(c)*.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN36[] **Statute of Limitations, Time Limitations**

Under Maryland law, the statute of limitations begins to run once plaintiff knows, or through the exercise of reasonable diligence should know, of the wrong.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Statute of Limitations > Tolling

HN37[] **Class Actions, Prerequisites for Class Action**

The United States District Court for the Eastern District of Pennsylvania concludes, based on relevant Maryland precedents, that the Maryland Court of Appeals would adopt cross-jurisdictional class action tolling in the antitrust context.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN38[] **Public Enforcement, State Civil Actions**

Courts interpreting the Maryland Antitrust Act, *Md. Code Ann., Com. Law § 11-201 et seq.*, are to be guided by the interpretation given by the federal courts to the various federal antitrust statutes. *Md. Code Ann., Com. Law II § 11-202(b)*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN39[] **Class Actions, Prerequisites for Class Action**

The Maryland class action rule, Md. R. 2-231, is similar to *Fed. R. Civ. P. 23*, and the Maryland Court of Appeals has ruled that its analysis shall be informed by cases interpreting *Fed. R. Civ. P. 23* and other analogous state rules outlining class certification requirements.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN40[] **Public Enforcement, State Civil Actions**

South Carolina's antitrust statute proscribes, inter alia, arrangements, contracts, agreements, trusts or combinations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into the state. *S.C. Code Ann. § 39-3-10*. Further, the statute forbids agreements that control, advance or reduce the price or cost to the consumer of goods that are either imported or that are transacted entirely within the state.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN41[] **Public Enforcement, State Civil Actions**

The Wisconsin antitrust statute prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade and commerce. *Wis. Stat. § 133.03*. Further, all contracts or agreements made by any person while a member of any combination or conspiracy prohibited by *Wis. Stat. § 133.03* are void. *Wis. Stat. § 133.14*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN42[] **Public Enforcement, State Civil Actions**

Wisconsin ***antitrust law***, though taken from the federal statutes, applies to intrastate as distinguished from interstate transactions. However, Wisconsin courts do not refuse to apply Wisconsin's antitrust statutes to intrastate activities that also involve interstate conduct or have interstate effects.

Counsel: [1]** FOR WINOFF INDUSTRIES, INC., Plaintiff: ALLEN D. BLACK, ROBERTA D. LIEBENBERG, FINE, KAPLAN & BLACK, PHILA, PA, H. LADDIE MONTAGUE, JR., JOHN R. TAYLOR, BERGER & MONTAGUE PC, PHILA, PA, HOWARD LANGER, LANGER & GROGAN P.C., PHILADELPHIA, PA, JOSEPH BRUCKNER, LOCKRIDGE, GRINDAL, NAUDEN, HOLSTEIN, PLLP, MINNEAPOLIS, MN, ROBERT J. LAROCCA, KOHN SWIFT & GRAF, P.C., PHILADELPHIA, PA.

FOR STONE CONTAINER CORPORATION, Defendant: ANDREW G. KLEVORN, KATHLEEN M. MULLIGAN, NATHAN P. EIMER, SIDLEY & AUSTIN, CHICAGO, IL, BARBARA W. MATHER, PEPPER HAMILTON LLP, PHILADELPHIA, PA, ERIC F. GLADBACH, NEW YORK, NY, JOHN P. HOOPER, NEW YORK, NY, R. MARK MC CAREINS, WINSTON & STRAWN, CHICAGO, IL, RALPH G. WELLINGTON, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR LANGER & GROGAN, P.C., HOWARD LANGER, Respondents: JOHN G. HARKINS, JR., HARKINS CUNNINGHAM, PHILADELPHIA, PA.

FOR FARMLAND FOODS, INC., Movant: JAMES J. RODGERS, DILWORTH PAXSON L.L.P., PHILADELPHIA, PA.

FOR USG CORPORATION, Movant: JOSEPH M. DONLEY, KITTREDGE, DONLEY, ELSON, FULLEM & EMBICK, PHILA, PA.

FOR VENTURA, JOHANNA FOODS, RICH ICE CREAM, FOREMOST FOODS USA, TREE TOP, ALAMAC ENTERPRISES INC., COUNTRY **[**2]** PURE, IMPERIAL FLAVORS, INC., JOHN F. PEOPLES, Movants: GEORGE BOCHETTO, BOCHETTO & LENTZ PC, PHILADELPHIA, PA.

FOR JEFFERSON SMURFIT CORP., SMURFIT-STONE CONTAINER CORP., Defendants: BARBARA W. MATHER, PEPPER HAMILTON LLP, PHILADELPHIA, PA, ERIC F. GLADBACH, NEW YORK, NY, JOHN P. HOOPER, NEW YORK, NY, PAUL H. SAINT-ANTOINE, DRINKER, BIDDLE & REATH LLP, PHILADELPHIA, PA, RALPH G. WELLINGTON, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR INTERNATIONAL PAPER CO., TERMINATED: 12/09/2003, Defendant: DANIEL B. HUYETT, STEVENS & LEE, TERMINATED: 12/16/1999, READING, PA, J. ROBERT ROBERTSON, STEVEN J. HARPER, STEVEN C. SEEGER, KIRKLAND AND ELLIS, CHICAGO, IL, RALPH G. WELLINGTON, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR GEORGIA PACIFIC CORP., TERMINATED: 12/09/2003, Defendant: DOUGLAS M. GARROU, THOMAS G. SLATER, JR. HUNTON & WILLIAMS, RICHMOND, VA, EDWARD M. POSNER, ISABEL C. DUFFY, REBECCA S. RIMMER, BRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA, PAUL H. SAINT-ANTOINE, DRINKER, BIDDLE & REATH LLP, PHILADELPHIA, PA, RALPH G. WELLINGTON, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR WEYERHAEUSER PAPER CO., TERMINATED: **[**3]** 12/09/2003, Defendant: RALPH G. WELLINGTON, SCOTT KL. FAST, SHERRY A. SWIRSKY, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA, RAM PADMAN ABHAN, ROBERT F. HUFF, JR., KIRKLAND & ELLIS, CHICAGO, IL.

FOR TEMPLER-INLAND INC., TERMINATED: 08/27/2003, Defendant: JENNIFER R. CLARKE, PHILA, PA.

FOR GAYLOR CONTAINER CORP., TERMINATED: 08/27/2003, Defendant: DONALD C.LE GOWER, DECHERT, PHILADELPHIA, PA, DOUGLAS J. KURTENBACH, RAM PADMAN ABHAN, ROBERT F. HUFF, JR., KIRKLAND & ELLIS, CHICAGO, IL, RALPH G. WELLINGTON, SCOTT L. FAST, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR UNION CAMP CORP, Defendant: DANIEL B. HUYETT, STEVENS & LEE, READING, PA.

FOR SIMPSON TACOMA KRAFT CO., TERMINATED: 11/08/1999, Defendant: FRANCIS P. NEWELL, MONTGOMERY MCCRACKEN, WALKER & RHOADS, LLP, PHILADELPHIA, PA.

FOR TENNECO, INC., TENNECO PACKAGING, Defendants: DANIEL W. SMITH, NORMAN M. HIRSCH, JENNER & BLOCK, CHICAGO, IL, DOUGLAS J. KURTENBACH, KIRKLAND & ELLIS, CHICAGO, IL, JOSEPH C. CRAWFORD, WOLF BLOCK SCHORR & SOLIS-COHEN, PHILADELPHIA, PA, RALPH G. WELLINGTON, SCOTT L. FAST, SHERRY A. SWIRSKY, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

[4]** FOR PACKAGING CORPORATION OF AMERICA, Defendant: DOUGLAS J. KURTENBACH, ROBERT F. HUFF, JR., KIRKLAND & ELLIS, CHICAGO, IL, RALPH G. WELLINGTON, SCOTT L. FAST, SHERRY A. SWIRSKY, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR GENERAL REFRACTORIES COMPANY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: ANTHONY J. BOLOGNESE, BOLOGNESE & ASSOCIATES, LLC, PHILADELPHIA, PA, CAROL V. GILDEN, MICHAEL JERRY FREED, STEVEN A. KANNER, MUCH SHELIST FREED DENENBERG AMENT & RUBENSTEIN, CHICAGO, IL, HOWARD LANGER, LANGER & GROGAN P.C., PHILADELPHIA, PA, ROBERT J. LAROCCA, KOHN SWIFT & GRAF, P.C., PHILADELPHIA, PA.

FOR STONE CONTAINER CORPORATION, Defendant: ANDREW G. KLEVORN, BRUCE MICHAEL ZESSAR, KATHLEEN M. MULLIGAN, NATHAN P. EIMER, SIDLEY & AUSTIN, CHICAGO, IL, BARBARA W. MATHER, PEPPER HAMILTON LLP, PHILADELPHIA, PA, ERIC F. GLADBACH, NEW YORK, NY, JOHN P. HOOPER, NEW YORK, NY, R. MARK MC CAREINS, WINSTON & STRAWN, CHICAGO, IL.

FOR PACKAGING CORPORATION OF AMERICA, Respondent: DOUGLAS J. KURTENBACH, RAM PADMAN ABHAN, KIRKLAND & ELLIS, CHICAGO, IL, SCOTT L. FAST, SHERRY A. SWIRSKY, SCHNADER HARRISON SEGAL & LEWIS LLP, PHILADELPHIA, PA.

[5]** FOR INLAND PAPERBOARD AND PACKAGING, INC., TERMINATED: 12/09/2003, Respondent: WILL W. SACHSE, DECHERT, PRICE & RHOADS, PHILADELPHIA, PA.

FOR WEYERHAEUSER COMPANY, TERMINATED: 12/09/2003, Respondent: SHERRY A. SWIRSKY, SCHNADER HARRISON SEGAL AND LEWIS L.L.P., PHILADELPHIA, PA.

FOR MAYTAG CORPORATION, Respondent: WILLIAM J. BLECHMAN, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW AND SPECTOR, MIAMI, FL.

FOR LANGER & GROGAN, P.C., HOWARD LANGER, Respondents: JOHN G. HARKINS, JR., HARKINS CUNNINGHAM, PHILADELPHIA, PA.

FOR CREST MEAT CO., INC., Movant: WARREN RUBIN, LAW OFFICES OF B.M. GROSS PC, PHILADELPHIA, PA.

FOR FARMLAND FOODS, INC., Movant: JAMES J. RODGERS, DILWORTH PAXSON L.L.P., PHILADELPHIA, PA.

FOR USG CORPORATION, Movant: JOSEPH M. DONLEY, KITTREDGE, DONLEY, ELSON, FULLEM & EMBICK, PHILA, PA. $5

FOR BACARDI USA, INC., CONAGRA FOOS, INC., CONOPCO, INC., ("UNILEVER"), COTT CORPORATION, DEL MONTE CORPORATION, DEL MONTE FRESH PRODUCE COMPANY, THE KROGER COMPANY, LEINER HEALTH PRODUCTS, PERRIGO COMPANY, REEBOK INTERNATIONAL LTD., REXALL SUNDOWN, INC., SAFEWAY INC., Movants: WILLIAM J. BLECHMAN, KENNY, NACHWALTER, SEYMOUR, ARNOLD, CRITCHLOW AND **[**6]** SPECTOR, MIAMI, FL.

FOR VENUTRA, JOHANNA FOODS, RICH ICE CREAM, FOREMOST FOODS USA, TREE TOP, ALAMAC ENTERPRISES INC., COUNTRY PURE, IMPERIAL FLAVORS, INC., JOHN F. PEOPLES, Movants: GEORGE BOCHETTO, BOCHETTO & LENTZ PC, PHILADELPHIA, PA.

Judges: JAN E. DUBOIS, J.

Opinion by: JAN E. DUBOIS

Opinion

[*337] DuBOIS, J.

August 27, 2004

MEMORANDUM

I. INTRODUCTION

Presently before the Court is Defendants' Motion to Dismiss Plaintiffs' State Law Claims (Docket No. 369, filed April 28, 2004), Opposition to Defendants' Motion to Dismiss Plaintiffs' State Law Claims (Docket No. 369, filed May 19, 2004), Memorandum of Plaintiff Perdue Farms Incorporated in Opposition to Defendants' Motion for Judgment on the Pleadings (Docket No. 383, filed May 24, 2004), Reply in Support of Defendants' Motion for Judgment on the Pleadings (Docket No. 386, filed June 2, 2004), Reply in Support of Defendants' Motion to Dismiss State Law

Claims (Docket No. 387, filed June 2, 2004) and Surreply of Plaintiff Perdue Farms Incorporated in Opposition to Defendants' Motion for Judgment on the Pleadings (Docket No. 390, filed June 4, 2004). For the reasons that follow, the defendants' Motion to Dismiss is denied.

[7] II. FACTUAL AND PROCEDURAL HISTORY**

This is an antitrust action involving allegations that a number of U.S. manufacturers of linerboard engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*. [1] The Court sets **[*338]** forth only an abbreviated factual and procedural history as pertinent to Defendants' Motion to Dismiss Plaintiffs' State Law Claims. The factual background of the case is described at length in this Court's Memorandum dated October 4, 2000 denying defendants' Motion to Dismiss, *In re Linerboard Antitrust Litig., 2000 U.S. Dist. LEXIS 14433, MDL No. 1261, 2000 WL 1475559, at *1-3 (E.D. Pa. Oct. 4, 2000)* ("Linerboard I"), its Memorandum dated September 4, 2001 certifying classes of direct purchasers of corrugated boxes and corrugated sheets, *In re Linerboard Antitrust Litig., 203 F.R.D. 197, 201-04 (E.D. Pa. 2001)* ("Linerboard II"), the Opinion of the Court of Appeals for the Third Circuit affirming the September 4, 2001 Memorandum and Order, *In re Linerboard Antitrust Litig., 305 F.3d 145, 147-49 (3d Cir. 2002)* (" **[**8]** Linerboard III"), this Court's Memorandum dated August 26, 2003 approving the final settlement between plaintiffs classes and two of the defendants, Temple-Inland, Inc. and Gaylord Container Corporation, *In re Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 573-575 (E.D. Pa. Aug. 26, 2003)* ("Linerboard IV"), and this Court's Memorandum dated June 2, 2004 awarding class counsel attorneys fees, *In re Linerboard Antitrust Litig., -- F. Supp. 2d --, 2004 U.S. Dist. LEXIS 10532, 2004 WL 1221350, *1-3 (E.D.Pa. Jun. 2, 2004)* ("Linerboard V").

[9] A. The Class Case**

The price fixing conspiracy that is the subject of this litigation was the focus of a 1998 complaint by the Federal Trade Commission ("FTC") against Stone Container Corporation ("Stone"). [2] **[**10]** See *In re Linerboard Antitrust Litigation, 2000 U.S. Dist. LEXIS 14433, 2000 WL 1475559, *1 (E.D.Pa. Oct. 4, 2000)*. Soon after the FTC filed its complaint, three lawsuits were filed in the Northern District of Illinois on behalf of purchasers of corrugated sheets ("Sheets Complaint I"). [3]

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[1] Linerboard includes any grade of paperboard suitable for use in the production of corrugated sheets, which are in turn used in the manufacture of corrugated boxes and for a variety of industrial and commercial applications. Corrugated sheets are made by gluing a fluted sheet which is not made of linerboard, known as the corrugating medium, between facing sheets of linerboard; corrugated sheets are also referred to as containerboard. The defendants named in the instant lawsuits are major integrated manufacturers and sellers of linerboard, corrugated sheets and corrugated boxes.

[2] The FTC charged Stone with a unilateral violation of *Section 5 of the Federal Trade Commission Act*. According to the FTC, Stone had attempted to reduce linerboard inventories and had "invited" some of its competitors to join in a "coordinated price increase." The FTC did not allege that any other manufacturer had accepted Stone's "invitation," nor did it allege the existence of any conspiracy. Stone and the FTC entered into a consent decree. In doing so, Sone did not admit liability for its alleged unilateral misconduct, and the consent decree has no preclusive effect on Stone in this private party action. See *In re Linerboard Antitrust Litigation, 2000 U.S. Dist. LEXIS 14433, 2000 WL 1475559, *1 (E.D.Pa. Oct. 4, 2000)*.

[3] General Refractories Co. v. Stone Container Corp., Civil Action No. 99-1341 (transferred on Mar. 16, 1999 to E.D. Pa.), and originally No. 98 C 3543 (filed June 8, 1998, N.D. Ill.); Albert I. Halper Corrugated Box Co. v. Stone Container Corp., Class Action No. 99-1396 (transferred on Mar. 19, 1999 to E.D. Pa.), and originally No. 98 C 4659 (filed July 28, 1998, N.D. Ill.) and Crest Meat Co., Inc. v. Stone Container Corp., Civil Action No. 99-1397 (transferred on Mar. 19, 1998 to E.D. Pa.), and originally No. 98 C 4612 (filed July 27, 1998, N.D. Ill.). These cases named only Stone as a defendant, but plaintiffs alleged that there were unnamed co-conspirators involved in the antitrust conspiracy, including inter alia, Jefferson Smurfit Corp. See Sheets Complaint I (all three complaints) at P 9. Together, these plaintiffs are referred to as the Corrugated Sheet Plaintiffs or Sheet Plaintiffs. The Corrugated Sheet Plaintiffs aver in Sheets Complaint I that they were harmed by an industry-wide combination to artificially raise the price of linerboard.

Four other lawsuits were filed **[**11]** against Stone in the Eastern District of Pennsylvania on behalf of purchasers of corrugated boxes in late 1998 ("Box Plaintiffs"). [4] On February 12, 1999 the Judicial Panel on Multidistrict Litigation transferred the actions pending in the Northern District of Illinois to this Court for all further pretrial proceedings. On May 14, 1999 the Corrugated Box Plaintiffs filed the First Amended and Consolidated Class **[*339]** Action Complaint ("Corrugated Box Amended Complaint"). Stone and the following "Non-Stone" Defendants were named in the Corrugated Box Amended Complaint: Jefferson Smurfit Corp., Smurfit-Stone Container Corp., International Paper Co., Georgia Pacific Corp., Weyerhaeuser Paper Co., Temple Inland Inc., Gaylord Container Corp., Union Camp Corp., Simpson Tacoma Kraft Co., Tenneco Inc., Tenneco Packaging, and Packaging Corp. of America. According to the Corrugated Box Amended Complaint, the Non-Stone Defendants accepted Stone's "invitation" to restrict the production of linerboard and artificially raise prices, resulting in an antitrust conspiracy in violation of the *Sherman Act*.

[12]** On May 18, 1999 a separate class action complaint was filed in the Eastern District of Pennsylvania on behalf of purchasers of corrugated sheets ("Sheets Complaint II"). This complaint names eleven of the twelve Non-Stone Defendants identified in the Corrugated Box Amended Complaint. Like the Corrugated Box Amended Complaint, Sheets Complaint II alleges that the named Non-Stone Defendants unlawfully conspired with Stone and each other to artificially raise the price of linerboard.

By Memorandum and Order dated September 4, 2001, this Court certified the following two plaintiff classes: a "sheet class" consisting of buyers of corrugated sheets and a "box class" consisting of purchasers of corrugated containers. *Linerboard II, 203 F.R.D. at 224*. On September 5, 2002, the Court of Appeals affirmed the ruling of this Court. By Order dated October 16, 2002, the Court of Appeals denied defendants' petition for en banc review. On January 14, 2003, defendants filed a Petition for Writ of Certiorari to the United States Supreme Court. The petition was denied on April 21, 2003. Thereafter, the class case was resolved through a series of partial settlements for a total **[**13]** of $ 202,572,489. [5]

[14] B. The Direct Actions**

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[4] Winoff Industries, Inc. v. Stone Container Corp., Civil Action No. 98-5055 (filed Sep. 23, 1998, E.D. Pa.), Oak Valley Farms, Inc. v. Stone Container Corp., Civil Action No. 98-5251 (filed Oct. 2, 1998, E.D. Pa.), Garrett Paper, Inc. v. Stone Container Corp., Civil Action No. 98-5228 (filed Oct. 1, 1998, E.D. Pa.), and Local Baking Products, Inc. v. Stone Container Corp., Civil Action No. 98-5384 (filed Oct. 9, 1998, E.D. Pa.). Together, these plaintiffs are referred to as the Corrugated Box Plaintiffs or Box Plaintiffs. The Corrugated Box Plaintiffs also aver that they were harmed by an industry-wide combination to artificially raise the price of linerboard. The four corrugated box actions in the Eastern District of Pennsylvania were consolidated by stipulation and order dated December 17, 1998 pursuant to *Federal Rule of Civil Procedure 42(a)*.

[5] By Order dated August 26, 2003, this Court approved a partial settlement in the amount of $ 8 million between plaintiff classes and Temple-Inland, Inc. and Gaylord Container Corp. The $ 8 million settlement was reduced to$ 7.2 million in accordance with the terms of the settlement agreement based on the number of parties that subsequently opted-out of the classes. This first partial settlement was described by petitioners as an "ice-breaker-a settlement that would lead to further settlements.

Within a month of Court approval of the ice-breaker settlement, on September 22, 2003, the plaintiff classes and defendants International Paper Company and Union Camp Corporation, Georgia Pacific Corporation, and Weyerhauser Company announced they had reached a settlement in the total amount of $ 68 million. The Court granted final approval of that settlement on December 8, 2003.

Prior to that date, in October and November 2003, the parties announced the two additional partial settlements with defendants Packaging Corporation of America, Tenneco, Inc., and Tenneco Packaging, Inc. (The "PCA settlement") in the amount of $ 43 million and with defendants Stone Container Corporation, Jefferson Smurfit Corporation, and Smurfit Stone Container Corporation (the "Stone settlement") in the amount of $ 92.5 million. As a result of a "most favored nation's clause" in the PCA settlement agreement, the terms of the Stone settlement triggered a reduction in the PCA settlement from $ 43 million to $ 34 million. The Court granted final approval of both the PCA settlement and the Stone settlement by Memorandum and Order dated March 21, 2004. With the Court's approval of these last two partial settlements, all claims in the class action were resolved for a total of $ 202,572,489.

One-hundred and forty entities opted out of the classes by filing Requests for Exclusion on or before June 9, 2003. [6] A detailed description of the notice to classes and the procedural history involving the opt-outs from the class is provided in this Court's Memorandum of this Court of September 5, **[*340]** 2003. Of the 140 Requests for Exclusion, 13 groups of opt-outs subsequently filed direct action actions against defendants. As of the date of this memorandum, 11 of those groups have claims against one or more of the defendants outstanding and one group has voluntarily dismissed its claims against all defendants." The 11 direct actions are as follows:

1. Perdue Farms Incorporated v. Stone Container Corporation, et al., No. 03-1702 (D. Md. filed June 9, 2003);

2. Sara Lee Corporation, et al. v. Smurfit Stone Container Corporation, et al., No. 03-3939 (N.D. Ill. filed June 10, 2003);

3. Procter & Gamble Company, et al. v. Stone Container Corporation, et al., No. 03-3944 (N.D. Ill. filed June 10, 2003);

4. United States Gypsum Company, et al. v. Stone Container Corporation, et al., No. 03-4251 (N.D. Ill. filed June 10 ,2003);

5. **[**15]** Smithfield Foods, Inc., et al. v. Smurfit Stone Container Corporation, et al., No. 03-3968 (N.D. Ill. filed June 11, 2003);

6. Hormel Foods Corporation, et al. v. Stone Container Corporation, et al., No. 03-3421 (D. Minn. filed June 13, 2003);

7. Milne Fruit Products, Inc., et al. v. Stone Container Corporation, et al., No. 03-4049 (N.D. Ill. filed June 13, 2003);

8. Kellogg Company, et al. v. Smurfit Stone Container Corporation, et al., No. 03-4213 (N.D. Ill. filed June 19, 2003)

9. Farmland National Beef Packing Co. v. Stone Container Corporation, et al., No. 03-1312 (D. of Kansas filed August 29, 2003).

10. Mars Inc., et al. v. Stone Container Corporation, et al., No. 03-6977 (N. D. of Ill. filed October 1, 2003); and

11. Conopco, Inc., et al. v. Smurfit Stone Container Corporation, as successor to Stone Container Corporation, et al., No. 03-3549 (E.D. Pa. filed June 9, 2003).

Of the above 11 cases, only the Perdue plaintiffs' Complaint alleged violations of state antitrust laws, the *Maryland Antitrust Act* ("MATA"), in addition to federal antitrust violations. On April 1, 2004, plaintiffs in the Procter & Gamble, Milne Fruit and **[**16]** Mars cases moved to amend their complaints to add causes of action under the laws of six states: Colorado, Indiana, Kansas, South Carolina, Tennessee and Wisconsin. The defendants did not oppose the motion to amend stating that they would instead file motions to dismiss. By Order dated April 1, 2004, the Court granted the motion to amend. These plaintiffs subsequently filed amended complaints and defendants filed responses. Thereafter, defendants moved to dismiss the state law claims in the Procter & Gamble, Milne Fruit and Mars Amended Complaints under *Federal Rule of Civil Procedure 12(b)(6)* and the *Maryland Antitrust Act* claims in the Perdue Complaint under *Federal Rule of Civil Procedure 12(c)*.

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[6] Copies of the Record of Potential Class Members Who Excluded Themselves from the Classes is appended to this Court's Memorandum and Order dated December 8, 2003 approving the Settlement Agreement between Temple-Inland, Inc. and Gaylord Container Corporation; this Court's Memorandum and Order dated December 8, 2003, granting Class Plaintiffs' Motion for Final Approval of Settlement Agreement Between the Class and International Paper Company and Union Camp Corporation, Georgia-Pacific Corporation, and Weyerhauser Company; and this Court's Memorandum and Order dated April 21, 2004 granting Class Plaintiffs' Motion for Final Approval of the Settlements with Defendants Packaging Corporation of America, Inc., Tenneco, Inc. And Tenneco Packaging Inc. and with Defendants Stone Container Corporation, Jefferson Smurfit Corporation, and Smurfit Stone Container Corporation.

[17]** On April 26, 2004, the plaintiffs in the Conopco, Kellogg, US Gypsum, Hormel and Perdue direct actions sought leave to amend their complaints consistent with the amendments in the Proctor & Gamble, Milne Foods and Mars direct actions. The Court decided to defer addressing that issue until it had ruled on the Defendants' Motion to Dismiss Plaintiffs' State Law Claims in the amended complaints filed in Procter & Gamble, Milne Foods and Mars direct actions. By Order dated June 22, 2004, the Court granted plaintiffs in the Conopco, Kellogg, US Gypsum, Hormel and Perdue direct actions leave to file amended complaints in the event that it denied the instant Motion to Dismiss Plaintiffs' State Law Claims and provided that any such amended complaints would be deemed filed as of April 26, 2004, the date on which these direct action plaintiffs sought leave of court to do so. [7]

[18] III. LEGAL STANDARDS**

A. *Rule 12(b)(6)*

Rule 12(b)(6) of the federal rules of civil procedure provides that, ***HN1***[] in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may **[*341]** be raised by motion. *Fed. R. Civ. P. 12(b)(6)*. In considering a motion to dismiss under *Rule 12(b)(6)*, a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Jenkins v. McKeithen, 395 U.S. 411, 421, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969)*. Only those facts alleged in the complaint may be considered in deciding such a motion. *ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994)*. A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*. Therefore, the facts alleged in plaintiffs' Amended Complaints are accepted as true in deciding this motion.

HN2[] The 'Third Circuit Rule" allows defendants to raise a limitations defense in a *Rule **[**19]** 12(b)(6)* motion where the "time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations." *Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002)* (citing *Hanna v. U.S. Veterans' Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir. 1975))*. Thus, the Court will consider defendants limitations arguments in addressing the motion to dismiss.

B. *Rule 12(c)*

HN3[] A motion for judgment on the pleadings, made pursuant to *Federal Rule of Civil Procedure 12(c)*, is treated under the same standard as a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. See *Shelly v. Johns-Manville Corp., 798 F.2d 93, 97 n.4 (3d Cir. 1986)*; *Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 376 (E.D.Pa. 1995)*. A motion for judgment on the pleadings will only be granted where the moving party has established that no material issue of fact remains to be resolved, and that the movant is entitled to judgment as a matter of law. See *Institute for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F.2d 1002, 1005 (3d Cir. 1991)*. **[**20]** In determining whether a material issue of fact exists, the court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. See *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993)*.

IV. DISCUSSION

Defendants Motion to Dismiss raises three issues. First, defendants have moved under *Rule 12(b)(6)* to dismiss the antitrust claims under Colorado, Indiana, Kansas, South Carolina and Tennessee law in the Mars, Milne Fruit and Procter & Gamble Amended Complaints on the ground that they are time barred. Second, defendants have moved under *Rule 12(c)* to dismiss the Perdue plaintiffs' Maryland antitrust claims on the ground that they are time barred. Third, defendants have moved under *Rule 12(b)(6)* to dismiss the South Carolina and Wisconsin claims in the Mars,

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[7] Direct action plaintiffs argued that this was the appropriate relation back date. The Court, applying *Federal Rule of Civil Procedure 15(c)*, concludes that the amendments relate back to the date on which the original direct action complaints were filed.

Milne Fruit and Procter & Gamble Amended Complaints on the ground that the conduct plaintiffs allege is not cognizable under the antitrust statutes of these states. The Court will address these issues in turn.

A. MOTION TO DISMISS COLORADO, INDIANA, KANSAS, SOUTH CAROLINA, [21] AND TENNESSEE CLAIMS UNDER *RULE 12(b)(6)* AS TIME BARRED**

1. Colorado, Indiana, Kansas, South Carolina and Tennessee Statutes of Limitations

Defendants argue that each plaintiff admits in its Amended Complaint that it knew of the alleged wrongful conduct by all defendants as of February 25 1998, when the FTC published its Complaint against Stone. Mars Am. Compl. P 65; Milne Am. Compl. P 61; Procter & Gamble Am. Compl. P 127. In the alternative, defendants argue that plaintiffs knew of defendants' alleged conspiracy by May 18, 1999, the date the Sheets Complaint II was filed in this district, at the latest. Defendants Mot. to Dismiss 5. Defendants argue under the statutes of limitations of the states in question, using either February 25, 1998 or May 18, 1999, as a baseline, direct action plaintiffs claims are time barred.

[*342] By Order dated April 1, 2004, the Court granted the motion of the Mars, Milne Fruit and Proctor & Gamble plaintiffs to amend their complaints. Thereafter, the Mars, Milne Fruit and Proctor & Gamble plaintiffs filed Amended Complaints.

Federal Rule of Civil Procedure 15(c) provides **[**22]** that:

> *HN4*[] An amendment of a pleading relates back to the date of the pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The Court concludes that the Amended Complaints allege claims that arose out of the conduct set forth in the original Complaints filed in these cases. The Mars direct action was filed on October 1, 2003, the Milne Fruit direct action was filed on June 13, 2003, and the Proctor & Gamble direct action was filed on June 10, 2003. Thus, the amendments relate back to these dates under *Rule 15(c)*.

a. Colorado

Claims under the Colorado Antitrust Act of 1992 (*Colo. Rev. Stat. § 6-4-104 et seq.*) have a four year limitations period. *HN5*[] "Any civil action commenced pursuant to this [Act] shall be brought within four years from the date such cause of action accrued." *Colo. Rev. Stat. § 6-4-118*.

HN6[] Plaintiffs' four year deadline for filing their Colorado claims began when "the circumstances giving rise to the cause of action are discovered or should have been **[**23]** discovered in the exercise of reasonable diligence." Id.

Defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of February 25 1998, then each plaintiff should have filed its complaint alleging violations of Colorado law by February 25, 2002. In the alternative, defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of May 18, 1999, the Colorado claims should have been filed by May 18, 2003.

b. Indiana

HN7[] Under Indiana case law, the statute of limitations for claims under the Indiana antitrust statute (*Ind. Code § 24-1-1-1 et seq.*) is two years. *Gibson v. Miami Valley Milk Producers, Inc., 157 Ind. App. 218, 299 N.E.2d 631, 637 (Ind. Ct. App. 1973)* (it is "without dispute that the two year statute of limitations" barred claims under the Indiana antitrust statute); *Sandidge v. Rogers, 167 F. Supp. 553, 556 (S.D. Ind. 1958)*; cf. *Citizens Nat'l Bank of Grant County v. First Nat'l Bank of Marion, 165 Ind. App. 116, 331 N.E.2d 471, 483 (Ind. Ct. App. 1975)* (assuming that two year statute of limitations **[**24]** applied to Indiana state antitrust claim).

HN8[] In Indiana, a cause of action accrues when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained. *Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 842 (Ind. 1992)* (finding discovery rule applies to all tort claims); *Burks v. Rushmore, 534 N.E.2d 1101, 1103-04 (Ind. 1989)*; *Meisenhelder v. Zipp Express Inc., 788 N.E.2d 924, 927 (Ind. Ct. App. 2003)*. 10 See *Ind. Code Ann. § 34-11-2-4* ("An action for … forfeiture of penalty given by statute must be commenced within two years after the cause of action accrues.").

Defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of February 25 1998, then each plaintiff should have filed its complaint alleging violations of Indiana law by February 25, 2000. In the alternative, defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of May 18, 1999, the Indiana claims should have been filed by May 18, 2001.

c. Kansas

HN9[] Kansas courts apply a three year statute of limitations **[**25]** for statutory claims under the Kansas Restraint of Trade Act (*Kan. Stat. Ann. § 50-101 et seq.*).11 See *Kan. Stat. Ann. § 60-512(2)* ("The following actions shall be brought within three (3) years:…An action upon a liability created by statute other than a penalty or forfeiture"); see also *Four B* ***[*343]*** *Corp. v. Daicel Chem. Indus., Ltd., 253 F. Supp. 2d 1147, 1156 (D. Kan. 2003)* (finding the "applicable statute of limitations [for antitrust liability] is three years, as set out in *§ 60-512(2)*") (citing *McCue v. Franklin, 156 Kan. 1, 131 P.2d 704 (Kan. 1942)*); *In re Vitamins Antitrust Litig., 2000 U.S. Dist. LEXIS 11351, 2000 WL 1524912, at *6 (D.D.C. July 14, 2000)* ("claims under the Kansas Antitrust Statutes are governed by the three-year statute of limitations set forth in the general Kansas statutes.").

HN10[] In Kansas, the statute of limitations began to run when the direct action plaintiffs reasonably could have learned of their potential cause of action. See *Med James, Inc. v. Barnes, 31 Kan. App. 2d 89, 61 P.3d 86, 93 (Kan. Ct. App. 2003)* ("Cases in Kansas have repeatedly held that the critical **[**26]** information to trigger the running of the statute of limitations is knowledge of the fact of injury, not the extent of injury."); *Roof-Techs Int'l v. State, 30 Kan. App. 2d 1184, 57 P.3d 538, 546 (Kan Ct. App. 2002)* ("The critical information is knowledge of the fact of injury, not the extent of injury.") (emphasis in original).

Defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of February 25 1998, then each plaintiff should have filed its complaint alleging violations of Kansas law by February 25, 2001. In the alternative, defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of May 18, 1999, the Kansas claims should have been filed by May 18, 2002.

d. South Carolina

HN11[] The South Carolina antitrust statute (*S.C. Code Ann. § 39-5-10 et seq.*) contains no express statute of limitations provision. Therefore, the general three year statute of limitations period for "an action upon a liability created by statute other than a penalty or forfeiture" is applicable. *S.C. Code Ann. § 15-3-530*. This three year statutory **[**27]** period is analogous to the three-year statute of limitations for claims under South Carolina's Unfair Trade Practices Act, *S.C. Code Ann. § 39-5-10 et seq.* See *S.C. Code Ann. § 39-5-150* (action may not be brought "more than three years after discovery of the unlawful conduct which is the subject of the suit.").

HN12[] In South Carolina, the statute of limitations begins to run when the plaintiff "knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645, 647 (S.C. 1996)*. This requires plaintiffs to act with "promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." Id.

Defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of February 25 1998, then each plaintiff should have filed its complaint alleging violations of South Carolina law by February 25, 2001. Defendants argue that in the alternative, if direct action plaintiffs knew **[**28]** of the alleged wrongful conduct by defendants as of May 18, 1999, the South Carolina claims should have been filed by May 18, 2002.

f. Tennessee

HN13[] Tennessee applies its general three year statute of limitations to claims under the Tennessee Trade Practices Act (*Tenn. Code § 47-25-101 et seq.*). See *Tenn. Code § 28-3-105* ("The following actions shall be commenced within three (3) years from the accruing of the cause of action ... (3) Civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered, or liquidated damages or other recovery therefore, when no other time of limitation is fixed by the statute creating such liability."); see also Leech v. Levi Strauss & Co., 1980 WL 4696, at *3 (Tenn. Ch. Ct. Sept. 25, 1980) (holding that a private antitrust action for injury sounds in tort and is subject to a three year statute of limitations).

HN14[] Under Tennessee law, the cause of action accrues and the statute of limitations begins to run when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should **[**29]** have been discovered. *Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982)*; McCroskey v. Bryant Air ***[*344]*** Conditioning Co., *524 S.W.2d 487, 491 (Tenn. 1975)*. The Tennessee Court of Appeals explained that the claim accrues upon "discovery of the existence of a right of action, that is, facts which would support an action for tort against the tortfeasor. Such facts include not only the existence of an injury, but the tortious origin of the injury." *Hathaway v. Middle Tenn. Anesthesiology, P.C., 724 S.W.2d 355, 359 (Tenn. Ct. App. 1986)*.

Defendants argue that if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of February 25 1998, then each plaintiff should have filed its complaint alleging violations of Tennessee law by February 25, 2001. Defendants argue that in the alternative, if direct action plaintiffs knew of the alleged wrongful conduct by defendants as of May 18, 1999, the Tennessee claims should have been filed by May 18, 2002.

2. Tolling the Colorado, Indiana, Kansas, South Carolina and Tennessee Statutes of Limitations

The Mars, Milne Fruit and Proctor & Gamble plaintiffs argue **[**30]** that the state statutes of limitations were tolled during the five years that defendants were contesting the issue of class certification, from the first date of filing in 1998 to this Court's Order of April 23, 2004 granting final certification of the two classes citing the rationale of the Supreme Court decisions *American Pipe & Const. Co. v. Utah, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)* and *Crown Cork & Seal Inc., v. Parker, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983)*. Pl.'s Opp. to Def.'s Mot. to Dismiss Pl.'s State Law Claims 3. Plaintiffs filed their direction actions within 10 months of the Order of April 23, 2004, thus within even the shortest statute of limitations of two years.

The Court notes as an initial matter, that if the statutes of limitations on the plaintiffs' claims in Mars, Milne Fruit and Proctor & Gamble plaintiffs claims were tolled because of the pendency of the class action, they were tolled until those plaintiffs filed Requests for Exclusion from the classes, not, as plaintiffs assert, when the Court issued its final certification order. See *Realmonte v. Reeves, 169 F.3d 1280, 1284 (10th Cir. 1999)* **[**31]** (citing *Tosti v. City of Los Angeles, 754 F.2d 1485, 1488 (9th Cir. 1985)* (when class certification has been granted, statute of limitations begins running anew from date class member opts out). These plaintiffs filed Requests for Exclusion on or before June 9, 2003. Thus, if the statutes of limitations were tolled, direct action plaintiffs claims are timely. The Court will analyze the arguments on this issue using the opt out date as the baseline.

HN15[] Filing a federal class action tolls the federal statute of limitations on individual claims pending a decision on class certification in the same federal court based on the facts alleged in the class case. *Crown Cork & Seal Inc., v. Parker, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983)*; *American Pipe & Const. Co. v. Utah, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)*. The Supreme Court reasoned that the purpose of *Fed. R. Civ. P. 23* would not be served by precluding putative class members from intervening in a class case if they failed to do so within the applicable statute of limitations. *American Pipe, 414 U.S. at 550-52*. The Court further **[**32]** explained:

> ***HN16***[] Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on

> the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

Id. at 552. The Supreme Court expressed a number of reasons for its holding in American Pipe. First, the Court reasoned that refusing to extend the tolling rule to class members would "deprive *Rule 23* class actions of the efficiency and economy of litigation which is a principal purpose of the procedure," leading to the filing of numerous protective, duplicative and in many cases, unnecessary, suits by individual class members. **[*345]** *Id. at 553-54*. Moreover, the Supreme Court concluded that the tolling rule is not inconsistent with the **[**33]** purposes behind statutes of limitations, namely, preventing plaintiffs from bringing "stale claims" with no prior notice to defendants.

Crown, Cork & Seal ***HN17***[] extended the ruling in American Pipe to cases in which class members filed individual suits instead of intervening in the class action after the denial of class certification. *Id. at 554*. In so ruling the Court reasoned that because defendants were put on notice of the factual predicates for all of the potential antitrust claims of class members, no "potential for unfair surprise" would be created by tolling the statutes of limitations for plaintiffs' claims during the pendency of class certification. *Crown, Cork, 462 U.S. at 353* (once class action is filed, "the defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class").

HN18[] American Pipe's holding has been extended to situations, such as the one presented in this case, in which a class is certified and putative class members choose to opt out of the litigation and file individual suits against the defendants. See, e.g., *Realmonte v. Reeves, 169 F.3d 1280, 1284 (10th Cir. 1999)* **[**34]** (collecting cases). In applying the American Pipe rule to class members who opted out of a class after class certification was granted, the Realmonte court stated:

> Considering the Supreme Court's rationale that tolling the applicable statute of limitations during the course of a class member's participation would serve to prevent the "needless duplication of motions" and protective filings by parties seeking to preserve their rights, we believe that, in this case, the tolling rule would even be more applicable.

Id. Continuing, the court stated that the *Rule 23(c)(2)* requirement of notice to all class members that can upon request be excluded from the class would be meaningless if the statute of limitations for such members' subsequent individual claims were not tolled. Id. (citing *Crown, Cork & Seal, 462 U.S. at 351-52*).

The Mars, Milne Fruit and Proctor & Gamble plaintiffs contend that none of the states in question have addressed application of the rationale of American Pipe and Crown, Cork to toll the statute of limitations on state antitrust claims during the pendency of an antitrust class action filed in federal **[**35]** court, hereafter referred to as "cross-jurisdictional class action tolling," but that the highest court of each state would adopt cross-jurisdictional class action tolling under the facts of the present case. Defendants agree that neither the highest court nor the legislature of those states have adopted cross jurisdictional class action tolling and argue that this Court should only apply a cross-jurisdictional tolling rule where the highest court or legislature has expressly adopted such a rule.

In *Chardon v. Soto, 462 U.S. 650, 656-7, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983)*, a case involving a claim under *42 U.S.C. § 1983*, the Supreme Court ruled that a federal court applying a state statute of limitations must also apply the state law of tolling. However, Chardon did not address the situation presently before this Court-how class action tolling applies in an antitrust case involving state and federal claims when the applicable state law does not provide for tolling.

HN19[] In analyzing plaintiffs tolling argument the Court will examine: (1) the federal interest in tolling the state statutes of limitations: (2) whether the highest court of the state has or **[**36]** would adopt cross-jurisdictional class action tolling for antitrust class actions filed in federal court; (3) whether plaintiffs state law claims are sufficiently similar to plaintiffs federal claims to toll the state statutes of limitations; and (4) the prejudice suffered by defendants if the Court tolls the statutes of limitations.

a. The Federal Interest

As the Eighth Circuit held in *Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717 (8th Cir. 1993)*, in "American Pipe the [Supreme] Court identified a strong federal interest in ensuring the 'efficiency and economy of the class-action procedure." *Id. at 718* (citing *Chardon, 462 U.S. at 661*. Thus, the Court will consider **[*346]** the federal interest in the efficiency of the class action procedure in applying state statutes of limitations.

In the antitrust context, declining to adopt cross-jurisdictional class action tolling will invite the filing of numerous protective, duplicative and in many cases, unnecessary, suits by class members that want to consider filing claims under state ***antitrust law*** not included in a federal class action complaint. *American Pipe, 414 U.S. at 553-54.* **[**37]** These suits would undermine the efficiency of federal class actions. For instance, in the present case, because the defendants made sales to buyers in many states, class members would have had to file protective suits in every state in which a class member potentially made purchases from defendants pending confirmation of those sales through discovery. Thus, in addition to filing protective suits in the seven states in question, adopting defendants' argument would mean that class members would have been required to file protective suits in a number of other states in order to preserve their state law claims. Moreover, if there were diversity of citizenship, defendants could remove such suits to federal court. Once in federal court, these cases would likely be transferred by the Judicial Panel on Multidistrict Litigation to this Court. Additional suits in this Court would further complicate these proceedings and consume significant judicial resources and unnecessarily increase the cost of litigation to the parties.

Further, pendency of suits in state court would require coordination of discovery in the federal case with discovery in the state cases that were not removed. The Manual **[**38]** for Complex Litigation counsels courts to "encourage techniques that coordinate discovery and avoid duplication." Manual for Complex Litigation (4) § 20.14 (2004). A cross-jurisdictional class action tolling rule accomplishes both goals. The Court believes that this federal interest alone is sufficient to warrant tolling of state statutes of limitations. *Adams Public School District, 7 F.3d 717 (8th Cir. 1993)* ("we view the federal interest as sufficiently strong to justify tolling in a diversity case when the state law provides no relief").

b. The States' Interests

The Court concludes that, independent of the federal interest involved, each of the states in question would adopt cross-jurisdictional class action tolling in antitrust class actions filed in federal court. ***HN20***[] In the absence of controlling state law, this Court must consider all available resources, including appellate court decisions of the individual courts in question, other state and federal decisions, and the general trend of authority, to determine how the highest courts of the various states in question would decide the issue. *Sawtell v. E. I. du Pont De Nemours and Co., 22 F.3d 248, 250* ***[**39]*** *(10th Cir.)*, cert. denied, *513 U.S. 917, 115 S. Ct. 295, 130 L. Ed. 2d 209 (1994)*. The Court will analyze the statutes and laws of each state individually but first will consider "other state and federal decisions, and the general trend of authority" as it applies in general to the laws of all the states in question.

A number of states' highest courts have addressed cross-jurisdictional tolling. The Supreme Court of Illinois in *Portwood v. Ford Motor Co., 183 Ill. 2d 459, 701 N.E.2d 1102, 233 Ill. Dec. 828 (Ill. 1998)*, declined to adopt cross-jurisdictional tolling under the following rationale:

> Tolling the statute of limitations for individual actions filed after the dismissal of a class action is sound policy when both actions are brought in the same court system. In such instances, failing to suspend the limitation period would burden the subject court system with the protective filings described by the Supreme Court in American Pipe and Crown, Cork. Tolling the statute of limitations for purported class members who file individual suits within the same court system after class status is denied therefore serves to reduce the total **[**40]** number of filings within that system.
>
> Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. **[*347]** Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as

> class actions after the statute of limitations has run. Although plaintiffs assert that the majority of courts which have considered this issue have chosen to adopt cross-jurisdictional tolling to preserve claims under state law, our research indicates precisely the opposite. At any rate, it is apparent that very few states to date have even considered the issue of cross-jurisdictional tolling, let alone adopted it. Given this state of affairs, it is clear that adoption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal **[**41]** of their class actions in federal court. We refuse to expose the Illinois court system to such forum shopping.
> Furthermore, because state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.

Id. at 1104.

The Supreme Court of Ohio reached the opposite result and adopted cross-jurisdictional tolling in **[*348]** *Vaccariello v. Smith & Nephew Richards, Inc., 94 Ohio St. 3d 380, 2002 Ohio 892, 763 N.E.2d 160 (Ohio 2001)*, an antitrust case. The Vaccariello court addresses the Illinois Supreme Court Portwood decision and provided the following rationale for cross jurisdictional tolling in antitrust cases:

> In *Portwood v. Ford Motor Co., 183 Ill. 2d 459, 701 N.E.2d 1102, 1104, 233 Ill. Dec. 828 (Ill. 1998)* the Supreme Court of Illinois rejected cross-jurisdictional tolling "because plaintiffs **[**42]** from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule," thereby burdening Illinois' court system. We are not persuaded that this is a realistic potential problem.
> Our holding today merely allows a plaintiff who could have filed suit in Ohio irrespective of the class action filed in federal court in Pennsylvania to rely on that class action to protect her rights in Ohio. To do otherwise would encourage all potential plaintiffs in Ohio who might be part of a class that is seeking certification in a federal class action to file suit individually in Ohio courts to preserve their Ohio claims should the class certification be denied. The resulting multiplicity of filings would defeat the purpose of class actions. Our holding does not invite plaintiffs who have no relationship to Ohio to file suit in our courts. Instead, only those plaintiffs who could have otherwise filed suit in Ohio will be able to file suit pursuant to the tolling rule we espouse today.

Id. at 163.

The Court finds the Ohio Supreme Court's rationale in Vaccariello more compelling in an antitrust case. In so ruling, the Court notes **[**43]** that Portwood involved products liability claims. "Several courts which have considered the applicability of the American Pipe tolling rule to products liability or mass tort cases have ruled against tolling" on the ground that it led to forum shopping-the filing of lawsuits in states which permitted tolling. *Staub v. Eastman Kodak Co., 320 N.J. Super. 34, 726 A.2d 955, 964 (N.J. Super.Ct.App.Div. 1999)* (collecting cases). This Court agrees with the Ohio Supreme Court that the Illinois Supreme Court's concerns about encouraging litigation expressed in Portwood are not realistic in antitrust cases. Unlike products liability cases which, because of our national economy, could potentially be filed in any state, claims under state antitrust statutes require much greater contacts between the potential claimant and the forum state. [8] See, e.g., *Vaccariello, 763 N.E.2d at 164* ("Our

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[8] The states have adopted various standards for assessing the requisite contacts between a claimant and a state's economy in order to give rise to a claim under the state's antitrust laws. Many, but not all, have adopted what amounts to an effects-based standard. See, e.g., *Abbott Lab. v. Durrett, 746 So. 2d 316, 1998 Ala. LEXIS 208, 1998 WL 436062 (Ala. July 31, 1998)* (limiting field of operation to purely intrastate transactions); *Heath Consultants, Inc. v. Precision Instruments, Inc., 247 Neb. 267, 527 N.W.2d 596, 606-07 (Neb.1995)*; *C. Bennett Bldg. Supplies Inc. v. Jenn Air Corp., 759 S.W.2d 883, 889 (Mo.Ct.App.1988)*; *International Television Prods. Ltd. v. Twentieth Century-Fox Television Div., 622 F. Supp. 1532, 1540 (S.D.N.Y.1985)*; *Lynch Display Corp. v. National Souvenir Ctr. Inc., 640 S.W.2d 837, 840 (Tenn.Ct.App.1982)* (examining whether intrastate effects of alleged conduct predominate over interstate effects to determine applicability of state antitrust statute); *R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal.Rptr. 585, 593 (Cal.Ct.App.1974)* (relying on "factual nexus" within state to determine applicability of state antitrust statute); *Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (Mass.1950)*;

holding today merely allows a plaintiff who could have filed suit in Ohio . . . to rely on that [federal] class action to protect her rights in Ohio. . . . [It] does not invite plaintiffs who have no relationship to Ohio to file suit in our courts."). See, **[**44]** e.g., *PMI Mortgage Ins. Co. v. Deseret Fed. Savings and Loan, 757 P.2d 1156* (Colo. Ct. of App. 1988); *Fidelity Finan. Svcs., Inc. v. West, 640 N.E.2d 394 (Ind. Ct. App. 1994)*; *Environmental Ventures, Inc. v. Alda Svcs. Corp., 19 Kan. App. 2d 292, 868 P.2d 540* (Kan. Ct. of App. 1994); *Federal Land Bank of Columbia v. Davant, 292 S.C. 172, 355 S.E.2d 293* (S.C. Ct. of App. 1987);*Smith v. Priority Transp., Inc., 1993 Tenn. App. LEXIS 90, 02A01-9203-CV-00074, 1993 WL 29021 (Tenn. Ct. App. Feb. 9, 1993)*.

[45]** In the antitrust context, declining to adopt cross-jurisdictional class action tolling will invite the filing of numerous protective, duplicative and in many cases, unnecessary, suits by class members. *American Pipe, 414 U.S. at 553-54*. These suits will consume judicial resources at the federal and state level. The Court agrees with the Staub court that the "efficient utilization of judicial resources and the reduction of costs to individual litigants are among the principal purposes of both state and federal class action rules." *Staub, 726 A.2d at 966* (citing *American Pipe, 414 U.S. at 553*). As the Staub court further explained:

> A tolling rule which permits individual claimants to refrain from filing suit pending a decision on certification is almost indispensable to accomplish those purposes. In fact, a contrary rule would reward defendants who caused a court to delay decision of class action certification until the statute of limitations had run against any potential plaintiffs . . .

Id. And in a footnote to this passage, the court addressed the precise issue before this Court:

> We see no reason for **[**46]** tolling to depend on whether the class action is pending in state or federal court. Tolling state statutes of limitations during the pendency of a putative class action in federal court would tend to promote the efficiency of both state and federal courts systems because suits asserting the individual claims of the class members might be filed in either court system or in both. Further, we have an interest in promoting the efficiency of both systems.

Id. at n.4.

In sum, ***HN21***[] the Court concludes that a rule recognizing cross-jurisdictional class action tolling in antitrust class actions filed in federal court generates greater efficiencies than a rule declining to do so. The Court will consider this factor when analyzing whether the various states in question, all of which have an interest in conserving judicial resources and reducing the cost of litigation, would adopt cross-jurisdictional class action tolling. The Court will also examine three additional factors to determine if a state's highest court would adopt cross-jurisdictional class action tolling whether: (1) whether that state has adopted class action tolling as to class actions filed in its own courts (hereafter **[**47]** referred to as "intra-jurisdictional class action tolling"); (2) whether that state's class action rule was modeled on *Federal Rule of Civil Procedure 23*; and (3) whether the state antitrust statute is similar to the *Sherman* and *Clayton Acts*.

(I) Colorado

Colorado has adopted intra-jurisdictional class action tolling. The Colorado Court of Appeals in Rosenthal v. Dean Witter, held:

> ***HN22***[] **[*349]** Because *Colorado Rule of Civil Procedure 23* is virtually identical to *Fed.R.Civ.P. 23*, we rely on cases applying the federal rule. *Goebel v. Colorado Dep't of Institutions, 764 P.2d 785 (Colo. 1988)*. The commencement of a class action tolls the statute of limitations for all the members of the putative class, the portion of the limitations period that remained at the time the class action was commenced. *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974)*. The statute of limitations remains tolled for all members of the putative class until class certification is denied. *Crown Cork & Seal Co. v.*

Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959, 969 (E.D. Wis. 1998) (applying an "effects based standard" which "extends the jurisdictional scope of [state] ***antitrust law*** to unlawful activity which has significantly and adversely affected trade and economic competition within this state").

> Parker, 462 U.S. 345, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983). **[**48]** At that point, class members may choose to file their own suits or intervene as plaintiffs in the pending action.

883 P.2d 522, 531 (Colo. 1994) rev'd on other grounds 908 P.2d 1095 (Colo. 1995). [9] As the Colorado Supreme Court stated in Rosenthal, Colorado's class action rule is "virtually identical" to Federal Rule of Civil Procedure 23.

HN23[] An intermediate Colorado appeals court has ruled that "federal judicial interpretations of the Sherman and Clayton Acts are entitled to careful scrutiny in determining whether a particular **[**49]** business arrangement is a per se antitrust violation under the Colorado Antitrust Act".Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471, 474 (Colo. Ct. of App. 1996). The only significant difference between plaintiffs' federal and state antitrust claims is that the Colorado Antitrust Act provides full consideration paid as a remedy. See Colo. Rev. Stat. Ann. § 6-4-121.

Thus, for all of the foregoing reasons, the Court concludes that the Supreme Court of Colorado would adopt cross-jurisdictional class action tolling for antitrust class actions filed in federal courts.

(ii) Indiana

HN24[] The Indiana Court of Appeals has adopted intra-jurisdictional class action tolling. Arnold v. Dirrim, 398 N.E.2d 426, 439 (Ind. 1979).

HN25[] Indiana's class action rule, Trial Rule 23, is "based upon Fed.R.Civ.P. 23" and the Indiana Supreme Court has ruled that it is appropriate for Indiana courts to consider federal court interpretations of the federal rule when applying the Indiana rule." Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843 (Ind. 1997) **[**50]** (citing In re Tina T., 579 N.E.2d 48, 55 (Ind.1991)).

HN26[] A United States District Court has noted that the Indiana antitrust statute is modeled after the Sherman Antitrust Act. Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982). The only significant difference between plaintiffs' federal and state law claims is that the Indiana statute provides full consideration paid as a remedy. See Ind. Code § 24-1-5

Thus, for all of the foregoing reasons, the Court concludes that the Supreme Court of Indiana would adopt cross-jurisdictional class action tolling for antitrust class actions filed in the federal courts.

(iii) Kansas

HN27[] The Supreme Court of Kansas had adopted intra-jurisdictional class action tolling. Waltrip v. Sidwell Corp., 234 Kan. 1059, 678 P.2d 128, 133 (Kan. 1984) ("we hold that the right of all putative members of a proposed class in an action filed pursuant to K.S.A. 60-223 to file a separate action is preserved pending the determination whether the initial case shall be maintained as a class action). [10]

[51]** **[*350]** As the Kansas Supreme Court noted most recently in Dragon v. Vanguard Industries, Inc., 277 Kan. 776, 89 P.3d 908 (Kansas 2004), ***HN28***[] Kansas' class action rule is "patterned after Fed. R. Civ. Proc. 23, although it is not identical, and this court has traditionally followed the federal courts' interpretation of the federal rule." Id. at 910 (citing Steele v. Security Benefit Life Ins. Co., 226 Kan. 631, 602 P.2d 1305 (Kan. 1979).

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[9] Defendants argue that the Supreme Court of Colorado would not adopt cross-jurisdictional class action tolling because Colorado courts strictly construe statutes of limitations and do not allow for tolling absent a specific statutory provision to that effect. Def.'s Mot. to Dismiss 18. However, as the citation to Rosenthal makes clear, Colorado has adopted intrajurisdictional class action tolling.

[10] Defendants argue that the Supreme Court of Kansas would not adopt cross-jurisdictional class action tolling because Kansas courts strictly construe statutes of limitations. Def.'s Mot. to Dismiss 19. Defendants further argue that issues related to Kansas state statutes of limitations must be resolved solely with reference to Kansas law. Id. However, as the citation to Waltrip makes clear, Kansas has adopted intra-jurisdictional class action tolling.

HN29[] The provisions of the Kansas antitrust act are very similar to the provisions of the *Sherman Act*. Compare *Kan. Stat. Ann. § 50-112* ("All arrangements, contracts, agreements, trusts or combinations between persons made with a view or which tend to prevent full and free competition . . . are hereby declared to be against public policy, unlawful and void.") with *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). The only significant difference between plaintiffs' federal and Kansas state law claims is that the applicable state law **[**52]** provides full consideration paid as a remedy. See *Kan. Stat. Ann. § 50-115*.

Thus, for all of the foregoing reasons, the Court concludes that the Supreme Court of Kansas would adopt cross-jurisdictional class action tolling for antitrust class actions filed in the federal courts.

(iv) South Carolina

HN30[] South Carolina's class action rule is "drawn principally from Federal *Rule 23*." See also, *McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (SC App 1986)* (Court of Appeals cites federal cases and commentary in construing new *Rule 23*, SCRCP). As an intermediate South Carolina appellate court recently explained, "citations to federal case law and the federal rules are based on the principal that interpretations of the federal rule provide guidance in interpreting the South Carolina rule absent material differences in their wording." Middleton v. SunStar Acceptance Corp., 2000 WL 33385388, *3 n.3 (S.C.Com.Pl.,2000).

HN31[] The South Carolina antitrust act is similar to the *Sherman Act*. Compare *S.C. Code Ann. § 39-3-10* ("All arrangements, contracts, agreements, trusts or combinations . . . made with a view **[**53]** to lessen, **[*351]** or which tend to lessen, full and free competition . . . are declared to be against public policy, unlawful and void.") with *15 U.S.C. § 1* **[*352]** ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). The only significant difference between plaintiffs' federal and state law claims is that the South Carolina antitrust act provides full consideration paid as a remedy. *S.C. Code Ann. § 39-3-30*.

Defendants cite *Witt v. American Trucking Ass'ns, 860 F. Supp. 295, 299, 301 n.4 (D.S.C. 1994)* for the rule that "South Carolina does not provide the tolling of the limitations period while a claim is pending in federal court." However, the statement of the Witt court cited by defendants was made in a footnote without elaborating the court's reasoning and it relies without explanation on two earlier decisions, only one of which was from a South Carolina state court and neither of which held that the filing of a claim in federal court does not toll the statute of limitations in a later filed state court claim. Further, and most importantly, **[**54]** Witt was not a class action. Thus,*Witt* is distinguishable from this case.

Thus, for all of the foregoing reasons, the Court concludes that the Supreme Court of South Carolina would adopt cross-jurisdictional class action tolling for antitrust class actions filed in the federal courts.

(v) Tennessee

HN32[] The Tennessee Supreme Court describes Tennessee's class action rule as "identical" to *Federal Rule of Civil Procedure 23* and has ruled that "federal authority is persuasive" in Tennessee state courts interpreting Tennessee's class action rule. *Meighan v. U.S. Sprint Communications Co., 924 S.W.2d 632, 637, n.2 (Tenn. 1996)*; *Bayberry Associates v. Jones, 783 S.W.2d 553 (Tenn.1990)*.

HN33[] The Tennessee antitrust statute uses language very similar to the *Sherman Act*. Compare *Tenn. Code Ann. § 47-25-101* ("All arrangements, contracts, agreements, trusts, or combinations . . . made with a view to lessen, or which tend to lessen, full and free competition . . . are declared to be against public policy, unlawful, and void.") with *15 U.S.C. § 1* ("Every contract, combination **[**55]** in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). The only significant difference between plaintiffs' federal and state law claims is that the Tennessee antitrust act provides full consideration paid as a remedy. *Tenn. Code Ann. § 47-25-106*.

In *Maestas v. Sofamor Danek Group, Inc., 33 S.W.3d 805, 808 (Tenn. 2000)* the Supreme Court of Tennessee declined to adopt cross-jurisdictional tolling in a products liability case. Defendants argue this decision precludes the application of cross-jurisdictional class action tolling in the present case. This Court disagrees. The Tennessee Supreme Court declined to adopt cross-jurisdictional class action tolling, citing the Supreme Court of Illinois Portwood decision. For the reasons stated supra, the Court concludes the Portwood rationale would not be adopted by the Tennessee Supreme Court in antitrust cases. Further, the factors the Tennessee Supreme Court considered, judicial economy and costs of litigation, favor adopting cross-jurisdictional class action tolling for antitrust class actions filed in federal court.

[56]** Thus, for all of the foregoing reasons, the Court concludes that the Supreme Court of Tennessee would adopt cross-jurisdictional class action tolling for antitrust class actions filed in the federal courts.

c. Tolling is Appropriate Because Plaintiffs State Law Claims are Substantially Similar to Those Asserted in the Federal Class Action

HN34[] For tolling to apply, claims do not have to be identical but only substantially similar to those brought in the original class action. *Crown, Cork, 462 U.S. at 355* ("when a plaintiff invokes American Pipe in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witnesses as the subject matter of the original class suit'") (citing *American Pipe, 414 U.S. 538, 38 L. Ed. 2d 713, 94 S. Ct. 756 (1974))* (Powell, concurring). See also *Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985)* ("We find no persuasive authority for a rule which would require that the individual suit must be identical in every respect to the class suit for the statute to be tolled."); *CSU Holdings v. Xerox (In re Independent Serv. Orgs. Antitrust Litig.), 1997 U.S. Dist. LEXIS 4496, Civil Action No. MDL-1021, 1997 WL 161940, **[**57]** *4 (D. Kan. Mar. 12, 1997)* (requiring the allegations of both suits to be identical "would be illogical because one of the primary reasons a member will opt out of a class suit is that she has strong individual claims against the defendant that she believes will not be redressed by the overall class settlement") (citations omitted).

Plaintiffs' state law claims meet the similarity requirements for tolling set forth in American Pipe and Crown, Cork. First, the factual predicates for plaintiffs' federal and state claims are the same. Second, as discussed above, the state antitrust statutes on which plaintiffs' claims are based are modeled upon or closely track the language of the federal antitrust statutes. *Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471, 474* (Colo. Ct. of App. 1996) ("federal judicial interpretations of the *Sherman* and *Clayton Acts* are entitled to careful scrutiny in determining whether a particular business arrangement is a per se antitrust violation under the *Colorado Antitrust Act*"); *Perry v. Hartz Mountain Corp., 537 F. Supp. 1387, 1390 (S.D. Ind. 1982)* (Indiana antitrust statute modeled after *Sherman Antitrust **[**58]** Act*); *Kan. Stat. Ann. § 50-112* ("All arrangements, contracts, agreements, trusts or combinations between persons made with a view or which tend to prevent full and free competition . . . are hereby declared to be against public policy, unlawful and void."); *S.C. Code Ann. § 39-3-10* ("All arrangements, contracts, agreements, trusts or combinations . . . made with a view to lessen, or which tend to lessen, full and free competition . . . are declared to be against public policy, unlawful and void."); *Tenn. Code Ann. § 47-25-101* ("All arrangements, contracts, agreements, trusts, or combinations . . . made with a view to lessen, or which tend to lessen, full and free competition . . . are declared to be against public policy, unlawful, and void.") with *15 U.S.C. § 1* ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").

The only significant difference between plaintiffs' federal and state antitrust claims is that the applicable state laws provide full consideration paid as a remedy. See *Colo. Rev. Stat. Ann. § 6-4-121* **[**59]** ; *Ind. Code § 24-1-5*; *Kan. Stat. Ann. § 50-115*; *S.C. Code Ann. § 39-3-30*; *Tenn. Code Ann. § 47-25-106*; *Wis. Stat. § 133.14*. However, as this Court noted several years ago, an individual plaintiff that seeks a different remedy from that sought in the class action should not be barred from asserting claims by the statute of limitations. *Swierkowski v. CONRAIL, 168 F. Supp. 2d 389, 395 (E.D. Pa. 2001)* ("Creating a rule which would require individual plaintiffs to litigate their damages claims while a class action seeking injunctive relief for an alleged pattern or practice of discrimination was pending would run completely counter to the efficiency rationale of the class action by having two suits covering essentially the same claim running at the same time.") (quoting *Crown, Cork, 462 U.S. at 350*).

d. Prejudice

Because defendants were put on notice of the factual predicate for all of the potential antitrust claims-whether federal or state-of class members, regardless of whether they stayed in the class **[**60]** or opted out and filed individual actions, no "potential for unfair surprise" would be created by tolling the statutes of limitations for plaintiffs' state law claims. *Crown, Cork, 462 U.S. at 353* (once class action is filed, "the defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class"). See also *Vaccariello, 763 N.E.2d at 163* (when a class action is filed, "the defendant is put on notice of the substance and nature of the claims against it" as to any subsequent individual claims that might be asserted arising out of the same set of facts); *Staub, 726 A.2d at 967* ("although defendants did not know of the specific claim of these plaintiffs until they commenced this suit, defendants knew within the period of limitations that if they were successful in defeating class certification, they would probably face individual suits").

In sum, the Court concludes that the statutes of limitations were tolled in Colorado, Indiana, Kansas, South Carolina and Tennessee from the date of filing the class action until the direct action plaintiffs opted out of the classes. Thus, direct **[**61]** action plaintiffs claims under the laws of these states are not time barred and will not be dismissed.

B. MOTION TO DISMISS MARYLAND CLAIMS UNDER *RULE 12(c)* AS TIME BARRED

Defendants have also moved to dismiss Perdue's claims arising under the MATA on the grounds that they are time barred. ***HN35***[] The MATA (*Md. Code Ann., Com. Law § 11-201 et seq.*) contains a four year statute of limitations. See *Md. Code Ann., Com. Law § 11-209(c)* ("An action brought to enforce this subtitle shall be commenced within four years after the cause of action accrues."). ***HN36***[] Under Maryland law, the statute of limitations begins to run once plaintiff "knows, or through the exercise of reasonable diligence should know, of the wrong." *Murphy v. Merzbacher, 346 Md. 525, 697 A.2d 861, 865 (Md. Ct. App. 1997)*. Thus, defendants argue that direct action plaintiffs had until February 25, 2002 to file their Maryland claims. Perdue did not file its direct action until June 9, 2003.

The Perdue plaintiffs argue that the Maryland statute of limitations was tolled during the pendency of class certification in this court. Defendants argue that **[**62]** Maryland has not affirmatively adopted cross-jurisdictional tolling and point to *Thelen v. Massachusetts Mutual Life Insurance Co., 111 F. Supp. 2d 688 (D.Md. 2000)* in support of their argument that Maryland would not adopt cross-jurisdictional class action tolling. In Thelen, a United States District Court sitting in diversity concluded:

> In Maryland, also, there is no case directly addressing the issue, but what precedents there are, augur against its adoption. See, e.g., *Hecht v. Resolution Trust Corp., 333 Md. 324, 635 A.2d 394, 399 (1994)*. Indeed, the existence of Rule 2-101(b), which **[*353]** provides a limited savings window if an identical action is dismissed by another court, clearly indicates the absence, under Maryland law, of the broad, cross-jurisdictional class action equitable tolling advocated by plaintiffs.

Id. at 694.

The facts in Thelen differ so substantially from the facts in the present matter as to make the district court's ruling distinguishable. Thelen involved an attempt by Maryland residents asserting Maryland common law and Massachusetts statutory consumer protection claims against a Massachusetts **[**63]** defendant to toll the statute of limitations on those claims based upon the pendency of separate and different class actions against the same defendant in state courts in New York and Mississippi. The common law and state consumer protection claims asserted by the class plaintiffs in New York and Mississippi class actions were different from each other and from those asserted by the Thelen plaintiffs and each different claim required proof of different elements. *Russo v. Massachusetts Mutual Life Ins. Co., 192 Misc. 2d 349, 746 N.Y.S.2d 380, 381-82 (N.Y.Sup.Ct. 2002)* (detailing the requirements of the New York statute under which the New York class action was brought); *Russo v. Massachusetts Mutual Life Ins. Co., 178 Misc. 2d 772, 680 N.Y.S.2d 916, 919 (N.Y.Sup.Ct. 1998)* (declining to apply substantively different Massachusetts law to plaintiffs claims); *Cunningham v. Massachusetts Mutual Life Ins. Co., 1996 U.S. Dist. LEXIS 21408, 1996 WL 901285 at *1 (N.D. Miss. 1996)* (all of plaintiffs claims were under

Mississippi law). Thus, the Thelen plaintiffs could not claim to have preserved their claims against the defendant by virtue of the filing of the class **[**64]** actions in New York and Mississippi and, unlike this case, Thelen presented substantial forum-shopping problems.

While the Thelen court concluded that "what precedents there are, augur against its adoption" in that case, ***HN37***[] this Court concludes, based on relevant Maryland precedents, that the Maryland Court of Appeals would adopt cross-jurisdictional class action tolling in the antitrust context. First, the Maryland General Assembly has instructed ***HN38***[] courts interpreting the MATA to "be guided by the interpretation given by the federal courts to the various federal [antitrust] statutes. *Md. Code Ann. Com. Law II § 11-202(b)*. Second, ***HN39***[] the Maryland class action rule, Rule 2-231, is "similar to *Rule 23 of the Federal Rules of Civil Procedure*" and the Maryland Court of Appeals has ruled that "our analysis shall be informed by cases interpreting *Rule 23* and other analogous state rules outlining class certification requirements." *Creveling v. Gov't Emples. Ins. Co., 376 Md. 72, 828 A.2d 229, 239 n.4 (Md. 2003)*; see also *Philip Morris v. Angeletti, 358 Md. 689, 752 A.2d 200, 219-20 (Md. 2000)* **[**65]** (noting that "there exists an abundance of cases from other jurisdictions, federal and state, that have analyzed class action rules either identical to or similar to Maryland's rule" and utilizing those cases as analytical aids).

Thus, for all the foregoing reasons, the Court concludes that the Maryland Court of Appeals would adopt cross-jurisdictional class action tolling in antitrust class actions filed in federal court.

C. MOTION TO DISMISS SOUTH CAROLINA AND WISCONSIN CLAIMS UNDER *RULE 12(b)(6)* BECAUSE CLAIMS INVOLVE INTERSTATE COMMERCE

Defendants argue that plaintiffs' South Carolina and Wisconsin claims are not cognizable under the antitrust laws of those states because they do not relate solely to intrastate conduct. The Court addresses these arguments in turn.

1. South Carolina

HN40[] South Carolina's antitrust statute proscribes, inter alia, "arrangements, contracts, agreements, trusts or combinations . . . made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State . . . ." *S.C. Code Ann. § 39-3-10*. Further, the statute forbids agreements that **[**66]** control, advance or reduce the price or cost to the consumer of goods that are either imported or that are transacted entirely within the state. Id.

[*354] Defendants assert that South Carolina courts have limited application of its state antitrust statute to "conduct that is solely intrastate in nature." Def. Mot. to Dismiss 20. Defendants cite *State v. Virginia-Carolina Chem. Co., 71 S.C. 544, 51 S.E. 455 (S.C. 1905)* and decisions applying that case in support of their position. *Three J. Farms, Inc. v. Alton Box Board Co., 1978 U.S. Dist. LEXIS 14134, 1978 WL 1459, at *6 (D.S.C. Nov. 29, 1978)*, rev'd on other grounds, *609 F.2d 112 (4th Cir. 1979)* ("even though South Carolina has an ***antitrust law*** . . . its application was limited many years ago to exclude activities having an effect upon interstate commerce"); *In re Wiring Device Antitrust Litig., 498 F. Supp. 79, 84-85 (E.D.N.Y. 1980)* (dismissing South Carolina antitrust claim under *Rule 12(b)(6)* because defendants' business activities were "wholly interstate in character").

In *Virginia-Carolina Chem. Co., 71 S.C. 544, 51 S.E. 455 (S.C. 1905)*, the South Carolina Attorney General **[**67]** brought suit against a number of fertilizer manufacturers. Most were located in South Carolina, but at least one, the Virginia-Carolina Chemical Co., was incorporated in New Jersey and had very few operations in South Carolina. The plaintiff alleged that the defendants entered into an unlawful scheme, controlled by Virginia-Carolina, to control the prices and lessen competition in the manufacture and sale of fertilizer in South Carolina. The South Carolina Supreme Court held that the clause of the South Carolina antitrust statute that regulates the importation of goods or sale of imported goods into South Carolina conflicted with the federal *interstate commerce clause*. *Virginia-Carolina, 51 S.E. at 461*. However, the South Carolina Supreme Court upheld the Circuit Court's decision to deny the defendants' motion to dismiss the complaint, finding that the plaintiff had sufficiently alleged unlawful conduct pursuant to South Carolina's antitrust statute.

Three J Farms, Inc. v. Alton Box Board Co., 1978 U.S. Dist. LEXIS 14134, Civil Action No. 78-1257, 1978 WL 1459 (D.S.C. November 29, 1978) and *In re Wiring Device Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980),* **[**68]** cite that part of the Virginia-Carolina decision which held that the clause of the South Carolina antitrust statute that regulates the importation of goods or sale of imported goods into South Carolina conflicted with the federal *interstate commerce clause*. *Virginia-Carolina, 51 S.E. at 461*. These cases do not stand for the proposition, as defendants assert, that South Carolina's ***antitrust law*** does not apply "where the defendant is alleged to have engaged in a scheme that took place and affected consumers across the country." Def. Mem. at 20. Rather, the courts in these cases made significantly more limited holdings that, on the specific facts before them, South Carolina law did not apply to claims based upon products manufactured outside of the state of South Carolina and imported into South Carolina for sale. [11]

[69]** In the instant case, plaintiffs allege ties to South Carolina that are comparable to, if not stronger than, those found to be sufficient in Virginia-Carolina. During the relevant time period, at least 16 plaintiffs resided in South Carolina, maintained facilities in South Carolina for which corrugated material was purchased from one or more of the defendants, or purchased corrugated material from one or more of the defendants for use in South Carolina. P&G Amended Complaint at P 161; Mars Amended Complaint at **[*355]** P 92. Plaintiffs allege that at least seven of the defendants maintained corrugated container manufacturing facilities in South Carolina during the relevant period. P&G Amended Complaint at P 162; Mars Amended Complaint at P 93. Thus, unlike the claims in *Three J Farms*, plaintiffs are not bringing claims based solely on the importation or sale of imported articles in South Carolina; defendants' conduct is not "wholly interstate" as was the case in In re Wiring Device Antitrust Litigation. Rather plaintiffs have pled in their Amended Complaints that defendants have produced linerboard in South Carolina and sold it to South Carolina entities. Accordingly, plaintiffs' **[**70]** South Carolina claims will not be dismissed on the ground that defendants' alleged conduct is not actionable under South Carolina ***antitrust law***.

2. Wisconsin

HN41[] The Wisconsin antitrust statute prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade and commerce." *Wis. Stat. Ann. § 133.03*. Further, "all contracts or agreements made by any person while a member of any combination or conspiracy prohibited by *§ 133.03*" are void. *Wis. Stat. Ann. § 133.14*.

Defendants argue that Wisconsin has limited the application of its state antitrust statute to "conduct that is solely intrastate in nature." Def. Mot. to Dismiss 20. Defendants cite *Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058 (Wisc. 1914)* and subsequent decisions applying Pulp Wood in support of their position. Id.

Pulp Wood involved antitrust allegations surrounding a series of contracts to supply wood pulp to Wisconsin paper manufacturers. The contracts required the paper mills to purchase wood pulp from a single Wisconsin supplier.

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[11] In Three J Farms, the Court ruled:

> Therefore any claim for damages resulting from the importation or the sale of imported corrugated containers is not a South Carolina claim, but purely a federal claim. This would include the plaintiff Shapiro since he was not located in South Carolina and in his affidavit affirms: 'It is conceded, of course, that corrugated boxes involved in this complaint have been shipped by the defendants into South Carolina.'

*1978 U.S. Dist. LEXIS 14134, 1978 WL 1459 at *6*. Similarly in In re Wiring Device, the district court concluded:

> The sole connection between the defendants and South Carolina is that an insignificant portion approximately one percent of the wiring devices which they have manufactured outside the state has been imported into the state. Thus, each defendant's activities in South Carolina involve nothing more than "soliciting, cultivating and supervising its interstate business." This circumstance is not sufficient to invoke the application of *section 39-3-10*. The well-established South Carolina rule that wholly interstate activity is outside the scope of that section must be applied.

498 F. Supp. at 83.

However, because the wood **[**71]** originally furnished to this supplier came from Wisconsin, Minnesota, Michigan and Canada, the Wisconsin Supreme Court held that defendants conduct was interstate in character and chose to apply the *Sherman Act*. Pulp Wood does not unequivocally bar the simultaneous application of state and federal ***antitrust law***.

"Subsequent cases have tended to cite Pulp Wood summarily for the proposition that ***HN42***[] Wisconsin ***antitrust law***, though taken from the federal statutes, applies "to intrastate as distinguished from interstate transactions." *Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959, 971 (E.D. Wis. 1998)*. As the Emergency One court explains, however, Wisconsin courts have not, as defendants assert, refused to apply Wisconsin's antitrust statutes to intrastate activities that also involve interstate conduct or have interstate effects. *Id. at 965-966* ("the Wisconsin Supreme Court has for some time interpreted the state antitrust statutes to reach interstate activities in certain circumstances and has rejected a mutually exclusive vision of state/federal antitrust enforcement"). [12]

[72]** In *State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 101 N.W.2d 133 (Wisc. 1960)*, the Wisconsin attorney general brought price-fixing charges against several domestic and foreign corporations engaged in the manufacture and sale of the chemical product calcium chloride in Wisconsin. The complaint alleged that **[*356]** some but not all of the acts constituting a nationwide conspiracy in restraint of trade occurred in Wisconsin. *Id. at 291*. Similar actions by the same defendants had been the subject of FTC proceedings over an extended period. *Id. at 293-94*. Defendants asserted inter alia that all sales of calcium chloride in Wisconsin were made in interstate commerce; that none of the defendants owned or operated a manufacturing plant, sales office or warehouse in Wisconsin; that the chemical was produced entirely out of state; and that each defendant routinely sold calcium chloride on a nationwide basis. *Id. at 292-93*. Based on these assertions, the defendants moved for summary judgment, arguing that Chapter 133 did not reach the conduct at issue. The Wisconsin Supreme Court rejected the defendants' argument and denied summary judgment. **[**73]** After examining both the state and federal legislative enactments in the antitrust field, that court concluded that there was no conflict between the two as the state statutes did not burden interstate commerce. *Id. at 295*.

Direct action plaintiffs have alleged more extensive intrastate conduct and contacts with Wisconsin than the defendants' Wisconsin conduct and contacts in Allied Chemical. In the Amended Complaints plaintiffs allege that during the relevant time period, at least 23 plaintiffs resided in Wisconsin, maintained facilities in Wisconsin for which corrugated material was purchased from one or more of the defendants, or purchased for use in Wisconsin corrugated material from one or more of the defendants. See, e.g., P&G Amended Complaint at P 125. Further, plaintiffs allege that at least six of the defendants maintained corrugated container manufacturing facilities in Wisconsin during the relevant time period. Id. at P 126. Plaintiffs also allege that contracts or agreements, pursuant to which plaintiffs purchased corrugated materials, were the result of, grew out of, or were otherwise connected with, the violation of the Wisconsin antitrust **[**74]** statute. Id. at P 127. Construing the allegations in the direct action plaintiffs' Amended Complaints liberally, the Court concludes that plaintiffs have sufficiently alleged wrongful conduct and damages pursuant to the requirements of the Wisconsin antitrust statute.

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[12] In place of "rote reliance" on the intrastate/interstate distinction, the Emergency One court adopted an "adverse effects standard" to determine whether Wisconsin state antitrust statutes are appropriately applied to economic activity that is both intrastate and interstate in character. The court reasoned:

> An adverse effects standard would extend the jurisdictional scope of Wisconsin ***antitrust law*** to unlawful activity which has significantly and adversely affected trade and economic competition within this state. This standard is consistent with both Wisconsin precedent and judicial interpretations of the scope of federal ***antitrust law***. Most importantly, it comports with the legislative intent of Chapter 133 . . . In a recent decision addressing the correct burden of proof to be applied to private, civil antitrust actions under the chapter, the Wisconsin Supreme Court noted its assumption that "the legislature intended an interpretation that advances, not hinders, the purposes of the statute." Ultimately, an adverse effects standard is the only standard that remains faithful to the purpose of Chapter 133--to protect and encourage competition in this state, by penalizing interstate activities that adversely affect it.

Id. at 969-970 (citations omitted).

In conclusion, with respect to the Wisconsin claims, direct action plaintiffs have brought to the Court's attention that the Wisconsin Court of Appeals recently certified a case for immediate appeal to the Wisconsin Supreme Court on the precise issue faced by this Court. Olstad v. Microsoft, No. 03-1086, 2004 WL 291267 (Wis. App. Feb. 17, 2004) ("The parties' arguments to this court strongly suggest that the determination of whether Wisconsin's antitrust statute applies to interstate commerce affecting intrastate commerce is an issue requiring careful analysis of public policy as well as law . . . this case is appropriate for certification to the Wisconsin Supreme Court."). Olstad is now pending argument in the Wisconsin Supreme Court. The Court will therefore grant defendants leave to file a second motion to dismiss direct action plaintiffs Wisconsin claims if Olstad is decided in a way **[**75]** that conflicts with this Court's ruling.

IV. CONCLUSION

As to defendants motion to dismiss under *Rules 12(b)(6)and 12(c)* raising timeliness issues, the Court concludes that the statutes of limitations in Colorado, Indiana, Kansas, South Carolina and Tennessee were tolled until the Mars, Milne Fruit and Proctor & Gamble opted out of the classes. Thus, direct action plaintiffs state law claims asserted in the Amended Complaints are not time barred. Similarly, the Perdue plaintiffs claims were tolled until Perdue opted out of the classes and the Perdue plaintiffs Maryland claims included in their Complaint are not time barred.

As to defendants motion to dismiss under *Rule 12(b)(6)* on the ground that direct action plaintiffs allegations are not cognizable under the South Carolina and Wisconsin antitrust laws, the Court concludes that neither South Carolina nor Wisconsin has limited the applicability of their antitrust statutes to preclude direct action plaintiffs claims as a matter of law.

[*357] Defendants Motion to Dismiss Plaintiffs' State Law Claims is denied for all of the foregoing reasons.

An appropriate Order follows.

ORDER

AND NOW, this 27th day of August, **[**76]** 2004, upon consideration of Defendants' Motion to Dismiss Plaintiffs' State Law Claims (Docket No. 369, filed April 28, 2004), Opposition to Defendants' Motion to Dismiss Plaintiffs' State Law Claims (Docket No. 369, filed May 19, 2004), Memorandum of Plaintiff Perdue Farms Incorporated in Opposition to Defendants' Motion for Judgment on the Pleadings (Docket No. 383, filed May 24, 2004), Reply in Support of Defendants' Motion for Judgment on the Pleadings (Docket No. 386, filed June 2, 2004), Reply in Support of Defendants' Motion to Dismiss State Law Claims (Docket No. 387, filed June 2, 2004) and Surreply of Plaintiff Perdue Farms Incorporated in Opposition to Defendants' Motion for Judgment on the Pleadings (Docket No. 390, filed June 4, 2004), **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiffs' State Law Claims is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs in Perdue Farms Incorporated v. Stone Container Corporation, et al., No. 03-1702 (D.Md. filed June 9, 2003), United States Gypsum Company, et al. v. Stone Container Corporation, et al., No. 03-4251 (N.D. Ill. filed June 10, 2003), Hormel Foods Corporation, et al. v. Stone Container **[**77]** Corporation, et al., No. 03-3421 (D. Minn. filed June 13, 2003), Kellogg Company, et al. v. Smurfit Stone Container Corporation, et al., No. 03-4213 (N.D. Ill. filed June 19, 2003), and Conopco, Inc., et al. v. Smurfit Stone Container Corporation, a successor to Stone Container Corporation, et al., No. 03-3549 (E.D. Pa. filed June 9, 2003) are **GRANTED LEAVE** to file and serve amended complaints within twenty (20) days which add the same federal and state claims that were included in the Amended Complaints filed by plaintiffs in Procter & Gamble Company, et al. v. Stone Container Corporation, et al., No. 03-3944 (N.D. Ill. filed June 10, 2003), Milne Fruit Products, Inc., et al. v. Stone Container Corporation, et al., No. 03-4049 (N.D. Ill. filed June 13, 2003), and Mars, Inc., et al. v. Stone Container Corporation, et al., No. 03-6977 (N.D. Ill. filed October 1, 2003). One copy of the amended complaints shall be served on the Court (Chambers, Room 12613) when the originals are filed.

BY THE COURT:

JAN E. DUBOIS, J.

Cheryl Terry Enters. v. City of Hartford

Supreme Court of Connecticut

May 19, 2004, Argued ; August 31, 2004, Officially Released

(SC 17067)

Reporter

270 Conn. 619 *; 854 A.2d 1066 **; 2004 Conn. LEXIS 352 ***; 2004-2 Trade Cas. (CCH) P74,540

CHERYL TERRY ENTERPRISES, LTD. v. CITY OF HARTFORD

Prior History: [*1]** Action in four counts to enjoin the defendant from, inter alia, awarding the contract for the transportation of schoolchildren within the city of Hartford to any bidder other than the plaintiff, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, Hurley, J., granted in part the defendant's motion to dismiss as to one count; thereafter, the case was tried to the jury before Corradino, J.; verdict in part for the plaintiff; subsequently, the court, Corradino, J., granted the defendant's motion to set aside the verdict and rendered judgment thereon, and ordered that Laidlaw Transit, Inc., be joined as a necessary party within thirty days; the plaintiff thereafter appealed from the judgment setting aside the verdict, and this court rendered judgment dismissing the appeal for lack of final judgment; thereafter, the case was reclaimed to the trial list and was tried to the court, Corradino, J., on the request for permanent injunctive relief; judgment denying the injunctive relief, from which the plaintiff appealed.

Cheryl Terry Enters. v. City of Hartford, 2003 Conn. Super. LEXIS 1666 (Conn. Super. Ct., June 4, 2003)

Disposition: Affirmed in part, reversed in part and remanded with direction.

Core Terms

trial court, bid, lost profits, damages, percent, municipal, present case, profits, calculated, reasonable certainty, transportation, costs, quotation, marks, injunctive relief, antitrust claim, figures, defense motion, speculation, five year, contracts, estimate, assumptions, antitrust, taxi, mandatory injunction, jury's verdict, school bus, busing, anticipated profits

LexisNexis® Headnotes

Public Contracts Law > Bids & Formation > Sealed Bids > General Overview

Public Contracts Law > Bids & Formation > Offer & Acceptance > General Overview

HN1[] **Bids & Formation, Sealed Bids**

See Hartford, Conn., Mun. Code § 2-548.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN2[] **Standards of Review, De Novo Review**

A trial court's subject matter jurisdiction is a matter of law, and an appellate court's review is plenary. If a party is found to lack standing, a trial court is without subject matter jurisdiction to determine the cause. A determination regarding a trial court's subject matter jurisdiction is a question of law.

Business & Corporate Compliance > ... > Sole Proprietorships > Business & Corporate Law > Sole Proprietorships

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

Public Contracts Law > Labor Laws

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > Unincorporated Associations

Governments > Local Governments > Claims By & Against

Public Contracts Law > Dispute Resolution > Bid Protests

HN3[] **Businesses & Corporations, Sole Proprietorships**

Conn. Gen. Stat. § 35-26 provides that every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful. For purposes of *§ 35-26*, "person" is defined broadly as any individual, proprietorship, corporation, limited liability company, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity. § 35-25(b). A municipality is a legal entity that can sue and be sued. Towns have no sovereign immunity, and are capable of suing and being sued in any action. The plain language of the statutory definition of "person" is broad enough to include municipalities.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Public Contracts Law > Dispute Resolution > Bid Protests

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Injunctions, Permanent Injunctions**

Conn. Gen. Stat. § 35-35 provides that any person injured in its business or property by any violation of the provisions of ch. 35 shall recover treble damages, together with a reasonable attorney's fee and costs. Section 35-34 provides that any person may sue for injunctive relief, both temporary or permanent, against threatened loss or damage to its property or business by any violation of ch. 35.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN5[] **Private Actions, Standing**

Conn. Gen. Stat. Ann. § 35-38 provides that any person who has been held to have violated any of the provisions of ch. 35 shall forfeit and pay to the state a civil penalty of not more than $ 250,000. Section 35-39 provides that a corporation, association, firm, partnership, proprietorship, or any other legal or commercial entity is liable under ch. 35 for the acts of its agents. The only express limitation on the Connecticut Antitrust Act's (Act), *Conn. Gen. Stat. § 35-24 et seq.*, applicability is set forth in § 35-31, which contains four classes of exceptions from liability under the Act. Section 35-31 exceptions are to be strictly construed. Although the legislature has excluded certain organizations and activities from liability under the Act, it has not excluded municipalities, or the municipal bidding process, from its provisions.

Governments > Legislation > Interpretation

HN6[] **Legislation, Interpretation**

Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended a list to be exclusive. A court itself cannot rewrite a statute to accomplish a particular result. That is the function of a legislature.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] **Private Actions, Standing**

See *Conn. Gen. Stat. § 35-38*.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN8[] **Private Actions, Standing**

In construing the Connecticut Antitrust Act, Conn. Gen. Stat. § 35-24 et seq., the courts of the State of Connecticut shall be guided by interpretations given by the federal courts to federal antitrust statutes. § 35-44b.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Private Actions, Standing**

The federal courts, including the United States Supreme Court, consistently hold that a municipality is a "person" within the federal antitrust statutes.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Local Governments > Claims By & Against

Public Contracts Law > Bids & Formation > Sealed Bids > Invitations for Bids

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Public Contracts Law > Dispute Resolution > Bid Protests

HN10[] **Justiciability, Standing**

If an unsuccessful bidder has standing to bring a claim against a municipality, such standing must be derived from a source other than its bid submitted in response to an invitation to bid. That source is the municipal bidding statutes themselves.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Trials > Jury Trials > General Overview

HN11[] **Judgments, Relief From Judgments**

A trial court possesses inherent power to set aside a jury verdict which, in the trial court's opinion, is against the law or the evidence. The supervision which a judge has over a verdict is an essential part of the jury system. A trial court should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality. A trial court has a duty to set aside a verdict where the jury's action is so unreasonable as to suggest that it was the product of such improper influences.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Judgments > Relief From Judgments > General Overview

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

HN12[] **Judicial Officers, Judges**

In determining whether to set aside a verdict, a trial court walks a thin line. The decision to set aside a verdict entails the exercise of a broad legal discretion that, in the absence of clear abuse, an appellate court shall not disturb. An appellate court's review of a trial court's action on a motion to set aside the verdict involves a determination of whether a trial court abused its discretion, according great weight to the action of a trial court and indulging every reasonable presumption in favor of its correctness since a trial judge has had the same opportunity as a jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. A trial judge can gauge the tenor of a trial, as an appellate court, on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury.

Civil Procedure > Judgments > Relief From Judgments > General Overview

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Civil Procedure > Trials > General Overview

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

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

HN13[] **Judgments, Relief From Judgments**

In evaluating the exercise of a trial court's discretion, an appellate court is mindful that litigants have a constitutional right to have juries decide issues of fact. The right to a jury trial is fundamental in our judicial system and is an immovable limitation on the legal discretion of a trial court to set aside a verdict, since the constitutional right of a trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded men passed upon by a jury and not by a court. Since, in setting aside a verdict, a trial court deprives a party in whose favor the verdict was rendered of his constitutional right to have factual issues resolved by the jury, an appellate court must examine the evidential basis of the verdict itself to determine whether a trial court abused its discretion.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN14[] **Jury Trials, Province of Court & Jury**

The amount of a damage award is a matter peculiarly within the province of the trier of fact.

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN15[] **Standards of Review, Abuse of Discretion**

In considering a motion to set aside a verdict, a trial court must determine whether the evidence, viewed in the light most favorable to the prevailing party, reasonably supports a jury's verdict. An appellate court must determine whether a trial court abused its discretion in making its determination that the evidence reasonably did not support the jury's award of damages.

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

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN16[ ] **Standards of Review, Abuse of Discretion**

In deciding whether damages properly have been awarded, an appellate court is guided by the well established principle that such damages must be proved with reasonable certainty. Although damages for lost profits may be difficult to prove with exactitude, such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty. Courts permit lost profits to be calculated by extrapolating from past profits.

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

HN17[ ] **Remedies, Damages**

Courts look to a number of factors in evaluating whether a plaintiff has proved lost profits to a reasonable certainty. A plaintiff's prior experience in the same business has been held to be probative as has a plaintiff's experience in the same enterprise subsequent to the interference. The experience of a plaintiff in a similar business has been admitted to prove lost profits. The average experience of participants in the same line of business as the injured party has been approved as a method of proving lost profits. Prelitigation projections, particularly when prepared by a defendant, have also been approved. The underlying requirement for each of these types of evidence is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN18[ ] **Private Actions, Remedies**

The vagaries of the marketplace usually deny a court sure knowledge of what a plaintiff's situation would have been in the absence of a defendant's antitrust violation. A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. The reasonableness of the assumptions underlying a plaintiff's damage theory is determined by the trier of fact. Federal appellate courts refuse to find damage evidence insufficient unless there was no basis for critical assumptions made by the trier of fact.

Evidence > ... > Testimony > Competency > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN19[] **Testimony, Competency**

The owner of property is competent to testify to its value. A franchise owner is competent to testify as to the value of a franchise. The weight to be accorded such testimony is for the trier to decide.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN20[] **Entry of Judgments, Multiple Claims & Parties**

The rule precluding double recovery is a simple and time-honored maxim that a plaintiff may be compensated only once for his just damages for the same injury. Plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint tortfeasors. The possible rendition of multiple judgments does not defeat the proposition that a litigant may recover just damages only once. Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments.

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

HN21[] **Injunctions, Mandatory Injunctions**

A mandatory injunction is a court order commanding a party to perform an act. Relief by way of mandatory injunction is an extraordinary remedy granted in the sound discretion of a court and only under compelling circumstances. An injunction will not lie where there is an adequate remedy at law. Injunctions should not be issued when damages can adequately protect an injured party. Where the granting of an injunction would cause damage to a defendant greatly disproportionate to the injury of which a plaintiff complains, it may be held inequitable to grant a mandatory injunction and a plaintiff may be remitted to her remedy by way of damages. Mandatory injunctions are disfavored as a harsh remedy and are used only with caution and in compelling circumstances.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

HN22[] **Judges, Discretionary Powers**

A mandatory injunction is an extraordinary remedy granted in the sound discretion of a court.

Counsel: Ralph J. Monaco, with whom was Thomas J. Londregan, for the appellant **[***2]** (plaintiff).

Ann F. Bird, assistant corporation counsel, with whom, on the brief, was Alexander Aponte, corporation counsel, for the appellee (defendant).

Richard D. O'Connor, with whom, on the brief, was George J. Kelly, Jr., for the appellee (Laidlaw Transit, Inc.).

Judges: Sullivan, C. J., and Borden, Norcott, Katz, Palmer, Vertefeuille and Zarella, Js. [1]

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[1] This case was argued on May 19, 2004, before a panel of this court consisting of Chief Justice Sullivan and Justices Norcott, Katz, Vertefeuille and Zarella. Thereafter, the court, pursuant to *Practice Book § 70-7 (b)*, sua sponte, ordered that the case be

Opinion by: KATZ

Opinion

[1070]** **[*621]** KATZ, J. In *Cheryl Terry Enterprises, Ltd. v. Hartford, 262 Conn. 240, 242, 811 A.2d 1272 (2002)*, the plaintiff, Cheryl Terry Enterprises, Ltd., appealed from the judgment of the trial court setting aside the jury's verdict for the plaintiff on its antitrust claim against the defendant, the city of Hartford. We concluded therein that the **[***3]** plaintiff had not appealed from a final judgment because the trial court had not yet resolved the plaintiff's remaining claim for permanent injunctive relief. The case thereafter was reclaimed to the trial list and, following additional hearings and briefing from the parties, the trial court denied the plaintiff's request for a mandatory injunction. Thereafter, the plaintiff appealed from the judgment of the trial court to the **[*622]** Appellate Court, and we transferred the appeal to this court pursuant to *General Statutes § 51-199 (c)* and *Practice Book § 65-1*.

In the present appeal, the plaintiff claims that the trial court improperly: (1) set aside the jury's verdict on its antitrust claim on the ground that, under our decision in *Lawrence Brunoli, Inc. v. Branford, 247 Conn. 407, 722 A.2d 271 (1999)*, the plaintiff, an unsuccessful lowest bidder in a municipal bidding process, lacked standing to bring an antitrust claim against the defendant; (2) determined that it could effectively repeal Connecticut's antitrust statute in cases involving municipal bidding; (3) set aside the jury's verdict on the plaintiff's antitrust claim on the ground **[***4]** that the plaintiff had failed to present sufficient proof of damages; (4) directed a verdict for the defendant on the plaintiff's equal protection claims; and (5) failed to award the plaintiff mandatory injunctive relief.

We conclude that the trial court improperly set aside the verdict on the ground that the plaintiff lacked standing to bring an antitrust claim for damages against a municipality arising out of the municipal bidding process. We conclude further that the trial court improperly set aside the verdict on the ground that the plaintiff had not proved its damages to a reasonable certainty. In light of that conclusion, we need not address the plaintiff's claim that the trial court improperly granted the defendant's motion for a directed verdict on its equal protection claims. Finally, we conclude that the trial court properly denied the plaintiff's request for injunctive relief. Accordingly, we reverse in part the judgment of the trial court.

The relevant facts and procedural history are set forth in our opinion in *Cheryl **[**1071]** Terry Enterprises, Ltd. v. Hartford, supra, 262 Conn. 240*. "The plaintiff is a school bus company based in Hartford. The president **[***5]** of the **[*623]** company, Cheryl Terry, has worked in the school transportation business for more than thirty years. The plaintiff was one of three vendors who had submitted sealed bids to the defendant in response to an invitation to bid for a proposed five year contract to provide bus transportation services for the Hartford public schools, commencing with the 1998-1999 school year. The plaintiff's bid was lower than either of the other vendors, Laidlaw Transit, Inc. (Laidlaw), and Dattco, Inc. (Dattco). Despite being the highest bidder, Laidlaw was awarded the five year contract.

"After Laidlaw was awarded the contract, the plaintiff brought the action underlying this appeal, claiming violations of its equal protection rights and state ***antitrust law*** [2] . . . . The plaintiff also claimed that, by awarding the contract to an entity other than the lowest responsible bidder, the defendant violated § 2-548 of the Hartford municipal code. [3] **[***7]** The plaintiff's complaint alleged a violation of the Connecticut Antitrust Act (act); *General Statutes § 35-24*

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considered . Justices Borden and Palmer were added to the panel, and they have read the record and the briefs, and have listened to the tape recording of the original oral argument.

[2] The plaintiff's complaint also contained a breach of contract claim, which was dismissed by the trial court prior to trial. The plaintiff has not appealed from that ruling, and, therefore, it is not before us in the present appeal.

[3] Section 2-548 of the Hartford municipal code provides in relevant part: ***HN1***[] "(a) The contract for which sealed bids are invited shall be awarded to the lowest responsible bidder. Any person or organization is deemed not to be a responsible bidder that . . .

et seq.; in that it was not awarded the contract due to a conspiratorial agreement between a [labor] union and the defendant, **[***6]** with the purpose of obtaining a union contract. [4] The plaintiff sought temporary **[*624]** and permanent injunctive relief relating to the contract, monetary damages and equitable relief. At trial, the defendant acknowledged that the plaintiff's bid was the lowest submitted, but it maintained that the plaintiff was not awarded the contract because the defendant had been informed that the plaintiff had a pending labor case with the National Labor Relations Board, and because its bid did not conform to the specifications of the bid request. Terry testified, however, that the plaintiff had 'fully complied with each and every material term of [the] defendant's bid specifications . . . .'

"Thereafter, the trial court held a hearing on the plaintiff's motion for a temporary restraining order. On August 4, 1998, subsequent to the completion of the hearing, but prior to the issuance of the trial court's decision, the defendant executed its contract with Laidlaw. The trial court issued a decision denying the plaintiff's motion for a temporary restraining order on August 7, 1998.

"After a trial on the plaintiff's equal protection and state antitrust claims, the trial court granted the defendant's motion for a directed verdict as to the plaintiff's equal protection claims, and submitted to the jury only the claim alleging an antitrust violation. Ultimately, the jury returned **[**1072]** a verdict for the plaintiff in the amount of $ 500,000 on that claim. The defendant then filed a motion to set aside the verdict. The trial court granted this motion and, thereafter, set aside the verdict for the plaintiff. The trial court reserved the question as to whether Laidlaw was a necessary party on the injunction portion of the claim **[***8]** and noted that it would hold a hearing on the plaintiff's request for permanent injunctive relief ab initio if it were to decide that Laidlaw was indeed a necessary party. The court ultimately determined that Laidlaw was a necessary party and that it should be joined as a party within thirty days of that order. Prior to a resolution of the claim for permanent **[*625]** injunctive relief, [however] the plaintiff appealed from the judgment of the trial court setting aside the verdict on its antitrust claim." [5] Cheryl Terry Enterprises, Ltd. v. Hartford, supra, 262 Conn. 243-45.

[*9]** As we noted previously, we dismissed the plaintiff's first appeal, concluding that the plaintiff had not appealed from a final judgment because the claim for injunctive relief had not been determined. Id., 242. Due to the trial court's subsequent resolution of the plaintiff's remaining claim for injunctive relief, we now address the merits of the plaintiff's claims.

I

We address the plaintiff's first two claims together because they are interrelated. The plaintiff claims that the trial court improperly granted the defendant's motion to set aside the verdict on the ground that Lawrence Brunoli, Inc. v. Branford, supra, 247 Conn. 407, precludes a plaintiff from pursuing a statutory antitrust claim for damages against a municipality arising out of a municipal bidding process. The defendant contends that the trial court properly found

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"(2) Has been found by a court or administrative body of competent jurisdiction to be in violation of the National Labor Relations Act and that such violation continues to exist . . . .

"(c) The city manager shall certify whether the bidder is deemed to be a responsible bidder. If the city manager deems a bidder to meet the city's requirements, the bidder will be certified for a period of one (1) year. In each case, where the city manager determines that a bidder is not deemed to be a responsible bidder, he shall state his reasons in a written opinion to be forwarded to . . . the bidder. . . ."

[4] Laidlaw was the only union shop of the three bidders on the contract.

[5] At the time of the plaintiff's first appeal to this court, Laidlaw had not been joined as a defendant, and, therefore, it was not a party to that appeal. Cheryl Terry Enterprises, Ltd. v. Hartford, supra, 262 Conn. 241. As we noted previously, however, when the case was reclaimed to the trial list, Laidlaw subsequently was a defendant in the plaintiff's action. In the current appeal, Laidlaw is involved as an appellee only as to the plaintiff's final claim--whether the trial court properly denied the plaintiff's request for injunctive relief. In conformity with our prior opinion, therefore, we will continue to refer to the city of Hartford as the defendant, and we refer to Laidlaw by name in part IV of this opinion, which addresses the plaintiff's final claim.

that, under *Lawrence Brunoli, Inc.*, the plaintiff lacked standing to pursue its antitrust claim, and, therefore, that the trial court lacked subject matter jurisdiction. We agree with the plaintiff.

The following additional facts are relevant to our resolution of this claim. Prior to trial, the plaintiff was **[***10]** **[*626]** warned by the trial court that it would allow the antitrust claim to go to the jury because the court was unprepared to rule on its ultimate viability, but that the court would "closely examine that issue if the jury were to return a verdict in the plaintiff's favor." Ultimately, the jury did return a verdict in the plaintiff's favor, and awarded the plaintiff $ 500,000 in damages. The defendant filed a motion to set aside the verdict, claiming, inter alia, that the court lacked subject matter jurisdiction to award damages on the antitrust claim. [6] The trial **[**1073]** court agreed, and granted the defendant's motion to set aside the verdict.

[*11]** ***HN2***[] "The trial court's subject matter jurisdiction is a matter of law and, therefore, our review is plenary. If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law." *Cadle Co. v. D'Addario, 268 Conn. 441, 446, 844 A.2d 836 (2004)*.

In its memorandum of decision on the defendant's motion to set aside the verdict, the trial court analyzed the act and determined that "it seems clear that a municipality can be sued under [the] act." We agree. The act provides, inter alia, that ***HN3***[] "every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful." *General Statutes § 35-26*. For purposes **[*627]** of the act, "'person'" is defined broadly as "any individual, proprietorship, corporation, limited liability company, firm, partnership, incorporated and unincorporated association, or any other legal or commercial entity . . . ." *General Statutes § 35-25 (b)*. We consistently have stated that a municipality is a legal entity that can sue and be sued. See, **[***12]** e.g., *Murphy v. Ives, 151 Conn. 259, 264, 196 A.2d 596 (1963)* ("towns have no sovereign immunity, and are capable of suing and being sued . . . in any action" [internal quotation marks omitted]). Therefore, the plain language of the statutory definition of "person" is broad enough to include municipalities, such as the defendant in the present case.

This broad definition of "person" is then utilized by the legislature to define both who may be liable for anticompetitive behavior, and who has standing to recover damages for such behavior. In regard to standing, *General Statutes § 35-35* provides in relevant part that ***HN4***[] "any person . . . injured in its business or property by any violation of the provisions of this chapter shall recover treble damages, together with a reasonable attorney's fee and costs." See also *General Statutes § 35-34* ("any person . . . may sue for injunctive relief, both temporary or permanent, against threatened loss or damage to its property or business by any violation of this chapter").

Conversely, the legislature also has used that same broad definition of "person" to define any individual **[***13]** or entity that may be liable under the act for anticompetitive behavior. See, e.g., *General Statutes § 35-38* ***HN5***[] ("any . . . person who has been held to have violated any of the provisions of this chapter shall forfeit and pay to the state a civil penalty of not more than two hundred fifty thousand dollars"); *General Statutes § 35-39* ("[a] corporation, association, firm, partnership, proprietorship, or any other legal or commercial entity is liable under this chapter for the acts of its . . . agents"). **[*628]** Indeed, the only express limitation on the act's applicability is set forth in *General Statutes § 35-31*, [7] **[***15]** which contains four classes of **[**1074]** exceptions from liability under

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[6] The defendant's motion to set aside the verdict also claimed that: (1) there was no evidence submitted upon which a reasonable jury could have concluded that the defendant conspired to restrain trade; and (2) there was no evidence upon which a reasonable jury could have concluded that the plaintiff suffered damages or an antitrust injury. Because the trial court found that it lacked subject matter jurisdiction in the present case, it declined to address the defendant's claim that there was insufficient evidence to support a finding that the defendant had conspired to restrain trade. Therefore, that claim is not before us in the present appeal. The defendant's remaining claim, that there was insufficient evidence to support a finding that the plaintiff had suffered damages for an antitrust injury, is addressed in part II of this opinion.

[7] *General Statutes § 35-31* provides: ***HN7***[] "(a) Nothing contained in this chapter shall be construed to forbid the existence or operation of labor, agricultural, or horticultural organizations instituted for the purpose of mutual help, and not having capital stock and not conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the

the act. None of these exceptions is applicable to the facts of the present case. See also *Mazzola v. Southern New England Telephone Co., 169 Conn. 344, 355, 363 A.2d 170 (1975)* ("[*§ 35-31*] exceptions are to be strictly construed"). Thus, although the legislature has excluded certain organizations and activities from liability under the act, it has not excluded municipalities, or the municipal bidding process, from its **[***14]** provisions. [8] **[*629]** See *Doucette v. Pomes, 247 Conn. 442, 457, 724 A.2d 481 (1999)* ***HN6***[] ("unless there is evidence to the contrary, statutory itemization indicates that the legislature intended [a] list to be exclusive" [internal quotation marks omitted]). Although the defendant may be correct that there are significant public policy reasons to exclude the municipal bidding process from the act, that is a change that must be made by the legislature, not this court. See *State v. Hanson, 210 Conn. 519, 529, 556 A.2d 1007 (1989)* ("It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." [Internal quotation marks omitted.]); see also *State v. Luurtsema, 262 Conn. 179, 202, 811 A.2d 223 (2002)* (rejecting argument imputing temporal requirement to restraint element of kidnapping statute). In sum, we conclude that the trial court properly determined that a municipality can be sued for violations of the act. [9]

[*16]** **[**1075]** Despite having reached this conclusion, however, the trial court granted the defendant's motion to set aside **[*630]** the judgment, determining that in light of our decision in *Lawrence Brunoli, Inc. v. Branford, supra, 247 Conn. 416*, the act was "effectively repealed" in actions arising from the municipal bidding process because "to allow antitrust damages here would be repugnant to the public benefit purposes of the municipal competitive bidding laws and would not therefore comport with the similar objectives of the antitrust laws to benefit the public, not competitors, and lead to results the legislature could not have intended." We disagree.

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legitimate objects thereof. Such organizations, or the members thereof, shall not be held or construed to be illegal combinations or conspiracies or monopolies in restraint of trade, under the provisions of this chapter.

"(b) Nothing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state, or of the United States.

"(c) Nothing contained in this chapter shall be construed to prevent persons engaged in the production of agricultural products as farmers, planters, dairymen or growers from acting together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; provided, such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: (i) That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or, (ii) that the association does not pay dividends on stock or membership capital in excess of eight per cent per annum, and, (iii) that the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

[8] ***HN8***[] "In construing [the act] . . . the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes." *General Statutes § 35-44b*. We note, therefore, that ***HN9***[] the federal courts, including the United States Supreme Court, consistently have held that a municipality is a "person" within the federal antitrust statutes. See, e.g., *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 396, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*.

[9] Our resolution of this issue is informed further by our decision in *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 26, 664 A.2d 719 (1995)*. In that case, the defendant, a transit district established by the town of Westport, provided bus and taxi services in direct competition with the plaintiff. After the plaintiff was forced out of business, it brought an action against the defendant, alleging violations of the act. *Id., 11-12*. The trial court found that the defendant had engaged in attempted monopolization and actual monopolization in violation of the act, and awarded the plaintiff damages for lost profits, the value of the business, and prejudgment interest. In addition, the trial court awarded the plaintiff treble damages under *§ 35-35*. *Id., 12-13*. On appeal to this court, the defendant claimed, inter alia, that it was entitled to "governmental immunity applicable to municipalities and their agencies because it is a transit district established by the town of Westport." *Id., 26*. We declined to review this claim, concluding that the record was insufficient to analyze the defendant's claim properly. *Id., 27*. Accordingly, we concluded that the trial court properly awarded the plaintiff treble damages for lost profits and the lost value of the business. *Id., 45*.

To begin with, we already have concluded that the trial court properly determined that the definition of "persons" subject to liability under the act is broad enough to include municipalities. Once the trial court made this determination, it should have denied the defendant's motion to set aside the verdict, and declined to apply the policy reasons set forth in *Lawrence Brunoli, Inc.*, in order to alter the plain language of the act. *State v. Hanson, supra, 210 Conn. 529*.

Moreover, *Lawrence Brunoli,* **[***17]** *Inc.*, readily is distinguishable from the present case. In *Lawrence Brunoli, Inc.,* the plaintiff, an unsuccessful bidder in a municipal bidding contest, alleged impropriety in the contract awarding process and brought a breach of contract action for money damages against the town of Branford. *Lawrence Brunoli, Inc. v. Branford, supra, 247 Conn. 408*. Specifically, the plaintiff alleged fraud, corruption or favoritism on the part of the defendant in awarding the contract. *Id., 410*. The trial court dismissed the action for lack of subject matter jurisdiction on the ground that the plaintiff lacked standing to assert a claim for money damages and was, therefore, limited to an action for injunctive relief. Id. The issue on appeal to this court was "whether the [trial] court [had] subject matter jurisdiction over a claim for damages, rather than for injunctive relief, allegedly resulting from fraud, corruption or favoritism in the award of a contract that **[*631]** is subject to competitive municipal bidding requirements." *Id., 408*. We answered that question in the negative, concluding that, "as a matter of law, an unsuccessful bidder to a municipal **[***18]** contract has no standing to assert a cause of action for money damages for failure of the municipality to follow its competitive bidding laws, regardless of whether the plaintiff alleges fraud, corruption or favoritism" in the bidding process. *Id., 411*. We began our analysis by noting that because the plaintiff only had bid on the contract, and was not awarded the contract, it lacked standing to bring a common-law breach of contract action. *Id., 411-12*. Accordingly, we concluded that ***HN10***[] "if an unsuccessful bidder has standing to bring a claim against a municipality . . . such standing must be derived from a source other than its bid submitted in response to an invitation to bid. That source is the municipal bidding statutes themselves." [10] *Id.,* ***[**1076]*** *412*. Because the statutes expressly did not confer standing for money damages, and our prior case law had limited relief in such actions to injunctive relief, we considered whether the policy considerations underlying the bidding statutes were best served by continuing to limit the remedy to injunctive relief. *Id., 412-16*. We concluded that they were, and, accordingly, affirmed the judgment of **[***19]** the trial court. *Id., 416*.

Our decision in *Lawrence Brunoli, Inc.*, was limited to actions based on common-law breach of contract claims or the municipal bidding statutes. In the present case, the plaintiff did not assert a common- law breach of contract action, nor an action for injunctive relief **[*632]** under the municipal bidding statutes, but, rather, **[***20]** sought relief under the act. We simply were not called upon in *Lawrence Brunoli, Inc.*, to address whether an unsuccessful lowest bidder had standing to bring an action under the act. Furthermore, as we stated in that case, "if an unsuccessful bidder has standing to bring a claim against a municipality . . . such standing must be derived from a source other than its bid submitted in response to the invitation to bid." *Id., 412*. As we noted previously, the legislature expressly has conferred standing on a broad range of individuals under the act, including unsuccessful bidders in a municipal bidding process. Thus, an independent source of standing, which was absent in *Lawrence Brunoli, Inc.*, exists in the present case. Put another way, in *Lawrence Brunoli, Inc.*, we were attempting to discern whether, in the absence of a direct conferral of standing by the legislature in the municipal bidding statutes, this court should recognize a right to standing for money damages. See *id., 412-16*. To the contrary, in the present case the legislature has conferred standing to a broad class of persons that includes a municipality, and this court cannot now limit **[***21]** that standing in a manner contrary to the plain language of the act.

Finally, we note that the policy considerations supporting our decision in *Lawrence Brunoli, Inc.*, are rendered inapplicable to the present case due to the legislature's broad conferral of standing under the act, which is based on several important principles, including, the protection of the public from anticompetitive behavior and the promotion

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[10] See, e.g., *Blesso Fire Systems, Inc. v. Eastern Connecticut State University, 245 Conn. 252, 254-55, 713 A.2d 1283 (1998)*; *Unisys Corp. v. Dept. of Labor, 220 Conn. 689, 693-95, 600 A.2d 1019 (1991)*; *Ardmare Construction Co. v. Freedman, 191 Conn. 497, 501, 467 A.2d 674 (1983)*; *Spiniello Construction Co. v. Manchester, 189 Conn. 539, 543-44, 456 A.2d 1199 (1983)*; *John J. Brennan Construction Corp., Inc. v. Shelton, 187 Conn. 695, 702, 448 A.2d 180 (1982)*; *Austin v. Housing Authority, 143 Conn. 338, 349, 122 A.2d 399 (1956)*.

of competition in the marketplace. See, e.g., *Shea v. First Federal Savings & Loan Assn. of New Haven, 184 Conn. 285, 294, 439 A.2d 997 (1981)* ("both federal and Connecticut ***antitrust law*** attempt to promote competition in the marketplace"). Put another way, although this court was hesitant to expose taxpayers to the additional costs of **[*633]** money damages in *Lawrence Brunoli, Inc.*, the legislature has not expressed a similar hesitation within the language of the act. Indeed, as the plaintiff correctly contends, it would be incongruous to allow a municipality to bring an action against contractors under the act for anticompetitive behavior, yet preclude those same contractors from bringing an action against a municipality that has engaged in anticompetitive **[***22]** behavior. [11] The trial court's reliance **[**1077]** on *Lawrence Brunoli, Inc.*, therefore, was misplaced.

II

We turn next to the plaintiff's claim that the trial court improperly granted the defendant's motion to set aside the verdict on the ground that the plaintiff had failed to prove its claim of lost profits to a reasonable degree of certainty. The defendant contends that the trial court properly determined that the plaintiff had introduced no evidence of lost profits. We agree with the plaintiff.

The following additional facts and procedural history are relevant to our resolution **[***23]** of this claim. At trial, the evidence concerning the plaintiff's lost profits consisted of the bid on the Hartford school transportation contract (bid) and the testimony of Terry, the plaintiff's president. The bid was for a five year contract, with busing services to commence on July 1, 1998, and to terminate on June 30, 2003. On the bid forms, bidders had to specify the price of five items for each of the five years. Specifically, the bid forms requested prices for three "runs" consisting of morning, midday and afternoon service, whereby bidders had to specify the **[*634]** annual unit price per school bus, and then multiply that price by the number of buses to arrive at an annual price per run. [12] The bid forms also requested an annual price for 180 half hours of "additional service." Finally, the bid forms requested the annual price of bus monitors, to be calculated by multiplying a monitor's hourly salary by 15,120 hours. Each of these prices were added together to arrive at the total annual price of the busing service. The bidder was then required to add together the annual prices for each of the five years, adjusted for present value, to arrive at the net present value, or total price, **[***24]** of the bid.

The net present value of the plaintiff's bid was $ 5,862,997.93. Terry testified that this figure included all of the plaintiff's costs, as well as its usual anticipated profit of 8 to 10 percent. Specifically, Terry testified that, in preparing the bid, she had calculated the following costs: the cost of purchasing new or used school buses, including the cost of financing those purchases; payroll, including taxes and workers' compensation insurance; facility costs, including the cost of gasoline for the school buses; property costs; and the cost of liability insurance. Terry further testified that she had calculated each of these costs on the basis **[***25]** of the individual specifications of the bid. She then testified that, after calculating the plaintiff's costs, she had added its anticipated profit. Terry stated that her usual practice was to add between 8 and 10 percent profit to her bids.

In addition, Terry testified at length concerning her approximately thirty years of experience in the school transportation business. She stated that she had started as a school bus driver in the 1960s, and soon thereafter **[*635]** was managing school transportation contracts for a number of cities and towns throughout the state, encompassing "well over 200" school buses at one time and "[forty- eight school buses] in Norwich alone." In 1984, Terry incorporated the plaintiff, which has provided **[**1078]** school transportation services since that time.

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[11] We note that the defendant's anticompetitive behavior in the present case resulted in a greater cost to taxpayers for the contract, not less. Although awarding damages to the plaintiff, the injured party, may exacerbate the additional costs paid by the taxpayers, thus bolstering the defendant's policy argument for exempting the municipal bidding process from the act, any change to the act must come from the legislature, not this court.

[12] With regard to morning, midday and afternoon service, the bid form requested prices for the following specifications: thirty-four school buses for morning service, running from 6:30 a.m. to 9:15 a.m.; one school bus for midday service, running from 10:30 a.m. to 12 p.m.; and thirty-four school buses for afternoon service, running from 2 p.m. to 5 p.m.

On cross-examination by the defendant, Terry acknowledged that she was unable to produce the exact figures that she had used in calculating the bid. She stated, however, that, although she had prepared the bid two and one-half years before the trial and could not remember the actual figures she had used, she could explain how she had calculated the bid. Terry explained that she had calculated the bid the same way **[***26]** that she calculates all of her bids: "I took my costs, as I always do, and added a profit, and that is all I can tell you because that is the way you do it." Although Terry acknowledged that it was "possible" that she could have miscalculated the bid, she stated: "I have been doing this for a long time, and I have been pretty much on target. . . . I am not infallible, no one is infallible, but I have a record." When the defendant's attorney asked Terry, a second time, if she could have miscalculated her expenses, she replied: "I have a record, that is why I am in business. . . . I am confident of my past experience which has been many many years in the business, or I wouldn't have been in the business."

At the end of Terry's testimony, the defendant moved to strike her testimony concerning anticipated profits as irrelevant because "she does not have the knowledge upon which to base an estimate of the profits." The trial court denied the motion to strike, but indicated that, "unless there is more offered in the way of facts and figures that [Terry] relied on, I may be in a position **[*636]** where I grant a motion for a directed verdict . . . ." [13] The plaintiff presented no further evidence **[***27]** concerning Terry's preparation of the bid or the plaintiff's anticipated profits.

[*28]** The jury returned a verdict in favor of the plaintiff on its antitrust claim, and awarded damages in the amount of $ 500,000.

[14] The defendant thereafter filed a motion to set aside the verdict, claiming, inter alia, that "the verdict bears no relationship to [the] damages proved in the case." The trial court agreed, and concluded that the plaintiff had "failed to prove damages to a reasonable certainty [and] that the jury verdict was based on sheer speculation." Specifically, the court stated that, "the plaintiff, through . . . Terry, presented no experts, statistics, financial records as to costs or any information **[**1079]** from which a reasonable calculation of lost profits could be made for this contract. [Terry] simply testified that she had been in the school **[*637]** transportation business for thirty years and her rate of profit was between 8 and 10 percent. . . . Terry was a very candid witness . . . [and] repeatedly said that she had done the calculation on cost for this bid over two years ago and did not have her records nor any present memory of any of the cost items that went into determining the expenses of completing the contractual obligations she was bidding for . . . . In **[***29]** the court's opinion, that will not do. Profits are determined by subtracting expenses from anticipated revenue. Although expenses for a five year contract cannot be calculated precisely in every category, some credible and concrete figures must be provided--[Terry] admitted at one time she had those very figures, she just did not bring them to court or no longer had them." The trial court further stated that, even if the plaintiff could have established lost profits "by proving the amount of the bid and the rate of profit it traditionally received by running this business for over thirty years," there was "no evidence that the school transportation contracts it had performed in the past were anything comparable to the prospective Hartford five year contract." Consequently, the trial court granted the defendant's motion to set aside the jury's verdict.

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[13] In denying the defendant's motion to strike Terry's testimony as irrelevant, the trial court stated: "My difficulty now is in [granting] a motion to strike if the trial isn't over, so I can't say that the testimony is not relevant, you know, as such. But I am telling you, counsel, in fairness to you, that unless it is tied up, I am going to have a problem, because one of the aspects of this case is a request for an injunction, and the other aspect of this case is a request for damages. . . . The law permits speculation, but in certain respects on future earnings, and the cases are pretty liberal. Like a claim for future earnings, but there has to be some foundational requirement. And [Terry] didn't remember any costs of this contract, she didn't remember maintenance, facilities, she had no access to these figures. And yet she says that she relies on these figures in determining what her bid price was and what her rate of profit is. . . . I can't say that her testimony was completely irrelevant, but I am telling you, counsel, unless there is more offered in the way of facts and figures that [Terry] relied on, I may be in a position where I grant a motion for a directed verdict . . . . And in fairness to you, I will allow you to recall her if she has figures."

[14] Approximately 8.5 percent of the net present value of $ 5,862,997.93, the plaintiff's bid on the Hartford school transportation contract, amounted to approximately $ 500,000, the amount awarded the plaintiff. Terry's estimated profit of between 8 and 10 percent of the net present value represents a profit between $ 469,039.83 and $ 586,299.79. Accordingly, the jury's damage award falls within this range.

[*30]** We begin with a brief discussion of the appropriate standard of review. ***HN11***[] "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . The supervision which a judge has over the verdict is an essential part of the jury system. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion **[*638]** that they or some of them were influenced by prejudice, corruption or partiality. . . . The court has a duty to set aside the verdict where the jury's action is so unreasonable as to suggest that it was the product of such improper influences. . . .

"We recognize that, ***HN12***[] in determining whether to set aside the verdict, the trial court walks a thin line. . . . Ultimately, the decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of **[***31]** clear abuse, we shall not disturb. Our review of the trial court's action on a motion to set aside the verdict involves a determination of whether the trial court abused its discretion, according great weight to the action of the trial court and indulging every reasonable presumption in favor of its correctness . . . since the trial judge has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . Moreover, the trial judge can gauge the tenor of the trial, as we, on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury. . . .

"Finally, ***HN13***[] in evaluating the exercise of the trial court's discretion, we are mindful that litigants have a constitutional right to have juries decide issues of fact. The right to a jury trial is fundamental in our judicial system, and this court has said that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which **[**1080]** there is room for a reasonable **[***32]** difference of opinion among fair-minded men passed upon by the jury and not by the court. . . . Since, in setting aside the verdict, the trial court has deprived the party in whose favor the verdict was rendered of his constitutional right to have factual issues resolved by the jury, we must examine the evidential basis of the verdict **[*639]** itself to determine whether the trial court abused its discretion." (Citations omitted; internal quotation marks omitted.) *Howard v. MacDonald, 270 Conn. 111, 126-28, 851 A.2d 1142 (2004)*.

In the present case, the trial court set aside the jury's verdict because it concluded that the plaintiff had not proved its damages to a reasonable certainty. ***HN14***[] "The amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury. . . . ***HN15***[] In considering a motion to set aside the verdict, the [trial] court must determine whether the evidence, viewed in the light most favorable to the prevailing party, reasonably supports the jury's verdict." (Internal quotation marks omitted.) *Carrol v. Allstate Ins. Co., 262 Conn. 433, 449, 815 A.2d 119 (2003)*. Accordingly, we must determine whether **[***33]** the trial court abused its discretion in making its determination that the evidence reasonably did not support the jury's award of damages.

HN16[] "In deciding whether damages properly have been awarded . . . we are guided by the well established principle that such damages must be proved with reasonable certainty. . . . Although we recognize that damages for lost profits may be difficult to prove with exactitude . . . such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty. . . . Consequently, we have permitted lost profits to be calculated by extrapolating from past profits." (Citations omitted; internal quotation marks omitted.) *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48, 69, 717 A.2d 724 (1998)*.

"This court and ***HN17***[] courts of other jurisdictions have looked to a number of factors in evaluating whether the plaintiff has proved lost profits to a reasonable certainty. A plaintiff's prior experience in the same business has been held to be probative . . . as has a plaintiff's **[*640]** experience in the same enterprise subsequent to the interference. . . **[***34]** . The experience of the plaintiff . . . in a similar business [has] been admitted to prove lost profits. . . . In addition, the average experience of participants in the same line of business as the injured party has been approved as a method of proving lost profits. . . . Similarly, prelitigation projections, particularly when prepared by the defendant, have also been approved. . . . The underlying requirement for each of these types of evidence is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed." (Citations omitted.) *Id., 72-74*.

Finally, this court has recognized that, *HN18*[] "the vagaries of the marketplace usually deny us sure knowledge of what [the] plaintiff's situation would have been in the absence of the defendant's antitrust violation. This fact and the general belief that it would be inequitable to allow a wrongdoer to defeat recovery by insisting on rigorous proof of damages have resulted in a lesser burden of proving the amount of damages in antitrust suits than in other contexts." (Internal quotation marks omitted.) *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 28, 664 A.2d 719 (1995),* **[***35]** quoting 1 A.B.A. Antitrust Section, ***Antitrust Law*** **[**1081]** Developments (3d Ed. 1992) p. 668. Accordingly, "[a] damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. . . . The reasonableness of the assumptions underlying the plaintiff's damage theory is determined by the trier of fact. . . . Federal appellate courts have refused to find damage evidence insufficient unless there was *no basis* for critical assumptions made by the [trier of fact]." (Citations omitted; emphasis added; internal quotation marks omitted.) *Westport Taxi Service, Inc. v. Westport Transit District, supra, 28*.

[*641] Our review of the record reveals that the jury's award of damages was reasonably supported by the evidence, which proved those damages to a reasonable certainty. First, the plaintiff's bid on the Hartford school transportation contract stated a net present value of $ 5,862,997.93. This figure reflects the net present value of the requested three daily runs of school bus service, additional service and bus monitors over the course of five years. On the basis of this evidence and any assumptions reasonably drawn therefrom, **[***36]** the jury reasonably could have concluded that, in the absence of the defendant's antitrust violation, the plaintiff would have performed the Hartford school transportation contract at a price of $ 5,862,997.93.

Second, Terry testified at length concerning her substantial experience in preparing bids for school transportation contracts. Specifically, Terry testified that she had approximately thirty years of experience in preparing such bids, and that she had run her own school transportation company since 1984. She also stated, several times, that she prepared her bids by first calculating her costs, and then adding in an anticipated profit, which was usually between 8 and 10 percent of the price of the bid. Although Terry could not produce the exact figures she had used in calculating the costs for the bid, she discussed, in detail, the nature of those costs. On cross- examination, Terry candidly acknowledged the possibility that she could have miscalculated the bid. She stated, however, that "I have been doing this for a long time, and I have been pretty much on target." Terry also stated: "I am confident of my past experience which has been many many years in the business, or I **[***37]** wouldn't have been in the business." On the basis of this testimony, the jury reasonably could have inferred that Terry accurately had predicted the plaintiff's profits on previous bids. Moreover, her testimony was consistent with our well settled principle **[*642]** that *HN19*[] "the owner of property is competent to testify to its value. . . . Furthermore, we have determined that a franchise owner is competent to testify as to the value of a franchise. . . . This is based in part on the common experience that an owner is familiar with her property . . . . The weight to be accorded such testimony is for the trier to decide." (Citations omitted; internal quotation marks omitted.) *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 35*.

In *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 32-36*, in which the plaintiff had alleged antitrust violations, this court upheld an award of damages for lost profits and lost business value. In that case, the plaintiff, a private taxi company, claimed that the defendant municipality had committed an antitrust violation by operating a government subsidized, below cost taxi service **[***38]** for the purpose of monopolizing the town's taxi business, thereby forcing the plaintiff out of business. After a court trial, the trial court agreed with **[**1082]** the plaintiff and awarded it damages for lost profits and lost business value. With regard to lost profits, the trial court found that the plaintiff had not sought a fare increase with the state public utilities commission, because it "legitimately [had] feared that it would have trouble enough competing with [the defendant's] service at present rates, without adding to the problem by increasing its fares." (Internal quotation marks omitted.) *Id., 30*. Accordingly, the court awarded damages of $ 12,144 in lost profits based upon the difference in what the plaintiff had been charging and what it could have charged but for the defendant's conduct. [15] *Id., 30-32*.

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[15] The plaintiff had been charging a fare of $ 1.80 for an average three mile trip, whereas taxi companies in the surrounding areas of Bridgeport, Greenwich and Stamford had been charging $ 2.70 for the same distance. The trial court therefore awarded

[*39] [*643]** The trial court in *Westport Taxi Service, Inc.*, then determined that the plaintiff also was entitled to $ 150,000 in damages for lost business value. In arriving at this figure, the trial court noted its reliance on the testimony of the plaintiff's vice president, who stated that a fair return on a taxi business would be between 10 and 12 percent. Specifically, "the trial court determined that [the witness'] valuation of the business was based on his own experience in the taxi business for more than twenty years, his knowledge of how a taxi business was valued by the industry, his discussions with other owners, his knowledge of other sales, his membership in the Connecticut Taxi Cab Association, his membership in the International Taxi Cab Association, and finally, his own personal experience and practice . . . ." (Internal quotation marks omitted.) *Id., 34*. In accordance with the testimony of the plaintiff's vice president, the trial court applied a 10 to 12 percent rate of return to its own calculation of the plaintiff's projected profits to arrive at its ultimate determination in lost business value. *Id., 33*.

The defendant appealed to this court, **[***40]** which affirmed the award of damages for lost profits and lost business value. *Id., 45*. With respect to lost profits, this court concluded that "the trial court based its calculation of the plaintiff's damages due to lost profits on sufficient evidence and reasonable assumptions . . . ." *Id., 32*. In addition, this court concluded that the trial court properly had relied on the testimony of the plaintiff's vice president to establish the lost value of the plaintiff's business. In so concluding, we noted "that the trial court has broad discretion to admit the testimony of anyone who is involved with a business or property and may have personal knowledge of its value." *Id., 35*. Because the plaintiff's vice president was competent to testify to the methods he had employed in valuing the business, the weight given his testimony was for **[*644]** the trial court, as the trier of fact, to decide. Id. Just as the plaintiff's vice president in *Westport Taxi Service, Inc.*, was competent to testify as to the plaintiff's lost anticipated profits and to his reliance on those figures in valuing his business, Terry was competent to testify in the present case as to **[***41]** the methods she had used in predicting a profit in the plaintiff's bid for the Hartford school transportation contract, and, therefore, the jury was entitled to credit her testimony as it did. [16] **[***42] [**1083]** See *Capitol City Personnel Services, Inc. v. Franklin, 52 Conn. App. 783, 787, 727 A.2d 1284 (1999)* (plaintiff proved damages with reasonable certainty when principal shareholder estimated profits as 25 percent of adjusted gross receipts, and testified that 25 percent was "accurate" for both industry and this particular plaintiff). [17]

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lost profits on the basis of the difference between the $ 1.80 average fare that the plaintiff had been charging and the $ 2.70 average fare that it could have charged. *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 30-31*.

[16] We note, in addition, that our observation in *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 29*, that the trial court in that case had "made meticulous findings of fact and clearly detailed its calculations" regarding the plaintiff's lost profits, does not lessen the applicability of that case to our resolution of this issue in the present case. This detail was the result of the fact that *Westport Taxi Service, Inc.*, was tried to the court, which has the ability, and indeed the obligation, to provide such findings. See *Practice Book § 6-1 (a)*.

[17] The defendant attempts to distinguish the present case from *Capitol City Personnel Services, Inc. v. Franklin, supra, 52 Conn. App. 787*, because in that case, "the plaintiff's witness testified that [the] plaintiff had earned a 25 percent profit markup on its billings for the same type of business in the same locality over the past three years. [The] plaintiff also presented testimony that other businesses in the same industry and area also earned about the same percentage profit at the time." This is a distinction without a difference. In the present case, Terry testified that she always anticipates a profit of between 8 and 10 percent, and that she usually is accurate. Therefore, Terry's estimate of lost profits was not a "pure guess [that] was wholly unsupported as to either the amount of business lost or the profit to be expected." *Doeltz v. Longshore, Inc., 126 Conn. 597, 602, 13 A.2d 505 (1940)*. Moreover, the fact that the plaintiff had submitted the lowest bid on the Hartford school transportation contract, is evidence that the plaintiff's bid was competitive in the industry. Therefore, the jury reasonably could have inferred that Terry's stated anticipated profit of 8 to 10 percent was accurate as to the state's school transportation industry, as well as to this particular plaintiff. Finally, the fact that the plaintiff's anticipated profit had ranged from 8 to 10 percent is not fatal to its claim for lost profits; that range of anticipated profit was sufficiently restrictive to permit the jury to determine the damages with reasonable certainty. See *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 33-34* (trial court's reliance on fair rate of return of between 10 to 12 percent in valuing plaintiff's business was proper).

Similarly, the dissent's reliance on *Doeltz* is misplaced. In that case, this court determined that lost profits had been improperly awarded for the plaintiff's new business when profits had actually increased after the defendant's interference and the plaintiff had presented no evidence of costs other than rent. *Doeltz v. Longshore, Inc., supra, 126 Conn. 601*. In addition, the plaintiff's

[*43]** **[*645]** Moreover, in *Bead Chain Mfg. Co. v. Saxton Products, Inc., 183 Conn. 266, 439 A.2d 314 (1981)*, this court concluded that, under the Uniform Commercial Code; *General Statutes § 42a-1-101 et seq.*; lost profits on a breached contract for the sale of goods may be established through the opinion testimony of the seller. Specifically, this court stated: "With regard to the loss of profits, [the plaintiff's] president testified, without objection, about the elements he considered in pricing the job for [the defendant]. Under the [Uniform Commercial] Code, it is not fatal that his cost and price estimates about the actual production run were necessarily theoretical, since [the defendant's] breach made it impossible to go forward with the production that would have made historically accurate figures available. . . . [The plaintiff's] **[**1084]** president based his estimates on his experienced view of the equipment that would be required, the difficulty of maintaining production, and the time required for the job. Having taken account of these and related factors, he built a 20 percent profit into the contract price of $ 13.95 per thousand units. **[***44]** The award of $ 3000 lost profits on a contract for **[*646]** 5,000,000 units at a total contract price of approximately $ 70,000 was therefore well within the supporting evidence." (Citations omitted.) *Bead Chain Mfg. Co. v. Saxton Products, Inc., supra, 279-80*. Although *Bead Chain Mfg. Co.* was decided under the Uniform Commercial Code, "we have often drawn upon provisions of the Uniform Commercial Code as a source of analogy for the emergent common law." *Normand Josef Enterprises, Inc. v. Connecticut National Bank, 230 Conn. 486, 501, 646 A.2d 1289 (1994)*. Therefore, as in *Bead Chain Mfg. Co.*, it is not fatal in the present case that Terry's estimated profits under the Hartford school transportation contract were necessarily theoretical, since it was the defendant's antitrust violation, in the first instance, that rendered the historically accurate figures unavailable.

The defendant, relying on *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 70*, and *Gordon v. Indusco Management Corp., 164 Conn. 262, 320 A.2d 811 (1973)*, contends that this court previously has set **[***45]** aside damage awards that were "supported by far more evidence than the verdict here." A review of those cases, however, reveals that they do not support the defendant's characterization. In *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 50-52*, the plaintiff, a corporation that sold exercise equipment, brought an action against the defendant law firm and certain individual attorneys for malpractice in connection with the plaintiff's failed attempt to establish a new business that would franchise fitness clubs. After a court trial, the trial court rendered a verdict for the plaintiff, and awarded the plaintiff approximately $ 15.9 million in lost profits. *Id., 51*. On appeal, this court reversed the damages award, because "the trial court improperly concluded that the plaintiff had established its damages to a reasonable certainty." *Id., 59*. Specifically, the plaintiff in that case **[*647]** had not sold any fitness franchises; *id., 72*; therefore, there was no record of such sales from which to extrapolate anticipated future profits. Accordingly, the plaintiff attempted to establish lost profits through the **[***46]** expert testimony of a certified public accountant, who estimated the plaintiff's lost profits on the basis of its prior sales of fitness equipment. *Id., 70-72*. As this court noted, however, this testimony was based on the faulty assumption that, because the plaintiff previously had sold fitness *equipment*, it would have been able to sell fitness *franchises* with a similar rate of success. Id.

The lost profits of a new business also was an issue in *Gordon v. Indusco Management Corp., supra, 164 Conn. 262*, the other case relied on by the defendant. In *Gordon*, the plaintiff, who had acquired an area distributorship franchise in a fast-food restaurant operation, entered into a contract with the defendant for the construction and lease of a building in Danbury in which the plaintiff would operate an outlet of the restaurant chain. *Id., 264*. After the defendant had failed to construct the outlet, as it had promised to in the contract, the plaintiff brought an action against the defendant for breach of contract. *Id., 263*. In an effort to establish lost profits, the plaintiff presented the testimony **[**1085]** of the operator an outlet **[***47]** of the fast-food chain located in Orange. That witness testified that his outlet's gross receipts were $ 175,000, and that his net profit was 12 percent of the gross receipts. *Id., 275*. As this court noted, however, the operator of the outlet in Orange had managed that outlet himself, and his stated figure of a 12 percent profit had *included* the value of his own services to the operation in that capacity. *Id., 276*. The plaintiff, by contrast, had intended to hire a manager to run his outlet for him. Id. Accordingly, the court in

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testimony that "we usually figure on the liquor 100 [percent profit] and food 50 [percent profit]"; *id., 599*; in an attempt to establish lost profits was deficient. *Id., 601*. This court concluded in *Doeltz* that, without more evidence, simply averaging the two figures to arrive at a claim for 75 percent lost profit, was insufficient, because "no attempt was made to show what relative proportion of [the plaintiff's] total sales fell within one class or the other. The evidence quoted shows that the estimate of the plaintiff was a pure guess and was wholly unsupported as to either the amount of business lost or the profit to be expected." *Id., 601-602*.

Gordon concluded that the plaintiff had not proved his damages, because, "since the plaintiff would not have given his services but would have employed a manager **[*648]** for his outlet, it is not clear that he would have enjoyed a similar profit margin." Id.

Unlike the businesses in both *Beverly Hills Concepts, Inc.*, and *Gordon*, the plaintiff in the present case is not a new business.

[18] As we previously have stated, Terry testified that she had approximately thirty years of experience in the school transportation industry and had been running her own school transportation company since 1984. She also testified that, prior **[***48]** to incorporating her own company, she had managed a school transportation company that had "well over 200" school buses and "[forty-eight school buses] in Norwich alone." The bid form in the present case indicates that only thirty-four school buses would have been required for performance of the Hartford school transportation contract. See footnote 12 of this opinion. Finally, Terry discussed the specific types of expenses that she had considered in preparing the bid, and she testified that she always had prepared her bids by first calculating the costs, and then adding in the anticipated profit. Accordingly, Terry's testimony established that she previously had managed school transportation contracts that were similar to the contract at issue in the present case, and on the basis of this testimony, the jury reasonably could have concluded that Terry's anticipated profit of between 8 and 10 percent was appropriate. Because the jury's damage award of $ 500,000, or approximately 8.5 percent in lost profits, was well within this range; see footnote 14 of this opinion; the trial court abused its discretion in setting aside the jury's verdict.

[*49]** **[*649]** III

The plaintiff next claims that the trial court improperly granted the defendant's motion for a directed verdict on its equal protection claims on the ground that the plaintiff had an adequate remedy at law in its antitrust claim, because the trial court subsequently deprived the plaintiff of that adequate remedy when it set aside the jury's verdict on the antitrust claim. The defendant contends that the trial court properly directed the verdict on the plaintiff's constitutional claims because the plaintiff had the remedy of a permanent injunction available to her. Because we have concluded that the trial court's judgment setting aside the verdict was improper, we need not decide this issue because a litigant may recover just damages only **[**1086]** once. [19]

[*50]** IV

The plaintiff's final claim is that the trial court improperly failed to grant it a mandatory injunction requiring that the defendant enter into a prospective, five year contract with the plaintiff on a cost plus 10 percent profit basis.

[20] **[***51]** The defendant contends that the trial **[*650]** court was within its discretion to deny the relief requested by the plaintiff. Laidlaw [21] claims that, because the 1998 contract has terminated, and it already is performing work

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[18] In addition, we note that neither *Beverly Hills Concepts, Inc.*, nor *Gordon* were antitrust cases and, accordingly, both can be distinguished on that ground alone. See *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 28* (there is "a lesser burden of proving the amount of damages in antitrust suits than in other contexts" [internal quotation marks omitted]); see also *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 92* (*Peters, J.*, dissenting).

[19] ***HN20***[] "The rule precluding double recovery is a simple and time- honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint tortfeasors. . . . The possible rendition of multiple judgments does not, however, defeat the proposition that a litigant may recover just damages only once. . . . Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments." (Internal quotation marks omitted.) *Haynes v. Yale-New Haven Hospital, 243 Conn. 17, 22 n.6, 699 A.2d 964 (1997)*.

[20] In its complaint, the plaintiff also sought prohibitory injunctive relief, namely, that the court temporarily restrain the defendant from entering into the contract with another party, and temporarily restrain the defendant from permitting any party to perform

under a new five year contract awarded in 2003, issuance of the mandatory injunctive relief sought by the plaintiff would severely harm Laidlaw. We agree with the defendant.

HN21[] "A mandatory injunction . . . is a court order commanding a party to perform an act." *Tomasso Bros., Inc.* v. O*ctober* *Twenty-Four, Inc., 230 Conn. 641, 652, 646 A.2d 133 (1994)*. "Relief by way of mandatory injunction is an extraordinary remedy granted in the sound discretion of the court and only under compelling circumstances. . . . Ordinarily, an injunction will not lie where there is an adequate remedy at law." (Citation omitted; internal quotation marks omitted.) *Monroe v. Middlebury Conservation Commission, 187 Conn. 476, 480, 447 A.2d 1 (1982)*; accord *Harvey v. Daddona, 29 Conn. App. 369, 377, 615 A.2d 177 (1992)* ("injunctions should not be issued when damages can adequately protect the injured party"). Moreover, "where the granting of the injunction would cause damage to the defendant greatly disproportionate to the injury of which the plaintiff complains, it may be held inequitable to grant a mandatory injunction and the plaintiff **[***52]** may be remitted to her remedy by way of damages." *Moore v. Serafin, 163 Conn. 1, 6-7, 301 A.2d 238 (1972)*. In sum, "mandatory injunctions are . . . disfavored as a harsh remedy and are used only with caution and in compelling circumstances." 42 Am. Jur. 2d 560, Injunctions § 5 (2000).

We conclude that the trial court properly determined that the present case failed to present the "'compelling **[*651]** circumstances'" required for the issuance of a mandatory injunction. *Monroe v. Middlebury Conservation Commission, supra, 187 Conn. 480*. The plaintiff had an adequate remedy under **[**1087]** the act, namely, an action for damages against the defendant, on which she prevailed. Moreover, even if the plaintiff had not had the ability to collect damages, we would conclude that the trial court properly exercised its discretion in denying the relief requested. See id. ***HN22***[] ("mandatory injunction is an extraordinary remedy granted in the sound discretion of the court" [internal quotation marks omitted]). The plaintiff was requesting that the trial court award a new contract to the plaintiff, for a term of five years, and for a total value of cost plus a *guaranteed profit* **[***53]** of 10 percent. The plaintiff has failed to cite, before both the trial court and this court, any authority for such a broad use of the extraordinary remedy of a mandatory injunction. Indeed, the contract underlying the present case has expired, and the defendant already has entered into a new five year contract with Laidlaw. Thus, if that contract, which is not challenged in the present case, remained in effect, and the plaintiff's request for a new contract was granted, the result would be that two contracts would be in effect for the same project. [22] This court previously has rejected such a bizarre result. See *Blesso Fire Systems, Inc. v. Eastern Connecticut State University, 245 Conn. 252, 257, 713 A.2d 1283 (1998)*. Consequently, we conclude that the trial court did not abuse its discretion in denying the plaintiff's request for a mandatory injunction.

[*54]** The judgment is reversed in part and the case is remanded with direction to reinstate the judgment for the plaintiff in accordance with the jury's verdict.

[*652] In this opinion SULLIVAN, C. J., and BORDEN, PALMER and ZARELLA, Js., concurred.

Concur by: NORCOTT

Dissent by: NORCOTT

Dissent

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work under the contract. The plaintiff concedes that, because the contract was in fact almost complete at the time of the hearing, its request for prohibitory injunctive relief was moot and nonjusticable. Consequently, we will address only the trial court's denial of the plaintiff's request for prospective mandatory relief. See *Tomasso Bros., Inc. v. October Twenty-Four, Inc., 230 Conn. 641, 652, 646 A.2d 133 (1994)* (distinguishing prohibitory injunctions from mandatory injunctions).

[21] Laidlaw is involved as an appellee solely for this claim. See footnote 5 of this opinion.

[22] Such a remedy also would create an expansive range of practical problems for the trial court when developing, and subsequently monitoring, the new contract, including: how would cost be determined; what services would be covered under the contract; how would changes resulting from changed market conditions be addressed; and how would the level of service provided by the plaintiff be measured.

NORCOTT, J., with whom VERTEFEUILLE, J., joins, concurring and dissenting. I concur with the outcome in parts I, III and IV of the thoughtful majority opinion. [1] I disagree with the majority's conclusion in part II, however, and respectfully dissent. More specifically, I would conclude that the trial court properly set aside the jury's verdict on the antitrust claim of the plaintiff, Cheryl Terry Enterprises, Ltd., on the ground that the plaintiff had failed to present sufficient proof of damages.

[*55]** Without reiterating the entire standard of review, I nonetheless note that I agree with the majority that a trial court's decision to set aside a verdict is entitled to "'broad legal discretion,'" and, therefore, our review of "'the trial court's action on a motion to set aside the verdict involves a determination of whether the trial court abused its discretion, according great weight to the action of the trial court and indulging every reasonable presumption in favor of its correctness' . . . ." (Citations omitted.) *Howard v. MacDonald, 270 Conn. 111, 127, 851 A.2d 1142 (2004)*; accord *Labbe v. Pension Commission, 239 Conn. 168, 192, 682 A.2d 490 (1996)*; *Ginsberg v. Fusaro, 225 Conn. 420, 425, 623* ***[**1088]*** *A.2d 1014 (1993)*; *Palomba v. Gray, 208 Conn. 21, 24, 543 A.2d 1331 (1988)*; *O'Brien v. Seyer, 183 Conn. 199, 208, 439 A.2d 292 (1981)*; *Jacobs v. Goodspeed, 180 Conn. 415, 416, 429 A.2d 915 (1980)*.

Moreover, I agree with the majority that we apply this familiar and deferential scope of review in light of **[*653]** the equally familiar principle that "damages must be proved **[***56]** with reasonable certainty. . . . Although we recognize that damages for lost profits may be difficult to prove with exactitude . . . such damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount with *reasonable certainty*." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 247 Conn. 48, 69, 717 A.2d 724 (1998)*. "The plaintiff cannot recover for the mere possibility of making a profit. . . . A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. . . . In order to recover lost profits, therefore, the plaintiff must present *sufficiently accurate and complete evidence* for the trier of fact to be able to estimate those profits with reasonable certainty." (Citations omitted; emphasis added; internal quotation marks omitted.) *Id., 70* [2]

[*57]** Applying this deferential standard of review to the present case, I would conclude that the trial court did not abuse its discretion when it granted the motion of the defendant, the city of Hartford, to set aside the verdict. As the trial court noted, the plaintiff "presented no experts, statistics, financial records as to costs or any information from which a reasonable calculation of lost profits could be made for this contract." To the **[*654]** contrary, as the majority recognizes, the only evidence offered by the plaintiff in support of its claim for lost profits was the testimony of its president, Cheryl Terry. Before evaluating whether the trial court properly determined that Terry's testimony, standing alone, failed to prove damages to a reasonable certainty, it is important to first identify what information was *not* testified to by Terry.

First, Terry failed to testify about *any profits* the plaintiff actually had made under prior busing contracts. See *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 72-73* (experience of plaintiff in

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[1] I join fully in the reasoning and conclusion set forth in part I of the majority opinion. I agree with the outcome in part III of the majority opinion, yet I would reach that result based on my conclusion that the plaintiff, Cheryl Terry Enterprises, Ltd., had failed to present an adequate record for review. With regard to part IV of the majority opinion, I agree that "the trial court properly exercised its discretion in denying the relief requested."

[2] This court has articulated a number of factors to be taken into account when evaluating whether a plaintiff has proved lost profits to a reasonable certainty. Those factors include: a plaintiff's prior experience in the same business; the plaintiff's experience in the same enterprise subsequent to the interference; the experience of the plaintiff and that of third parties in a similar business when dealing with a new business; the average experience of participants in the same line of business as the injured party; and prelitigation projections. *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 72-74*. We have emphasized, however, that "the underlying requirement for each of these types of evidence is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed." *Id., 74*.

same business probative on issue of lost profits); Kay Petroleum Corp. v. Piergrossi, 137 Conn. 620, 624-25, 79 A.2d 829 (1951) **[***58]** (profits earned by plaintiff in year prior to breach may be extrapolated to time remaining on contract breached by defendant); Tull v. Gundersons, Inc., 709 P.2d 940, 945 (Colo. 1985) (trial court improperly excluded evidence of plaintiff's "past profit experience on other projects"); Van Hooijdonk v. Langley, 111 N.H. 32, 34, 274 A.2d 798 (1971) ("an established business can usually provide data from **[**1089]** which future prospects [of profitability] can reasonably be projected"); White v. Southwestern Bell Telephone Co., 651 S.W.2d 260, 263, 26 Tex. Sup. Ct. J. 441 (Tex. 1983) (profits earned by plaintiff's florist shop prior to defendant's breach of contract relevant to determination of lost profits caused by defendant's failure to list plaintiff's business properly in telephone directory).

Second, Terry failed to testify about any profits that the plaintiff actually had made under subsequent busing contracts. See Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 73 (plaintiff's experience in same enterprise subsequent to interference probative on issue of lost profits); El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 698, 261 N.W.2d 358 (1978) **[***59]** (increased profits earned after **[*655]** faulty pizza oven replaced indicative of profits lost as result of defendant's breach of warranty of merchantability); Cook Associates v. Warnick, 664 P.2d 1161, 1165-66 (Utah 1983) (plaintiff's experience at unaffected plant relevant to lost profits projected for affected plant).

Third, Terry failed to testify about profits other participants in the busing industry had made under a contract with the defendant, or, more generally, under contracts with other towns. See Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 73 (experience of third parties in similar business probative on issue of lost profits); Chung v. Kaonohi Center Co., 62 Haw. 594, 611, 618 P.2d 283 (1980) (proper to base future profit calculation on experience of third party conducting virtually identical business at same location), overruled in part on other grounds, Francis v. Lee Enterprises, Inc., 89 Haw. 234, 237, 971 P.2d 707 (1999); Vickers v. Wichita State University, 213 Kan. 614, 618, 518 P.2d 512 (1974) (approving of reliance on experience **[***60]** of others in same line of business). While the lack of this evidence is not, by itself, fatal, it would have "removed the assessment of damages from the realm of speculation [by providing] . . . objective verifiable facts that bear a logical relationship to projected future profitability." Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 76.

Rather than testify about past profits the plaintiff or other companies actually had made under prior contracts, Terry merely testified that she always added 8 to 10 percent profit to her expenses to determine *the bid amount*, and that she "would have hoped for" the same amount for the contract with the defendant. [3] This **[*656]** testimony is speculative on a number of different levels. First, Terry failed to present any evidence as to what profit expectation she in fact had added to prior bids, and merely claimed that she usually added a profit of 8 to 10 percent. Second, Terry failed to testify about profits the **[**1090]** plaintiff *actually had earned* on those prior contracts, and limited her testimony to what she had included in the bid. While the former would have "removed the assessment of damages from **[***61]** the realm of speculation"; Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 76; the latter attempts to prove speculative future profit levels through mere speculation about past bid calculations. Third, the speculative nature of Terry's testimony was compounded by the fact that she was unable to testify accurately as to whether she added in an 8 percent profit projection, a 10 percent profit projection,

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[3] In testifying generally about the bid preparation process, Terry stated: "You can't determine your price per bus until you have all [of your] costs factored in. This is how you come out with your cost per bus or cost per van when you have your driver pay scale and all of the above that I just mentioned. And then you come out with the total price. *Then you add your profit, which is usually between--I usually add 8 to 10 percent, hoping for the higher*, but I don't know until after that first year." (Emphasis added.)

With regard to the bid submitted to the defendant, the following colloquy occurred during the plaintiff's direct examination of Terry:

"Q. And what was the net present value of the five years in the [bid submitted to the defendant]?

"A. $ 5,862,097.

"Q. And of that, what was your anticipated profit?

"A. It would have been about 8 to 10 percent that I would have hoped for."

or some other number to the bid submitted to the defendant. Instead, Terry merely testified that it was her normal practice to add an 8 to 10 percent profit level to bids. Given that the total bid amount was almost $ 6 million, that is a difference between a $ 480,000 profit at 8 percent, and a $ 600,000 profit at 10 percent, being factored into the bid. Put another way, the plaintiff's bid price of $ 5,862,097 was arrived at either by: (1) adding up the total costs for providing the services under the contract and adding an 8 percent profit; or (2) adding up the total costs for providing the services under the **[*657]** contract and adding a 10 percent profit. [4] **[***63]** It simply cannot be true, as the majority seems to accept, that Terry added **[***62]** up her costs and added in an expected profit of *8 to 10* percent. To reach the fixed price eventually submitted with the bid, Terry had to add in one or the other, not both. [5]

[*64]** The majority places great emphasis on the fact that Terry "had approximately thirty years of experience in the school transportation industry and had been running her own school transportation company since 1984." On the basis of this experience, the majority states that "the jury reasonably could have concluded that Terry's anticipated profit of between 8 and 10 percent was appropriate." Although I agree that Terry, as well as the plaintiff, had substantial experience in the busing industry, I would conclude that this counsels **[*658]** strongly in favor of upholding the trial court's determination that the plaintiff had not proved lost profits to a reasonable certainty. Put another way, despite having **[**1091]** over thirty years of experience in the busing industry, having calculated and submitted numerous bids for busing contracts, having performed busing services pursuant to contracts with several cities and towns, and presumably having earned a sufficient profit to remain in business for thirty years, Terry failed to testify about any profits the plaintiff actually had made over that time. To the contrary, she testified only that she normally added an 8 to 10 percent profit level *to the bid* **[***65]** . I cannot conclude, given her extensive experience in the business and all of the past financial information at the plaintiff's disposal, that the trial court abused its discretion by determining that Terry's testimony failed to prove damages to a reasonable certainty.

As the majority notes, "this court has recognized that, 'the vagaries of the marketplace usually deny us sure knowledge of what [the] plaintiff's situation would have been in the absence of the defendant's antitrust violation,'" and therefore a plaintiff in a typical antitrust case is subject to a "'lesser burden of [proof] . . . .'" This case is not a typical antitrust case, however, as the plaintiff's situation was necessarily limited to an identifiable amount based on the figures set forth in the bid submitted to the defendant. As the trial court stated: "This is not a case where the requirements of proof of lost profits should be relaxed because of the intricacies of proof presented by a complex antitrust case. The contract price was known, all that was needed was information about expenses which Terry at one time admitted she had calculated. This rather is a situation where evidence that could have been preserved **[***66]** and presented was not offered in court and, without that evidence, there can be no reasonable basis for the jury's determination of lost profits." See also *Doeltz v. **[*659]** Longshore, Inc., 126 Conn. 597, 601, 13 A.2d 505 (1940)* ("while the modern tendency is toward greater liberality in the requirements [for demonstrating lost profits] . . . it is the unvarying rule that evidence of such certainty as the nature of the case permits should be produced" [citation omitted]). The present case does not involve a scenario where the defendant's actions

[4] With regard to how she calculated the bid submitted to the defendant, Terry testified: "I took my costs, as I always do, and added a profit, and that is all I can tell you because that is the way you do it."

[5] The majority claims that "the fact that the plaintiff's anticipated profit had ranged from 8 to 10 percent is not fatal to its claim for lost profits; that range of anticipated profit was sufficiently restrictive to permit the jury to determine the damages with reasonable certainty." This statement misses the point. The fact that the plaintiff may have adjusted its anticipated profit between 8 and 10 percent for varying bids it had made in the past is not relevant. What is relevant to the present case, however, is the profit level the plaintiff factored into the *specific bid* submitted to the defendant. Terry was unable to testify to that amount, and could only testify that in the past it had ranged from 8 to 10 percent. Indeed, the fact that Terry testified that it ranged from 8 to 10 percent indicates that it was always a firm number, and not a range, that she factored into a particular contract.

The record further reveals that the plaintiff had never provided busing services to the defendant before, and its prior contracts were with towns in the southeastern portion of Connecticut. The majority concludes that the fact that the plaintiff submitted the lowest bid indicates that "the plaintiff's bid was competitive in the industry." Although that may be true, it also may be true that the fact that the plaintiff submitted the lowest bid is evidence that the plaintiff reduced its normal profit level in order to win this contract, and expand its business into the central portion of the state. In sum, the fact that the plaintiff submitted the lowest bid has no bearing on a determination as to what the plaintiff's profit would have been if it had been awarded the contract.

prevented an opportunity for limitless business growth, and the concomitant opportunity for the limitless accumulation of profits. To the contrary, the business activity of the plaintiff in the present case, and the concomitant opportunity to accumulate profits, was limited to the terms specified in the bid. The nature of the present case therefore required the plaintiff to present more certain evidence of lost profits than that provided by Terry's testimony. Id.

At the completion of Terry's testimony, the defendant moved to strike her testimony on the ground that she did not have the knowledge upon which to base an estimate **[***67]** of the profit built into the bid. Although the trial court denied the defendant's motion, it nevertheless warned counsel for the plaintiff that, "unless there is more offered in the way of facts and figures that [Terry] relied on, I may be in a position where I grant a motion for a directed verdict . . . ."

[6] **[***69]** Despite this **[*660]** cautionary statement **[**1092]** from the trial court, the plaintiff failed to present any additional evidence concerning the preparation of the bid and Terry's profit estimates. Accordingly, the trial court found that Terry's testimony that, in her experience, she normally factored an 8 to 10 percent profit into a bid, without more, did not prove the plaintiff's lost profits under the proposed contract to a reasonable certainty. See *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 72* (trial court abused discretion in awarding damages for lost profits where plaintiff did not prove lost profit damages to reasonable certainty). On the record before us, considering the factors this court outlined in *Beverly Hills Concepts, Inc.,* [7] and indulging every reasonable presumption in favor of the trial court's action; *Howard v. MacDonald, supra, 270 Conn. 127*; **[***68]** I would conclude that the trial court did not abuse its discretion in granting the defendant's motion to set aside the verdict.

In reaching this conclusion, I am guided by this court's decision in *Doeltz v. Longshore, Inc., supra, 126 Conn. 597*. In *Doeltz*, the plaintiff had leased a refreshment concession from the defendant for $ 500 plus 5 percent of the gross receipts for the summer season. *Id., 598*. Under the terms of the lease, the defendant was to equip the bar and permit the plaintiff to have the exclusive sales of beverages and food on the defendant's premises. Id. Despite the terms of the lease, the plaintiff alleged that the bar was not equipped and ready for him on the agreed date, and that the defendant subsequently interfered with the operation of the plaintiff's business. *Id., 598-99*. The plaintiff brought an action against the defendant seeking, inter alia, an award of lost profits. *Id., 599*. In support of his claim for lost profits, the plaintiff testified that he "usually figured on the liquor 100 percent [profit] and [on the] **[*661]** food 50 percent [profit]." (Internal quotation marks omitted.) Id. On the **[***70]** basis of those usual profit margins, the plaintiff testified that he averaged a 75 percent profit, and, therefore, if he lost $ 3750 in business due to the defendant's interference, then his lost profits were $ 2500. [8] Id. The jury returned a verdict for the plaintiff in the amount $ 2500, and the trial court denied the defendant's subsequent motion to set aside the verdict. Id. On appeal, this court reversed the judgment of the trial court, concluding that the "unsatisfactory and conjectural character [of

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[6] Specifically, the trial court stated: "My difficulty now is in [granting] a motion to strike if the trial isn't over, so I can't say that the testimony is not relevant, you know, as such. But I am telling you, counsel, in fairness to you, that unless it is tied up, I am going to have a problem, because one of the aspects of this case is a request for an injunction, and the other aspect of this case is a request for damages. . . . The law permits speculation, but in certain respects on future earnings, and the cases are pretty liberal. Like a claim for future earnings, but there has to be some foundational requirement. And [Terry] didn't remember any costs of this contract, she didn't remember maintenance, facilities, she had no access to these figures. And yet she says that she relies on these figures in determining what her bid price was and what her rate of profit is. . . . I can't say that her testimony was completely irrelevant, but I am telling you, counsel, unless there is more offered in the way of facts and figures that [Terry] relied on, I may be in a position where I grant a motion for a directed verdict . . . . And in fairness to you, I will allow you to recall her if she has figures."

[7] See footnote 2 of this opinion.

[8] Although $ 2500 is slightly less than 75 percent profit of $ 3750 in sales, the plaintiff stated that the lower amount was applicable because "sometimes you give something away free of charge, and so forth, you know, the kids come in for ice cream cones and sometimes you give a drink away on the house." (Internal quotation marks omitted.) *Doeltz v. Longshore, Inc., supra, 126 Conn. 599*.

the plaintiff's evidence] is plain." *Id., 601*. In so concluding, this court noted, inter alia, that "no data whatever as to his costs, other than rent, were shown nor was there any testimony to the effect that such data were not available." Id. Moreover, the court noted that the plaintiff's estimation **[**1093]** of a 75 percent profit level "was a pure guess and was wholly unsupported as to either the amount of business lost or the profit to be expected." *Id., 602*.

[*71]** The facts of *Doeltz* and the present case are similar in several important respects. First, both the plaintiff's testimony in *Doeltz* and Terry's testimony in the present case were predicated upon unsupported claims of "usual" profit margins. Just as there was no evidence in *Doeltz* to support the claimed average of 75 percent profits, there was no evidence in the present case to support the claimed level of 8 to 10 percent profit. Moreover, the plaintiff's testimony in *Doeltz* contained speculation about usual profits *earned* in his business. Terry's testimony in the present case, however, concerned speculative profit levels set forth in a bid, rather than speculation over past profits actually earned. If **[*662]** the testimony in *Doeltz* was insufficient because it was speculative, then surely Terry's testimony was insufficient as well. Second, in both cases, no data whatsoever was presented by the plaintiff as to relevant costs, nor was there testimony in either case that this data was unavailable. Therefore, I would conclude in the present case, just as this court concluded in *Doeltz*, that the "unsatisfactory and conjectural character [of Terry's testimony] is plain. **[***72]** " *Id., 601*.

This conclusion is buttressed by an examination of other cases in which this court has addressed awards for lost profits. In those cases where the award was affirmed, the plaintiff had presented specific evidence, beyond mere speculation, which supported the award. See, e.g., *Westport Taxi Service, Inc. v. Westport Transit District, 235 Conn. 1, 29, 664 A.2d 719 (1995)* (affirming award of lost profits where "trial court made meticulous findings of fact and clearly detailed its calculations regarding the plaintiff's damages" based on, inter alia, specific figures in evidence regarding average taxi fares, yearly rides and commissioner's guidelines for fair rate of return);

[9] *Burr v. Lichtenheim, 190 Conn. 351, 361, **[*663]** 460 A.2d 1290 (1983)* (affirming award of lost profits where **[**1094]** plaintiff "introduced, as an exhibit, a contract for sale of that property for $ 25,000 [that was lost by the plaintiff] . . . [and] expert testimony that he might reasonably have expected to make a profit of $ 23,000 to $ 25,000 had he been able to build [on a separate piece of land] in 1976"); *Humphrys v. Beach, 149 Conn. 14, 20, 175 A.2d 363 (1961)* **[***73]** (award of $ 3500 for lost profits over one year and three months had sufficient support in record, namely, "evidence that the [plaintiff's] profit in 1955 was $ 3500, and that it was about half of that amount during the first half of 1956"); *Kay Petroleum Corp. v. Piergrossi, supra, 137 Conn. 624* (award of $ 3025 for lost profits over three years and nine months had sufficient support in record, namely, evidence that plaintiff had profit of $ 806.57 in prior year); *Kastner v. Beacon Oil Co., 114 Conn. 190, 194, 158 A. 214 (1932)* (award for lost profits reasonably supported by testimony from owner that, inter alia, in 1928, net profit was about $ 3400, and in 1929, gross profit was $ 3200, and net profit was something less due to family illness).

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[9] The majority's reliance on *Westport Taxi Service, Inc. v. Westport Transit District, supra, 235 Conn. 1*, in support of its conclusion is misplaced. To begin with, much of the discussion the majority cites to from *Westport Taxi Service, Inc.,* is contained in the part of that opinion addressing the defendant's challenge to the trial court's award of $ 150,000 for the loss of the business, and not the part of that opinion addressing the defendant's challenge to an award of $ 12,144 in lost profits. See *id., 32-35*. Second, within that part of *Westport Taxi Service, Inc.,* addressing the award for lost profits, this court noted that the trial court, as the trier of fact in that case, had "sufficient evidence" from which to make "reasonable assumptions" concerning lost profits. *Id., 32*. That sufficient evidence included, inter alia, evidence that the plaintiff collected a $ 1.80 average fare, that the state commission would have approved a fare increase to the rate of $ 2.70, that surrounding communities were charging an average fare of $ 2.70, and that the commission considered a reasonable rate of return to be a ratio of operating costs to gross revenue of between 85 and 95 percent. *Id., 30-31*. That level of evidence simply was not presented by Terry in the present case. Thus, while the majority is correct that the owner in *Westport Taxi Service, Inc.,* properly was allowed to testify that a fair rate of return on a taxi business would be 10 to 12 percent, the trial court "applied this rate of return to *its own calculations of the plaintiff's lost profits* and concluded that the plaintiff's value was $ 150,000." (Emphasis added.) *Id., 34*. Put another way, the award for lost value of business was based on calculations made from the "sufficient evidence" of lost profits presented by the plaintiff; *id., 32*; evidence that is completely absent in the present case.

[*74]** Moreover, in other cases this court has found that awards for lost profits were not proved to a reasonable certainty, despite the fact that the plaintiff had presented more significant evidence than was presented by the plaintiff in the present case. See, e.g., *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 68* (vacating trial court's award of $ 15.9 million in lost profits for prospective period of twelve years because not proved to reasonable certainty where testimony from plaintiff's expert on future sales **[*664]** of franchises too speculative to support award); *Gargano v. Heyman, 203 Conn. 616, 620, 525 A.2d 1343 (1987)* (despite fact that "to support his claim for damages, the plaintiff offered his 1983 and 1984 federal income tax returns and testimony concerning an offer to purchase his business," this court affirmed state trial referee's finding that plaintiff had failed to prove lost profits to reasonable certainty); *West Haven Sound Development Corp. v. West Haven, 201 Conn. 305, 324-27, 514 A.2d 734 (1986)* (despite fact that expert was certified public accountant, university professor **[***75]** and had coauthored college textbook on securities analysis and business valuation, award based on present value of future profits vacated because expert used faulty calculations and assumptions;); *Gordon v. Indusco Management Corp., 164 Conn. 262, 275-76, 320 A.2d 811 (1973)* (evidence that similar business had grossed "$ 175,000 and had net profit of 12 percent of gross receipts" insufficient to support $ 21,000 award for lost profits because plaintiff had more expenses to subtract from gross revenue than other business had).

This court has stated that "[a] damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence." (Internal quotation marks omitted.) *Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, supra, 247 Conn. 70*. I continue to adhere to the sentiments expressed in that statement. As the foregoing discussion illustrates, however, this court consistently has required a higher level of "record evidence" to support an award for lost profits than that which was submitted in the present case. The majority's conclusion therefore represents a significant departure **[***76]** from our prior cases.

I recognize that my conclusion would mean that the defendant, whose antitrust violations caused the plaintiff's harm, would escape virtually unscathed. Although troubling, "this outcome is a direct result of the plaintiff's **[*665]** choice of evidence." *Id., 78*. As the trial court aptly noted, "if the expense **[**1095]** figures had been preserved and presented at trial, it would have been possible for the jury to have a nonspeculative basis to determine lost profits. . . . Without that evidence, there can be no reasonable basis for the jury's determination of lost profits."

I therefore respectfully dissent, and would affirm the judgment of the trial court granting the defendant's motion to set aside the verdict on the ground that the plaintiff failed to prove lost profits to a reasonable certainty.

Next Generation Realty, Inc. v. Iowa Realty Co.

Supreme Court of Iowa

September 1, 2004, Filed

No. 84 / 03-0470

Reporter
686 N.W.2d 206 *; 2004 Iowa Sup. LEXIS 253 **; 2004-2 Trade Cas. (CCH) P74,538

NEXT GENERATION REALTY, INC., an Iowa Corporation, and HOMEBUYERS CONSULTANTS, an Iowa Corporation, Appellants, vs. IOWA REALTY COMPANY, INC., an Iowa Corporation d/b/a IOWA REALTY, FIRST REALTY, LTD., an Iowa Corporation d/b/a FIRST REALTY, MIDAMERICAN ENERGY HOLDINGS COMPANY, an Iowa Corporation, and DES MOINES AREA ASSOCIATION OF REALTORS, an Iowa Nonprofit Corporation, Appellees.

Prior History: [1]** Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge. Appeal from dismissal of antitrust suit brought under Iowa Code chapter 553.

Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 2001 Iowa Sup. LEXIS 2 (Iowa, 2001)

Disposition: Affirmed.

Core Terms

listings, antitrust

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

Temporary injunctions, by their very nature, are preliminary and thus do not contribute to any determination of facts in dispute.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Remedies**

Without an antitrust injury, the provisions of Iowa Code ch. 553 (2003) do not apply.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Public Enforcement, State Civil Actions**

Iowa Code § 533.2 (2003) provides that Iowa Code ch. 533 (2003) is to be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose, and shall be made to achieve uniform application of the state and federal laws prohibiting monopolistic practices.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Private Actions, Remedies**

Until a monopolistic act impacts on the public's access to a competitive market, the injured are left to proceed with traditional tort or contract remedies. Iowa Code ch. 553 (2003) simply does not provide a remedy for a private wrong.

Counsel: Glenn L. Norris and George F. Davison, Jr. of Hawkins & Norris, P.C., Des Moines; Christopher T. Cook of Wandro, Lyons & Baer, P.C., Des Moines; and Dennis C. Schemmel of Schemmel Law Offices, P.C., Des Moines, for appellants.

John D. French and Amy M. Gernon of Faegre & Benson LLP, Minneapolis, MN; Mark McCormick of Belin Lamson McCormick Zumbach & Flynn, A P.C., Des Moines; and Kimberly J. Walker and Chad R. Anderson of Faegre & Benson LLP, Des Moines, for appellees Iowa Realty Company, Inc., First Realty, Ltd., and MidAmerican Energy Holdings Company.

F. Richard Lyford and Joan M. Fletcher of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellee Des Moines Area Association of Realtors.

Judges: All justices concur except Ternus and Wiggins, JJ., who take no part. This opinion shall be published.

Opinion

[*207] PER CURIAM.

This antitrust suit was dismissed on summary judgment, [1] and the plaintiffs have appealed, vigorously contending there are material facts very much in dispute. There is some **[**2]** attraction to this contention because the parties certainly disagree on matters relating to the disputed issues. The dismissal was nevertheless correct because a controlling legal principle in the field of ***antitrust law*** renders the disputed issues irrelevant. [2] So we affirm.

[3]** Defendants, Iowa Realty Company, Inc. and First Realty (Iowa Realty defendants), are real estate brokerage firms that do business in the Des Moines area. Iowa Realty purchased First Realty in 1995. Now both firms are wholly owned by Home Services of America, Inc., which is wholly owned by MidAmerican Energy Holding Company. Customarily, Des Moines realtors charge a 7% commission for selling previously owned homes: half going to the seller's agent, half to the buyer's.

The Iowa Realty defendants are members of defendant Des Moines Area Association of Realtors (DMAAR). DMAAR is a professional association of real estate agencies that offers members the Multiple Listing Service (MLS). This service provides **[*208]** a vehicle for listing and selling residential real estate.

Plaintiff, Next Generation Realty, Inc. (Next Generation), is a real estate broker in the Des Moines area. Although Next Generation was a DMAAR member through 2001, it seldom used the MLS for its clients' listings; Next Generation used the MLS for only 2% of its sales. Instead, Next Generation relied on "office exclusive" listings, which are not accessible to other MLS participants. This was part of Next Generation's business **[**4]** strategy, and it advertised that not using the MLS saved its customers money. Plaintiff Homebuyer's Consultants, which operated only during 1998, offered services to buyers on a negotiated-fee basis. Because it did not represent sellers, it did not contribute a single listing on the MLS.

DMAAR requires that members report office exclusive listings within forty-eight hours of posting. This way all members can obtain accurate information concerning the status of properties, even though other brokers cannot sell office-exclusive listings. In March 2000 DMAAR set its fee for exclusive listings at $ 35, which covered DMAAR's expenses. Next Generation protested, claiming the fee was highly prejudicial because it dealt almost entirely with exclusive listings.

Next Generation did not report its office exclusive listings to DMAAR, resulting in delinquent fees totaling $ 20,160. On September 11, 2001, the DMAAR board voted to suspend Next Generation's MLS privileges until its past-due fees (which by then totaled $ 36,120) were paid in full. Next Generation did not pay the fees and was expelled.

On October 30, 2001, DMAAR elected its officers and directors for 2002. Iowa Realty agents received **[**5]** enough votes to form a majority of the board, but those elected did not assume their positions until 2002.

Plaintiffs' claims are grounded in two Iowa statutes. Under *Iowa Code section 553.4* (2003), they claim Iowa Realty defendants conspired to take control of DMAAR through an unorthodox election and conspired to expel plaintiffs from DMAAR and its MLS. They append an assertion to this claim to allege horizontal price-fixing. The claim under

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[1] ***HN1***[] Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Schoff v. Combined Ins. Co., 604 N.W.2d 43, 45 (Iowa 1999)*. *See generally* *Iowa R. Civ. P. 1.981*.

[2] The same dispute was involved in our opinion in *Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178 (Iowa 2001)*, in which we reversed the granting of the temporary injunction. Following remand, the district court conducted a hearing, reviewed extensive discovery taken following the remand, and made extensive findings, which these plaintiffs urge for our consideration. We, however, find those findings of scant relevance here. The hearing on a temporary injunction is preliminary, and the one here was made irrelevant when we ordered it vacated in the prior decision. ***HN2***[] Temporary injunctions, by their very nature, are preliminary and thus do not contribute to any determination of facts in dispute. *Econ. Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 648 (Iowa 1995)*. It would be especially inappropriate to factor the temporary-injunction evidence ruling here. Since it was entered, parties have been added and dropped, and extensive discovery has been undertaken. We base our review on the record made since then.

Iowa Code section 553.5 is that defendants engaged in a monopolistic practice by refusing to share MLS real estate commissions with them.

The trial court dismissed the petition on alternative grounds. In affirming the dismissal though, we need consider only one. There was no antitrust injury, and ***HN3***[] without an antitrust injury, the provisions of *Iowa Code chapter 553* do not apply.

I. In adopting *Iowa Code chapter 553*, the legislature left us without authority to innovate from the federal courts' understanding of federal ***antitrust law***. In the preliminary appeal involved in this dispute, we again pointed out that *Iowa Code section 553.2* ***HN4***[] provides that the chapter is to **[**6]** be "'construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose,' and 'shall be made to achieve uniform application of the state and federal laws prohibiting . . . monopolistic practices.'" *Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 182 (2001)* (quoting *Iowa Code § 553.2*).

The authorities we are obliged to follow make it clear that antitrust laws were not intended to deal with claimed wrongs inflicted on individual parties. Their function is only to foster the public's access to a freely competitive market. Antitrust is in place to protect the market, not any individual merchant doing business there. The marketplace is often unfair, **[*209]** sometimes brutal; sometimes tortious acts take place there. *Chapter 553* presupposes all this. But, ***HN5***[] until an act impacts on the public's access to a competitive market, the injured are left to proceed with traditional tort or contract remedies. *Iowa Code chapter 553* simply does not provide a remedy for a private wrong. Cases holding this include *Dial A Car, Inc. v. Transportation, Inc., 317 U.S. App. D.C. 240, 82 F.3d 484, 486-87 (D.C. Cir. 1996)*; **[**7]** *National Ass'n of Review of Appraisers & Mortgage Underwriters, Inc. v. Appraisal Foundation, 64 F.3d 1130, 1135 (8th Cir. 1995)*; *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos., 682 F.2d 660, 663-64 (7th Cir. 1982)*.

The record here contains no hint that the public was inhibited from access to services of real estate brokers. The proofs are unanimous to the contrary. Iowa Realty's share of the local market decreased from 71.7% in 1996 to 61.5% in 2001, roughly a 10% decline. Next Generation's market share was 2.6% in 1999, and is projected at 6.2% by 2006. There were fifty-one Des Moines real estate agencies in 1996, and the same number in 2001. Of those fifty-one firms in 2001, twenty were recent entrants, after 1996. Plaintiffs' own growth during the period has been remarkable.

In resisting the assertion that the market had been adversely affected by the wrongs plaintiffs assert, the defendants offered an impressive analysis by a highly qualified expert in the field. He supported his opinion with a careful statistical analysis. Although plaintiffs think otherwise, the issue was not joined on the question when plaintiffs **[**8]** offered the anecdotal evidence of one witness, unsupported by any statistical data. She elected not to enter the Des Moines real estate business because of defendants' conduct.

II. The trial court correctly rejected plaintiffs' price-fixing contention because that contention lacked any support in the record. Although MLS participants typically apply a commission rate of 7%, there is no evidence that the information exchanged through MLS participation causes or induces MLS participants to always charge and subsequently split the 7% commission rate on sold properties. The practice of splitting a 7% commission was established many years ago in the Des Moines business community, and there is no suggestion that the defendants in any way took part in originating the practice or furthering its continuance.

The petition was correctly dismissed.

AFFIRMED.

All justices concur except Ternus and Wiggins, JJ., who take no part.

This opinion shall be published.

Republic Tobacco Co. v. N. Atl. Trading Co.

United States Court of Appeals for the Seventh Circuit

June 17, 2004, Argued ; September 1, 2004, Decided

Nos. 04-1098 & 04-1202

Reporter

381 F.3d 717 *; 2004 U.S. App. LEXIS 18470 **; 2004-2 Trade Cas. (CCH) P74,531

REPUBLIC TOBACCO CO., Plaintiff-Appellee/Cross-Appellant, v. NORTH ATLANTIC TRADING COMPANY, INC., et al., Defendants-Appellants/Cross-Appellees.

Subsequent History: Motion granted by *Republic Tobacco, L.P. v. N. Atl. Trading Co., 2005 U.S. Dist. LEXIS 16223 (N.D. Ill., Aug. 3, 2005)*

Prior History: [1]** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 4011. John F. Grady, Judge.

Republic Tobacco, L.P. v. N. Atl. Trading Co., 2003 U.S. Dist. LEXIS 21153 (N.D. Ill., Nov. 20, 2003)
Republic Tobacco, L.P. v. N. Atl. Trading Co., 254 F. Supp. 2d 985, 2002 U.S. Dist. LEXIS 6150 (N.D. Ill., Apr. 5, 2002)

Disposition: District court's grant of summary judgment on Republic's defamation claim and North Atlantic's antitrust claims affirmed. District court's remitted damages award order vacated.

Core Terms

district court, presumed, damages, customers, punitive damages, defamation, defamatory, lawsuit, geographic, products, actual malice, wholesalers, innocent, cigarette paper, contends, tobacco, remittitur, remitted, argues, Toys, summary judgment, Southeast, defamatory statement, relevant market, antitrust, display, parties, incentive program, antitrust claim, allegations

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's decision to grant summary judgment in the moving party's favor, construing all the facts and inferences in favor of the non-moving party.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN2[] **Defamation, Elements**

A defamatory statement is one that tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him. To make out a defamation claim under Illinois law, a plaintiff must show that the defendant made a false statement concerning him, that there was an unprivileged publication to a third party with fault by the defendant, which caused damage to the plaintiff.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > General Overview

HN3[] **Defamation, Defamation Per Se**

Defamatory statements may be actionable per se or actionable per quod. Illinois courts have recognized four categories of statements that are considered defamatory per se: (1) words that impute the commission of a crime; (2) words that impute infection with a loathsome disease; (3) words that impute an inability to perform or a want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession, or business. If a statement qualifies as defamatory per se, it is unnecessary for a plaintiff to demonstrate actual damage to reputation. Rather, statements that fall within these per se categories are thought to be so obviously and materially harmful to the plaintiff that injury to its reputation may be presumed. In contrast, with a per quod action, in order to recover the plaintiff must plead and prove that it sustained actual damage of a pecuniary nature ("special damages").

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN4[] **Defamation, Defamation Per Se**

Under the Illinois innocent construction rule, even a statement that falls into one of the limited per se categories will not be found defamatory per se if it is "reasonably capable of an innocent construction." This rule requires courts to consider a written or oral statement in context, giving the words, and their implications, their natural and obvious meaning. If a statement may reasonably be interpreted innocently, it cannot be actionable per se. However, the Illinois courts have firmly emphasized that only reasonable innocent constructions will remove an allegedly defamatory statement from the per se category. Whether a statement is reasonably capable of an innocent construction is a question of law for the court to decide.

Torts > ... > Defenses > Privileges > General Overview

HN5[] **Defenses, Privileges**

A number of common law privileges and defenses exist that may shield a defendant from liability for making another wise defamatory statement.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > ... > Defenses > Privileges > General Overview

HN6[] Defenses, Fair Comment & Opinion

A statement that does not contain any verifiable facts (as some call, "an opinion") is not actionable under Illinois law. In Illinois, a statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion, but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > ... > Defenses > Privileges > General Overview

Torts > ... > Defamation > Defenses > Truth

HN7[] Defenses, Fair Comment & Opinion

Substantial truth is a complete defense to an allegation of defamation. This rule derives from the recognition that falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest the law of defamation protects.

Torts > ... > Defenses > Privileges > General Overview

HN8[] Defenses, Privileges

Under Illinois law, publication of defamatory matters in a report of an official proceeding that deals with a matter of public concern is privileged as long as the report is accurate and complete.

Torts > ... > Defenses > Privileges > General Overview

HN9[] Defenses, Privileges

Illinois law confers a privilege upon "statements made within a legitimate business context." Under this rule, a statement is conditionally privileged when the defendant makes it (1) in good faith; (2) with an interest or duty to be upheld; (3) limited in scope to that purpose; (4) on a proper occasion; and (5) published in a proper manner only to proper parties.

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Torts > ... > Defenses > Privileges > Constitutional Privileges

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Torts > Intentional Torts > Defamation > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN10[] **Freedom of Speech, Defamation**

The *First Amendment* imposes limits on state defamation law. However, a court must first examine the threshold question of whether the challenged statements are actionable under state law; if they are not, the *First Amendment* does not come into play.

Constitutional Law > ... > Freedom of Speech > Defamation > Public Figures

Torts > ... > Defenses > Privileges > Constitutional Privileges

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Freedom of Speech > Defamation > General Overview

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

HN11[] **Defamation, Public Figures**

Federal constitutional law adds another layer of limitations on the kind of defamatory statements for which a defendant may be found liable. At common law, defamation was a strict liability tort, but constitutional doctrine has imposed culpability, or fault, requirements in most cases. The level of culpability is determined by whether the statement was of public concern and whether the plaintiff is a public or private figure. Moreover, overlapping with the common law rule, the *First Amendment* protects statements on matters of public concern that are not provably false.

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN12[] **Appellate Review, Appealability**

The United States Court of Appeals for the Seventh Circuit has long refused to consider arguments that were not presented to the district court in response to summary judgment motions. Appellate review is not designed to serve as an unsuccessful party's second bite at the apple -- an opportunity to raise issues and arguments that were not brought forth below. This is so even when the issue is an element of a plaintiff's prima facie case.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

HN13[] **Reviewability of Lower Court Decisions, Preservation for Review**

Issues and arguments which were not raised before the district court cannot be raised for the first time on appeal. The rule is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. To reverse the district court on grounds not presented to it would undermine the essential function of the district court. This rule is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > Intentional Torts > Defamation > General Overview

HN14[] **Defenses, Fair Comment & Opinion**

Prefacing a defamatory statement with the phrase "in my opinion" does not shield a defendant from liability, and the same is true for presenting a defamatory statement under a list of "concerns." Prefatory language does not control whether these statements are actionable as defamation; what matters is whether the assertions are verifiably false.

Torts > Intentional Torts > Defamation > General Overview

HN15[] **Intentional Torts, Defamation**

Illinois courts (and federal courts when interpreting Illinois law) have been quick to find implications of criminal conduct or of employee or business misconduct in statements that might have seemed susceptible of an interpretation that would have taken them out of the per se categories.

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

HN16[] **Federal & State Interrelationships, Erie Doctrine**

As a federal court sitting in diversity, the United States Court of Appeals for the Seventh Circuit is obligated to apply Illinois law as announced by the Illinois Supreme Court. In circumstances where a state supreme court has not issued a ruling on the issue presented, the rulings of the intermediate court control, unless there is a persuasive indication that the highest court would decide the issue differently.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

Torts > ... > Defenses > Privileges > General Overview

HN17[] **Defenses, Fair Comment & Opinion**

The United States Court of Appeals for the Seventh Circuit is confident that if presented with the issue, the Illinois Supreme Court would determine that the common law defamation privilege may not be self-conferred. It is significant that the Illinois Supreme Court has adopted the official proceeding privilege, and commentary on that privilege provides that a person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not.

Torts > ... > Defenses > Privileges > General Overview

Torts > Intentional Torts > Defamation > General Overview

HN18[] **Defenses, Privileges**

The test under the innocent construction rule is objective: it asks whether there is an objectively reasonable innocent interpretation of the allegedly defamatory statements.

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

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Appeals > Remands

HN19[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's remittitur decision for an abuse of discretion.

Torts > Remedies > Damages > General Overview

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Remedies > General Overview

HN20[] **Remedies, Damages**

By definition, presumed damages are speculative in nature, and this limitation on presumed damages protects a defamation defendant from being subjected to an astronomical award based upon a jury's guess about the plaintiff's unproven harm. Illinois law requires an appellate court to give some deference to the jury's determination of presumed damages while also considering whether it considers the jury award of presumed damages excessive. If it finds the award excessive, the court may exercise discretion and reduce the award to what it considers a more appropriate figure.

Torts > Remedies > Damages > General Overview

Torts > Intentional Torts > Defamation > General Overview

Torts > ... > Defamation > Remedies > General Overview

HN21[] **Remedies, Damages**

In a case lacking proof of economic injury and where the defamatory statements were publicized to a relatively limited audience, it would be inappropriate to award presumed damages that are exponentially greater than have been awarded in past cases. While under the doctrine of presumed damages a party is not required to show specific loss, there must be some meaningful limit on the magnitude of a jury award when it is arrived at by pure speculation. Presumed damages serve a compensatory function -- when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss, it becomes questionable whether the award is serving a different purpose.

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

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

HN22[] **Federal & State Interrelationships, Erie Doctrine**

In a diversity proceeding, state law governs whether punitive damages are appropriate.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

HN23[] **Damages, Punitive Damages**

Punitive damages are available under Illinois law upon proof of actual malice.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

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

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

HN24[] **Damages, Punitive Damages**

In a diversity action, state law governs the factors a jury may consider in determining the amount of punitive damages, while federal law governs the district court's review of the jury award and appellate review of the district court's decision.

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

Civil Procedure > Appeals > Remands

HN25[] Standards of Review, Abuse of Discretion

An appellate court reviews the district court's determination on the size of the jury verdict for an abuse of discretion.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN26[] Damages, Punitive Damages

Under Illinois law, three factors are particularly relevant in analyzing the amount of a punitive damages award: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims.

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN27[] Relevant Market, Geographic Market Definition

There are some circumstances where to establish a violation of antitrust laws it is unnecessary to prove that defendant wielded market power in a properly defined product and geographic market, and may rely instead on direct evidence of anticompetitive effects.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN28[] Regulated Practices, Market Definition

Horizontal agreements are illegal per se. Unlike horizontal agreements between competitors, vertical exclusive distributorships are presumptively legal. Rather than condemning exclusive dealing, courts often approve them because of their procompetitive benefits.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN29[] **Price Fixing & Restraints of Trade, Vertical Restraints**

As horizontal agreements are generally more suspect than vertical agreements, courts must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases. To do so might harm competition and frustrate the very goals that ***antitrust law*** seeks to achieve.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN30[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Neither Toys "R" Us nor Indiana Federation of Dentists allows an antitrust plaintiff to dispense entirely with market definition. Rather, these cases stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power--in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN31[] **Relevant Market, Geographic Market Definition**

In antitrust cases, economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN32[] **Regulated Practices, Market Definition**

The relevant market has both a product and a geographic dimension.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN33[] **Regulated Practices, Market Definition**

Identifying a geographic market requires both careful selection of the market area in which the seller operates and to which the purchaser can practicably turn for supplies.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN34[] Regulated Practices, Market Definition

Contracts represent transactions that have occurred within the market. The question of what transactions have occurred in the market is subsequent to and therefore irrelevant to the definition of the market itself.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Appeals > Remands

HN35[] Reviewability of Lower Court Decisions, Preservation for Review

An order that offers a choice between a remitted award and a new trial is not a final decision, and if a plaintiff agrees to accept the reduced judgment in the trial court, that plaintiff may not later argue that the jury's verdict should be reinstated on appeal. However, if the plaintiff declines to accept the reduced award, no appeal may be taken until after a new trial.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Appeals > Remands

HN36[] Reviewability of Lower Court Decisions, Preservation for Review

Ash suggests that a plaintiff may expedite appeal by taking "a pratfall" on a new trial, meaning that the plaintiff can accept defeat in the second trial by failing to put up a real fight and then appeal seeking reinstatement of the first jury's verdict. Ash explained that if a plaintiff cannot afford the same elaborate presentation it mustered the first time, or if the absence of witnesses undermines the case, then the plaintiff may do poorly -- but it has the first verdict to fall back on. A party electing the new-trial branch of the remittitur option may take a pratfall as quickly as it pleases, and thus expedite the appeal. Nowhere does Ash suggest that the Donovan may be completely circumvented by simply stipulating that a second trial would result in a judgment equal to the remitted award.

Judges: Before FLAUM, Chief Judge, and MANION and WILLIAMS, Circuit Judges.

Opinion by: FLAUM

Opinion

[*721] FLAUM, *Chief Judge*. This appeal involves the claims that two competing tobacco companies brought against one another -- one company suing for violation of antitrust laws, the other for defamation. North Atlantic Trading Co., Inc. ("North Atlantic") was upset when its efforts to engage new markets for its cigarette papers proved unsuccessful. It blamed its difficulties in cultivating new customers on the business practices of its competitor, Republic Tobacco Company ("Republic") and decided to sue. The hard feelings went both ways -- Republic became upset with North Atlantic after North Atlantic criticized Republic's business practices in two letters sent to customers. Claiming that it had been defamed (among other things), Republic also decided to sue.

The parties' dueling lawsuits were eventually consolidated into one case before the United States District Court for the Northern District of Illinois. At summary judgment, the district court considered **[**2]** both parties' multiple claims and counterclaims -- the only one to survive being Republic's defamation claim. Not only did it advance; it was successful at summary judgment. Following this judgment, a **[*722]** jury trial was held on the issue of damages, both presumed and punitive, for the defamation claim. The jury returned a verdict for $ 8.4 million in presumed damages and $ 10.2 million in punitive damages. The trial court granted North Atlantic's subsequent motion for remittitur, reducing the awards to $ 3.36 million and $ 4.08 million, respectively.

On appeal, North Atlantic seeks review of: (1) the district court's decision to grant summary judgment to Republic on its defamation claim; (2) the remitted damage awards; and (3) the district court's decision to grant summary judgment to Republic on North Atlantic's antitrust claims. Republic cross-appeals the district court's refusal to entertain a procedure that might have enabled Republic to appeal the remittitur. For the reasons stated in this opinion, we affirm the district court's decisions with respect to Republic's defamation claim, North Atlantic's antitrust claims, and Republic's cross-appeal. On the issue of damages, we vacate **[**3]** the district court's award of presumed and punitive damages, and award to Republic $ 1 million in presumed damages and $ 2 million in punitive damages.

I. Background

Republic and North Atlantic are competitors in the market for premium roll-your-own ("RYO") cigarette papers, tobacco, and other tobacco-related products. Republic and North Atlantic sell their RYO products to distributors and wholesalers, who in turn resell the products to outlets such as convenience stores, drugstores, gas stations, and mini-marts. Republic's products are marketed under several brand names, including Job, Top, and Drum, while North Atlantic's products are marketed under the brand name Zig-Zag. North Atlantic's Zig-Zag has been the number-one selling domestic RYO cigarette paper brand since its introduction in the U.S. in 1938. North Atlantic estimates its domestic market share of cigarette paper is 49 percent or higher. Republic is the second largest supplier of cigarette paper, with a market share of approximately 25 percent. Robert Burton Associates ("RBA") is the third major competitor in the cigarette paper business.

In 1997, North Atlantic acquired an exclusive license to market and distribute **[**4]** the Zig-Zag brand of RYO papers in the United States. At this time, North Atlantic announced that it sought to challenge Republic's historic market dominance in the "Southeastern" United States -- a group of nine states where Republic's total market share is as much as 95 to 98 percent. Things did not go according to North Atlantic's plan and the company experienced some difficulty in penetrating this market. Republic asserts that NorthAtlantic's disappointing sales growth in these states was the product of simple market economics, principally Republic's lower pricing and superior marketing strategy.

In contrast, North Atlantic claims that its sales difficulties were caused, in part, by Republic's unfair and unlawful business practices. North Atlantic believed Republic to be violating antitrust and unfair competition laws by pursuing enhanced exclusivity agreements through its incentive programs for distributors and retailers. North Atlantic also claims that it believed Republic was violating trademark and unfair competition laws by defacing Zig-Zag display boxes. [1]

[5] [*723] A. Disputed Statements**

Naturally, in the course of business relations, North Atlantic and Republic sent letters to their customers. Statements contained in two letters sent from North Atlantic representatives to North Atlantic customers or potential customers that were critical of Republic's business practices form the basis of Republic's defamation suit. The first letter (the "Czerewko Letter") was sent to a potential customer in the course of North Atlantic and Republic's battle for retail outlets. The second letter (the "August 13 Letter") was sent to North Atlantic customers shortly after North Atlantic filed its lawsuit against Republic.

1. Czerewko Letter

In January 1998, North Atlantic Regional Manager John Czerewko sent a letter to a customer attacking the integrity of Republic's business conduct and accusing Republic of engaging in inappropriate activity with respect to the plastic display boxes. In late 1997, Clark Oil, one of the largest convenience store chains in the Midwest, elected to stock and sell Republic's products exclusively. Czerewko was involved in a North Atlantic campaign to convince Clark to drop its exclusivity with Republic. North Atlantic **[**6]** offered $ 95,000 in promotional money to Clark if it agreed to sell North Atlantic products, however this offer was less lucrative than the $ 110,000 offer Clark received from Republic.

In the course of courting this potential client, Czerewko wrote a one-page letter to Clark buyer Sanjiv Jain discussing Republic's competing proposal for exclusivity as well as the modifications to the display boxes. Czerewko wrote, "Frankly, I have some concerns not only with the Exclusivity proposal, the rationale, the Cigarette Paper category, but also for Clark in long term consequences." Below this sentence, are two boldface headings ("**The Republic Proposal for exclusivity**" and "**Similarity of Display Units**"), each with a series of bullet-points underneath. According to Republic and the district court, the defamatory statements in the Czerewko Letter consist of the following three sentences located under the "**Similarity of Display Units**" heading:

> . Recently, another Chain was positioned for exclusivity and a modified, defaced Zig Zag unit was used. We own the patent-trademark which has been violated.
>
> . Our Attorneys initiated legal action regarding this and had to **[**7]** include the Chain in the Trademark-Patent violation.

Republic contends that these statements were false and defamatory because North Atlantic held no patent or trade-mark rights in the boxes and had not initiated litigation against anyone in connection with the display boxes.

After receiving the Czerewko Letter, Clark forwarded it to Clark's supplier, Eby-Brown, which buys products directly from Republic and distributes them to retailers. Thereafter, Eby-Brown discontinued its participation in Republic's incentive programs. Clark subsequently discontinued its participation in Republic's incentive program as well.

2. August 13 Letter

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[1] Plastic display boxes were used to package RYO papers sold by North Atlantic in limited promotional runs. Customers received the display boxes along with their purchase of the products inside. Some of Republic's customers wanted to use the boxes to display and sell Republic's cigarette papers. To meet this demand, Republic obtained unused boxes from third-party distributors and then re-labeled the boxes with its own labels, restocked the boxes with its products, and made them available to customers upon request.

In June 1998, Republic filed this defamation action, a few days after Clark cancelled its exclusive contract. Two weeks later, North Atlantic filed a second suit in the U.S. District Court for the Western **[*724]** District of Kentucky, alleging unfair competition, deceptive trade practices, and antitrust violations. On August 13, 1998, North Atlantic sent a letter to all of its customers -- many of whom were also customers of Republic -- explaining that North Atlantic had filed a lawsuit against Republic, charging Republic with "unfair competition, **[**8]** deceptive trade practices and antitrust violations." The letter went on to describe the substance of these allegations as follows:

> The complaint alleges that Republic Tobacco's exclusivity agreements, rebates, incentive programs, buybacks and other activities violate federal and state antitrust and unfair competition laws. The complaint charges that Republic Tobacco entered into contracts, combinations, and conspiracies in illegal restraint of trade and has attempted to illegally monopolize, and has illegally monopolized, the roll-your-own ("RYO") cigarette paper market in the southeast United States.
>
> The complaint also alleges that Republic Tobacco has defaced and directed others to deface North Atlantic's and National Tobacco's vendor displays for ZIG-ZAG tm RYO cigarette papers. On many of these vendors, the ZIG-ZAG tm brand name has been covered up with an advertisement for JOB tm, TOP tm, and other Republic Tobacco RYO cigarette brands. The lawsuit alleges that these activities violate North Atlantic's and National Tobacco's rights and constitute unfair competition under federal and state law.

Republic responded to the August 13 Letter with a letter of its own, calling **[**9]** North Atlantic's claims "frivolous," and asserting that they "were raised solely for the purpose of fulfilling [North Atlantic's] published business plan to increase revenue of the Zig Zag products primarily through price increases." (internal quotations omitted).

B. Incentive Programs

North Atlantic's antitrust claims, as described in the August 13 Letter, are premised on Republic's alleged attempts to foreclose competition in the nine-state "Southeast" region through its incentive programs. The nine-state region, as defined by North Atlantic's economist, includes the states east of the Mississippi River and south of the Ohio River: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia (collectively the "Southeast"). Historically, Republic's brands have been tremendously popular in each of these nine states.

Republic's incentive programs allowed participating customers to receive rebates, free products, and free travel in exchange for stocking or promoting specified amounts of Republic's RYO products and meeting certain sales goals. [2] Program participants could enhance rebate and travel benefits by electing to sell **[**10]** Republic's brands of cigarette paper exclusively. These programs lasted for one year or less and were all terminable at will.

North Atlantic contends that Republics' incentive programs had the result of foreclosing North Atlantic products from the shelves of 46 percent of convenience stores **[*725]** in the Southeast, effectively eliminating choice in the region. Republic counters that its practices are not anticompetitive and its success in these states is due to its procompetitive incentive-based marketing strategy and its offering low, steady **[**11]** prices on its products at a time when North Atlantic raised its prices by more than 15 percent.

C. Proceedings Below

Once served with the complaint in this case, North Atlantic sought to transfer this case to Kentucky, or to stay proceedings pending resolution of its Kentucky lawsuit, but the district court refused. North Atlantic then filed

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[2] The Republic Value-Added Rebate Incentive Program ("VRIP") provides incentives to distributors for stocking, promoting, and selling Republic's products to their retail accounts. Republic's Convenience Store Distribution Incentive Program ("CDIP") provides discounts to convenience stores to stock, promote, and sell Republic's products. The Republic Travel Plus Program, open to both distributors and convenience stores, offers "points" to be used toward trips, such as cruises.

counter-claims against Republic in the court below, including the same antitrust claim presented in the Kentucky action. Accordingly, the case proceeded below, and the Kentucky court suspended the action.

Following extensive fact and expert discovery, the parties filed cross-motions for summary judgment. In its summary judgment order, the district court considered Republic's six-count Seconded Amended Complaint and North Atlantic's ten-count amended counterclaim. The district court granted Republic's motions with respect to all of North Atlantic's claims. With respect to the antitrust counterclaims, the court held that a determination of the relevant market was a necessary element of each count brought by North Atlantic. Although the court acknowledged that the definition of a relevant market is a question of fact and that the parties **[**12]** disagreed on the relevant geographic market, the court found that there was no evidence to support a definition of the nine-state Southeast as the relevant geographic market. The district court found that there was no doubt that Republicand North Atlantic operated in a nationwide market and that their purchasers, i.e., distributors and wholesalers, turn to suppliers across the nation for RYO papers. As NorthAtlantic did not argue that Republic monopolized, attempted to monopolize, unreasonably restrained trade in, or foreclosed competition in the national market for RYO papers, the district court granted summary judgment on each of North Atlantic's antitrust counterclaims.

In the same order, the district court granted Republic's motion for summary judgment on its defamation claim, holding that North Atlantic was liable for defamation *per se* as a matter of law in light of (1) the statements in the Czerewko Letter that "we own the patent-trademark which has been violated," and "our Attorneys initiated legal action regarding this and had to include the Chain in Trademark-Patent violation," and (2) the statements in the August 13 Letter describing North Atlantic's Kentucky lawsuit **[**13]** allegations. According to the court, these statements were false assertions about Republic, were unprivileged, and were defamatory *per se* because they attacked the integrity of Republic's business conduct, prejudiced Republic in its business, and with respect to the August 13 Letter, accused Republic of illegal conduct.

Following the court's order, a jury trial was held to assess presumed and punitive damages on Republic's defamation claim. At trial, Republic introduced evidence to show that its reputation had been harmed by North Atlantic's statements. Three witnesses testified that after the August 13 Letter was sent, Republic received phone calls from its salesmen and from dozens of customers indicating that customers thought less of Republic, were concerned that they had been "dragged [] into illegal conduct," and were wary of further participation in Republic's incentive programs. Republic's President, Donald Levin, testified that reputation is important in the **[*726]** small, closely regulated tobacco industry and that Republic had built strong business relationships and a good reputation over the years. Absent from Republic's presentation was evidence that any customer reduced **[**14]** purchases or severed business relations with Republic as a direct result of North Atlantic's actions.

After a three-day trial, the jury returned a verdict in Republic's favor of $ 8.4 million in presumed damages and$ 10.2 million in punitive damages. Upon North Atlantic's motion, the district court remitted these awards by 60 percent, to $ 3.36 million and $ 4.08 million, respectively. The court then gave Republic the option of accepting the remittiturs or facing a new trial. Republic accepted the remittiturs. We now consider both parties' appeals.

II. Analysis

A. Defamation

HN1[] We review *de novo* the district court's decision to grant summary judgment in Republic's favor, construing all the facts and inferences in favor of North Atlantic. *See* *Vision Fin. Group, Inc. v. Midwest Family Mut. Ins. Co., 355 F.3d 640, 642 (7th Cir. 2004)*.

HN2[] A defamatory statement is one that "tends to cause such harm to the reputation of another that it lowers that person in the eyes of the community or deters third persons from associating with him." *Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 607 N.E.2d 201, 206, 180 Ill. Dec. 307 (Ill. 1992)* (citing **[**15]** *Restatement (Second) of Torts § 599* (1977)). To make out a defamation claim under Illinois law, the plaintiff must show "that the defendant[]made a false statement concerning him, that there was an unprivileged publication to a third party with fault by the defendant, which caused damage to the plaintiff." Krasinski v. United Parcel Serv., Inc., 124 Ill. 2d 483, 530 N.E.2d 468, 471, 125 Ill. Dec. 310 (Ill. 1988)(citing Restatement (Second) of Torts § 588 (1977)).

HN3[] Defamatory statements may be actionable *per se* or actionable *per quod*. Illinois courts have recognized four categories of statements that are considered defamatory *per se*: (1) words that impute the commission of a crime; (2) words that impute infection with a loathsome disease; (3) wordsthat impute an inability to perform or a want of integrity in the discharge of duties of office or employment; or (4) wordsthat prejudice a party, or impute lack of ability, in his or her trade, profession, or business. *See* Kolegas, 607 N.E.2d at 206. If a statement qualifies as defamatory *per se* (the theory **[**16]** upon which Republic solely relies), it is unnecessary for a plaintiff to demonstrate actual damage to reputation. Rather, statements that fall within these *per se* categories are thought to be so obviously and materially harmful to the plaintiff that injury to its reputation may be presumed. *See* Owen v. Carr, 113 Ill. 2d 273, 497 N.E.2d 1145, 1147, 100 Ill. Dec. 783 (Ill. 1986). In contrast, with a *per quod* action, in order to recover the plaintiff must plead and prove that it sustained actual damage of a pecuniary nature ("special damages"). *See* Dubinsky v. United Airlines, 303 Ill. App. 3d 317, 708 N.E.2d 441, 447, 236 Ill. Dec. 855 (Ill. App.Ct. 1999). For further discussion of *per quod* actions see Bryson v. News America Publications, 174 Ill. 2d 77, 672 N.E.2d 1207, 1221, 220 Ill. Dec. 195 (Ill. 1996). **HN4**[] Under the Illinois innocent construction rule, even a statement that falls into one of the limited *per se* categories will not be found defamatory *per se* if it is "reasonably capable of an innocent construction." Kolegas, 607 N.E.2d at 206. This rule "requires courts to consider a written or oral **[**17]** statement in context, giving the words, and their implications, **[*727]** their natural and obvious meaning." Bryson, 672 N.E.2d at 1215. If a statement may reasonably be interpreted innocently, it cannot be actionable *per se*. *See id.* However, the Illinois courts have firmly emphasized that "only *reasonable* innocent constructions will remove an allegedly defamatory statement from the *per se* category." *Id.* (emphasis in original). Whether a statement is reasonably capable of an innocent construction is a question of law for the court to decide. *See* Kolegas, 607 N.E.2d at 207.

HN5[] A number of common law privileges and defenses exist that may shield a defendant from liability for making another wise defamatory statement. Four of these defenses and privileges, to varying degrees, are relevant to this appeal. First, **HN6**[] a statement that does not contain any verifiable facts (as some call, "an opinion") is not actionable under Illinois law. [3] In Illinois, "[a] statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, **[**18]** a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993); *see also* Wilkow v. Forbes, Inc., 241 F.3d 552, 555 (7th Cir. 2001) (Illinois law); Pope v. Chronicle Publ'g Co., 95 F.3d 607, 614 (7th Cir. 1996) (Illinois law); Restatement (Second) of Torts § 566 (1977) ("A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."). Second, **HN7**[] substantial truth is a complete defense to an allegation of defamation. *See* Pope, 95 F.3d at 613. This rule derives from the "recognition that falsehoods which do no *incremental* damage to the plaintiff's reputation do not injure the only interest the law of defamation protects." Haynes, 8 F.3d at 1228 (emphasis in original). Third, **HN8**[] under Illinois law, publication of defamatory matters in a report of an official proceeding **[**19]** that deals with a matter of public concern is privileged as long as the report is accurate and complete. *See* Restatement (Second) of Torts § 611(1977); *see also* Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350, 360, 50 Ill. Dec. 242 (Ill.1980). Fourth, **HN9**[] Illinois law confers a privilege upon "statements made within a legitimate business context." Larson v. Decatur Mem'l Hosp., 236 Ill. App. 3d 796, 602 N.E.2d 864, 867, 176 Ill. Dec. 918 (Ill. App. Ct.1992). Under this

[3] This principle overlaps with the constitutional protection for statements of on matters of public concern that are not provably false. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990). *Milkovich*, a federal constitutional law case, reflects the fact that **HN10**[] the First Amendment imposes limits on state defamation law. However, we must first examine the threshold question of whether the challenged statements are actionable under Illinois law; if they are not, the First Amendment does not come into play. *See* Wilkow v. Forbes, Inc., 241 F.3d 552, 555 (7th Cir. 2001); Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988).

rule, "[a] statement is conditionally privileged when the defendant makes it (1) in good faith; (2) with an interest or duty to be upheld; (3) limited in scope to that purpose; (4) on a proper occasion; and (5) published in a proper manner only to proper parties." *Id.* (citing *Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217, 221 (Ill. 1968))*.

[20]** ***HN11***[] Federal constitutional law adds another layer of limitations on the kind of defamatory statements for which a defendant may be found liable. At common law, **[*728]** defamation was a strict liability tort, but constitutional doctrine has imposed culpability, or fault, requirements in most cases*. See* *New York Times v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*; *Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)*. The level of culpability is determined by whether the statement was of public concern and whether the plaintiff is a public or private figure. Moreover, overlapping with the common law rule, the *First Amendment* protects statements on matters of publicconcern that are not provably false*. See* *Milkovich, 497 U.S. 1, 20, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990)*. For further discussion of various *First Amendment* limitations to defamation actions see Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* §§ 20.33-20.35 (2d. ed. 1992).

As important to this appeal as the principles of defamation is the rule of waiver. ***HN12***[] "We have long refused to consider arguments that were not presented to the district **[**21]** court in response to summary judgment motions." *Arendt v. Vetta Sports, Inc., 99 F.3d 231, 237 (7th Cir. 1996)* (quoting *Cooper v. Lane, 969 F.2d 368, 371 (7th Cir. 1992))*; *see also* *Maust v. Headley, 959 F.2d 644, 650 (7th Cir. 1992)*; *DeValk Lincoln Mercury v. Ford Motor Co., 811 F.2d 326, 338 (7th Cir. 1987)*. Appellate review is not designed to serve as an unsuccessful party's second bite at the apple -- an opportunity to raise issues and arguments that were not brought forth below. This is so even when the issue is an element of a plaintiff's prima facie case. *See* *Resolution Trust Corp. v. Juergens, 965 F.2d 149, 153 (7th Cir. 1992)* (the law of summary judgment "does not permit a nonmovant defendant to delay pointing out claimed flaws in the plaintiff's prima facie case until an appeal is underway"). As we said of waiver in *Boyers v. Texaco Refining and Marketing, Inc.*:

> It is axiomatic that ***HN13***[] issues and arguments which were not raised before the district court cannot be raised for the first time on appeal . . . . The rule is essential in order that parties may have the opportunity to offer **[**22]** all the evidence they believe relevant to the issues . . . and in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. To reverse the district court on grounds not presented to it would undermine the essential function of the district court. This rule is not meant to be harsh, overly formalistic, or to punish careless litigators. Rather, the requirement that parties may raise on appeal only issues which have been presented to the district court maintains the efficiency, fairness, and integrity of the judicial system for all parties.

848 F.2d 809, 812 (7th Cir. 1988) (citations and quotations omitted).

With these principles in mind, we now turn to the statements at issue in this case.

1. Czerewko Letter

To review, the disputed statements in the Czerewko Letter consist of the following three sentences:

> . Recently, another Chain was positioned for exclusivityand a modified, defaced Zig Zag unit was used. We own the patent-trademark which has been violated.
>
> . Our Attorneys initiated legal action regarding this and had to include the Chain in the Trademark-Patent **[**23]** violation.

Republic asserts that the Czerewko Letter was designed to persuade Clark to abandon its exclusive deal with Republic, **[*729]** in favor of a less profitable deal from North Atlantic. Republic contends that to accomplish this task North Atlantic utilized a strategy of attacking Republic's lower prices, rebates and travel incentives with slander and threats.

North Atlantic responds that the Czerewko Letter was sent by a regional sales director to a single customer to propose a business relationship and express "concerns" about a competitor's proposal. North Atlantic contends that the letter's statements cannot reasonably be construed as objectively false and defamatory. Although North Atlantic did not have patent rights in the display boxes, the company did believe that it had rights in those boxes (and indeed, it pursued a trademark claim below, albeit unsucessfully). According to North Atlantic, the Czerewko Letter simply expressed an opinion that the company's legal rights had been violated.

We disagree with North Atlantic's characterization of the Czerewko Letter and with its contention that the letter's organization as a list of "concerns" prevents the disputed statements **[**24]** from being actionable as defamation. As explained above, ***HN14***[] prefacing a defamatory statement with the phrase "in my opinion" does not shield a defendant from liability, and the same is true for presenting a defamatory statement under a list of "concerns." Prefatory language does not control whether these statements are actionable as defamation; what matters is whether the assertions included in the three disputed sentences are verifiably false.

We conclude that they are. These statements cannot be read as the expression of "a subjective view, an interpretation, a theory, conjecture, or surmise . . . ." *Haynes, 8 F.3d at 1227*. Nor are they mere sales puffery as can be found elsewhere in the letter (e.g., "Zig Zag is a magical name"). Rather, Czerewko is claiming to be in possession of objectively verifiable facts that could easily be evaluated in a defamation suit. *Did North Atlantic have trademark rights or hold a patent in the display boxes? Was this patent or trademark violated? Had legal action been pursed to enforce these rights? Had another chain been included in the legal action?*A jury could readily answer all of these questions and thereby verify the truthfulness **[**25]** of Czerewko's statements. What is more, the phrasing of these statements in the past tense makes them all the easier to separate out from statements expressing the speaker's subjective view. The reasonable reader would understand Czerewko to be informing him of events that have already occurred. While it may be difficult in some circumstances to verify or refute a prediction about the future, it is relatively easy to do so when describing events that have allegedly occurred in the past.

In this case, however, it is unnecessary for a jury to examine the truth of Czerewko's statements as North Atlantic does not dispute that the underlying facts are false. That is, North Atlantic concedes that it had no trademark and held no patent on the display boxes; and it follows that there was no patent or trademark violation. Moreover, North Atlantic admits that at the time that the Czerewko Letter was written it had filed no lawsuit, so clearly then no other "chain" had been included in a lawsuit.

Still, North Atlantic urges us to give an innocent construction to the disputed statements. North Atlantic argues that we should interpret the sentence mentioning "legal action" as either true (because **[**26]** the word "action" could mean "activity" and not just a lawsuit) or nondefamatory (because simply saying that someone has been sued is not defamatory in this litigious day and age). To benefit from the **[*730]** innocent construction rule, a statement must be reasonably susceptible to an innocent interpretation. "When a defamatory meaning was clearly intended and conveyed, [Illinois courts] will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibelous under the innocent construction rule." *Bryson, 672 N.E.2d at 1217*. If we interpret the words according to the meaning that they were intended to convey to the reasonable reader, it is clear that they are both false and defamatory. First, the words "legal action" can only be intended to mean some sort of lawsuit or official proceeding and not mere discussion between parties (which is the interpretation required to render the statement true). It stretches reason to interpret "legal action" as "any activity of a lawyer" when it is used in daily parlance to mean a lawsuit or legal proceeding. Second, we are unpersuaded by North Atlantic's argument that litigation **[**27]** is a fact of life and that a statement that a corporation has been sued is not, of itself, defamatory. Even if that were true, the statement was not simply that Republic had been sued, but it provided factual detail about Republic's alleged inappropriate activity. We also must bear in mind that the Czerewko Letter was sent to a Republic customer in order to convince the customer to establish an exclusive relationship with North Atlantic.

North Atlantic further argues that the district court erred by granting Republic summary judgment on its defamationclaim without requiring Republic to prove that it was injured by the statements in the Czerewko Letter. However, it was unnecessary for Republic to plead and prove special damages as the allegations in the Czerewko Letter fit into at least two *per se* categories -- malfeasance or misfeasance in the performance of an office or a job and unfitness for one's profession or trade. That is, the Czerewko Letter suggests that Republic was involved in improperly defacing its competitor's merchandise and conducting its business in violation of trademark and patent laws. North Atlantic again contends that it is entitled to an innocent construction **[**28]** for these statements. However, as we noted in *Haynes*, ***HN15***[] "Illinois courts (and federal courts when interpreting Illinois law) have been quick to find implications of criminal conduct or of employee or business misconduct in statements that might have seemed susceptible of an interpretation that would have taken them out of the per se categories." *8 F.3d at 1226*. Again, considering the letter's context and the words' natural and obvious meaning, we conclude that an innocent construction of the Czerewko Letter would be inappropriate.

Finally, with respect to the Czerewko Letter, North Atlantic raises the following three issues that were not presented to the district court at summary judgment: (1) the Czerewko Letter did not contain any defamatory statements "of and concerning" Republic; (2) the district court made no inquiry into fault; and (3) the Czerewko Letter is privileged as a statement made within a legitimate business context. Despite North Atlantic's vigorous efforts to convince us that these issues command reversal of the district court's judgment, we are unable to consider the arguments related to any of them because North Atlantic waived them by not raising **[**29]** them prior to appeal.

2. August 13 Letter

Turning to the August 13 Letter, North Atlantic's main contention is that the description of its antitrust claims is not a statement of fact concerning Republic; rather, it is a statement of opinion regarding **[*731]** the legality of Republic's practices. According to North Atlantic, every lawsuit expresses the plaintiff's opinion that the defendant's conduct has violated the law. An expression of that opinion, North Atlantic contends, is not actionable as a false and defamatory factual statement, regardless of how a court ultimately resolves the plaintiff's claims on the merits. North Atlantic warns of dire consequences if the district court's ruling is upheld -- suggesting that unsuccessful plaintiffs will become *per se* liable for defamation for having alleged incorrectly that the defendant violated the law and that judicial proceeding will have to be conducted in secret.

Republic responds that North Atlantic waived this argument by failing to raise it below. North Atlantic counters that it "consistently argued that the August 13 letter did not contain a false statement of fact, and hence was not actionable, because it accurately summarized **[**30]** the allegations of the Kentucky lawsuit." Looking to record, we see that North Atlantic did argue below that the August 13 Letter did not raise a false statement of fact. However, it did so by making an argument based on truth. *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 17-18 ("The statements allegedly attributable to . . . the August 13 letter accurately summarize the claims set forth in North Atlantic's legal pleadings. Accordingly, the statements are true and non-actionable."). North Atlantic is therefore attempting on appeal to recast its truth defense as an opinion defense. But under Illinois law truth and opinion are two separate defenses. *See* *Pope, 95 F.3d at 613-14* (listing "substantial truth" and "statement of opinion" as two separate defenses). We, therefore, agree with Republic that North Atlantic waived the opinion defense by failing to raise it below. In any event, North Atlantic's position seems akin to a rule that filing a lawsuit provides blanket protection for one seeking to publicize false facts. This is a proposition that we, of course, find unsettling. Moreover, we are unimpressed by North Atlantic's *in* **[**31]** *terrorem* argument that finding liability here will have the effect of muzzling litigants, as North Atlantic's argument fails to take into account common law and constitutional defenses that protect parties speaking on matters of common interest or public concern.

Next, North Atlantic contends that the August 13 Letter is protected by common law privilege as a description of an official proceeding. In Illinois, this privilege protects publications that fairly and accurately report an official action or proceeding. *See* *Catalano v. Pechous, 83 Ill. 2d 146, 419 N.E.2d 350, 360-61, 50 Ill. Dec. 242 (Ill. 1980)*. The district court held this privilege inapplicable to the August 13 Letter for two reasons: (1) NorthAtlantic made the underlying allegations in the Kentucky lawsuit, and could not "confer the privilege upon itself", and (2) the basis of this privilege is the public's interest in official proceedings, and North Atlantic disseminated the information to its own customers, not the public. In response to the first reason, North Atlantic argues that as long as the underlying lawsuit itself is not objectively baseless (designed solely to immunize otherwise defamatory **[**32]** statements), there is no reason in law or logic to strip the plaintiff of the privilege. This is an argument for the modification or extension of Illinois law, and ***HN16***[] as a federal court sitting in diversity, we are obligated to apply Illinois law as announced by the Illinois Supreme Court. In circumstances where a state supreme court has not issued a ruling on the issue presented, "the rulings of the intermediate court control, unless there is a persuasive indication that the highest court would decide the issue **[*732]** differently." *Allstate Ins. Co. v. Keca, 368 F.3d 793, 800 (7th Cir. 2004)*.

While the Illinois Supreme Court has not directly addressed whether this privilege may be "self-conferred" -- i.e., by filing a pleading and then reporting on it, ***HN17***[] we are confident that if presented with the issue, the Illinois Supreme Court would determine that the privilege may not be self-conferred. It is significant in our view that the Illinois Supreme Court has adopted the official proceeding privilege as expressed in the Second Restatement *§ 611*. *See Catalano, 419 N.E.2d at 360-61* (abandoning *§ 611* of the Restatement (First) of Torts and adopting *§ 611 of the Restatement (Second) of Torts* **[**33]**). The commentary to the Second Restatement of Torts states:

> A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not.

Restatement (Second) of Torts, § 611, comment c (1977).

Given that the Illinois Supreme Court has adopted *§ 611*, we think it likely that they would follow this commentary as well. Moreover, our conclusion is bolstered by a ruling from an Illinois appellate court holding that this privilege may not be self-conferred. *See Kurczaba v. Pollock, 318 Ill. App. 3d 686, 742 N.E.2d 425, 443, 252 Ill. Dec. 175 (Ill. App. Ct. 2000)* (finding the fair report privilege not available to defendant who circulated his own complaint to third parties).

We are unpersuaded by North Atlantic's arguments that the Illinois Supreme Court would decide the issue differently. North Atlantic relies primarily on *ADT Co. v. Brink's Inc., 380 F.2d 131 (7th Cir. 1967)*, a case in which this Court (applying Illinois law) held that a defamation **[**34]** defendant was entitled to invoke the privilege with respect to statement made in a press release describing a lawsuit against its competitor. Putting aside any factual differences between that case and the one before us now, *Brink's* was based on the First Restatement, which did not have language analogous to comment c of the Second Restatement. [4]

Next, we address North Atlantic's contention that the district court erred in failing to require Republic to prove fault. Under *Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)*, North Atlantic argues that Republic was obligated to show at least negligence, and to the extent that this case involves a matter of public concern, Republic was required to show actual malice. Republic responds that North Atlantic **[**35]** waived this argument by not raising it before the district court. We agree that by failing to point out this alleged deficiency in Republic's case prior to appeal North Atlanticwaived this argument.

Finally, North Atlantic contends that the district court erred by granting summary judgment to Republic without requiring Republic to prove that it was injured by the August 13 Letter. As with the Czerewko Letter, the statements of the August 13 Letter fit comfortably within several *per se* categories. North Atlantic accuses Republic of defacing property and operating its business in violation of federal and state law. North Atlantic argues that under the innocent construction rule, the August 13 Letter can reasonably **[*733]** be construed as describing North Atlantic's good-faith allegations about the legality of Republic's conduct. NorthAtlantic's position is beside the point, though, because regardless of North Atlantic's professed intentions, the letter substantively conveys objectively verifiable facts which can only be read one way. North Atlantic's position seeks to turn the innocent construction rule into a subjective test. ***HN18***[] The test is objective: it asks whether there is an objectively **[**36]** reasonable innocent interpretation of the allegedly defamatory statements. In this case, we conclude that there is not.

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[4] The rule against self-conferral renders this privilege inapplicable to the August 13 Letter, and it is therefore unnecessary for us to address the alternate ground upon which the district court supplied for its decision.

B. Damages

With respect to the damage awards, North Atlantic argues that the district court erred in the following three ways: (1) by allowing the jury to award presumed damages and punitive damages absent a predicate determination of actual malice; (2) by refusing to consider whether $ 3.36 million in presumed damages is impermissibly "substantial," and by allowing Republic to recover that amount; and (3) by permitting Republic to recover punitive damages at all, much less an award of $ 4.08 million. We address each argument in turn.

First, we review *de novo* North Atlantic's contention that the district court committed legal error by allowing Republic to recover damages without making a predicate determination of fault. North Atlantic contends that Illinois law requires a plaintiff to prove actual malice, i.e., knowledge of falsity or reckless disregard for truth or falsity, to recover either presumed or punitive damages. North Atlantic's position has merit. Indeed, the Illinois Supreme Court has never approved the recovery of punitive or presumed **[**37]** damages on less than actual malice. *See*, *e.g.*, *Babb v. Minder, 806 F.2d 749, 758 (7th Cir. 1986)* ("Under Illinois law, . . . only upon a showing of actual malice may damages be presumed and punitive damages be awarded."); *Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292, 296 (Ill. 1975)* ("Only if liability was predicated on actual malice could punitive damages be awarded or actual damages be presumed."). And while the United States Supreme Court has held that the federal Constitution does not prohibit a private individual from recovering punitive or presumed damages upon a showing of less than actual malice when the statements in question do not involve a matter of public concern, *see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773-74, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985)*, the Illinois Supreme Court has yet to decide, as a matter of state law, whether this lower threshold of recovery will be permitted.

However, none of this aids North Atlantic. First of all, North Atlantic waived this argument by failing to propose a jury instruction requiring a predicate finding of actual malice for general damages or to object to the **[**38]** court's instruction on that ground. *See* *Fed. R. Civ. P. 51*; *Gordon v. Degelmann, 29 F.3d 295, 298 (7th Cir. 1994)*. Furthermore, while there was no actual malice instruction given for presumed damages, the court instructed the jury that it could award punitive damages only if it found that North Atlantic "knew [its] statements were untrue" or "made the statements with conscious disregard as to whether they were true or not." This standard is at least as strict as the actual malice standard of knowledge or reckless disregard. Following this instruction, the jury awarded punitive damages to Republic. Thus, the jury necessarily found that North Atlantic acted with "knowledge or conscious disregard" of the statements' falsity and, *a fortiori*, that the actual malice standard had been met.

[*734] Second, we consider North Atlantic's argument that the district court abused its discretion by allowing Republic to recover $ 3.36 million in presumed damages. Because this is a case of defamation *per se*, proof of actual damage was unnecessary and Republic was entitled to presumed damages. After a trial on damages, the jury awarded **[**39]** Republic $ 8.4 million is presumed damages, which the district court later reduced to $ 3.36 million. In remitting the award, the district court explained that it agreed with North Atlantic's "most basic argument: $ 8.4 million is simply excessive given the evidence of harm in this case." *Republic Tobacco, L.P. v. N. Atl. Trading Co., 2003 U.S. Dist. LEXIS 21153, No. 98-C-4011, 2003 WL 22794561, at *7 (N.D. Ill. Nov. 23, 2003)*. ***HN19***[] We review the district court's remittitur decision for an abuse of discretion. *See* *McNabola v. Chicago Transit Authority, 10 F.3d 501, 516 (7th Cir. 1993)*.

North Atlantic contends that under Illinois law an award of presumed damages may not be "substantial," *see* *Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142 (7th Cir. 1987)*; *Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88, 97 (Ill. App. Ct. 1973)* ("Substantial damages are not presumed."), and that $ 3.36 million falls into this impermissible category. ***HN20***[] By definition, presumed damages are speculative in nature, and this limitation on presumed damages protects a defamation defendant from being subjected to an astronomical **[**40]** award based upon a jury's guess about the plaintiff's unproven harm. In *Brown & Williamson*, this Court explained Illinois law as requiring, "an appellate court to give some deference to the jury's determination of presumed damages while also considering whether it considers the jury award of presumed damages excessive. If it finds the award excessive, the court may exercise discretion and reduce the award to what it considers a more appropriate figure." *827 F.2d at 1141*.

Following this principle, we hold that the district abused its discretion in allowing $ 3.36 million in presumed damages. We conclude that a presumed damages award of $ 1 million is more appropriate in this case. Republic failed to identify any presumed damages award in the history of Illinois law remotely in the vicinity of $ 3.36 million. (In fact, the most sizeable award identified was the award of $ 1 million, remitted from $ 3 million, in *Brown & Williamson*.) ***HN21***[] In a case lacking proof of economic injury [5] and where the defamatory statements were publicized to a relatively limited audience (North Atlantic's customers and potential customers), it would be inappropriate to award presumed damages **[**41]** that are exponentially greater than have been awarded in past cases. While we are mindful that under the doctrine of presumed damages a party is not required to show specific loss, there must be some meaningful limit on the magnitude of a jury award when it is arrived at by pure speculation. Presumed damages serve a compensatory function -- when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss, it becomes questionable whether the award is serving a different purpose. An award of $ 1 million is sizeable enough to compensate Republic for the damage that we presume was caused to its reputation in the tobacco industry and the harm that we presume was done to the business relationships it **[*735]** cultivated over the years, yet not so substantial as to be out of line with other presumed damages awards allowed under Illinois law.

[42]** Third, North Atlantic requests that the award of punitive damages be reversed, arguing that they should not have been allowed at all, or in the alternative, that the award should be substantially remitted. We will consider these arguments separately.

North Atlantic argues that the conduct at issue in this case does not meet the demanding standard for awarding punitive damages under Illinois law. ***HN22***[] In a diversity proceeding, state law governs whether punitive damages are appropriate. *See* *Ross v. Black & Decker, Inc., 977 F.2d 1178, 1187 (7thCir. 1992)*. ***HN23***[] Punitive damages are available under Illinois law upon proof of actual malice. *See* *Brown & Williamson, 827 F.2d at 1142*; *see also* *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc., 118 Ill. 2d 447, 516 N.E.2d 260, 263, 114 Ill. Dec. 105 (Ill. 1987)*(explaining that punitive damages may be awarded when the defendant acts "with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard for the rights of others"). As explained above, the jury was instructed that in order to award **[**43]** punitive damages it must find that the defendant acted with "knowledge or conscious disregard" -- a standard stricter than actual malice. Since this is essentially a sufficiency of the evidence argument, we ask only whether a rational jury could conclude that North Atlantic's statements were made with knowledge or reckless (or conscious) disregard of their falsity. A rational jury could so conclude. Evidence was presented that in order to gain a business advantage over its competitor, North Atlantic made statements without regard to their truth. The nature and timing of the events are probative of North Atlantic's willful intent -- the combination of the cutthroat competition that existed between the companies, the substance of the letters, and the identity of the recipients supports the conclusion that North Atlantic deliberately used the letters to harm Republic's business.

We are more receptive to North Atlantic's claim that the amount of punitive damages awarded was excessive. The jury awarded Republic $ 10.2 million in punitive damages, which the trial court remitted to $ 4.08 million. ***HN24***[] In a diversity action, state law governs the factors a jury may consider in determining the **[**44]** amount of punitive damages, while federal law governs the district court's review of the jury award and appellate review of the district court's decision. *See* *Black & Decker, 977 F.2d at 1189*. ***HN25***[] We review the district court's determination on the size of the jury verdict for an abuse of discretion. *Id.* ***HN26***[] Under Illinois law, three factors are particularly relevant in analyzing the amount of a punitive damages award: "(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." *Hardin, Rodriguez & Boivin Anesthesiologists, Ltd. v. Paradigm Ins. Co., 962 F.2d 628, 640 (7th Cir. 1992)* (citing *Hazelwood v. Illinois Central Gulf. Railroad, 114 Ill. App. 3d 703, 450 N.E.2d 1199, 1207, 71 Ill. Dec. 320 (Ill. 1983))*.

[5] Indeed, the failure to prove economic injury prompted the district court to grant North Atlantic summary judgment on Republic's tortious-interference claim -- a ruling from which Republic has not cross-appealed, but a cause of action in which this case seems to most comfortably fit, putting the actual injury requirement aside.

We concentrate on the first factor. We generally agree with the district court's comprehensive analysis supporting its decision to remit the jury's punitive damage award, but, in view of our discussion of presumed damages above, we conclude that the district court did not go far enough in remitting the punitive damage award. **[**45]** While evidence supports the jury's **[*736]** determination that North Atlantic acted with the requisite malice to justify punitive damages, the "nature and enormity of [North Atlantic's] wrong" does not justify a $ 10.2 million award, or even a $ 4.08 million award. We therefore further reduce the punitive damage award to $ 2 million.

C. Antitrust

North Atlantic argues that the district court erred by concluding that North Atlantic's antitrust claims had to fail on the ground that North Atlantic did not establish the existence of a distinct geographic market. This Court's review of summary judgment is *de novo*. *See* *Vision Fin. Group, Inc. v. Midwest Family Mut. Ins. Co., 355 F.3d 640, 642 (7thCir. 2004)*.

North Atlantic's antitrust claims included that Republic (1) entered into unlawful agreements in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, *see* *15 U.S.C. § 1*; (2) acted unlawfully to attempt to monopolize and monopolize in violation of Section 2 of the Sherman Act, *see* *15 U.S.C. § 2*; and (3) entered into unlawful exclusive dealing agreements that substantially lessen competition **[**46]** in violation of Section 3 of the Clayton Act, *see* *15 U.S.C. § 14*.

A determination of the relevant market is ordinarily required for all of North Atlantic's claims. However, as North Atlantic argues, ***HN27***[] there are some circumstances where to establish a violation of antitrust laws it is unnecessary to prove that defendant wielded market power in a properly defined product and geographic market, and may rely instead on direct evidence of anticompetitive effects. *See* *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*. Relying on our decision in *Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000)*, North Atlantic argues that this is such a case. In *Toys "R" Us*, this Court upheld an Federal Trade Commission finding that a powerful chain store owner had coordinated a horizontal agreement among toy manufacturers to restrict distribution to warehouse clubs. *221 F.3d at 940*. Because the FTC had demonstrated that the boycott organized by Toys "R" Us was having an effect in the market, the Court held that the FTC did not need to prove the contours of a distinct geographic market to state an **[**47]** antitrust claim. *See* *id. at 937*; *see also* *Indiana Fed'n of Dentists, 476 U.S. at 460-61* (holding that, in light of direct evidence of anticompetitive effects, the FTC did not need to prove the contours of a distinct geographic market in order to prove that a group of dentists had violated the antitrust laws by agreeing not to provide insurers with x-rays when submitting claims).

North Atlantic's reliance on *Toys "R" Us* is misplaced. *Toys "R" Us* made very clear that despite the vertical agreements between Toys "R" Us and individual manufacturers, the conspiracy at issue was horizontal. ***HN28***[] Horizontal agreements, which have not been alleged in this case, are illegal *per se.* Unlike horizontal agreements between competitors, vertical exclusive distributorships (like in this case) are presumptively legal. *See* *CDC Techs., Inc. v. IDEXX Lab., Inc., 186 F.3d 74, 80-81 (2d Cir. 1999)*. Rather than condemning exclusive dealing, courts often approve them because of their procompetitive benefits. *See*, *e.g.*, *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984)* (exclusive dealing eliminates **[**48]** divided loyalties and reduces free riding). In fact, emphasizing the existence of a horizontal conspiracy, *Toys "R" Us* contrasted the situation in that case with the "typical story of a legitimate vertical transaction" in which the manufacturer sought exclusivity in exchange for what it hoped **[*737]** would be more effective promotion of its goods. *221 F.3d at 936*. ***HN29***[] As horizontal agreements are generally more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases. To do so might harm competition and frustrate the very goals that ***antitrust law*** seeks to achieve. *Cf.*, *e.g.*, *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-64, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* (noting the dangers of imposing too low a standard of proof in anti-trust cases); *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144 (3d Cir. 2003)* (citing the "chilling effect on lawful conduct that would result from the unreasonable interpretation of evidence").

Nonetheless, the fact that "direct evidence of anticompetitive effects" has not been used outside the context of horizontal agreements **[**49]** does not entirely dispose of North Atlantic's argument. It may be that, in a proper case alleging vertical restraints, a direct anticompetitive effects analysis could be used to show market power. But this is not that case. North Atlantic fails to recognize that ***HN30***[] neither *Toys "R" Us* nor *Indiana Federation of Dentists* allows an antitrust plaintiff to dispense entirely with market definition. Rather, these cases stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power [6] -- in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.

[50]** For example, in *Indiana Federation of Dentists*, there was no dispute that the product market was, roughly speaking, dental services; all seemed to agree to "the reality that markets for dental services tend to be relatively localized"; and the FTC found "adverse effects on competition in those areas where IFD dentists *predominated*." *Ind. Fed'n of Dentists, 476 U.S. at 461* (emphasis added). In other words, there was no significant dispute about the rough contours of the relevant market, and the FTC's findings only applied where the IFD dentists commanded a substantial market share. Likewise in *Toys "R" Us*, the product market (the wholesale toy market) was not contested; the geographic market was assumed to be national; and Toys "R" Us had "20% of the national wholesale market and up to 49% of some local wholesale markets." *Toys "R" Toys "R" Us, Inc., 221 F.3d at 937*. These circumstances were enough, we held, to allow an inference of market power from direct evidence of anticompetitive effects.

The situation before us now is entirely different because of the dispute about the relevant geographic market. *Toys "R" Us* and *Indiana Federation of Dentists* **[**51]** do not excuse North Atlantic from providing evidentiary support for its putative Southeast geographic market. ***HN31***[] Economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market. As we explain below, there is no evidentiary support for the putative Southeast geographic market. Therefore, North Atlantic cannot even cross the threshold into a *Toys "R" Us*- style proof of market power through direct evidence of anticompetitive effects.

Thus, because North Atlantic can draw no support from *Toys "R" Us* or *Indiana Fed'n of Dentists*, and exclusive **[*738]** dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue, *see Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 320-27, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*, North Atlantic must precisely establish a relevant market. ***HN32***[] The relevant market has both a product and a geographic dimension. *See Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. The parties agree that the relevant product market is the market for premium RYO cigarette papers. The **[**52]** relevant geographic market, however, is disputed. North Atlantic contends that the market is limited to the Southeast region of the United States, which it defines as Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Republic counters that the relevant market is nationwide and that North Atlantic has failed to establish sufficient facts to demonstrate that the nine states that make up the so-called Southeast are in fact a relevant market.

HN33[] Identifying a geographic market requires both, "careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric, 365 U.S. at 327*. Applying the two-part test to this case, the district court concluded that the only possible market supported by the evidence is national, and that it was therefore unnecessary to present the question to a jury. We agree.

With respect to the first prong, it is undisputed that North Atlantic, Republic, and their competitors operate nationally and sell to wholesale customers all over the United States. All three of the top suppliers (North Atlantic, Republic and RBA) **[**53]** publish national price lists.

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[6] Indeed, even the references to "plaintiff" and "defendant" are questionable, as both *Toys "R" Us* and *Indiana Federation of Dentists* originated not as private-party civil litigation, but as agency proceedings before the Federal Trade Commission.

With respect to the second prong, Republic presented unrebutted evidence that distributors and wholesalers can practicably (and in fact do) turn to suppliers across the nation for RYO cigarette paper. Before the district court, North Atlantic argued that the relevant purchasers were indirect customers (i.e., retailers and consumers) rather than the direct customers (i.e., distributors and wholesalers) -- a position the district court rejected and that NorthAtlantic does not explicitly now reassert. Rather, North Atlantic contends on appeal that Republic's sales contracts (which included restrictions on buying or selling Republic's product to or from other wholesalers) made it impossible for wholesalers to turn to outside suppliers for Republic's products outside of their region. This argument puts the cart before the horse -- ***HN34***[] contracts represent transactions that have occurred within the market. The question of what transactions have occurred in the market is subsequent to and therefore irrelevant to the definition of the market itself.

Additionally, North Atlantic argues that as a result of barriers to entry caused by "transportation costs and the realities **[**54]** of the market," wholesalers outside the Southeast are not well-positioned to enter the region to sell competing product. Even if this convenience-based argument could meet the *Tampa Electric* standard of practicability, this argument (and to some extent the argument previously discussed) reverts to the position advanced at the district court that consumers and retailers are the "purchasers" for purposes of the geographic analysis. This is wrong because Republic and North Atlantic do not sell cigarette papers to retailers and consumers. They sell to distributors and wholesalers. Accordingly, the evidence presented regarding where wholesalers can practicably sell their products (or in other words, where customers and retailers practicably turn for alternative sources **[*739]** of RYO paper) is beside the point when it comes to market definition. Thus, the primary defect in North Atlantic's geographic argument remains -- North Atlantic has not identified any evidence presented at trial indicating that wholesalers and distributors in the Southeast because of market forces were only able to turn to suppliers in that region.

This conclusion is hardly surprising, as tobacco products generally have **[**55]** been found to have national markets. *See*, *e.g.*, *FTC v. Swedish Match, 131 F. Supp. 2d 151, 166 (D.D.C.2000)* (loose leaf chewing tobacco); *R.J. Reynolds Tobacco Co. v. Phillip Morris Inc., 60 F. Supp. 2d 502, 504 (M.D.N.C.1999)* (cigarettes).

As there is no genuine issue that the relevant geographicmarket in this case is a national market, and North Atlantic does not argue that Republic has a monopoly or has attempted to monopolize in the national market, summary judgment was appropriately granted on all of North Atlantic's anti-trust claims.

D. Cross-Appeal

On cross-appeal, Republic challenges "the longstanding rule that a plaintiff in a federal court . . . may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co., Inc., 429 U.S. 648, 650, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977)*. ***HN35***[] An order that offers a choice between a remitted award and a new trial is not a final decision, and if a plaintiff agrees to accept the reduced judgment in the trial court, that plaintiff may not later argue that the jury's verdict should be reinstated on appeal. *Id.* However, if the plaintiff declines to accept the **[**56]** reduced award, no appeal may be taken until after a new trial. *See* *Ash v. Georgia-Pacific Corp., 957 F.2d 432, 437 (7th Cir. 1992)*. Because Republic accepted the remittitur here, instead of facing a second trial, it cannot challenge the remittitur. *See* *id. at 437-38*.

However, Republic contends that *Ash* allows for a third option for successful plaintiffs facing remittitur -- stipulating that a second trial would result in entry of judgment in the amount equal to the remitted award and appeal the remittitur based on that stipulation -- and the district court erred in refusing to allow Republic to pursue this course. Republic argues that absent this option, in order to obtain appellate review of a remittitur, a successful plaintiff must undertake a seemingly endless series of new trials -- until one jury produces a verdict that squares with the trial judge's view of an appropriate verdict. We disagree with Republic's reading of *Ash*. ***HN36***[] *Ash* suggests that a plaintiff may expedite appeal by taking "a pratfall" on a new trial, meaning that the plaintiff can accept defeat in the second trial by failing to put up a real fight and then appeal seeking **[**57]** reinstatement of the first jury's verdict. *Ash* explained that if a plaintiff "cannot afford the same elaborate presentation it mustered the first time, or if the absence of witnesses . . . undermines the case, then [the plaintiff] may do poorly -- but it has the first verdict to fall back on. A party electing the new-trial branch of the remittitur option may take a pratfall as quickly as it pleases, and thus expedite the appeal." *Id. at 438*. Nowhere does *Ash* suggest that the *Donovan* may be completely circumvented by simply stipulating that a second trial would result in a judgment equal to the remitted award. We therefore reject Republic's invitation to sanction such a procedure.

III. Conclusion

For the reasons given in this opinion, we AFFIRM the district court's grant of summary judgment to Republic on its defamation claim and North Atlantic's antitrust **[*740]** claims. We AFFIRM the district court's decision with respect to Republic's cross-appeal. We VACATE the district court's remitted damages award and order entry of judgment for $ 1 million in presumed damages and $ 2 million in punitive damages.

In re Relafen Antitrust Litig.

United States District Court for the District of Massachusetts

September 2, 2004, Decided

MASTER FILE NO. 01-12239-WGY

Reporter

225 F.R.D. 14 *; 2004 U.S. Dist. LEXIS 22003 **; 2004-2 Trade Cas. (CCH) P74,602

IN RE RELAFEN ANTITRUST LITIGATION

Subsequent History: Summary judgment denied by, Partial summary judgment denied by *In re Relafen Antitrust Litig., 346 F. Supp. 2d 349, 2004 U.S. Dist. LEXIS 26996 (D. Mass., Nov. 29, 2004)*

Prior History: *In re Relafen Antitrust Litig., 221 F.R.D. 260, 2004 U.S. Dist. LEXIS 8539 (D. Mass., 2004)*

Disposition: Court is not convinced that proposed settlement class meets requirements of Rule 23.

Core Terms

payor, settlement, antitrust, purchasers, state law, unjust enrichment, certification, consumer, indirect, attorney general, damages, exemplar, class member, entities, parties, courts, certify, proposed settlement, asserted claim, proposed class, overcharges, plaintiffs', determines, nabumetone, rights

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN1[] **Private Actions, Standing**

The United States Supreme Court has determined that under federal ***antitrust law***, indirect purchasers generally lack standing to seek antitrust damages.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] **Complaints, Requirements for Complaint**

The federal rules permit plaintiffs to plead alternative and inconsistent claims. Fed. R. Civ. P. 8(e)(2).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN3[] **Class Actions, Certification of Classes**

The United States Supreme Court has emphatically rejected the suggestion that the settlement concerns of Fed. R. Civ. P. 23(e) supersede the certification requirements of Rule 23(a), (b).

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4[] **Class Actions, Compromise & Settlement**

The safeguards provided by the Fed. R. Civ. P. 23 (a), (b) class-qualifying criteria, are not impractical impediments--checks shorn of utility--in the settlement-class context.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Constitutional Law > Equal Protection > Parentage

Torts > Procedural Matters > Settlements > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Torts > ... > Settlements > Multiple Party Settlements > General Overview

HN5[] **Class Actions, Compromise & Settlement**

While settlement classes remain an important technique in the resolution of complex, class action litigation, their utility does not excuse a court from examining the proposed class definition with equal, if not greater, care.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN6[] **Class Actions, Prerequisites for Class Action**

One of several factors counseling against certification of a settlement class is the fact that certain claimants have more valuable claims, the consequence being a second instance of disparate interests. Thus, as the United States Supreme Court has recognized, absent at least some consideration of the "value" of class members' claims a certifying court cannot assure "fair and adequate representation." In addition to raising adequacy concerns, differences in state law may undermine predominance, "compounding" the questions that affect only individual members.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7[] **Class Actions, Prerequisites for Class Action**

The claims of disparate groups cannot be mixed together under *Fed. R. Civ. P. 23(a)*.

Governments > Legislation > Interpretation

HN8[] **Legislation, Interpretation**

Legislative choices--even choices not to act--must be respected: Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.

Contracts Law > Remedies > Equitable Relief > General Overview

HN9[] **Remedies, Equitable Relief**

The North Dakota Supreme Court has suggested that the doctrine of unjust enrichment applies only if another has, without justification, obtained a benefit at the direct expense of the complainant.

Counsel: [1]** For Eon Labs, Inc., (Consolidated Plaintiff): William Alper Cohen, Pontani, Lieberman & Pavane, New York. NY.

For State of Maryland, (Intervenor Plaintiff): Meredyth Smith Andrus, Office of the Maryland Attorney General, Antitrust Division, Baltimore. MD.

For Walgreen Company, (Consolidated Plaintiff): Richard Alan Arnold, Kenny Nachwalter, Miami. FL.

For Meijer Distribution, Inc., (Plaintiff): Michael J. Boni, Kohn, Swift & Graf, Philadelphia, PA.

For Glaxosmithkline PLC, (Defendant): Bernard J. Bonn. III, Abbey Gardy & Squitieri, New York. NY.

For Meijer Distribution, Inc., (Plaintiff): Jacqueline E. Bryks, Cohen, Milstein, Hausfeld & Toll, New York. NY.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Michael M. Buchman, Milberg, Weiss, Bershad & Schulman LLP, New York. NY.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Patrick E. Cafferty, Miller, Faucher and Cafferty, LLP, Ann Arbor. MI.

For Meijer Distribution, Inc., (Plaintiff): Neill Clark, Berger & Montague, Philadelphia. PA.

For Meijer Distribution, Inc., (Plaintiff): Eric Cramer, Berger & Montague, Philadelphia. **[**2]** PA.

For State of Idaho, (Intervenor Plaintiff): Brett T. DeLange, Idaho Attorney General's Office, Street Boise. ID.

For Smithfield Foods, Inc, (Consolidated Plaintiff): Glen DeValerio, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston. MA.

For Louise Houchins, (Consolidated Plaintiff): Kathleen M. Donovan-Maher, Berman DeValerio Pease Tabacco Burt & Pucillo, Boston. MA.

For Eon Labs, Inc., (Consolidated Plaintiff): Ruth T. Dowling, Palmer & Dodge, LLP, Boston, MA.

For Meijer Distribution, Inc., (Plaintiff): Nancy F. Gans, Moulton & Gans, Boston, MA.

For Glaxosmithkline PLC, (Defendant): George G. Gordon, Dechert LLP, Philadelphia. PA.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Daniel E. Gustafson, Heins Mills & Olson, P.L.C., Minneapolis. MN.

For State of Arkansas, (Intervenor Plaintiff): Richard C. Heidlage, Attorney General's Office, Boston, MA.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Samuel D. Heins, Heins Mills & Olson, P.L.C., Minneapolis. MN.

For Direct Purchaser, (Consolidated Plaintiff): Theodore M. Hess-Mahan, Shapiro Haber & Urmy LLP, Boston. **[**3]** MA.

For Glaxosmithkline PLC, (Defendant): Timothy C. Hester, Covington & Burling, Washington. DC.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Elizabeth J. Holland, Kenyon & Kenyon, New York. NY.

For Teamsters Local No. 35 Heath Plans, (Consolidated Plaintiff): Mayme A. Holt-Brown, Percy, Smith, Foote, & Gadel, LLP, Alexandria, LA.

For State of Washington, (Intervenor Plaintiff): Donivan Irby, Office of Attorney General of Washington, Seattle. WA.

For Barbara Brown, (Consolidated Plaintiff): Michael J. Kane, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA.

For Meijer Distribution, Inc., (Plaintiff): Robert N. Kaplan, Kaplan, Fox & Kilsheimer LLP, New York, NY.

For Glaxosmithkline PLC, (Defendant): Kevin T. Kerns, Dechert LLP, Philadelphia, PA.

For Meijer Distribution, Inc., (Plaintiff): Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP, New York. NY.

For Meijer Distribution. Inc., (Plaintiff): Peter Kohn, Berger & Montague, Philadelphia, PA.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Steven J. Lee, Kenyon & Kenyon, New York, NY.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated **[**4]** Plaintiff): Theodore M. Leiverman, Spector, Roseman & Kodroff, Philadelphia, PA.

For Barbara Brown, (Consolidated Plaintiff): Lester L. Lew, Wolf, popper, Ross, Wolf & Jones, New York, NY.

For Eon Labs, lnc., (Consolidated Plaintiff): Richard D Margiano, Cohen, Pontani, Lieberman and Pavane, New York, NY.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): James W. Matthews, Sherin and Lodgen LLP, Boston, MA.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Robert J. Muldoon, Jr. Sherin & Lodgen LLP, Boston, MA.

For Insurer Group, (Plaintiff): Jonathan D. Mutch, Robins, Kaplan, Miller & Ciresi L.L.P., Boston. MA.

For SAJ Distributors, Inc., (Interested Party): Dianne M. Nast, Roda & Nast, P.C., Lancaster, PA.

For State of Oregon, (Intervenor Plaintiff): Tim D. Nord, Oregon Department of Justice, Salem, OR.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Edward Notargiacomo, Hagens Berman LLP, Cambridge, MA.

For Meijer Distribution. Inc., (Plaintiff): Linda P. Nussbaum, Cohen, Milstein, Hausfeld & Toll, New York. NY.

For Teva Pharmaceutical Industries LTD, (Consolidated **[**5]** Plaintiff): Joseph Opper, Garwin, Bronzaft, Gerstein & Fisher, New York, NY.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Margaret H. Paget, Sherin & Lodgen, Boston. MA.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): David K. Park, Willkie Farr & Gallagher, New York, NY.

For Tyler Fox, (Consolidated Plaintiff): David Pastor, Gilman and Pastor, LLP, Saugus, MA.

For Teamsters Local No. 35 Heath Plans, (Consolidated Plaintiff): Douglas H. Patton, Dewsnup, King & Olsen, Salt Lake City, UT.

For Meijer Distribution, Inc., (Plaintiff): Bernard Persky, Goodkind, Labaton, Rudoff & Sucharow, LLP, New York, NY.

For Albertson's, Inc., (Consolidated Plaintiff): Scott E. Perwin, Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, Miami, FL.

For State of Arkansas, (Intervenor Plaintiff): Bradford J. Phelps, Office of the Attorney General of Arkansas, Little Rock, AR.

For Glaxosmithkline PLC, (Defendant): Matthew A. Porter, Dechert LLP, Boston, MA.

For State of Illinois, (Intervenor Plaintiff): Robert W Pratt, Office of the Illinois Attorney General, Chicago, IL.

For CVS Meridian. Inc., (Consolidated Plaintiff): **[**6]** Barry L. Refsin, Hangley, Aronghick, Segal & Pudlin, Philadelphia. PA.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): J. Douglas Richards, Milberg, Weiss, Berhsad & Schulman LLP, New York, NY.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): William H. Rooney, Willkie Farr & Gallagher, New York, NY.

For Meijer Distribution, Inc., (Plaintiff): Hollis L. Salzman, Goodkind, Labaton, Rudoff & Sucharow, LLP, New York, NY.

For Direct Purchaser, (Consolidated Plaintiff): L. Kendall Satterfield, Finkelstein, Thompson & Loughran, Washington, DC.

For Direct Purchaser, (Consolidated Plaintiff): Stephen H. Schwartz, Garwin, Bronzaft, Gerstein & Fisher, New York, NY.

For Eon Labs, Inc., (Consolidated Plaintiff): Thane D. Scott, Palmer & Dodge, LLP, Boston, MA.

For CVS Meridian, Inc., (Consolidated Plaintiff): Steve D. Shadowen, Hangley, Aronchick, Segal & Pudlin, Harrisburg, PA.

For Direct Purchaser, (Consolidated Plaintiff): Jay B. Shapiro, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.C., FL.

For Meijer Distribution, Inc., (Plaintiff): Thomas G. Shapiro, Shapiro Haber & Urmy LLP, Boston, **[**7]** MA.

For End-Payor Plaintiffs, (Consolidated Plaintiff): W. Scott Simmer, Robins, Kaplan, Miller & Ciresi L.L.P., Washington, DC.

For Glaxosmithkline PLC, (Defendant): Christopher N. Sipes, Covington & Burling, Washington, DC.

For Teamsters Local No. 35 Heath Plans, (Consolidated Plaintiff): David P. Smith, Percy, Smith, Foote, & Gadel, LLP, Alexandria, LA.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Thomas M. Sobol, Hagens Berman LLP, Boston, MA.

For A.F. of L. -- A.G.C. Building Trades Welfare Plan, (Consolidated Plaintiff): Eugene A. Specter, Spector & Roseman, Philadelphia, PA.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): David M. Stark, Willkie Farr & Gallagher, New York, NY.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Archana Tamoshunas, Garwin, Bronzaft, Gerstein & Fisher, New York, NY.

For Glaxosmithkline PLC, (Defendant): Joseph A. Tate, Dechert LLP, Philadelphia, PA.

For State of Oregon, (Intervenor Plaintiff): Michelle M. Teed, Oregon Department of Justice, Salem, OR.

For Direct Purchaser, (Consolidated Plaintiff): Richard M. Volin, Thompson & **[**8]** Loughran, Washington, DC.

For Barbara Brown, (Consolidated Plaintiff): Ann D. White, MAGER WHITE & GOLDSTEIN LLP, Jenkintown, PA.

For End-Payor Plaintiffs, (Consolidated Plaintiff): K. Craig Wildfang, Robins, Kaplan, Miller & Ciresi, L.L.P., Minneapolis, MN.

For Teva Pharmaceutical Industries LTD, (Consolidated Plaintiff): Pamela A. Zorn, Sherin and Lodgen LLP, Boston, MA.

Judges: WILLIAM G. YOUNG, CHIEF JUDGE.

Opinion by: WILLIAM G. YOUNG

Opinion

[*19] MEMORANDUM

YOUNG, C.J.

I. INTRODUCTION

By Order dated November 21, 2003, this Court allowed the end payor plaintiffs' motion for class certification with respect to persons and entities who purchased nabumetone in five "exemplar" states. Order of 11/21/03 [Doc. No. 168 in Master File No. 01-12222-WGY] at 3, 5; see also *In re Relafen Antitrust Litig., 221 F.R.D. 260 (D. Mass. 2004)*. The end payor plaintiffs, having since reached an agreement of settlement with SmithKline, now seek to extend certification to a nationwide settlement class. [Doc. No. 306]. To assist the parties in their ongoing negotiations, the Court offers the following analysis.

II. BACKGROUND

Because the present **[**9]** analysis is, in the Court's view, primarily a continuation of a previous memorandum, see *Relafen, 221 F.R.D. 260*, the Court relates the factual and procedural background only briefly. In this consolidated action against SmithKline Beecham Corporation and GlaxoSmithKline PLC (collectively "SmithKline"), the plaintiffs

[1] alleged that SmithKline fraudulently procured and maliciously prosecuted its patent for nabumetone, a nonsteroidal anti-inflammatory drug sold under the brand name "Relafen." *Id. at 263*. Essentially, the plaintiffs claimed that but for SmithKline's unlawful conduct, they could have begun purchasing nabumetone in a competitive market -- comprising both Relafen and its generic alternatives -- as early as September 1998, nearly four years before generic nabumetone products actually became available. *Id. at 264*.

[10]** The end payor plaintiffs -- parties who purchased nabumetone from sources other than SmithKline for purposes other than resale -- assert claims under federal and state antitrust laws, state unfair competition statutes, and state consumer protection statutes. *Id. at 264*. On September 16, 2003, the end payor plaintiffs moved for certification of a nationwide class under *Federal Rule of Civil Procedure 23(b)(2)* and *(3)*. Id. After hearing oral argument and conducting a "rigorous analysis" of the end payor plaintiffs' proposed order, the Court denied the motion for certification under *Rule 23(b) (2)* and allowed it under *Rule 23(b)(3)* for the following exemplar classes:

With respect to their state antitrust and consumer protection claims --

> All persons or entities who purchased Relafen or its generic alternatives in the states of Arizona, California, Massachusetts, or Vermont during the period of September 1, 1998 through June 30, 2003 for consumption by themselves, their families, members, employees, insureds, participants, or beneficiaries.

and with respect to their unjust enrichment claims --

> All persons or entities in the United **[**11]** States who purchased Relafen in the states of Arizona, California, Massachusetts, Tennessee, or Vermont during the period September 1, 1998 through June 30, 2003 for consumption by themselves, their families, members, employees, insureds, participants, or beneficiaries.

Id. at 288. Excluded from both classes were governmental entities; SmithKline and its officers, directors, management, employees, **[*20]** subsidiaries, and affiliates; persons or entities who purchased Relafen for purposes of resale; persons or entities who purchased Relafen directly from SmithKline or its affiliates; and persons or entities who suffered no economic harm as a result of SmithKline's alleged conduct. Id.

On November 25, 2003, SmithKline moved for summary judgment. [Doc. Nos. 169, 187, 193, 197, 202]. With respect to the end payor plaintiffs, SmithKline emphasized that states had varied in their responses to *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, in which ***HN1***[] the Supreme Court determined that under federal ***antitrust law***, indirect purchasers (parties who, like the end payor plaintiffs, "are not the immediate buyers from the alleged antitrust violators," **[**12]** *Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 207, 111 L. Ed. 2d 169, 110 S. Ct. 2807 (1990))* generally lack standing to seek antitrust damages. See Defs.' Unjust Enrichment Mem. [Doc. No. 203] at 5-9. SmithKline maintained that in those states that construe their antitrust statutes consistently with Illinois Brick, permitting the end payor plaintiffs to seek restitution for unjust enrichment would allow an "end run" around state antitrust policies. See id. at 5-7. In addition, SmithKline continued, in those states that construe their antitrust statutes inconsistently with Illinois Brick -- that is, those states that allow indirect purchasers to seek antitrust damages under either statutory enactments (commonly termed "Illinois Brick repealers") or judicial decisions -- permitting the end payor plaintiffs to seek restitution for unjust enrichment would lead to unlawful "double recovery." See id. at 8-9. The Court agreed, in part. It allowed SmithKline's motion "with respect to unjust enrichment claims asserted under the laws of states in which such claims would constitute an end [] run around the state's adherence to Illinois Brick." Order of 12/19/03 [Doc. No. 229] **[**13]** at 2-3. The Court otherwise denied the motion, mindful that ***HN2***[] the Federal Rules permit plaintiffs to plead alternative and inconsistent claims. See *Fed. R. Civ. P. 8(e)(2)*.

The end payor plaintiffs now seek certification of a nationwide settlement class. [Doc. No. 306]. Members of the proposed class -- defined as "persons or entities in the United States who purchased Relafen and/or its generic alternatives . . . during the period of September 1, 1998 through June 30, 2003" -- would share in a settlement fund

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[1] As discussed in greater detail elsewhere, the majority of the plaintiffs in this action -- including two of SmithKline's competitors, Teva Pharmaceuticals USA and Eon Labs, Inc., and many of SmithKline's customers, described by the parties as "direct purchasers" and "drugstore plaintiffs" -- have settled their claims.

of $ 75 million. Am. Stip. & Agreement [Doc. No. 305] P 1. Recovery would vary according to the end payor's status (as a settling health plan, third-party payor, or consumer), and, more importantly for present purposes, according to the end payor's place of purchase (in a "Group I" or "Group II" state). Id. P 17. Not surprisingly, Group I and Group II correspond to the responses to Illinois Brick described above: Group I states have rejected Illinois Brick; Group II states have not. Id. P2(m)-(n). To account for their varying "strengths and weaknesses," claims asserted under the laws of Group I states would be "favored" over those asserted under the laws **[**14]** of Group II states should the settlement fund prove insufficient. Pls.' Supp. Mem. [Doc. No. 334] at 10. Otherwise, all claims would be compensated equally, with consumers, [2] for example, receiving the greater of 100 to 150 percent of their claims or a minimum payment of $ 50. Am. Stip. & Agreement P 17. This allocation according to place of purchase, unlike the allocation according to status, was not the result of "independent negotiations" between counsel designated to represent the distinct interests of Group I or Group II claimants. Compare Pls.' Mem. at 7-8.

Also before the Court are motions by the attorneys **[**15]** general of six Group II states: Arkansas, Idaho, Illinois, Maryland, Oregon, and Washington. [Doc. Nos. 314, 316, 318, 320, 322, 324]. The moving attorneys general seek to intervene under *Rule 24(a)*, expressing concern that the proposed settlement would disadvantage the rights of end payors in their respective states. See, e.g., **[*21]** Ark.'s Mot., Attach. 1 (Ark.'s Mem.). Notwithstanding the repeated reassurances of the parties, see, e.g., Pls.' Supp. Mem.; Defs.' Mem. [Doc. No. 337], and the conditional acquiescence of the attorneys general, the Court continues to have serious reservations regarding the breadth of the proposed class. In an effort to guide further negotiations, the Court expresses these reservations below.

III. DISCUSSION

A. Legal Standard

Here, as before, see *Relafen, 221 F.R.D. at 265*, the end payor plaintiffs bear the burden of establishing the elements necessary for class certification: the four requirements of *Rule 23(a)* and one of the several requirements of *Rule 23(b)*. *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)*; *Guckenberger v. Boston Univ., 957 F. Supp. 306, 325 (D. Mass 1997)* **[**16]** (Saris, J.). The Court's role in this context is clear: it must "conduct a rigorous analysis of the prerequisites established by *Rule 23*," *Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003)* -- with one exception. Because the end payor plaintiffs move to certify a settlement class, the Court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem, 521 U.S. at 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231*. The other requirements of *Rule 23*, however -- "those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context. . . . for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." Id.

At oral argument, the end payor plaintiffs nevertheless asserted that courts don an entirely "different hat" at settlement. This Court disagrees. ***HN3***[] The Supreme Court in Amchem emphatically rejected the suggestion that the settlement concerns of *Rule 23(e)* supersede the certification requirements of *Rule 23(a)* and *(b)*: **[**17]**

> Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.
>
> ***HN4***[] The safeguards provided by the *Rule 23 (a)* and *(b)* class-qualifying criteria, we emphasize, are not impractical impediments -- checks shorn of utility -- in the settlement-class context.

[2] The distribution to third-party payors (health benefit plans that purchased nabumetone for beneficiaries) would also reflect the Group I-Group II distinction, but would do so somewhat differently. Am. Stip. & Agreement P 2 (t). The claims of third-party payors would be limited to 15 percent of the purchases made in Group I states plus 5 percent of the purchases made in Group II states. Id.

Id. at 621. Indeed, a proposed amendment to Rule 23 which would have expressly validated the end payor plaintiffs' understanding -- that courts may certify a settlement class "even though the requirements of subdivision (b)(3) might not be met for purposes of trial," id., 521 U.S. at 619 (quoting Proposed Amendment to Fed. R. Civ. P. 23(b)) -- was widely criticized as both practically unwise and legally unsound. See id. (citing, inter alia, Letter from Steering Committee to Oppose Proposed Rule 23 to Stotler of 5/28/96, available at http://www.misko.com/library/steering23.PDF); see also, e.g., Paul D. Carrington & Derek P. Apanovitch, The Constitutional Limits of Judicial Rulemaking: **[**18]** The Illegitimacy of Mass-Tort Settlements Negotiated under Federal Rule 23, 39 Ariz. L. Rev. 461 (1997); John C. Coffee, Jr., Class Action "Reform": Advisory Committee Bombshell, N.Y.L.J., May 21, 1996, at 1. Accordingly, **HN5**[] while settlement classes "remain [] an important technique in the resolution of complex, class action litigation," Pls.' Mem. at 23, their utility does not excuse the Court from examining the proposed class definition with equal, if not greater, care. See Amchem, 521 U.S. at 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231; Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 279-80, 285-86 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

Nor is the Court convinced that the present settlement posture renders it wholly "inappropriate to address the strength of class claims." Pls.' Supp. Mem. at 6. As the **[*22]** end payor plaintiffs emphasize, under Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), the certification inquiry may not involve a "preliminary **[**19]** hearing into the merits." Id. at 177. But the suggestion that Eisen bars all consideration of disparities between class members' claims "reads too much into too little." See Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000). In fact, the Supreme Court's subsequent opinion in Ortiz v. Fibreboard Corp., 527 U.S. 815, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999), noted that **HN6**[] one of several factors counseling against certification of the settlement class was the fact that certain claimants "had more valuable claims . . . [,] the consequence being a second instance of disparate interests." Id. at 857. Thus, as the Supreme Court recognized in Ortiz, absent at least some consideration of the "value" of class members' claims -- which here varies according to differences in state law -- a certifying court cannot assure "fair and adequate representation." Id. at 856 (quoting Amchem, 521 U.S. at 627, 138 L. Ed. 2d 689, 117 S. Ct. 2231); see Carrington & Apanovitch, supra, at 471 ("The modification of rights from those that can be enforced at trial to those that will be measured by weak conjecture [at settlement] effects **[**20]** a transfer of wealth from class members with clearly meritorious claims to those whose claims are more dubious. . . . The wealth transfer is most apparent when the court-approved settlement treats diverse class members as if their claims were of equal worth."). In addition to raising adequacy concerns, differences in state law may undermine predominance, "compounding" the questions that affect only individual members. Amchem, 521 U.S. at 624, 138 L. Ed. 2d 689, 117 S. Ct. 2231. For these reasons, the Court, unlike the end payor plaintiffs, may not gloss over differences in state law by characterizing all claims as "questionable but potentially viable." Pls.' Supp. Mem. at 8.

The Court also rejects the suggestion that its approach to determining the "content" of state law ought differ here. 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4507. Although the Court must, in the context of settlement, "round [] off the differences" to some extent, Carrington & Apanovitch, supra, at 466, its role in resolving questions of state law remains otherwise unchanged: it "must determine issues of state law as it believes the highest court of the state would determine **[**21]** them," Wright, Miller & Cooper, supra, § 4507. The end payor plaintiffs nevertheless urge the Court to be "humble" in its determinations. As to the need for humility, this Court does not disagree. As to the consequences of humility, however, this Court has a different view. Humility does not, as the end payor plaintiffs suggest, require the Court to favor recovery. Rather, it requires the Court to apply state law "'as it exists.'" Wright, Miller & Cooper, supra, § 4507 (quoting Burris Chem., Inc. v. USX Corp., 10 F.3d 243, 247 (4th Cir. 1993)). Here, the relevant state law is uniformly "guided" by federal interpretation. E.g., Md. Code Ann., Comm. Law II § 11-202(a); see Pls.' Class Certification Mem. [Doc. No. 127], Ex. A. Accordingly, absent an express indication to the contrary, the Court presumes that state law is guided by the federal rule of Illinois Brick. See FTC v. Mylan Lab., Inc., 62 F. Supp. 2d 25, 43 (D.D.C. 1999). Although this presumption acts to bar recovery in many states, it simply is not this Court's "function . . . to expand the existing scope of state law." Wright, Miller & Cooper, supra, § 4507; **[**22]** see Migliori v. Airborne Freight Corp., 952 F. Supp. 38, 44 n.7 (D. Mass. 1997).

Having thus established the framework for its inquiry, the Court proceeds to consider the states included in the proposed settlement class. The Court offers its analysis mindful that "at some point there must be an end to reclassification." Ortiz, 527 U.S. at 857, 144 L. Ed. 2d 715, 119 S. Ct. 2295. The following variations, however, raise serious concerns of adequacy and predominance, and, as such, warrant special attention.

B. Previously Excluded States

1. Excluded "Exemplar States" [3]

Florida. Kansas, Maine, Michigan, Minnesota, New York, North Carolina. In **[*23]** its previous certification order, the Court excluded end payors from the above exemplar **[**23]** states because the "laws of [these] states incorporate variations that counsel against certification." See Relafen, 221 F.R.D. at 280. Because the proposed settlement class essentially must meet the same specifications, Amchem, 521 U.S. at 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231, these "variations" in state law remain relevant. Significantly, the Court excluded end payors from these states not because their inclusion would "present intractable management problems," id. (citing Fed. R. Civ. P. 23(b)(3)(D)), but because their inclusion would raise concerns regarding the predominance of common questions, the adequacy of representation, and the superiority of class resolution. See Relafen, 221 F.R.D. at 276, 280. These concerns "persist [] when settlement, rather than trial, is proposed." Amchem, 521 U.S. at 621, 138 L. Ed. 2d 689, 117 S. Ct. 2231.

The end payor plaintiffs nevertheless urge the Court to abandon its practice of "considering statutory and common law claims asserted under the laws of the same state as a pair," Relafen, 221 F.R.D. at 280. See Pls. Supp. Mem., Ex. A (The Rationale for the Classification of Group I States) ("Rationale") at 2-4 (including **[**24]** end payors from previously excluded exemplar states because either their statutory or common law claim "remains viable"). As the Court previously explained, however:

> To the extent that a judgment in this action would be claim preclusive, [as the proposed settlement would be, see Am. Stip. & Agreement P 18,] including State *A* equitable claims would effectively waive State *A* statutory claims, raising adequacy concerns for end payors who might prefer to litigate their statutory claims individually or as part of a State *A* class.

Relafen, 221 F.R.D. at 280. The need for fair and adequate representation demands "undiluted, even heightened, attention in the settlement context." [4] Amchem, 521 U.S. at 620, 138 L. Ed. 2d 689, 117 S. Ct. 2231; see also id. 521 U.S. at 615, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (explaining that the Rule 23(b)(3) requirements of predominance and superiority attempt to balance the "competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other"). As such, the Court may not certify a class including end payors from previously excluded exemplar states without, at a minimum, **[**25]** ensuring that absent class members receive the "structural protection" required by Amchem. See Ortiz, 527 U.S. at 857, 144 L. Ed. 2d 715, 119 S. Ct. 2295.

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[3] Adopting the practice of the end payor plaintiffs, the Court uses the term "exemplar states" to refer to Arizona, California, Florida, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Carolina, Tennessee, and Vermont. See Proposed Exemplar Order at 1.

[4] Consider end payors from Maine, for example. If permitted to bring their own class action, they would be free to attempt a "stronger and more precise showing of individual impact." See Relafen, 221 F.R.D. at 282. They would then face no bar to asserting their statutory claims, which provide for recovery of "3 times the amount of the damages sustained and cost of suit, including necessary and reasonable investigative costs, reasonable experts' fees and reasonable attorney's fees." Me. Rev. Stat. Ann. tit. 10, § 1104(1). If, on the other hand, end payors from Maine are included in the proposed settlement, they must release their statutory claims in exchange for a maximum recovery of 1.5 times the amount of their "Recognized Consumer Claims." See Am. Stip. & Agreement PP 17-18.

2. Group II States

Alabama, Alaska, Colorado, Connecticut, Delaware, **[**26]** Georgia, Indiana, Kentucky, Mississippi, Missouri, Montana. New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia, Wyoming. The inclusion of end payors from Group II states poses its own threat to "class cohesion." See *Amchem, 521 U.S. at 624, 138 L. Ed. 2d 689, 117 S. Ct. 2231*. Unlike end payors from Group I states, end payors from Group II states lack recognized rights of action under both the statutory schemes, compare *Relafen, 221 F.R.D. at 278*, and the common law, see Order of 12/19/03 at 2-3, of their respective states. As to the latter common law claims, the Court offers a brief explanation. The rule of Illinois Brick, to which Group II states look for guidance, seeks to "eliminate the complications of apportioning overcharges," "eliminate multiple recoveries," and "promote the vigorous enforcement of the antitrust laws." *UtiliCorp United. 497 U.S. at 208, 212, 214, 111 L. Ed. 2d 169, 110 S. Ct. **[*24]** 2807*. Respectfully, the Court is not persuaded that these concerns "are absent under Plaintiffs' claims of unjust enrichment.'" Pls.' Supp. Mem. at 4 (quoting In re Cardizem CD Antitrust Litig., Master File No. 99-md-1278, Order No. 70, at 31 (E.D. **[**27]** Mich. May 23, 2003), attached as Ex. A to Pls.' Unjust Enrichment Opp'n [Doc. No. 205]). Specifically, determining the benefit conferred by end payors involves at least some of "the complications of apportioning overcharges" and creates serious risk of "multiple recoveries." See *In re Terazosin Hydrochloride Antitrust Litig., 160 F. Supp. 2d 1365, 1380 (S.D. Fla. 2001)* ("Illinois Brick expressed concerns [regarding] indirect purchasers actions . . .

The end payors' unjust enrichment claim raises identical concerns."); *Mylan Laboratories, 62 F. Supp. 2d at 43* (" Providing monetary relief to indirect purchasers increases the risk of duplicative recovery. Therefore, restitution and/or disgorgement on behalf of indirect purchasers will be denied absent express authority for such relief under state law."). As explained in Illinois Brick, the "risk" arises because "following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same [or a portion of the same] amount." *Illinois Brick, 431 U.S. at 730, 52 L. Ed. 2d 707, 97 S. Ct. 2061*. For this reason, many of the Group I "repealers" specifically **[**28]** provide, for example, that "the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." *740 Ill. Comp. Stat. 10/7*; see *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 78 n.9, 762 N.E.2d 303 (2002)*. If, in determining the law of Group II states (which lack such repealers), this Court were simply to "read in" unjust enrichment claims, it would frustrate the ability of Group II states to make the same policy choices.

The parties respond that these end payors are properly included because they retain, "at a minimum, a right to appeal this Court's decision." Defs.' Mem. at 5; see Pls.' Supp. Mem. at 7-8. Their response, although of course accurate, largely misses the mark. The Court does not deny that Group II end payors may "upset" its determinations, either by filing an appeal, or by initiating an action in state court, see *Migliori, 952 F. Supp. 38, 44 n.7* (noting that a Massachusetts state judge, unlike a federal district judge, need "not hesitate to participate in the evolution of Massachusetts common law"). The Court determines only that their rights to assert such challenges **[**29]** are substantially different from the rights enjoyed by Group I end payors. For this reason, ***HN7***[] "the claims of these disparate groups cannot be mixed together under *Rule 23(a)*." Cf. *Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1195 (11th Cir. 2003)* (determining that representation was inadequate where the economic interests of certain class members were "significantly different from -- and potentially antagonistic to -- [those of] the named representatives purporting to represent them").

The Court is not convinced that the present Group I-Group II distinction sufficiently addresses these concerns. First, as noted above, this allocation was not made after "division into homogenous subclasses," each "with separate representation." *Ortiz, 527 U.S. 815, 856, 144 L. Ed. 2d 715, 119 S. Ct. 2295*. Second, although Group I consumers would be "favored" should the fund prove insufficient, consumers otherwise would receive the same compensation "without regard to their state of residence." Pls.' Mem. at 18. Thus, in the more likely event that the fund is sufficient, see Pls.' Supp. Mem. at 18 (noting that "historically consumer participation in these settlements has been less than 20%"), **[**30]** consumers would be treated "all the same," *Ortiz, 527 U.S. at 857, 144 L. Ed. 2d 715, 119 S. Ct. 2295*. As noted in Ortiz, this "itself is an allocation decision with results almost certainly different from the results that those with [more valuable claims] would have chosen." Id.; accord Amchem ("The disparity between . . .

categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. Although this is not a limited fund' case certified under *Rule 23 (b) (1) (B)*, the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." (citation omitted)).

[*25] Notwithstanding the above, the parties suggest that Group II end payors must be included because as a practical matter, "a settlement may be impossible unless some compensation is provided." Pls.' Supp. Mem. at 11-13; Defs.' Mem. at 3. Both *Amchem* and *Ortiz*, however, expressly rejected similar arguments, namely that a reviewing court may certify a settlement class simply because settlement is practical or desirable:

> The argument **[**31]** is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And *Rule 23*, which must be interpreted with fidelity to the *Rules Enabling Act* and applied with the interests of absent class members in close view, cannot carry the large load. . . .

Amchem, 521 U.S. 591, 628-29, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (footnote omitted).

> Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.
> But we are not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law . . .

Ortiz, 527 U.S. at 865, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (Rehnquist, C.J., concurring). Here, as in Amchem, ***HN8***[] legislative choices -- even choices not to act -- must be respected: "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue **[**32]** in court." *In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002)*.

C. States Represented by their Attorneys General

Arkansas, Idaho, Illinois, Maryland, Oregon, Washington. The above Group II states move to intervene under *Rule 24(a)*, seeking to secure the more favorable allocation made to Group I states. Each of these states authorizes its attorney general to represent residents as parens patriae, *Ark. Code Ann. § 4-75-315*; *Idaho Code § 48-108*; *740 Ill. Comp. Stat. 10/7*; *Md. Code Ann., Com. Law II, § 11-209*; *Or. Rev. Stat. § 646.775*; *Wash. Rev. Code § 19.86.080*, and, with the exception of those discussed below, repudiates the rule of Illinois Brick, *Ark. Code Ann. § 4-75-315*; *Idaho Code § 48-108*; *740 Ill. Comp. Stat. 10/7*. Notwithstanding these commonalities, the laws of certain states incorporate variations that cast doubt on the "interest" claimed by the attorneys general. See *Fed. R. Civ. P. 24(a)(2)*.

1. Adherence to Illinois Brick

Maryland. Oregon, Washington. The Court previously suggested that the unjust enrichment claims asserted by Group II end payors may raise "identical" Illinois Brick concerns. **[**33]** *Terazosin, 160 F. Supp. 2d at 1380*. The same is true of parens patriae claims asserted by attorneys general. The "rationales of . . . Illinois Brick may not apply with equal force," but they nevertheless are implicated. See *UtiliCorp United, 497 U.S. at 208, 111 L. Ed. 2d 169, 110 S. Ct. 2807*. For example, although attorneys general typically will have adequate incentives to "promote the vigorous enforcement of the antitrust laws," recovery on behalf of indirect purchasers nevertheless creates a serious risk of "multiple recoveries." Id. As explained above, the risk arises because the rule of Illinois Brick, which has been incorporated by the courts of Maryland, Oregon, and Washington, bars recovery by the indirect purchaser in favor of "recovery of the full overcharge by the direct purchaser." *Illinois Brick, 431 U.S. at 730, 52 L. Ed. 2d 707, 97 S. Ct. 2061*; see *Davidson v. Microsoft Corp., 143 Md. App. 43, 52, 792 A.2d 336 (2002)* ("We hold today, therefore, that until the legislature expressly provides otherwise, Illinois Brick bars suits by indirect purchasers seeking to recoup alleged overcharges under MATA [the *Maryland Antitrust Act*]."); Daraee v. Microsoft Corp., No.

0004 03311, 2000 WL 33187306, **[**34]** * 1 (Or. Cir. June 27, 2000) ("The indirect purchaser rule of *Illinois Brick v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)* [,] applies to Oregon's Antitrust Act."); *Blewett v. Abbott Lab., 86 Wash. App. 782, 789, 938 P.2d 842 (1997)* ("The holding of Illinois Brick is rational **[*26]** and based on the collectively greater experience of federal courts in adjudicating antitrust suits. We conclude we must follow it.") [5] **[**35]** ; see also *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957, 963 n.4 (9th Cir. 1999)* (noting that "the district court . . . [had] treated [Oregon] state and federal antitrust claims as one and the same for purposes of standing analysis" and doing the same). [6] Because the Court concludes that permitting additional recovery on behalf of indirect purchasers would undermine the policies of these states, it determines that their intervention is not warranted.

2. Recently Enacted Repealers

Arkansas, Idaho. Certain of the attorneys general assert authority under recently enacted Illinois Brick repealers. See *Ark. Code Ann. § 4-75-315* (effective Apr. 8, 2003); *Idaho Code § 48-108* (effective July 1, 2000). Unlike interpretations or clarifications of existing law, see, e.g., *Elkins v. Microsoft Corp., 174 Vt. 328, 338, 817 A.2d 9 (2002)*, the above repealers "effectuate a change in [state] law," id. See Act of Apr. 8, 2003, 2003 Ark. Acts 1172 ("It is found and determined by the Eighty-fourth General Assembly that without **[**36]** the amendments herein, the Attorney General is unable to adequately protect the interests of the consumers of the State of Arkansas. . . ."); Idaho Competition Act of 2000, *ch. 148, 2000 Idaho Sess. Laws 148* ("The proposed *Idaho Competition Law* replaces Idaho's present *Antitrust Act*."). More specifically, they "increase a party's liability for past conduct." *Landgraf v. USI Film Prods., 511 U.S. 244, 280, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)*; see *California v. ARC America Corp., 490 U.S. 93, 105, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)* (noting that state indirect purchaser claims "impose liability over and above that authorized by federal law").

For this reason, the Court presumes that the Arkansas and Idaho repealers "are to be given only prospective application." *City of Dover v. Barton, 337 Ark. 186, 189, 987 S.W.2d 705 (1999)*; accord *City of Garden City v. City of Boise. 104 Idaho 512, 515, 660 P.2d 1355 (1983)*. To presume the contrary would offend "elementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf, 511 U.S. at 265, 128 L. Ed. 2d 229, 114 S. Ct. 1483*. Here, the conduct complained of [7] -- namely SmithKline's **[**37]** enforcement of its patent, see *In re Relafen Antitrust Litig.,*

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[5] The Court interprets a subsequent portion of Blewett -- which rejects the indirect purchaser's request for injunctive relief but notes that she is "not entirely without a remedy," *Blewett, 86 Wash. App. at 790, 938 P. 2d 842* -- to refer to the attorney general's authority to "restrain and prevent" antitrust violations, *Wash. Rev. Code § 19.86.080*. A contrary interpretation (that is, an interpretation which would permit the attorney general to seek monetary relief on the indirect purchaser's behalf) would implicate the "multiple recoveries" concerns of Illinois Brick, a rule the Blewett court had just confirmed as "rational" and applicable. *Blewett, 86 Wash. App. at 789, 938 P.2d 842*.

[6] On the persuasive authority of determinations by a "federal district court judge who sits in a particular state," see Wright, Miller & Cooper, supra, § 4507:

> As a general proposition, a federal district court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions regarding the law of that state than is a federal appellate judge who has no such personal acquaintance with the law of the state.

Id.

[7] In addressing the reach of New York's repealing amendment, the Cardizem court focused its attention on the time of injury, rather than the time of violation. Cardizem , supra, at 12. This Court respectfully disagrees. The presumption against retroactive legislation is rooted in the belief that "individuals should have an opportunity . . . to conform their conduct" to the law. *Landgraf, 511 U.S. at 265, 128 L. Ed. 2d 229, 114 S. Ct. 1483*. Accordingly, it is the relationship between the statute and the conduct -- not the injury -- that raises concerns of "unfair surprise" and "upsetting expectations." *Id., 511 U.S. at 283 n.35, 128 L. Ed. 2d 229, 114 S. Ct. 1483*.

286 F. Supp. 2d 56, 61 (D. Mass. 2003) -- occurred prior to the statutory enactments. Following the traditional presumption, then, the Court declines to apply the statutes absent a clearer expression of retroactive reach. Compare Ark. Code Ann. § 4-75-320 (c) ("This section is not intended to allow for the commencement of any action by the Attorney General under the provisions of this **[*27]** subchapter for events occurring prior to the enactment of this section of which the Attorney General had actual knowledge.").

[38] D. Non-Exemplar Group I States**

District of Columbia, Hawaii. Iowa, Louisiana, Nebraska, Nevada, New Mexico, New Jersey, North Dakota, South Dakota, West Virginia. Wisconsin. The Court concludes by considering the Group I states not addressed in the Court's previous certification order. Like the exemplar states, each of these Group I states, with the exception of those discussed below, "permits indirect purchaser actions under its antitrust, consumer protection, or unfair trade practices, statutes." *Relafen. 221 F.R.D. at 278*; see *D.C. Code Ann. § 28-4509*; *Haw. Rev. Stat. § 480-3*; *Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002)*; *Arthur v. Microsoft Corp., 267 Neb. 586, 676 N.W.2d 29 (2004)*, *Nev. Rev. Stat. Ann. § 598A.210*; *N.M. Stat. Ann. § 57-1-3*, *N.D. Cent. Code § 51-08.1-08*; *S.D. Codified Laws § 37-1-33*; W. Va. Code St. R. tit. 142, § 9; *Wis. Stat. § 133.18*. In addition, however, the laws of these states incorporate certain significant differences, to which the Court now turns.

1. Adherence to Illinois Brick

Louisiana, New Jersey. As described above, "absent an express indication to the contrary, the **[**39]** Court presumes that state law is guided by the federal rule of Illinois Brick." The authority cited by the end payor plaintiffs -- which at best suggests a "split of authority" in the states of Louisiana and New Jersey, Rationale at 6 -- fails to provide such an indication. See *Free v. Abbott Lab., 176 F.3d 298, 301 (5th Cir. 1999)* ("Because the Illinois Brick scheme is preferable for this purpose, we believe Louisiana courts would follow it.") [8] **[**40]** ; *Van Natta Mechanical Corp., v. Di Staulo, 277 N.J. Super. 175, 190, 649 A.2d 399 (N.J. Super. Ct. App. Div. 1994)* (affirming the dismissal of a state antitrust claim because the plaintiff failed to meet the standing requirements applied under federal law). [9] Accordingly, the Court concludes that these states are more properly placed in Group II.

2. Minimum Statutory Damages

New Mexico, Hawaii. Certain of the Group I states provide minimum statutory damages for antitrust plaintiffs. See *Haw. Rev. Stat. § 480-13(b)* ("Any consumer who is injured by any unfair or deceptive act . . . (1) May sue for

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[8] The end payor plaintiffs urge the Court to disregard the Fifth Circuit's determination because Louisiana ***antitrust law***" was intended to be sweeping in its breadth."' Pls.' Supp. Mem. at 6 (quoting *Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149, 1154 (La. 1986))*. As the Fifth Circuit noted, however, Louisiana Power addressed a question of statutory interpretation "distinguishable" from the "policy laden" question of defining antitrust injury: "Louisiana courts have not eschewed the importance of defining antitrust injury in this manner but, in fact, have deferred to federal precedent." *Free, 176 F.3d at 300*.

Moreover, even if the Court were not convinced by Free, it would remain convinced by Loew's: "In *Loew's, Incorporated v. Don George, Inc., 237 La. 132, 110 So.2d 553 (La. 1959)*, the Supreme Court held that an antitrust action sounds in tort and the one year prescriptive period of *La. C.C. art. 3492* applies in a private action." *State ex rel. Ieyoub v. Bordens, Inc., 684 So.2d 1024, 1026 (La. Ct. App. 1996)*. Under Loew's, end payors from Louisiana, unlike end payors from other Group I states, are subject to an apparent time bar, a fact that "'invariably weighs against class certification under *Rule 23(b) (3)*.'" See *Relafen, 221 F.R.D. at 283* (quoting *Waste Management, 208 F.3d at 296*).

[9] The Court is not persuaded that end payors claims present a different question because they are "premised primarily on the *New Jersey Consumer Fraud Act*" rather than the *New Jersey Antitrust Act.* Pls.' Supp. Mem. at 5. Like the unjust enrichment claims described above, consumer fraud claims may create precisely the risk of "multiple recoveries," which Illinois Brick (and parallel New Jersey decisions) seek to avoid.

damages sustained by the consumer and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $ 1,000 [or $ 5,000 where the plaintiff is an elder'] or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorneys' fees together with the costs of suit [.] "); *N.M. Stat. Ann. § 57-12-10(B)-(C)* (permitting parties complaining of an unfair **[**41]** or deceptive trade practice to recover "actual damages or the sum of one hundred dollars ($ 100), whichever is greater" as well as attorneys' fees and costs). Not surprisingly, though, these minimum **[*28]** remedies are unavailable in class actions. See *Haw. Rev. Stat. § 480-13(c)(1)* ("The minimum $ 1,000 recovery provided in subsections (a) and (b) shall not apply in a class action or a de facto class action lawsuit [.] "); *N.M. Stat. Ann. § 57-12-10(E)* ("In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.").

Including end payors from Hawaii and New Mexico in the proposed class thus waives their rights to substantial [10] statutory damages. As the Court explained in its previous opinion:

> Such waiver necessarily casts doubt on the named plaintiffs' fitness to represent class members who might prefer to pursue statutory or punitive remedies individually.
>
> Nor are the Court's concerns lessened because any class member wishing to pursue his **[**42]** or her statutory right to minimum and treble damages may opt out of the class. Scholars have recognized that as a practical matter, the opportunity to opt out is unevenly distributed, with far lesser opportunity held by plaintiffs like those here, who have small rather than independently viable claims, and who receive best practicable rather than individual notice.

Relafen, 221 F.R.D. at 286 (citations and alterations omitted). For these reasons, the Court determines that Hawaii and New Mexico ought be grouped with the excluded exemplar states.

[**43] 5. Direct Benefit

North Dakota. The Court turns finally to unjust enrichment claims asserted under the common law of North Dakota. In *Apache Corp. v. MDU Resources Group, Inc., 1999 ND 247, 603 N.W.2d 891 (N.D. 1999)*, ***HN9***[] the North Dakota Supreme Court suggested that the doctrine of unjust enrichment applies only "if another has, without justification, obtained a benefit at the direct expense of the [complainant].'" *Id. at 895* (quoting *Midland Diesel Serv. & Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D. 1981))* (alteration in original) (emphasis added). Here, the benefits that SmithKline received were obtained most directly from wholesalers, who, in turn, obtained benefits from end payors. Because its precedent casts doubt on the end payors' unjust enrichment claims, North Dakota ought also be grouped with the excluded exemplar states. See *Relafen, 221 F.R.D. at 287* (excluding North Carolina plaintiffs from the exemplar classes because they "would be subject to an individualized defense regarding the direct benefit' element of their unjust enrichment claims").

IV. CONCLUSION

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[10] The value of their statutory damages provisions distinguishes the laws Hawaii and New Mexico from the law of Massachusetts, for example. See *Mass. Gen. Laws ch. 93A, § 9* ("If the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater. . . ."). The Seventh Circuit in Reynolds suggested that waiver of such modest amounts may not present a "fatal" conflict. See *Reynolds, 288 F.3d at 282* (noting that where class members would receive $ 15 for one refund anticipation loan and $ 30 for two or more such loans, there was an unremarked conflict "between those class members who took out one or two refund anticipation loans and those who took out more than two and thus will receive no compensation for the additional damages," but declining to find this conflict fatal "in light of the modesty of the stakes").

In sum, the Court is **[**44]** not convinced that the proposed settlement class, as presently defined, meets the requirements of *Rule 23*. The Court is not insensitive to the "tugs . . . of systemic efficiency." *Amchem. 521 U.S. at 615, 138 L. Ed. 2d 689, 117 S. Ct. 2231*. But it is perhaps in these circumstances -- when it is faced with obvious savings of time, effort, and expense -- that the Court must most carefully safeguard the rights of absent class members "who might prefer to go it alone." Id.

WILLIAM G. YOUNG

CHIEF JUDGE

Blind Doctor, Inc. v. Hunter Douglas, Inc.

United States District Court for the Northern District of California

September 7, 2004, Decided

No. C-04-2678 MHP

Reporter

2004 U.S. Dist. LEXIS 18480 *; 59 Fed. R. Serv. 3d (Callaghan) 635

BLIND DOCTOR INCORPORATED dba BLIND DOCTOR.COM and dba WELLS INTERIORS, a Delaware Corporation registered to do business in California, Plaintiff, V. HUNTER DOUGLAS, INC., a Foreign Corporation registered to do business in California, Defendants.

Disposition: Plaintiff's motion for preliminary injunction DENIED.

Core Terms

advertising, coverings, products, window, antitrust, manufacturer, preliminary injunction, price fixing, restrictions, retailers, conspiracy, merits, hardships, rule of reason, customer, Sherman Act, irreparable, prices, anti trust law, tip, fabricators, injunctive, unreasonable restraint, horizontal, vertical, probability of success, business relationship, antitrust claim, proprietary, restrained

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Grounds for Injunctions**

A preliminary injunction is a "provisional remedy." Aimed at preserving the status quo and preventing the occurrence of irreparable harm during the course of litigation, preliminary injunctions may be issued where the moving party has established two prerequisites for equitable relief: one, a threat of irreparable injury and, two, the inadequacy of available legal remedies. *Fed. R. Civ. P. 65* (placing this type of injunctive relief within the bounds of the court's discretion and equitable power). In general, a preliminary injunction is appropriate where a plaintiff can demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in plaintiff's favor. The two components of this test sit on a kind of sliding scale or "continuum;" thus, the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

In all occasions in which a court issues a preliminary injunction, *Fed. R. Civ. P. 65(d)* requires that the court make the injunction specific in terms describing in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. *Fed. R. Civ. P. 65(d)*. This mandate for specificity ensures that those against whom an injunction is drawn receive fair and precise notice of what conduct is prohibited.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

International Trade Law > General Overview

HN3[] **Sherman Act, Claims**

The Sherman Antitrust Act (Sherman Act) makes illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 1*. In order to establish a claim under *§ 1* of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained competition under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint actually restrains competition, causing injury that extends beyond the impact on the claimant to affect the field of commerce in which the claimant is engaged (i.e., "antitrust injury").

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Regulated Industries, Higher Education & Professional Associations**

Despite the language in *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, prohibiting any contract, the Supreme Court has repeatedly declined to read this language literally and instead has recognized that Congress intended to outlaw only unreasonable restraints. Following this logic, the Court has set forth a two-tiered mode of analysis to determine whether a contract, combination, or conspiracy is "unreasonable:" some agreements are analyzed under a per se rule of illegality while others are assessed from a rule of reason analysis. Most antitrust claims are analyzed under a rule of reason, according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition. This analysis is holistic and inclusive, taking into account a variety of factors including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Some types of restraint have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. Per se analysis of a restraint is appropriate once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it. Because of the level of certitude required, courts have been hesitant to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The bedrock of any antitrust claim under *§1* of the Sherman Act, *15 U.S.C.S. § 1*, is a conspiracy or compact between two parties. While the words "conspiracy" or "agreement" are freely used in colloquial speech, in the antitrust milieu they take on discrete and defined meanings. In ***antitrust law***, an agreement is found only when the conspirators have a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement. In antitrust actions, there is an essential distinction between illegal concerted actions and lawful independent decisions, with the conspiring sheep fenced in by *§ 1* analysis and the independent goats left to safely graze entirely alone. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

Manufacturers are able to choose with whom they wish to deal and unilaterally may refuse to deal with a distributor or customer for business reasons without running afoul of antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

Non-price restrictions arise in the normal course of business and are not illegal under the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

A manufacturer can announce its resale prices or other non-price restrictions and refuse to deal with those who fail to comply without running afoul of antitrust laws.

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Antitrust Issues > Pricing Conduct

HN10[] **Antitrust & Trade Law, Regulated Industries**

Price fixing comes in two general strains: horizontal and vertical. Vertical price fixing occurs when a supplier attempts to fix the prices charged by those who resell its products. A vertical price fixing scheme setting minimum prices is generally subject to per se analysis. However, a vertical price fixing scheme setting maximum prices is not a per se antitrust violation and should be analyzed under the rule of reason approach. Horizontal price fixing, by contrast, is a restraint imposed by agreement between competitors to fix prices and muscle out competition. Horizontal price fixing is always subject to per se analysis and is the poster child of a Sherman Antitrust Act violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under a rule of reason analysis for restraints of trade, a plaintiff must identify the relevant geographic and product markets in which the plaintiffs and the defendants compete and allege facts demonstrating that the defendants' conduct has an anticompetitive effect on those markets.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN12[] Antitrust & Trade Law, Sherman Act

Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim under a rule of reason analysis.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, it is not enough for a plaintiff to merely allege injury to itself as a result of defendant's practices; competition within the industry itself must actually be restrained for an actionable claim. It is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers. Thus the famous aphorism, it is competition, not competitors, which the Sherman Act protects. The United States Court of Appeals for the Ninth Circuit has specifically identified four requirements for a showing of antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) is of the type the antitrust laws were intended to prevent. Only if all four requirements are satisfied will the court label plaintiff's alleged injury an actionable "antitrust injury."

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN14[] Private Actions, Standing

Without a violation of the antitrust laws, there can be no antitrust injury.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] Injunctions, Grounds for Injunctions

The second component of the two-part test for injunctive relief requires the moving party to show that the balance of hardships tip in its favor. Because the branches of the preliminary injunction test represent two points on a sliding scale in which the required degree of irreparable harm increases as probability of success decreases, a strong showing of one factor of the test can tip the scales in the evaluation of whether a preliminary injunction is justified. As the Ninth Circuit has said, if the movant has a 100 percent probability of success on the merits, then the balance of the hardships factor need not be regarded.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN16[] **Injunctions, Grounds for Injunctions**

Loss of profit is generally not recognized as an irreparable harm sufficient to sustain a motion for preliminary injunction. The temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough.

Counsel: **[*1]** For Blind Doctor Incorporated, Plaintiff: Lawrence Alioto, San Francisco, CA.

dba, Blind Doctor.Com, Plaintiff.

dba, Wells Interiors, Plaintiff.

For Hunter Douglas Inc., a Foreign Corporation registered to do business in California, Defendant: Anthony J. Marchetta, Pitney Hardin, LLP, Florham Park, NJ. Murray J. Laulicht, Pitney Hardin, LLP, Florham Park, NJ. William R. Overend, Reed Smith LLP, San Francisco, CA.

Judges: MARILYN HALL PATEL, Judge, United States District Court.

Opinion by: MARILYN HALL PATEL

Opinion

MEMORANDUM AND ORDER

Motion for Preliminary Injunction

In July 2004, plaintiff Blind Doctor, Inc. brought this civil action against defendant Hunter Douglas, Inc. seeking injunctive relief for alleged violations of federal ***antitrust law***. See *15 U.S.C. § 1*. At its core, Blind Doctor's complaint alleges that Hunter Douglas engaged in price fixing by placing restrictions on the advertising of its window coverings. Before the court is Blind Doctor's motion for preliminary injunction, a request to have the court prevent Hunter Douglas from discontinuing shipment of its coverings to Blind Doctor due to Blind Doctor's violation of Hunter **[*2]** Douglas' advertising policies. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

[1]

A Delaware corporation licensed to do business in California, plaintiff Blind Doctor is involved in the buying, selling, installing, and repairing of window coverings. [2] The owners and operators of the corporation are Eric and Lynn Wells -- a husband and wife duo who founded Blind Doctor in May of 2001 and currently employ five additional employees at their primary place of business in San Ramon, California. Mr. and Mrs. Wells have been involved in the retail side of the window covering business since 1976. From 1976 to 2000, they operated an Oregon corporation known as Wells Interiors, Inc. which did business in California, Oregon, and Nevada, and a mail order business throughout the United States. Mr. and Mrs. Wells previously sold Hunter Douglas window coverings through Wells Interiors, but in 2000 they filed a petition under the bankruptcy laws in California, and Wells Interiors was liquidated as part of that proceeding. As a result of the bankruptcy, Hunter Douglas was unable to collect on substantial **[*3]** accounts receivable owed by Wells Interiors. Furthermore, Wells Interiors ceased honoring its customer service obligations and warranty claims submitted by customers that had purchased Hunter Douglas products, forcing Hunger Douglas to directly handle customer service issues that normally would have been handled by Wells Interiors.

Defendant Hunter Douglas, Inc. is a foreign corporation engaged in the manufacture, distribution, and sale of window coverings throughout the United States and the world. While Hunter Douglas is involved in the production of window covering parts, it contracts with a select group of licensed manufacturers **[*4]** to assemble the parts into finished products ready for sale. These licensed manufacturers -- known in the trade as fabricators -- are trusted with proprietary window covering parts from Hunter Douglas and function as the exclusive distributors of Hunter Douglas products to retailers and dealers. Hunter Douglas contracts with approximately ten such fabricators in the United States for distribution of its products; two of the fabricators are Blinds and Designs in Wixom, Michigan, and Steven Fabrics in Minneapolis, Minnesota. From May 2001 to April 2004, plaintiff purchased Hunter Douglas products through Blinds and Designs; from April 2004 to the present, plaintiff purchased defendant's finished window coverings from Steven Fabrics. [3] All of the fabricators, as wells as retailers like Blind Doctor, are at liberty to set their own prices for Hunter Douglas products.

[*5] The world of window covering manufacturing is characterized by fierce competition, and defendant Hunter Douglas accounts for just one of many window covering manufacturers currently competing in the market. In an effort to boost sales, retailers such as plaintiff offer customers a wide choice of window coverings from many different manufacturers. In 2001, Blind Doctor began dealing in various Hunter Douglas products while also offering a variety of other competing brands for sale. Without evidentiary support, plaintiff asserts that in 2002 alone Hunter Douglas products accounted for 60 to 70 percent of total sales. Hunter Douglas challenges this claim, offering statistical evidence to support its counterargument that Hunter Douglas products accounted for only 37 percent of Blind Doctor's sales in 2002.

Hunter Douglas views its overall positive brand image as one of its most significant assets in the highly competitive market of window coverings. To protect its reputation for quality customer service and to preserve the upscale image of its trade name, Hunter Douglas requires retail dealers to abide by certain advertising policies. All Hunter Douglas products are subject to advertising **[*6]** restrictions that forbid the use of false or misleading claims [4] **[*7]**

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[1] Unless otherwise noted, the facts are uncontested and distilled from the parties' moving papers.

[2] "Window coverings" is an inclusive term referring to blinds, shades, and shutters. However, draperies or curtains are not considered window coverings. Gottuso Decl., at P 2. For those in the "House Beautiful" know, apparently the latter are included in the "window treatment" category.

[3] While alleging that the two fabricators -- Blinds and Designs and Steven Fabrics -- are co-conspirators in the antitrust violation, plaintiff oddly fails to name them as defendants in the current lawsuit. As a result, the fabricators are not formally parties to the current litigation and are merely mentioned in this order to provide factual context. Hunter Douglas, Inc. is the only defendant in the present action.

[4] According to the Hunter Douglas Dealer Advertising Policy, examples of false and misleading claims include any ad that contains the phrases "factory direct prices;" "factory sale;" "factory discount prices;" "warehouse prices/discounts;" "buy direct

in the actual advertisement. Company policy also restricts the printing of a discount for a product that exceeds the maximum discount outlined in the advertising policy. Certain products within the Hunter Douglas collection have been deemed "proprietary products" by the company, and these window coverings are under an even more restrictive advertising regime. With an eye towards preserving the quality image of these upscale proprietary products, Hunter Douglas prohibits retailers from selling them over the Internet or via toll -- free telephone numbers. [5] Still, all of Hunter Douglas' policies act merely to restrict the advertising practices of retailers; they do not dictate the actual prices retailers charge for Hunter Douglas products.

In September 2001, Hunter Douglas learned that Blind Doctor was creating a website through which Blind Doctor intended to sell certain propriety products made by Hunter Douglas over the Internet. After Blind Doctor ignored Hunter Douglas' request to cease such activity, Hunter Douglas severed its business **[*8]** relationship with Blind Doctor in April 2002. In justifying its decision to break ties, Hunter Douglas cited Blind Doctors' history of unresolved consumer complaints stemming from the Wells Interiors bankruptcy, along with a smattering of recent advertising policy violations. These violations included the improper placement of an advertisement that made unauthorized use of Hunter Douglas artwork; the improper offering of proprietary products on a website; and the offering of certain proprietary products through a mail order operation.

Blind Doctor later requested that Hunter Douglas reconsider its decision to terminate business ties. In a May 2002 letter, Hunter Douglas agreed to resume business with Blind Doctor provided that Blind Doctor cease violating Hunter Douglas' advertising policy. This newly reinstated business relationship proved tenuous at best, and two years later, in June 2004, Hunter Douglas once again severed its business relationship with Blind Doctor due to Blind Doctor's continued use of prohibited forms of advertising along with the history of unresolved consumer complaints stemming from Wells Interiors. [6]

[*9] In response, plaintiff Blind Doctor filed this action on July 2, 2004, alleging that Hunter Douglas' advertising policies constitute an impermissible vertical restraint under Section One of the Sherman Act. See *15 U.S.C. § 1*. Plaintiff now seeks a preliminary injunction against Hunter Douglas, requiring Hunter Douglas to continue making its products available to plaintiff for retail sale.

LEGAL STANDARD

HN1[] A preliminary injunction is a "provisional remedy." *Napa Valley Publ. Co. v. City of Calistoga, 225 F. Supp. 2d 1176, 1180 (N.D. Ca. 2002)* (Chen, Mag. J.) (citation omitted). Aimed at preserving the status quo and preventing the occurrence of irreparable harm during the course of litigation, id., preliminary injunctions may be issued where the moving party has established two prerequisites for equitable relief: one, a threat of irreparable injury and, two, the inadequacy of available legal remedies. See *Fed. R. Civ. P. 65* (placing this type of injunctive relief within the bounds of the court's discretion and equitable power); *Easyriders Freedom F.I.G.H.T. v. Hannigan,*

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and save;" "wholesale pricing;" and any other statement which implies that the retailer is purchasing directly from the manufacturer. App. of Exs. in Supp. of Pl.'s Mot., Ex. 2 at 6.

[5] Concerns with Internet and telephone purchases stem from the fact that Hunter Douglas views these mediums of exchange as inherently impersonal and removed. As explained by Richard Gottuso, vice president and general counsel of Hunter Douglas, "In instituting its advertising policies, Hunter Douglas exercised its sound business judgment and determined that sales presentations as to [proprietary products] should be made, to the greatest extent possible, in-person, by well-informed dealers, so as to ensure superior customer service commensurate with the high expectations of consumers that express interest in purchasing such products. Such face-to-face encounters are important, because they facilitate immediate and unfettered communication between dealers and consumers." Gottuso Decl., at P 12.

[6] In support of its decision to terminate business ties, Hunter Douglas specifically cited Blind Doctor's use of a toll -- free telephone number which was published on its website that allowed customers to purchase proprietary products; Blind Doctor's improper use of Hunter Douglas' marks in an Internet domain name; and Blind Doctor's improper publishing of retail price information for Hunter Douglas's proprietary products on its website.

92 F.3d 1486, 1495 (9th Cir. 1996); **[*10]** Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist., 868 F.2d 1085, 1087 (9th Cir. 1989).

In general, a preliminary injunction is appropriate where a plaintiff can demonstrate "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003) (en banc; per curiam) (citing Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003), and Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999)); see also Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999) (distilling four relevant factors into this two-part test); Los Angeles Mem'l Coliseum Comm. v. Nat'l Football League, 634 F.2d 1197, 1200-01 (9th Cir. 1980) (listing the likelihood of plaintiff's success on the merits, the threat of irreparable harm to the plaintiff if the injunction is not issued, the relative balance **[*11]** of harm between the parties, and the public interest as factors to consider). The two components of this test sit on a kind of sliding scale or "continuum," Southwest Voter, 344 F.3d at 918; thus, "the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." Id. (noting, too, that review of a district court's preliminary injunction decision is "limited and deferential"); see also Miller ex rel. NLRB v. California Pac. Medical Ctr., 19 F.3d 449, 456 (9th Cir. 1994) (en banc) (citations omitted).

As **HN2**[] in all occasions in which a court issues a preliminary injunction, Federal Rule of Civil Procedure 65(d) requires that the court make the injunction "specific in terms . . . describing in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). This mandate for specificity ensures that those against whom an injunction is drawn receive fair and precise notice of what **[*12]** conduct is prohibited. See Union Pac. R.R. v. Mower, 219 F.3d 1069, 1077 (9th Cir. 2000).

DISCUSSION

At the core of plaintiff's complaint lies the allegation that defendant violated Section One of the Sherman Antitrust Act by engaging in a price fixing conspiracy and by coercing plaintiff to participate in that scheme. Plaintiff seeks a preliminary injunction to restrict defendant from discontinuing its business relationship with plaintiff on account of plaintiff's violation of the alleged price fixing conspiracy. The Ninth Circuit, as noted, has propounded a two-pronged test for determining whether a moving party is entitled to a preliminary injunction. See, e.g., Sun Microsystems, 188 F.3d at 1119. The court addresses each branch of this test separately below.

I. Probable Success on the Merits

A. Sherman Act Standard

To warrant injunctive relief, plaintiff must show a probability of success on the merits of its Sherman Act claim. The Sherman Antitrust Act **HN3**[] makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign **[*13]** nations." 15 U.S.C. § 1. In order to establish a claim under Section One, plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained competition under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint actually restrains competition, causing injury that extends beyond the impact on the claimant to affect the field of commerce in which the claimant is engaged (i.e., "antitrust injury"). See *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001)*; Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1443-44 (9th Cir. 1995), cert. denied, *516 U.S. 987, 133 L. Ed. 2d 424, 116 S. Ct. 515 (1996)*: Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir. 1995), cert. denied, *516 U.S. 861, 133 L. Ed. 2d 111, 116 S. Ct. 170 (1995)*; McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988). **HN4**[] Despite the language in Section One of the Sherman Act prohibiting *any* contract, the Supreme Court has repeatedly declined to read this language literally and instead has recognized that **[*14]** Congress intended to outlaw only *unreasonable* restraints. See National Soc. of Professional Engineers v. United States, 435 U.S. 679, 687, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978) (noting that Section One of the Sherman Act "cannot mean what it says"); State Oil

Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997). [7] Following this logic, the Court has set forth a two-tiered mode of analysis to determine whether a contract, combination, or conspiracy is "unreasonable": some agreements are analyzed under a per se rule of illegality while others are assessed from a rule of reason analysis. See, e.g., *McDaniel v. Appraisal Inst., 117 F.3d 421, 422 (9th Cir. 1997)*. "Most antitrust claims are analyzed under a rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition." *State Oil, 522 U.S. at 10*. This analysis is holistic and inclusive, taking into account a variety of factors "including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." Id.

[*15] ***HN5***[] Some types of restraint, however, have such "predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." Id. Per se analysis of a restraint is appropriate "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; see also *Broad. Music. Inc. v. Columbia Broad. Sys. Inc., 441 U.S. 1, 19 n.33, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Because of the level of certitude required, courts have been hesitant to adopt per se rules "with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *State Oil, 522 U.S. 3 at 10, 139 L. Ed. 2d 199* (citation omitted). [8]

[*16] Proceeding through the three-step inquiry as mandated by Section One, plaintiff's motion falls far short of convincing the court that its antitrust claim has a probability of success on the merits.

1. Conspiracy

HN6[] The bedrock of any Section One antitrust claim is a conspiracy or compact between two parties. See *15 U.S.C. § 1*. While the words "conspiracy" or "agreement" are freely used in colloquial speech, in the antitrust milieu they take on discrete and defined meanings. In ***antitrust law***, an agreement is found only when "the conspirators have a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*. The Supreme Court has made clear that, in antitrust actions, there is an essential distinction between illegal concerted actions and lawful independent decisions, with the conspiring sheep fenced in by Section One analysis and the independent goats left to safely graze entirely alone. See *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. "Independent **[*17]** action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Id.; see also *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)*.

While plaintiff contends in the present action that defendant was engaged in a price -- fixing conspiracy -- a conspiracy manifested through defendant's advertising policy -- a review of the facts reveals that plaintiff's understanding of what constitutes a "conspiracy" is misguided. Defendant is nothing more than a lone manufacturer of window coverings acting independently to control the overall image of its products. The Ninth Circuit has long held that ***HN7***[] manufacturers are able "to choose with whom [they] wish to deal and *unilaterally* may refuse to deal with a distributor or customer for business reasons without running afoul of antitrust laws." *Dimidowich v. Bell*

[7] Read literally, the statute deems unlawful "every" contract that restrains trade. But, as Justice Brandeis noted, restraint is the very essence of every contract and, read literally, Section One would outlaw the entire body of private contract law: "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement, concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*.

[8] As the Supreme Court has reminded, the purpose of both the per se and rule of reason analyses is "to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)*. That policy decision lies in the exclusive purview of Congress.

& Howell, 803 F.2d 1473, 1478 (9th Cir. 1987) (emphasis added). This is all that defendant has done, and courts have uniformly refused to find antitrust implications if the termination reflected the isolated decision of a single manufacturer. **[*18]** See *Sierra Wine and Liquor Co. v. Heublein, Inc., 626 F.2d 129, 133 (9th Cir. 1980)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)*, cert. denied sub. nom., *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 396 U.S. 1062, 24 L. Ed. 2d 755, 90 S. Ct. 752 (1970)*. Because "independent action is not proscribed" under the Sherman Act and because plaintiff has failed to show a "contract, combination . . . or conspiracy," at first blush plaintiff's antitrust claim appears fatally flawed. See *Colgate, 250 U.S. at 307*; *15 U.S.C. § 1*.

Furthermore, plaintiff's understanding of "price fixing" under the Sherman Act is similarly misguided. Defendant has never dictated the price of its products to the fabricators and retailers who sell defendant's window coverings downstream to consumers. App. of Exhs. in Supp. of Mot. for Prelim. Inj., Ex. 2 at 6. Instead, in an effort to maintain consumer goodwill and a reputation for stellar customer service, defendant merely requires retailers to abide by certain advertising restrictions. Courts have long recognized that such advertising **[*19]** restrictions do not rise to the level of an antitrust violation. Indeed, the Supreme Court has said that ***HN8***[] non-price restrictions like those enacted by defendant "arise in the normal course of business" and are not illegal under the Sherman Act. *Monsanto Co., 465 U.S. at 763*; see also *GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 989-90 (9th Cir. 1976)*. [9] Defendant is free to set restrictions on retailer advertising and to terminate business ties with merchants who fail to abide by the restrictions. As the Supreme Court explained in Colgate,***HN9***[] a manufacturer can announce its resale prices or other non-price restrictions and refuse to deal with those who fail to comply without running afoul of antitrust laws. See *Colgate, 250 U.S. at 307*.

[*20] In an attempt to bolster its antitrust allegations, plaintiff cites two cases that deal with price fixing and coordinated behavior. However, both cases are examples of group collusion and are factually dissimilar to the instant action, rendering the cases ultimately unhelpful to plaintiff. As Ninth Circuit doctrine illustrates, plaintiff's use of United States v. Serta Associates., Inc. to buttress its antitrust claim is both misplaced and inappropriate. *296 F. Supp. 1121 (N.D. Ill. 1968)*, aff'd *393 U.S. 534, 21 L. Ed. 2d 753, 89 S. Ct. 870 (1969)*. Serta dealt with *group* of manufacturers joining together in a single entity to control prices of mattresses -- a situation defined as horizontal price fixing and a glaring violation of Section One. *Id. at 1122*. "The internal organization of Serta Associates indicates that it is the product of horizontal cooperation among manufacturers who might otherwise compete with one another." *Serta, 296 F. Supp. at 1122*. However, no such grouping occurred in the present case. Instead, a single manufacturer merely set advertising -- not price-restrictions on retailers down the distribution chain, making the **[*21]** Serta ruling entirely inapposite.

The same is true of *California Dental Ass'n v. FTC, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*, a case involving a *group* of dentists who formed a nonprofit professional association to regulate dental advertising throughout the state of California. The association was comprised of competitors whose self-regulation restricted certain forms of advertising. As explained by the Supreme Court, the California Dental Association was "a voluntary nonprofit association of local dental societies . . . including about three-quarters of those practicing in the State." *Id. at 759*. This is quite unlike the solitary manufacturer in the present case merely restricting advertising of its own products. Furthermore, California Dental is distinguishable on the grounds that the infringing association functioned in the unique marketplace of dentistry, "a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential customers to get and verify information about the price and availability of services magnifies the **[*22]** dangers to competition associated with misleading advertising." *Id. at 772*. This is quite unlike the market for window coverings, a market hardly characterized by "significant challenges to informed decisionmaking" by customers. *Id. at 773*. Restrictions on advertising in the context of a dental association may be antitrust infringement, but restrictions on advertising

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[9] Even if defendant had taken the more drastic step of dictating prices to retailers, defendant would still not be found in violation of Section One so long as it acted unilaterally. See *Mularkey v. Holsum Bakery, Inc., 146 F.3d 1064, 1065 (9th Cir. 1998)*. Yet plaintiff does not allege this more severe scenario of price dictation. Rather, plaintiff points to the much less suspect policy that allows defendant to control the advertising of its products in the marketplace.

made by a lone window coverings manufacturer does not. In short, defendant's independent decision to set nonprice restrictions on advertising does not constitute a cognizable conspiracy or compact under the Sherman Act.[10] Plaintiff thus fails to satisfy the first element of a colorable Section One claim.

[*23] 2. Unreasonable Restraint on Trade

Plaintiff similarly fails to satisfy the second element of Section One, namely unreasonable restraints on competition. As noted above, the unreasonableness of an agreement between two parties is analyzed under either a per se rule of illegality or a rule of reason approach. See, e.g., *Tanaka, 252 F.3d at 1062*. With little to no explanation, plaintiff maintains that defendant's advertising policy constitutes price fixing and is, thus, a per se violation of *Section One of the Sherman Act*. However, by classifying advertising restrictions as per se antitrust behavior, plaintiff is assuming that the economic impact of such restrictions is immediately obvious and not deserving of closer investigation by the court. Pl.'s Mot. for Prelim. Inj., at 4; see *State Oil, 522 U.S. at 10*. In the end, the court finds that plaintiff's invocation of per se analysis is more wishful thinking than sound law.

HN10[] Price fixing comes in two general strains: horizontal and vertical. Vertical price fixing occurs when a supplier attempts to fix the prices charged by those who resell its products. See *Gen. Cinema Corp. v. Buena Vista Distrib. Co., 681 F.2d 594, 597 (9th Cir. 1982).* **[*24]** A vertical price fixing scheme setting minimum prices is generally subject to per se analysis. See *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725-27, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. However, a vertical price fixing scheme setting maximum prices is not a per se antitrust violation and should be analyzed under the rule of reason approach. See *State Oil, 522 U.S. at 22*. Horizontal price fixing, by contrast, is a restraint imposed by agreement between competitors to fix prices and muscle out competition. Horizontal price fixing is always subject to per se analysis and is the poster child of a Sherman Antitrust Act violation. See *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 100, 101 n.21, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*.

Not only is it difficult to fit plaintiff's general allegation of price fixing into one of the specific categories recognized by the Ninth Circuit, it is even more difficult to see how price fixing has occurred at all between retailers and the defendant manufacturer. There is no obvious vertical price fixing, as defendant has set no maximum or minimum prices that retailers must abide by. **[*25]** Nor is there any evidence of horizontal price fixing, as there is no conspiracy among manufacturers of window coverings to set artificial prices. Because defendant's advertising policy does not have a "predictable and pernicious anticompetitive effect" on the market that fits into one of the categories of price fixing defined by the Ninth Circuit, this court refuses to label it a per se violation. *State Oil, 522 U.S. at 10*. The evaluation must thus proceed under the more measured and deliberate rule of reason framework.

HN11[] Under a rule of reason analysis, plaintiff must "identify the relevant geographic and product markets in which Plaintiffs and Defendants compete and allege facts demonstrating that Defendants' conduct has an anticompetitive effect on those markets." *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104-05 (9th Cir. 1999)*. However, plaintiff has alleged virtually nothing in the way of facts to define the market for window coverings. Furthermore, plaintiff has entirely failed to show that defendant's advertising policy has an unreasonable restraint on the market through anticompetetive effects as required. See *Mularkey, 146 F.3d at 1065*; **[*26]** *Tanaka, 252 F.3d at 1063*. Without such showings, plaintiff cannot tenably claim that defendant's conduct unreasonably restrains trade under the rule of reason analysis. Because ***HN12***[] "failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim" under a rule of reason analysis, the court finds that plaintiff has not shown an unreasonable restraint on trade resulting from defendant's advertising policy. *Tanaka, 252 F.3d at 1063*.

3. Antitrust Injury

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[10] *Section Two of the Sherman Act* prohibits unilateral action when the manufacturer acts as a monopolistic power in the relevant market. See *Copperweld, 467 U.S. at 767*. Plaintiff has not alleged a Section Two violation in this action, and the issue of monopoly power wielded by defendant will be not addressed.

The final requirement for a Section One violation is the presence of antitrust injury or injury to competition. See, e.g., *Sicor Ltd., 51 F.3d at 854*; *McGlinchy, 845 F.2d at 811*. ***HN13***[] Under the Sherman Act, it is not enough for plaintiff to merely allege injury to itself as a result of defendant's practices; competition within the industry itself must actually be restrained for an actionable claim. As noted by the Ninth Circuit, "it is well established that the antitrust laws are only intended to preserve competition for the benefit of consumers. Thus the famous aphorism, it is competition, not competitors, which the Act protects.'" *American Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999),* **[*27]** quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502*. *344, 8 L. Ed. 2d 510 (1962)*. The Ninth Circuit has specifically identified four requirements for a showing of antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) is of the type the antitrust laws were intended to prevent. See *American Ad, 190 F.3d at 1055*. Only if all four requirements are satisfied will the court label plaintiff's alleged injury an actionable "antitrust injury."

Plaintiff appears to forget that the antitrust injury analysis must begin with the identification of defendant's specific unlawful conduct. ***HN14***[] "Without a violation of the antitrust laws, there can be no antitrust injury." *Id. at 1056*. As noted, plaintiff has not stated a colorable claim of a violation of Section One-the court has determined that defendant did not collude or conspire or agree to inhibit competition in the market for window coverings. Because plaintiff has failed to allege dispositive facts or controlling law to properly establish unlawful conduct by defendant, the antitrust injury analysis **[*28]** fails at element one.

Factors two and three deal with the causality involved between defendant's actions and plaintiff's alleged injuries. Plaintiff alleges that if defendant ceases to sell products to plaintiff, plaintiff "will suffer not merely loss of profits with respect to defendant's goods, but loss of good will from lack of a full line of goods." Def.'s Mot. for Prelim. Inj., at 2. However, plaintiff cannot allege that the injury "flows from that which makes that conduct unlawful." *American Ad, 190 F.3d at 1055*. Defendant's conduct is lawful, making plaintiff's alleged harm unfortunate but unactionable.

Finally, factor four speaks to antitrust conduct and is closely tied to factor one. As previously noted, defendant's policy is not the type of conduct that the antitrust laws were intended to prevent. Defendant's unilateral decision to control the advertising of its window coverings is simply not collusive behavior. After evaluating the four factors necessary for a showing of antitrust injury, the court can find no evidence suggesting that defendant's advertising restrictions have impeded competition in the marketplace for window coverings.

A preliminary injunction **[*29]** is warranted if the moving party is able to show a provisional likelihood of success on the merits of its claim. After a review of the elements necessary to establish a violation of *Section One of the Sherman Act*, the court concludes it is highly unlikely that the facts alleged by plaintiff show a likelihood of success on the merits. Thus, plaintiff's claim fails the first prong in a successful motion for preliminary injunction.

II. Possibility of Irreparable Injury / Balance of Hardships

HN15[] The second component of the two-part test for injunctive relief requires the moving party to show that the balance of hardships tip in its favor. Because the branches of the preliminary injunction test "represent two points on a sliding scale in which the required degree of irreparable harm increases as probability of success decreases," a strong showing of one factor of the test can tip the scales in the evaluation of whether a preliminary injunction is justified. See *Sammartano v. First Jud. Dist. Ct., 303 F.3d 959, 965 (9th Cir. 2002)*; see also *Sun Microsystems, 188 F.3d at 1119*. As the Ninth Circuit has said, "if the movant has a 100% probability **[*30]** of success on the merits," then the balance of the hardships factor need not be regarded." *Sammartano, 303 F.3d at 965*.

Because plaintiffs probability of success on the merits is virtually nonexistent, the balance of hardships factor must tip overwhelmingly in plaintiff's favor in order for the court to issue a preliminary injunction. The sliding scale logic employed by the Ninth Circuit mandates that an improbability of success on the merits can only be overcome by a strong showing of the balance of hardships tipping in plaintiff's favor. Yet plaintiff's assertion that it "will suffer not merely loss of profits with respect to defendant's goods, but loss of good will from lack of a full line of goods" is completely bereft of evidentiary support -- no numbers, statistics, or any other solid facts that illustrate the extent of harm wrought by defendant's decision. Wells Decl., at 2-3. Also, plaintiff's conclusory statement that it will lose

"50% of its sales and profits from the termination" is devoid of evidentiary foundation. [11] Id. Furthermore, *HN16*[] loss of profit is generally not recognized as an irreparable harm sufficient to sustain a motion for preliminary injunction. **[*31]** As explained by the Supreme Court: "The temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough." *Sampson v. Murray, 415 U.S. 61, 90, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974)* (internal quotation marks omitted).

The lack of verifiable evidence illustrating hardship resulting from defendant's decision to sever business ties renders plaintiff's conclusory allegations of hardship hollow. Plaintiff has failed to show how, and to what extent, the balance of hardships tip in its favor. In the end, plaintiff's passing and unsubstantiated **[*32]** statements of injury fail to convince the court that the hardships plaintiff alleges are real, let alone that they tip the balance in plaintiff's favor.

CONCLUSION

Based on the foregoing conclusions, Blind Doctor's motion for preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated:September 7, 2004

MARILYN HALL PATEL

Judge

United States District Court

Northern District of California

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[11] Indeed, on the causality requirement as well as the balance of hardships showing, it appears from the record before the court that plaintiff's loss of business, if any, is from its poor dealings with its customers as well as failing to adhere to *legitimate* contract obligations.

United States v. Oracle Corp.

United States District Court for the Northern District of California

September 09, 2004, Decided

No C 04-0807 VRW

Reporter

331 F. Supp. 2d 1098 *; 2004 U.S. Dist. LEXIS 18063 **; 2004-2 Trade Cas. (CCH) P74,542

UNITED STATES OF AMERICA, et al, Plaintiffs, v. ORACLE CORPORATION, Defendant.

Disposition: Court entered findings of fact and conclusions of law. Court concluded that plaintiffs failed to carry the burden of proof entitling them to relief and entered judgment for defendant.

Core Terms

software, customers, products, vendors, effects, outsourcing, plaintiffs', merger, mid-market, Microsoft, geographic, discount, percent, functionality, unilateral, market share, firms, differentiated, enterprise, markets, compete, anticompetitive, witnesses, competitor, localized, merging, consumers, BearingPoint, billion, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Jurisdiction

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN1[] **Clayton Act, Jurisdiction**

Section 7 of the Clayton Act prohibits a person engaged in commerce or in any activity affecting commerce from acquiring the whole or any part of a business's stock or assets if the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly. *15 U.S.C.S. § 18*. The United States is authorized to seek an injunction to block the acquisition, *15 U.S.C.S. § 25*, as are private parties and the several states, and district courts have jurisdiction over such actions. *15 U.S.C.S. § 25*, *28 U.S.C.S. § 1337(a)*. Plaintiffs have the burden of proving a violation of § 7 of the Clayton Act by a preponderance of the evidence.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN2[] **Antitrust & Trade Law, Clayton Act**

To establish a violation of § 7 of the Clayton Act, 15 U.S.C.S. § 18, plaintiffs must show that a pending acquisition is reasonably likely to cause anticompetitive effects. Congress used the words "may be substantially to lessen competition" to indicate that its concern was with probabilities, not certainties. Section 7 of the Clayton Act does not require proof that a merger or other acquisition will cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. Substantial competitive harm is likely to result if a merger creates or enhances "market power," a term that has specific meaning in ***antitrust law***.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

In determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed. This is a "necessary predicate" to finding anticompetitive effects. Market definition under the case law proceeds by determining the market shares of the firms involved in the proposed transaction, the overall concentration level in the industry and the trends in the level of concentration. A significant trend toward concentration creates a presumption that the transaction violates § 7 of the Clayton Act, *15 U.S.C.S. § 18*. In other words, plaintiffs establish a prima facie case of a § 7 of the Clayton Act violation by showing that the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN4[] **Antitrust & Trade Law, Clayton Act**

Under Philadelphia Nat. Bank, a post-merger market share of 30 percent or higher unquestionably gives rise to the presumption of illegality. To rebut this presumption, a defendant may show that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market. Arguments related to efficiencies resulting from the merger may also be relevant in opposing the plaintiffs' case. If the defendant successfully rebuts the presumption of illegality, the burden of producing additional evidence of anticompetitive effects shifts to the plaintiffs, and merges with the ultimate burden of persuasion, which remains with the government at all times.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] **Admiralty & Maritime Law, Maritime Contracts**

An application of the burden-shifting approach under § 7 of the Clayton Act, *15 U.S.C.S. § 18*, requires the court to determine (1) the "line of commerce" or product market in which to assess the transaction; (2) the "section of the country" or geographic market in which to assess the transaction; and (3) the transaction's probable effect on competition in the product and geographic markets.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN6[] Antitrust Actions, Facilities

Both the United States Supreme Court and appellate courts acknowledge the need to adopt a flexible approach in determining whether anticompetitive effects are likely to result from a merger. Reflecting their "generality and adaptability," application of the antitrust laws to mergers during the past half-century has been anything but static. Accordingly, determining the existence or threat of anticompetitive effects has not stopped at calculation of market shares.

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN7[] Antitrust, Horizontal Mergers

Unilateral effects result from the tendency of a horizontal merger to lead to higher prices simply by virtue of the fact that the merger will eliminate direct competition between the two merging firms, even if all other firms in the market continue to compete independently. Unilateral effects are thought to arise in primarily two situations. The first situation involves a dominant firm and a "fringe" of competitors producing a homogeneous product. In this situation, the dominant firm has a substantial cost advantage over the fringe competitors and, therefore, can restrict output to obtain an above-marginal cost price. The second situation concerns differentiated products. Competition in differentiated product markets is often described as "monopolistic competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Actual Monopolization, Anticompetitive & Predatory Practices

Like a seller in a perfectively competitive market, sellers in a "competitive" differentiated products market do not obtain monopoly rents. In differentiated product markets with few barriers to entry, firms will introduce products that are increasingly close, although not perfect substitutes, for the other products in the market. The introduction of additional products causes the demand curve faced by each seller to shift downward and leftward until, at long run equilibrium, the demand curve intersects the average cost curve of the seller (defined as economists define costs to include a reasonable profit) eliminating the monopolistic rent.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Differentiated product markets share some characteristics of both a pure monopoly and perfect competition, in that prices are above marginal costs but economic profits have been driven down to zero. Firms selling differentiated products have some "market power" in that they are able to exert some control over the prices they obtain although this does not rise to the level of "monopoly power."

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > General Overview

HN10[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Under § 7 of the Clayton Act, *15 U.S.C.S. § 18*, a plaintiff must prove not only that the merging firms produce close substitutes but also that other options available to the buyer are so different that the merging firms likely will not be constrained from acting anticompetitively.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

HN11[] **Regulated Practices, Market Definition**

Four factors make up a differentiated products unilateral effects claim. First, the products controlled by the merging firms must be differentiated. Products are differentiated if no "perfect" substitutes exist for the products controlled by the merging firms. Second, the products controlled by the merging firms must be close substitutes. Products are close substitutes if a substantial number of the customers of one firm would turn to the other in response to a price increase. Third, other products must be sufficiently different from the products controlled by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging firms. Finally, repositioning by the non-merging firms must be unlikely. In other words, a plaintiff must demonstrate that the non-merging firms are unlikely to introduce products sufficiently similar to the products controlled by the merging firms to eliminate any significant market power created by the merger.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > General Overview

HN12[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In a unilateral effects case, a plaintiff is attempting to prove that the merging parties could unilaterally increase prices. Accordingly, a plaintiff must demonstrate that the merging parties would enjoy a post-merger monopoly or dominant position, at least in a "localized competition" space.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN13[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Relevant markets defined in terms of "localized competition" may be much narrower than relevant markets defined in typical cases in which a dominant position is required. Judicial experience cautions against the use of qualitative factors to define narrow markets. This judicial experience arises, in part, from the rise (and fall) of the "submarkets" doctrine.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN14[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Merely demonstrating that the merging parties' products are differentiated is not sufficient under § 7 of the Clayton Act, *15 U.S.C.S. § 18*. Instead, a plaintiff must demonstrate product differentiation sufficient to sustain a small but significant and non-transitory price increase.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN15[] Regulated Practices, Market Definition

Product characteristics that are too vague do not meet § 7 of the Clayton Act's requirement that the relevant market be "well-defined."

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN16[] Regulated Practices, Market Definition

A differentiated product "market" is a market in which sellers compete along more dimensions than price. As a result, products competing against one another in a differentiated product market may have widely different prices. That products with widely different prices may, in fact, be in the same market complicates market definition considerably.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] Actual Monopolization, Anticompetitive & Predatory Practices

Because a monopolist exercises market power by increasing price until the cross-price elasticity of demand is so high that a further price increase would be unprofitable, a high cross-price elasticity of demand at current prices, by itself, does not demonstrate that the seller lacks market power.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN18[] Regulated Practices, Market Definition

Courts should be wary of defining markets so broadly that a seller's existing market power is missed. On the other hand, in differentiated product markets, some measure of market power is inherent and an unduly narrow product market definition proves too much. In merger analysis, the court is concerned primarily with determining whether the merger would enhance market power, not whether market power currently exists.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN19[] **Regulated Practices, Market Definition**

The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases. It is generally misleading to suggest that a firm "controls" a certain market share in the absence of an analysis beyond market concentration. Such a concern applies with equal force to differentiated products unilateral effects claims. Furthermore, in differentiated products unilateral effects cases, the merging parties' combined market shares relative to competitors may be less relevant than the size of their market shares in determining whether anticompetitive effects are likely. Accordingly, a strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

HN20[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Differentiated products unilateral effects analysis shares many similarities to "standard" antitrust analysis. The primary differences are that the relevant market is likely to be smaller and more difficult to define and that quantitative analyses may be robust.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN21[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In analyzing antitrust claims, courts have considered both "circumstantial" and "direct" evidence of anticompetitive effects. Even though "direct" evidence of the potential for anticompetitive harm from a merger is not literally available, merger analyses range from highly qualitative ("circumstantial") to highly quantitative ("direct"), depending on the data available for a particular market. Qualitative analyses of antitrust claims are most often structural. In a structural analysis, anticompetitive effects are presumed if a plaintiff demonstrates undue concentration in a well-defined market. A relevant market may be defined by reference to Brown Shoe's "practical indicia." Once the relevant market is defined, market shares are calculated and inferences are drawn from the degree of concentration.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN22[] **Regulated Practices, Market Definition**

To prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position. The United States Court of Appeals for the Ninth Circuit has noted that a market share of 30 percent is presumptively insufficient to establish the power to control price.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Defining the relevant market is critical in an antitrust case because the legality of the proposed merger in question almost always depends upon the market power of the parties involved.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN24[] **Regulated Practices, Market Definition**

Arbitrage occurs when a consumer of a product buys the product from a vendor in one geographic location at a low price, but then sells the product to another consumer in a different geographic location for a higher price.

Antitrust & Trade Law > Clayton Act > General Overview

HN25[] **Antitrust & Trade Law, Clayton Act**

In the antitrust context, the most persuasive testimony from customers is not what they say in court, but what they do in the market.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN26[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In order for a claimed efficiency to be "cognizable" as a defense to rebut a plaintiff's claim of anticompetitive effects, it must be "substantiated" and "verifiable."

Counsel: **[**1]** For United States of America, Plaintiff: Claude F. Scott, Jr., United States Department of Justice, Antitrust Division, Networks & Technology Enforcement Section, Washington, DC. Conrad John Smucker, United States Department of Justice, Antitrust Division, Washington, DC. J. Bruce McDonald, United States Department of Justice, Antitrust Division, Washington, DC. N. Scott Sacks, Assistant Chief, United States Department of Justice, Antitrust Division, Washington, DC. Pamela P. Cole, United States Department of Justice, Antitrust Division, San Francisco, CA. Phillip R. Malone, United States Department of Justice, Antitrust Division, San Francisco, CA. Phillip H. Warren, United States Department of Justice, Antitrust Division, San Francisco, CA. R. Hewitt Pate, United States Department of Justice, Antitrust Division, Networks & Technology Enforcement Section, Washington, DC. Renata B. Hesse, United States Department of Justice, Antitrust Division, Networks & Technology Enforcement Section, Washington, DC. Chad S. Hummel, Manatt Phelps & Phillips LLP, Los Angeles, CA. Kyle David Andeer, United States Department of Justice, San Francisco, CA.

For State of Texas, Plaintiff: Greg Abbott, **[**2]** Office of the Attorney General, Austin, TX. Barry R. McBee, Office of the Attorney General, Austin, TX. Edward D. Burbach, Office of the Attorney General, Austin, TX. Kim Van Winkle, Office of the Attorney General, Austin, TX. Mark Bernard Tobey, Office of the Attorney General of Texas, Austin, TX.

For State of Hawaii, Plaintiff: Mark J. Bennett, Department of the Attorney General, Honolulu, HI.

For State of Maryland, Plaintiff: Ellen S. Cooper, Attorney General, Antitrust Division, Baltimore, MD. Alan Michael Barr, Attorney General, Antitrust Division, Baltimore, MD. Gary Honick, Attorney General, Antitrust Division, Baltimore, MD. J. Joseph Curran, Jr., Attorney General, Antitrust Division, Baltimore, MD. John Robert Tennis, Attorney General, Antitrust Division, Baltimore, MD.

For Commonwealth of Massachusetts, Plaintiff: Timothy E. Moran, Massachusetts Office of the Attorney General, Consumer Protection and Antitrust Division, Boston, MA.

For State of Minnesota, Plaintiff: Kristen Marie Olsen, Office of the Attorney General, St. Paul, MN.

For State of New York, Plaintiff: Jay L. Himes, Office of the Attorney General of New York, New York, NY.

For State **[**3]** of North Dakota, Plaintiff: Todd A. Sattler, North Dakota Office of Attorney General, Consumer Protection and Antitrust Division, Bismarck, ND.

For State of Connecticut, Plainfiff: Arnold B. Feigin, Hartford, CT. Clare E. Kindall, Office of the Attorney General, Hartford, CT. Darren P. Cunningham, Office of the Attorney General, Hartford, CT. Steven M. Rutstein, Hartford, CT.

For State of Ohio, Plaintiff: Beth Ann Finnerty, Office of the Ohio Attorney General, Antitrust Section, Columbus, OH. Jennifer Lynne Edwards, Ohio Attorney General's Office, Antitrust Section, Columbus, OH. Mitchell Lee Gentile, Office of the Ohio Attorney General, Antitrust Section, Columbus, OH.

State of Michigan, Plaintiff.

For State of Massachusetts, Plaintiff: Timothy E. Moran, Massachusetts Office of the Attorney General, Consumer Protection and Antitrust Division, Boston, MA.

For SAP America, Inc., Intervenor Pla: David Jacques Smith, Arent Fox PLLC, Washington, DC. Andrew Thomas Mortl, Glynn & Finley, LLP, Walnut Creek, CA.

For Oracle Corporation, Defendant: Gregory Lindstrom, Latham & Watkins LLP, San Francisco, CA. J. Thomas Rosch, Latham & Watkins LLP, San Francisco, CA. **[**4]** Michele M. Pyle, Latham & Watkins LLP, New York, NY. Christopher S. Yates, LATHAM & WATKINS LLP, San Francisco, CA. Daniel M. Wall, Latham & Watkins LLP, San Francisco, CA. Joshua N. Holian, Latham & Watkins, San Francisco, CA.

For Microsoft Corporation, Third Party, 3rd party defendant: Charles F. Rule, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, DC. David J. Dadoun, Microsoft Corporation, Redmond, WA. Stephen D. Alexander, Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, CA.

For Fidelity Employee Service Company, LLC, 3rd party defendant: Thane D. Scott, Palmer & Dodge LLP, Boston, MA. Hway-Ling Hsu, Bergeson. LLP, San Jose, CA.

For Deloitte & Touche, LLP, 3rd party defendant: Michael J. Bettinger, Preston Gates & Ellis LLP, San Francisco, CA.

For Greyhound Lines, Inc., 3rd party defendant: Arturo Esteban Sandoval, McDermott, Will & Emery, Palo Alto, CA.

For Automatic Data Processing, Inc., 3rd party defendant: Jahan P. Raissi, Shartsis Friese & Ginsburg LLP, San Francisco, CA.

For Nextel Communications, Inc., 3rd party defendant: Susan Haines, Jones Day, San Francisco, CA.

For Peoplesoft, Inc., party seeking additional confidentiality **[**5]** protections, Interested Party: Brian Byrne, Clearly, Gottlieb, Steen & Hamilton, Washington, DC. Leah Brannon, Cleary Gottlieb Steen & Hamilton, Washington, DC. Mark Leddy, Clearly Gottlieb Steen & Hamilton, Washington, DC. Matthew I. Bachrack, Cleary Gottlieb Steen & Hamilton, Washington, DC. Gary Leland Reback, Carr & Ferrell LLP, Palo Alto, CA.

For SunGard Bi-Tech Inc, Interested Party: John Mark Gidley, White & Case LLP, Washington, DC. Rajeev Kumar Malik, White & Case LLP, Washington, DC.

For Siebel Systems, Inc., Interested Party: David M. Lisi, Fenwick & West LLP, Palo Alto, CA. Emmett C. Stanton, Fenwick & West LLP, Mountain View, CA. Jeremy Todd Elman, Fenwick & West LLP, Mountain View, CA.

Systems & Computer Technology Corporation, Interested Party.

For Cap Gemini Ernst & Young U.S. LLC., Interested Party: Michael Stolper, New York, NY. George A. Yuhas, Esq., Orrick Herrington & Sutcliffe LLP, San Francisco, CA.

For Bearingpoint, Inc., Non-Party BearingPoint, Inc., Interested Party: Edward L. Fountain, Jones Day, Washington, DC. Monica J. Palko, Bearing Point, Inc., McLean, VA. Matthew P. Vandall, Jones Day, San Francisco, CA. Shawn Hanson, Jones **[**6]** Day, San Francisco, CA.

For Kronos Incorporated, Interested Party: Alyce T. Moore, Kronos Incorporated, Chelmsford, MA.

For Bank of America Corporation, ATTORNEY TO BE NOTICED, Interested Party: Bruce H. Jackson, Baker & McKenzie, San Francisco, CA.

For Verizon Communications, Interested Party: Daniel H. Bookin, O'Melveny & Myers LLP, San Francisco, CA.

For Target Corporation, Interested Party: Karleen M. O'Connor, Cox Castle & Nicholson LLP, San Francisco, CA. Craig S. Coleman, Faegre & Benson LLP, Minneapolis, MN. Michael A. Ponto, Faegre & Benson LLP, Minneapolis, MN.

For Lawson Software, Inc., Miscellaneous: Michael R. Lindsay, Minneapolis, MN. Theresa K. Hankes, Dorsey & Whitney LLP, San Francisco, CA.

For U.S. Department of Defense, U.S. Department of Defense, Miscellaneous: Robert J. Katerberg, U. S. Department of Justice, Washington, DC.

For International Business Machines Corp., Miscellaneous: William Harrison Wright, III, Hogan & Hartson LLP, Los Angeles, CA.

For Accenture, Ltd., Miscellaneous: Charles E. Koob, Simpson Thacher & Bartlett LLP, New York, NY. George M. Newcombe, Simpson Thacher & Bartlett LLP, Palo Alto, CA.

For Ford **[**7]** Motor Company, Miscellaneous: Jason Bergmann, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA.

For Bipin Patel, Miscellaneous: Jason Bergmann, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA.

For Bloomberg News, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, LLP, San Francisco, CA.

For Associated Press, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, LLP, San Francisco, CA.

For Los Angeles Times, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, LLP, San Francisco, CA.

For Contra Costa Times, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, LLP, San Francisco, CA.

For San Francisco Chronicle, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, LLP, San Francisco, CA.

For San Jose Mercury News, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA. Karl Olson, Levy, Ram, Olson & Rossi, **[**8]** LLP, San Francisco, CA.

For Reuters, Intervenor: Erica L. Craven, Levy, Ram, Olson & Rossi LLP, San Francisco, CA.

Judges: VAUGHN R WALKER, United States District Chief Judge.

Opinion by: VAUGHN R WALKER

Opinion

[*1100] FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON

The government, acting through the Department of Justice, Antitrust Division, and the states of Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, New York, North Dakota, Ohio and Texas, First Amended Complaint (FAC) (Doc # 125) P 3 at 5-6, seek to enjoin Oracle Corporation from acquiring, directly or indirectly, the whole or any part of the stock of PeopleSoft, Inc. Plaintiffs allege that the acquisition would violate section 7 of the Clayton Act, *15 U.S.C. § 18*. Both companies are publicly traded and headquartered in this district. Jt Stip Fact (Doc # 218) at 1-2. The court has subject matter jurisdiction under *15 U.S.C. § 25* and *28 U.S.C. §§ 1331*, *1337(a)* and *1345*. There is no dispute about the **[*1101]** court's personal jurisdiction over the defendant.

Oracle initiated its tender offer for the shares of PeopleSoft on June 6, 2003. Jt Stip of Fact (Doc # 128) **[**9]** *at 2;* Ex P2040. Plaintiffs brought suit on February 26, 2004. Compl (Doc # 1). The case was tried to the court on June 7-10, 14-18, 21-25, 28-30 and July 1, 2004, with closing arguments on July 20, 2004, and further evidentiary proceedings on August 13, 2004. Based on the evidence presented and the applicable law, the court concludes that plaintiffs have failed to carry the burden of proof entitling them to relief and, therefore, orders that judgment be entered for defendant and against plaintiffs.

INTRODUCTORY FINDINGS: INDUSTRY OVERVIEW

Products at Issue

Of the many types of computer software, such as operating system software, database software, integration software (sometimes called "middleware" in software parlance) and utilities software, this case involves only one -- application software. And within this type, the present case deals with only applications that automate the overall business data processing of business and similar entities; these applications are called "enterprise application software" (EAS). Jt Definitions (Doc # 332) at 6. There are three main kinds of EAS. Plaintiffs single out one.

Some EAS programs are mass market PC-based applications of **[**10]** fairly limited "functionality" (meaning capability). Id (Doc # 332) at 5. See Daniel E O'Leary, Enterprise Resource Planning Systems at 19 (Cambridge, 2000). Other EAS programs are developed by or for a specific enterprise and its particular needs; most large organizations had such specially designed EAS (called "legacy software") prior to the advent of the products in suit. Plaintiffs focus their claims on the third, intermediate category of EAS -- enterprise resource planning (ERP) system software. Jt Sub Definitions (Doc # 332) at 6. ERP is packaged software that integrates most of an entity's data across all or most of the entity's activities. See O'Leary, Enterprise Resource Planning Systems at 27-38. Oracle and PeopleSoft develop, produce, market and service ERP software.

These copyrighted software programs are licensed ("sold" is the term applied to these license transactions) to end users along with a continued right to use license which usually includes maintenance or upgrades of the software. To the customer, the fees to license and maintain ERP software are generally a small part, 10 to 15 percent, of the total cost of the installation and maintenance of an ERP **[**11]** system. Tr at 133:12-15 (Hatfield); 655:2-4 (Maxwell); 1385:6-11 (Gorriz). An ERP installation, because of its complexity, usually requires substantial and expensive personnel training, consulting and other services to integrate the program into the customer's pre-existing or "legacy" software. Jt Sub Definitions (Doc # 332) at 6. See also O'Leary, Enterprise Resource Planning Systems at 19. ERP software vendors often provide some of those services, but they are typically also performed and augmented by the customer's own staff, obtained from providers other than ERP vendors or both.

Many ERP programs were developed to address the needs of particular industries, such as banking and finance, insurance, engineering, construction, healthcare, government, legal and so forth (in industry lingo, these are called "verticals"). See Martin Campbell-Kelly, From Airline Reservations to Sonic the Hedgehog, at 169-73 (MIT, 2003). Vertical-specific ERP programs, although well suited to the needs of firms engaged in a particular industry, often are not well suited to the **[*1102]** needs of firms in other verticals. An enterprise that relies on vertical-specific ERP software products, but whose operations **[**12]** embrace more than one vertical faces the task of integrating the programs. The largest and most complex organizations face particular difficulty. "Only custom-written software or carefully tailored and integrated cross-industry packages [can] handle larger firms' historically idiosyncratic accounting systems and diverse overseas operations." Id at 172.

ERP programs have been developed to handle the full range of an enterprise's activities; these include human relations management (HRM), financial management systems (FMS), customer relations management (CRM), supply chain management (SCM), Product Life Cycle Management, Business Intelligence (BI), among many others. These are called "pillars." Although ERP encompasses many pillars, see Ex D5572, plaintiffs assert claims with respect to only two pillars, HRM and FMS. FAC (Doc # 125) P 23 at 12-13.

Within these two pillars, plaintiffs further limit their claims to only those HRM and FMS products able to meet the needs of large and complex enterprises with "high functional needs." Id at P 14 at 9. Plaintiffs label HRM and FMS products capable of meeting these high function needs "high function HRM software" and "high function FMS software, **[**13]** " respectively. Id P 23(a)-(b) at 12-13. ERP pillars incapable of meeting these high function needs are called "mid-market" software by plaintiffs. Id P 13 at 9.

"High function software" is a term adopted by plaintiffs to describe what they contend is the separate and distinct line of commerce in which they contend competition would be lessened by the proposed acquisition. Id at P 23 at 13-14. Plaintiffs apply the term "high function" to both HRM and FMS. "High function software," as defined by plaintiffs, has no recognized meaning in the industry. See Tr at 349:7-10 (Bergquist); 2298:6-20 (Elzinga).

Rather, industry participants and software vendors use the terms "enterprise" software, "up-market" software and "Tier One" software to denote ERP that is capable of executing a wide array of business processes at a superior level of performance. See Tr at 274:24-275:7 (Bergquist); Tr at 1771:5-1772:1 (Wilmington); Tr at 1554:25-1555:7 (Wolfe); Tr at 2180:22-2181:5 (Iansiti). Software vendors use these terms to focus sales and marketing initiatives. Tr 2816:6-2818:8 (Knowles) (testifying that SAP divided mid-market and large enterprise at $ 1.5 billion based on SAP's sales resources and **[**14]** estimated amount of IT "spend" available from those customers).

Each ERP pillar consists of "modules" that automate particular processes or functions. HRM and FMS software each consists of numerous modules. Exs P3010, P3011. Tr at 268:8-269:11, 270:5-271:12 (Bergquist). HRM modules include such functions as payroll, benefits, sales incentives, time management and many others. Ex P3010. FMS modules include such functions as general ledger, accounts receivable, accounts payable, asset management and many others. Ex P3011.

"Core" HRM modules are those specific ERP modules that individually or collectively automate payroll, employee tracking and benefits administration. Core FMS modules are those ERP modules that individually or collectively track general ledger, accounts receivable, accounts payable and cash and asset management business processes. Core FMS and HRM modules are offered by all the ERP vendors that have HRM and FMS offerings. Ex P3179 (Ciandrini 1/16/04 Dep) at Tr 256:2-257:10. Large enterprise customers rarely, if ever, buy core HRM or FMS modules **[*1103]** in isolation. Tr at 3461:14-23 (Catz). Customarily, FMS and HRM software are purchased in bundles with other products. Tr **[**15]** at 3807:21-3808:1 (Hausman). See also Tr at 3813:12-13 (Hausman). Customers purchase a cluster of products such as Oracle's E-Business Suite that provide the customer with a "stack" of software and technology, which may include core HRM or FMS applications, add-on modules, "customer-facing" business applications such as CRM software, and the infrastructure components (application servers and database) on which the applications run. Tr at 3461:14-3462:5 (Catz); Tr at 3807:21-3808:1 (Hausman). See, e g, Exs P1000-P1322 (Oracle discount request forms).

ERP vendors, including Oracle and PeopleSoft, sell modules individually as well as integrated suite products. Some ERP vendors sell only one or a few modules. Individual modules are referred to as "point solutions" as they address a particular need of the enterprise. ERP vendors that sell products for only one or a limited number pillars are referred to as point solution or "best of breed" providers. A customer licensing a particular module because it fits the specific needs of the enterprise is sometimes said to be seeking a best of breed or point solution. An ERP customer that acquires best of breed or point solutions faces the task **[**16]** of integrating these solutions with one another and with the customer's existing ERP or legacy footprint.

Although the production cost of ERP applications is negligible, vendors bear significant development and marketing expenses and substantial costs of pre-and post-sales support and ongoing maintenance and enhancement. ERP vendors employ and bear substantial costs of account managers, technical sales forces and personnel for user training, product documentation and post-sale support.

Customers at Issue

"Large Complex Enterprises" (LCE) is a term adopted by plaintiffs to describe the ERP customers that have "high function software" needs. Based on the testimony described hereafter, the court finds that industry participants and software vendors do not typically use this term and it has no widely accepted meaning in the industry.

While many in the software industry differentiate between large customers and mid-market customers, there is no "bright line" test for what is a "large" or "up-market" customer. Tr 348:23-349:3 (Bergquist) (acknowledging "different parties tend to define it differently"); Tr 2033:1-12 (Iansiti); Ex P3032 (Henley 5/4/04 Dep) at Tr 98:20-25. Likewise, **[**17]** there is no "bright line" test for what is a "mid-market" customer. Tr at 2820:9-19 (Knowles) (SAP executive noting that the separation between mid-market and large enterprise customers is "not an exact science"); Ex D7174 (Pollie 5/26/04 Dep) at Tr 54:14-55:3 (testifying that the meaning of the term mid-market "varies from, from everyone you talk to"); Ex P3191 (Block 12/16/03 Dep) at Tr 88:12-21, 94:19-95:3 (noting the term mid-market is used in many different ways by many different people). ERP vendors, analysts, systems integrators and others in the industry define the mid-market variously. Compare Tr at 864:19-865:2 (Keating) (noting variability of definitions and that Bearing Point generally refers to mid-market as customers in its General Business Group, which is synonymous with companies having less than $ 2 billion in revenue) with Tr at 1846:17-1847:15 (Wilmington) (PeopleSoft formerly defined mid-market as less than $ 500 million revenue, but after acquiring J D Edwards, it raised mid-market to include companies with less than $ 1 billion revenue).

[*1104] Prior to Oracle's tender offer, PeopleSoft used a proxy of $ 500 million in revenue to distinguish mid-market customers from **[**18]** large customers. Tr at 348:5-18 (Bergquist). SAP defines its "large enterprise" market as companies with more than $ 1.5 billion in revenues. Tr at 2819:12-20 (Knowles). Oracle segments the market based on the customers' revenue level or number of employees. Ex P3070 (Prestipino 5/18/04 Dep) at Tr at 21:5-23:11.

Plaintiffs failed to show ERP vendors distinguish mid-market customers from large customers on the amount of money spent in an ERP purchase. Yet, as discussed below, this was the basis on which plaintiffs attempted to quantify the ERP market.

Vendors at Issue

Many firms develop, produce, market and maintain ERP software. Ex 5543 at 8-17. Some ERP software vendors, notably Oracle, PeopleSoft and a German company, SAP AG, developed cross-industry applications or "suites" of "generalized integrated software that could be customized for virtually any large business," Campbell-Kelly, From Airline Reservations to Sonic the Hedgehog at 172. It is to the products of these three vendors that plaintiffs direct their allegations. Although not alone in the ERP business, these three firms have the most comprehensive ERP software offerings.

Oracle. Oracle is headquartered in **[**19]** Redwood Shores, California. Oracle has over 41,000 employees and offices in 80 countries and sells product in over 120 countries. Tr at 3485:10-12, 3486:16-18 (Catz). Oracle's E-Business suite is a fully integrated suite of more than 70 modules for FMS, internet procurement, BI, SCM, manufacturing, project systems, HRM and sales and service management. Ex P2209 at xiv. As of December 2002, Oracle had over 5000 customers of its E-Business Suite, Release Hi. Ex P2208 at ORLIT-EDOC-00244117; Ex P3038. Oracle's ERP products have enjoyed success with telecommunications and financial services customers. Oracle is a major producer of relational database software which accounts for a much larger share of its revenue than its ERF business.

PeopleSoft. PeopleSoft is headquartered in Pleasnton, California and has 8300 employees. PeopleSoft sells software "in most major markets." Ex 7149 at 7. It has offices in Europe, Japan, Asia-Pacific, Latin America and other parts of the world. Id. PeopleSoft was formed in 1987 to develop an HRM product, and it continues to enjoy widespread customer acceptance of its HRM offerings. PeopleSoft now sells, in addition to HRM products, FMS, SCM and CRM products **[**20]** and related consulting services. Jt Stip Fact (Doc # 218) at 2. In 2003, Peoplesoft generated about $ 1.7 billion in revenue, derived almost entirely from ERP-related business. PeopleSoft v8 is PeopleSoft's current integrated suite offering. It competes with Oracle's E-Business suite, Release 11i.

SAP. SAP AG is headquartered in Waldorf, Germany. SAP AG has global operations, including major business operations in more than a dozen countries and customers in more than 120 countries around the globe. Tr at 2805:20-2806:2 (Knowles). SAP AG has over 30,000 employees and sells a product called MySAP ERP Suite, which includes HRM, FMS, corporate controlling and corporate services. Tr at 2811:7-13 (Knowles). SAP AG offers a product called All-in-One, which is "essentially a scaled-down version of MySAP ERP with a lot of functionality turned off." Tr at 2813:20-2814:2 (Knowles). All-in-One is marketed both through an indirect channel of resellers to the $ 200 million-and-below customer revenue segment and by SAP's direct sales **[*1105]** force. Tr at 2813:20-2814:2 (Knowles). SAP AG also offers a product called Business One, which is a "packaged software offering" targeting the $ 200 million-and-below **[**21]** customer revenue segment and sold through an indirect channel of resellers. Tr at 2813:10-17 (Knowles). SAP has six sales regions worldwide. SAP America, Inc is responsible for sales in the United States and Canada. Tr at 2808:16-19 (Knowles). SAP America sells software solutions created by SAP AG. Tr at 2808:8-15, 2806:16-17 (Knowles). In addition to selling software solutions created by SAP AG, the largest price discounts offered by SAP America must be approved by SAP AG. Tr 2836:22-24 (Knowles). SAP products have won wide acceptance in the aerospace and petroleum industries. Tr at 899:9-900:19, 947:10-21 (Keating).

Lawson. Lawson is headquartered in Saint Paul, Minnesota and has 1700 employees. Lawson was founded in the mid-1970s and has 2000 customers, mostly in North America and Europe. Lawson offers FMS, HRM, procurement products, merchandising products, enterprise performance management (EPM), service automation and a unique function called surgery instrument management. Tr at 3591:5-10 (Coughlan). In 2003, Lawson generated more than $ 360 million in annual revenue. Tr at 3589:19 (Coughlan). Lawson has tended to do extremely well in the healthcare and retail verticals. **[**22]** Tr at 3591:1-2 (Coughlan). As Professor Jerry Hausman testified, and the court will hereafter find, although Lawson does not now compete in all the industry verticals in which Oracle, PeopleSoft and SAP compete, Lawson has sufficient resources and capabilities to reposition to any industry vertical it so chooses. Tr at 3841:3-13 (Hausman).

AMS. AMS is an ERP vendor that was recently acquired by CGI, headquartered in Montreal, Quebec, with offices in North America, Europe and Asia-Pacific. As an ERP vendor, AMS offers FMS, HRM, procurement, tax and revenue software, CRM, CMS, environmental compliance software, performance management and budgeting and contracting software to government entities. See P3034 (Morea 5/7/04 Dep) at Tr 14:19-23. AMS has been successful in its sales to state and federal governmental agencies, often competing head to head with commercial ERP vendors. Tr at 972:6-15 (Keating) (agreeing that AMS is a "viable competitor for large and complex federal procurements"). In fact, only a short time after this action was initiated, the United States Department of Justice chose AMS FMS over the FMS offerings of Oracle, PeopleSoft and SAP. See D7166 (Morea 5/7/04 Dep) **[**23]** at Tr 21:22-22:7.

Microsoft. Microsoft is headquartered in Redmond, Washington, and sells a wide range of software products. In 2001 Microsoft acquired Great Plains Software and renamed it Microsoft Great Plains. Microsoft now has a division called Microsoft Business Solutions (MBS), which was created in 2002 when Microsoft Great Plains acquired the Danish software company Navison. Tr at 2972:19-2973:9, 2973:8-9 (Burgum). MBS has four existing ERP product lines: Navison, Great Plains, Axapta and Solomon. Tr at 2996:16 (Burgum). Great Plains offers FMS, HRM, E-commerce, retail management, CRM, analytics and reporting. See *http://www.microsoft.com/BusinessSoluions/GreatPlains/default.asp* x. Solomon provides FMS only. Tr at 2998:4 (Burgum). Navison offers FMS, SCM, CRM and E-commerce. See http://www.microsoft.com/BusinessSolutions/Navison/default.aspx. Finally Axapta offers FMS, HRM, SCM, E-commerce, CRM and analytics. See http://www.microsoft.com/BusinessSolutions/ Axapta/default.aspx.

[*1106] *Best of breed vendors.* Ninety percent of ERP sales are purchases of software "bundles" containing several pillars; rarely does a consumer purchase a single pillar. Tr at 3815:10-13 (Hausman). **[**24]** FMS and HRM pillars typically are sold in a bundle along with additional kinds of ERP, such as CRM or SCM. Further, the discounts that are offered to potential consumers are based on the value of the entire bundle, not simply based upon the presence of an HRM or FMS pillar. Tr at 3813:23-3814:1 (Hausman). Accordingly, when Oracle or PeopleSoft offers a discount on a bundle, it is doing so in order to ensure that the customer purchases all the pillars from Oracle or PeopleSoft, rather than turn to a best of breed vendor that specializes in selling a single kind of pillar. One best of breed vendor, Siebel, sells individual pillars of CRM. Testimony suggests Siebel is recognized industry-wide as selling high-quality CRM, equal to or better than the CRM pillars in Tier One software. Tr at 3814:15-17 (Hasuman).

Outsourcing. Because of the extensive amount of training and maintenance involved in implementing ERP packages purchased from ERP vendors, some companies have chosen an alternative solution -- outsourcing. Outsourcing occurs when a company hires another firm to perform business functions, often HRM functions. Tr at 2198:15-2198:3 (Elzinga). A company may outsource a single HRM **[**25]** function, such as benefits, pensions or payroll, or it may choose to outsource its entire continuum of HRM needs. Tr at 1648:14-22 (Bass). Many firms have outsourcing capabilities. Some of the outsourcers discussed at trial include: Accenture, Fidelity, ADP, Mellon, Exult, Hewitt, Aon and Convergys. Outsourcing firms may process a company's HR data using HRM software manufactured by an ERP vendor, such as Oracle, but some outsourcing firms use internally created HRM software (such as Fidelity using HR Access). Tr at 3152:18-3153:23 (Sternklar).

In addition to individual vertical success, ERP vendors have tended to enjoy varying degrees of success in different geographic regions. SAP, for example, has been more successful at selling ERP to financial institutions in Europe than in North America. Tr at 996:20-997:15 (Keating).

The FMS and HRM software sold to large customers is the same as that sold to mid-market customers. Tr at 819:8-11 (Allen); Tr at 1787:25-1788:2 (Wilmington); Tr at 3436:24-3437:11 (Catz); Ex D7166 (Morea 5/17/04 Dep) at Tr 18:15-19:2 (AMS); Ex P3179 (Ciandrini 1/16/04 Dep) at Tr 235:15-22. All the vendors -- including Oracle, SAP, and PeopleSoft -- have a single **[**26]** product "and that one product is sold up and down the line" to customers of all sizes. Ex P3171 (Ellison 1/20/04 Dep) at Tr 148:10-151:15. While some ERP vendors have introduced special licensing packages of FMS and HRM that are marketed to smaller customers, the actual software code in the FMS and HRM products sold to both large and mid-market customers is not different. Ex P3070 (Prestipino 5/18/04 Dep) at Tr 35:19-36:10 (Oracle); Tr at 3437:5-9 (Catz). Oracle has recently launched its E-Business Suite Special Edition to appeal to its smallest customers -- those who can use only 50 seats or less. It contains the same code as the software sold to the largest and middle-sized customers, but it arrives pre-configured by the consulting organization. Tr at 3436:24-3438:5 (Catz). It contains a subset of the modules found in Oracle's E-Business Suite, including FMS but excluding HRM. Tr at 3437:5-11 (Catz); Ex P3070 (Prestipino 5/18/04 Dep) at Tr 25:5-22, 32:19-33:19.

Despite the identity of code in each company's ERP packaged product, ERP product offerings are not homogeneous. While **[*1107]** the ERP products offered by Oracle and PeopleSoft and other vendors perform the same or similar functions, **[**27]** these products are not uniform in their architecture, scalability, functionality or performance characteristics. Tr at 897:23-899:3, 899:9-900:19, 901:6-902:15, 903:6-15, 946:18-20, 947:4-9, 992:23-993:7, 993:16-994:2, 996:20-997:15 (Keating). The product of each vendor possesses certain features or qualities so that none is a perfect substitute for any other. As the testimony indicated, and the court finds, no vendor is capable of meeting all of the high function needs, as defined by plaintiffs, of all customers. Tr at 2085:3-5 (Iansiti).

Furthermore, because each packaged ERP product must be customized and configured to fit the software footprint of the customer, a packaged ERP product may, as fitted to one customer's information technology footprint, differ significantly from the same packaged ERP product fitted to another customer's footprint. Because of these facts, the court finds the ERP products in suit to be differentiated products.

The court also finds that ERP software is highly durable and, therefore, regarded by customers as a capital good. Campbell demo # 5,6,19; see also Tr at 189:12-18 (Hatfield); Tr at 1107:16-19 (Cichnowicz); Tr at 1572:14-18 (Wolfe).

Customers **[**28]** almost always purchase a cluster of products such as Oracle's E-Business Suite that provide the customer with a stack of software and technology, which may include core HRM or FMS applications, add-on modules, customer-facing business applications such as CRM software and the infrastructure components (application servers and database) on which the applications run. Tr at 3461:14-3462:5 (Catz); Tr at 3807:21-3808:1 (Hausman). See, e g, Exs P1000-P1322 (Oracle discount request forms).

Plaintiffs' Claim of Threatened Injury to Competition

Plaintiffs allege that the HRM and FMS sold by Oracle, PeopleSoft and SAP are the only HRM and FMS products that can appropriately be deemed "high function HRM and FMS." FAC (Doc # 125) P 9 at 8.

Plaintiffs allege that these "high function" HRM and FMS products have the "scale and flexibility to support thousands of simultaneous users and many tens of thousands of simultaneous transactions and the ability to integrate seamlessly into bundles or 'suites' of associated HRM and FMS functions." Id P 14 at 9. Plaintiffs allege that "high function" HRM and FMS products compete in a market that is separate and distinct from that of all other ERP products, **[**29]** such as SCM, CRM or mid-market HRM and FMS, the latter being HRM or FMS products designed for organizations having less demanding needs. These mid-market products include Oracle's E-Business Suite Special Edition, SAP's MySAP and All-in-One, PeopleSoft's PeopleSoft EnterpriseOne and the products of ERP vendors such as Lawson and AMS.

Moreover, plaintiffs allege that this competition is geographically confined to the United States. Id at PP 24, 26 at 13. Within this narrowly defined product and geographic market, plaintiffs allege that with limited and specially explained exceptions, only Oracle, PeopleSoft and, to a lesser degree, SAP's United States arm, SAP America, are in effective competition. The proposed merger would therefore, in plaintiffs' view, constrict this highly concentrated oligopoly to a duopoly of SAP America and a merged Oracle/PeopleSoft.

Oracle, predictably enough, contends that plaintiffs' market definition is legally and practicably too narrow. Oracle contends that (1) "high function" HRM and **[*1108]** FMS software does not exist; "high function" is simply a label created by plaintiffs; (2) there is just one market for all HRM and FMS ERP products; (3) many firms other **[**30]** than the three identified by plaintiffs compete in the business of developing, producing, marketing and maintaining HRM and FMS ERP software; (4) this competition plays out in many more products than those in the HRM and FMS pillars; (5) price competition comes from sources in addition to ERP software vendors and includes competition from firms that provide outsourcing of data processing, the integration layer of the "software stack" and from the durability and adaptability of enterprises' installed base or legacy systems; (6) the geographic area of competition is worldwide or, at the very least, the United States and Europe; (7) the knowledgeable and sophisticated customers of ERP software would impede the exercise of any market power by a merged Oracle/PeopleSoft; and (8) potential entrants are poised to enter into competition, so that the proposed merger will not have an anticompetitive effect.

Taking up this dispute, the court first discusses the applicable law and economic principles that underlie its decision and then describes the parties' contentions and evidence along with the court's resolution of the disputed factual issues not previously discussed. This begins with the **[**31]** parties' sharply differing definitions of the product and geographic markets and whether there is a level of concentration sufficient to trigger the presumption under *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*, that the proposed transaction will lead to a substantial lessening of competition under the principles set forth in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (Apr 2, 1992, as revised Apr 8, 1997) ("Guidelines"). The court then turns to an efficiency defense offered by Oracle before setting forth its conclusions of law.

In brief summary, for the reasons explained at length herein, the court's findings and conclusions are as follows:

! plaintiffs have not proved that the product market they allege, high function HRM and FMS, exists as a separate and distinct line of commerce;

! plaintiffs have not proved the geographic market for the products of the merging parties is, as they allege, confined to the United States alone;

! plaintiffs have not proved that a post-merger Oracle would have sufficient market shares in the product and geographic markets, properly defined, to **[**32]** apply the burden shifting presumptions of Philadelphia Nat'l Bank;

! plaintiffs have not proved that the post-merger level of concentration (HHI) in the product and geographic markets, properly defined, falls outside the safe harbor of the Horizontal Merger Guidelines (Guidelines);

! plaintiffs have not proved that the ERP products of numerous other vendors, including Lawson, AMS and Microsoft, do not compete with the ERP products of Oracle, PeopleSoft and SAP and that these other vendors would not constrain a small but significant non-transitory increase in price by a post-merger Oracle;

! plaintiffs have not proved that outsourcing firms, such as Fidelity and ADP, would not constrain a small but significant non-transitory increase in price by a post-merger Oracle;

! plaintiffs have not proved that the ability of systems integrators to adapt, configure and customize competing ERP vendors' products to the needs of the group of customers that plaintiffs contend constitute a separate and distinct **[*1109]** product market would not constrain a small but significant non-transitory increase in price by a post-merger Oracle;

! plaintiffs have not proved that a post-merger **[**33]** Oracle and SAP would likely engage in coordinated interaction as the products of Oracle and SAP are not homogeneous, but are differentiated products, and that the pricing of these products is not standardized or transparent;

! plaintiffs have not proved localized product or geographic competition between Oracle and PeopleSoft that will be lessened as a result of the proposed merger as the merger would not create a dominant firm occupying a product or geographic space in which there is no serious competition;

! assuming that localized product or geographic competition exists between Oracle and PeopleSoft, plaintiffs have not proved that SAP, Microsoft and Lawson would not be able to reposition themselves in the market so as to constrain an anticompetitive price increase or reduction in output by a post-merger Oracle;

! plaintiffs have proved that products in the integration layer of the computer software industry and the presence of incumbent ERP systems would not constrain anticompetitive conduct on the part of a post-merger Oracle;

! Oracle has not proved efficiencies from the proposed merger sufficient to rebut any presumption of anticompetitive effects; should **[**34]** the court's principal findings and its conclusion that plaintiffs have not proved the proposed merger will likely lead to a substantial lessening of competition not be upheld on appeal, Oracle's efficiency defense should not require further trial court proceedings.

HORIZONTAL MERGER ANALYSIS

Section 7 of the Clayton Act ***HN1***[] prohibits a person "engaged in commerce or in any activity affecting commerce" from acquiring "the whole or any part" of a business' stock or assets if the effect of the acquisition "may be substantially to lessen competition, or to tend to create a monopoly." *15 USC § 18*. The United States is authorized to seek an injunction to block the acquisition, *15 USC § 25*, as are private parties and the several states, *California v. American Stores Co., 495 U.S. 271, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990)*; *Hawaii v. Standard Oil Co. 405 U.S. 251, 258-59, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*, and district courts have jurisdiction over such actions. *15 U.S.C. § 25*; *28 USC § 1337(a)*. Plaintiffs have the burden of proving a violation of *section 7* by a preponderance of the evidence.

[35]** ***HN2***[] To establish a *section 7* violation, plaintiffs must show that a pending acquisition is reasonably likely to cause anticompetitive effects. See *United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171, 12 L. Ed. 2d*

775, 84 S. Ct. 1710 (1964) (noting that a section 7 violation is established when "the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown"); United States v. Marine Bancorp. Inc., 418 U.S. 602, 622-23, 41 L. Ed. 2d 978, 94 S. Ct. 2856 (1974); FTC v. H J Heinz Co., 345 U.S. App. D.C. 364, 246 F.3d 708, 713, 719 (DC Cir. 2001). "'Congress used the words "may be substantially to lessen competition" (emphasis supplied) to indicate that its concern was with probabilities, not certainties.'" Id. at 713 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 323, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)). "Section 7 does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such con **[*1110]** sequences in the future." Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986). Substantial competitive harm **[**36]** is likely to result if a merger creates or enhances "market power," a term that has specific meaning in ***antitrust law***. See Eastman Kodak Co. v. Image Tech. Servs., Inc, 504 U.S. 451, 464, 119 L. Ed. 2d 265, 112 S. Ct. 2072, 92 Cal. Daily Op. Service 4823 (1992); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).

Market Definition

HN3[] In determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed. This is a "necessary predicate" to finding anticompetitive effects. United States v. E.I. Du Pont de Nemours & Co., 353 U.S. 586, 593, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957). Market definition under the case law proceeds by determining the market shares of the firms involved in the proposed transaction, Philadelphia Nat'l Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715, the overall concentration level in the industry and the trends in the level of concentration. United States v. Aluminum Co. of Am., 377 U.S. 271, 277-79, 12 L. Ed. 2d 314, 84 S. Ct. 1283 (1964); United States v. Von's Grocery Co., 384 U.S. 270, 272-74, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966). A **[**37]** significant trend toward concentration creates a presumption that the transaction violates section 7. United States v. Baker Hughes Inc., 285 U.S. App. D.C. 222, 908 F.2d 981, 982-83 (DC Cir. 1990) (Thomas, J). See also United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 120-22, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975). In other words, plaintiffs establish a prima facie case of a section 7 violation by "showing that the merger would produce 'a firm controlling an undue percentage share of the relevant market, and [would] result [] in a significant increase in the concentration of firms in that market.'" Heinz, 246 F3d at 715 (quoting Philadelphia Nat'l Bank, 374 U.S. at 363) (alterations in original). **HN4**[] Under Philadelphia Nat'l Bank, a post-merger market share of 30 percent or higher unquestionably gives rise to the presumption of illegality. 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

To rebut this presumption, defendant may "show that the market-share statistics give an inaccurate account **[**38]** of the merger's probable effects on competition in the relevant market." Heinz, 246 F.3d at 715 (internal quotation marks and alterations omitted). See also Baker Hughes, 908 F.2d at 987; California v. Am. Stores Co., 872 F.2d 837, 842-42 (9th Cir. 1989), rev'd on other grounds, 495 U.S. 271, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990); FTC v. Warner Communs. Inc., 742 F.2d 1156, 1164 (9th Cir. 1984); Olin Corp. v. FTC, 986 F.2d 1295, 1305-06 (9th Cir. 1993). Arguments related to efficiencies resulting from the merger may also be relevant in opposing plaintiffs' case. See FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999); FTC v. Staples, Inc, 970 F. Supp. 1066, 1088 (D. DC 1997). "'If the defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effects shifts to [plaintiffs], and merges with the ultimate burden of persuasion, which remains with the government at all times.'" Heinz, 246 F.3d at 715 (quoting Baker Hughes, 908 F.2d at 983) (first alteration in original).

HN5[] An application **[**39]** of the burden-shifting approach requires the court to determine (1) the "line of commerce" or product market in which to assess the transaction; (2) the "section of the country" or geographic market in which to assess the **[*1111]** transaction; and (3) the transaction's probable effect on competition in the product and geographic markets. See Marine Bancorporation, 418 U.S. at 618-23; FTC v. Harbour Group Investments LP, 1990 U.S. Dist. LEXIS 15542, 1990 WL 198819 at * 2 n3 (D. DC). See also FTC v. Swedish

Match, 131 F. Supp. 2d 151, 156 (D. DC 2000); FTC v. Cardinal Health, Inc, 12 F. Supp. 2d 34, 45 (D. DC 1998); Staples, 970 F. Supp. at 1072.

HN6[] Both the Supreme Court and appellate courts acknowledge the need to adopt a flexible approach in determining whether anticompetitive effects are likely to result from a merger. Reflecting their "generality and adaptability," Appalachian Coals. Inc. v. United States, 288 U.S. 344, 360, 77 L. Ed. 825, 53 S. Ct. 471 (1933), application of the antitrust laws to mergers during the past half-century has been anything but static. Accordingly, determining the existence or threat of anticompetitive effects has not stopped **[**40]** at calculation of market shares. In Hospital Corp. of Am. the court upheld the FTC's challenge to the acquisition of two hospital chains, but noted that "the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act." 807 F.2d at 1386. Hence, the court held that it was appropriate for the FTC to eschew reliance solely on market percentages and the "very strict merger decisions of the 1960s." Id. at 1386. In addition to market concentration, probability of consumer harm in that case was established by factors such as legal barriers to new entry, low elasticity of consumer demand, inability of consumers to move to distant hospitals in emergencies, a history of collusion and cost pressures creating an incentive to collude. 807 F.2d at 1388-89.

In United States v. Waste Management, 743 F.2d 976 (2d Cir. 1984), the court of appeals reversed a finding of a section 7 violation based on market shares and prima facie illegality under Philadelphia Nat'l Bank, one made even though there were few barriers **[**41]** to new entry into the market. The trial court had erroneously ignored the Supreme Court's holding in United States v General Dynamics, 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974), that a prima facie case may still be rebutted by proof that the merger will not have anticompetitive effects. A finding of market shares and consideration of the Philadelphia Nat'l Bank presumptions should not end the court's inquiry.

The trend in these cases away from the "very strict merger decisions of the 1960s," Hospital Corp. of Am. 807 F.2d at 1386, is also reflected in the Guidelines. The Guidelines view statistical and non-statistical factors as an integrated whole, avoiding the burden shifting presumptions of the case law. The Guidelines define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." Guidelines § 0.1. Five factors are relevant to the finding of market power: (1) whether the merger would significantly increase concentration and would result in a concentrated market, properly defined; (2) whether the merger raises concerns about potential adverse competitive effects; (3) whether timely and likely **[**42]** entry would deter or counteract anticompetitive effects; (4) whether the merger would realize efficiency gains that cannot otherwise be achieved; and (5) whether either party would likely fail in the absence of the merger. Guidelines, § 0.2.

In defining the market, the Guidelines rely on consumer responses. Starting with the smallest possible group of competing products, the Guidelines then ask "whether 'a hypothetical monopolist over that group of products would profitably impose at **[*1112]** least a "small but significant and nontransitory" [price] increase ["(SSNIP)"],'" generally deemed to be about five percent lasting for the foreseeable future. United States v. Sungard Data Sys., Inc, 172 F. Supp. 2d 172, 182 (D. DC 2001) (quoting Guidelines § 1.11). If a significant number of customers respond to a SSNIP by purchasing substitute products having "a very considerable degree of functional interchangeability" for the monopolist's products, then the SSNIP would not be profitable. United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 399, 100 L. Ed. 1264, 76 S. Ct. 994. See Guidelines § 1.11. Accordingly, the product market must be expanded to encompass those substitute products that constrain the monopolist's pricing. **[**43]** The product market is expanded until the hypothetical monopolist could profitably impose a SSNIP. Id § 1.11. Similarly, in defining the geographical market, the Guidelines hypothesize a monopolist's ability profitably to impose a SSNIP, again deemed to be about five percent, in the smallest possible geographic area of competition. Id § 1.21. If consumers respond by buying the product from suppliers outside the smallest area, the geographic market boundary must be expanded. Id.

Once the market has been properly defined, the Guidelines set about to identify the firms competing in the market and those likely to enter the market within one year. Guidelines § 1.32. Following these steps, the Guidelines calculate the market share of each participant, followed by the Herfindahl-Hirschman Index (HHI) concentration measurement for the market as a whole. Guidelines § 1.5. The HHI is calculated by squaring the market share of each participant, and summing the resulting figures. Id. The concentration standards in the Guidelines concern the (1) pre-merger HHI (HHI1), (2) the post-merger HHI (HHI2) and (3) the increase in the HHI resulting from the merger, termed delta HHI (?HHI). See Andrew **[**44]** I Gavil, William E Kovacic and Jonathan B Baker, ***Antitrust Law*** in Perspective; Cases. Concepts and Problems in Competition Policy, 480-84 (Thomson West, 2002). The Guidelines specify safe harbors for mergers in already concentrated markets that do not increase concentration very much. For example if the post-merger HHI is between 1000 and 1800 (a moderately concentrated market) and the ?HHI is no more than 100 points, the merger is unlikely to be presumed illegal. Guidelines § 1.51. Likewise, if the post-merger HHI is above 1800 (a highly concentrated market) and the ?HHI is no more than 50 points, the merger will not be presumed illegal. Id.

Notwithstanding these statistical data, the Guidelines next focus on the likely competitive effects of the merger. Guidelines § 2.0; *Baker Hughes, 908 F.2d at 984* ("Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness * * *.). The Guidelines recognize that anticompetitive effects may arise in two contexts. First, the Guidelines address the lessening of competition through coordinated interaction between the merged firm and remaining rivals. Guidelines **[**45]** § 2.1. Second, the Guidelines address the anticompetitive effects based on unilateral action. Id § 2.2.

Anticompetitive Effects Coordinated Effects

In analyzing potential coordinated effects, a court is concerned that the merger may diminish competition by "enabling the firms * * * more likely, more successfully, or more completely to engage in coordination interaction." Guidelines § 2.1. This behavior can be express or tacit (implied by silence), and the behavior may or may not be lawful in and of itself. Id. The Guidelines explicitly recognize that successful coordinated interaction "entails **[*1113]** reaching [1] terms of coordination that are profitable to the firms involved and [2] an ability to detect and punish [cheating]." Id § 2.1. See also *FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989)*; *Hospital Corp. of Am., 807 F.2d at 1386-87*. Examples of "terms that are profitable" include common pricing, fixed price differentials, stable market shares and customer or territorial restrictions. Guidelines § 2.11

Factors that increase the likelihood of coordination include product homogeneity, pricing standardization and pricing transparency. **[**46]** *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 238, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*; *Elders Grain, 868 F.2d at 905*. Plaintiffs do not contend that any of those conditions are presented in the proposed merger which must, therefore, be analyzed for unilateral anticompetitive effects.

Unilateral Effects

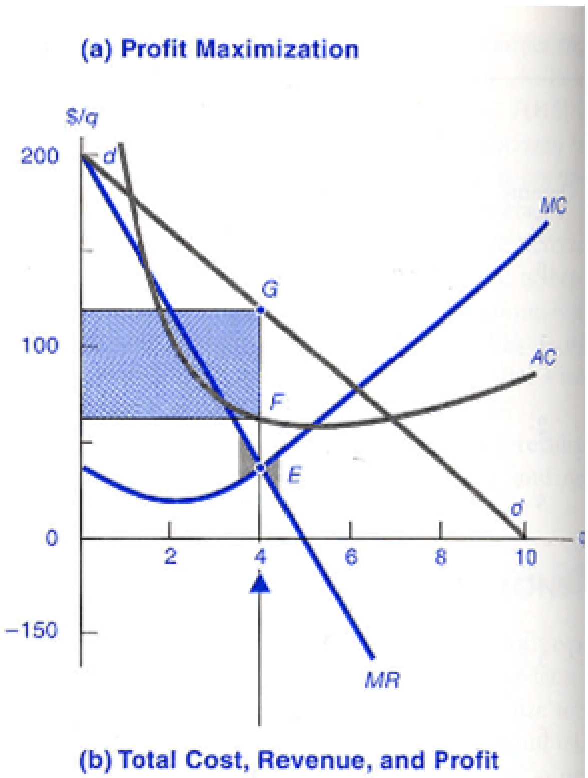
There is little case law on unilateral effects merger analysis. Few published decisions have even discussed the issue, at least using the term "unilateral effects." See, e g, *Swedish Match. 131 F. Supp. 2d at 168*; *New York v Kraft Gen Foods, Inc., 926 F. Supp. 321, 333-35 (S.D.N.Y. 1995)*; Guidelines § 2.2. But, as the court demonstrates below, "unilateral effects" is primarily a new term to address antitrust issues that courts have in other contexts considered for quite some time.

HN7[] Unilateral effects result from "the tendency of a horizontal merger to lead to higher prices simply by virtue of the fact that the merger will eliminate direct competition between the two merging firms, even if all other firms in the market continue to compete independently." Carl Shapiro, Mergers with Differentiated Products, 10 Antitrust 23, 23 (Spring 1996). **[**47]** Unilateral effects are thought to arise in primarily two situations, only the second of which is alleged in this case. See Roscoe B Starek III & Stephen Stockum, What Makes Mergers Anticompetitive?: "Unilateral Effects" Analysis Under the 1992 Merger Guidelines, 63 Antitrust LJ 801, 803 (1995); Guidelines §§ 2.21, 2.22; Phillip E Areeda, Herbert Hovenkamp & John L Solow, 4 ***Antitrust Law*** P 910 (Aspen, rev ed 1998) (subdividing unilateral effects theories into four categories).

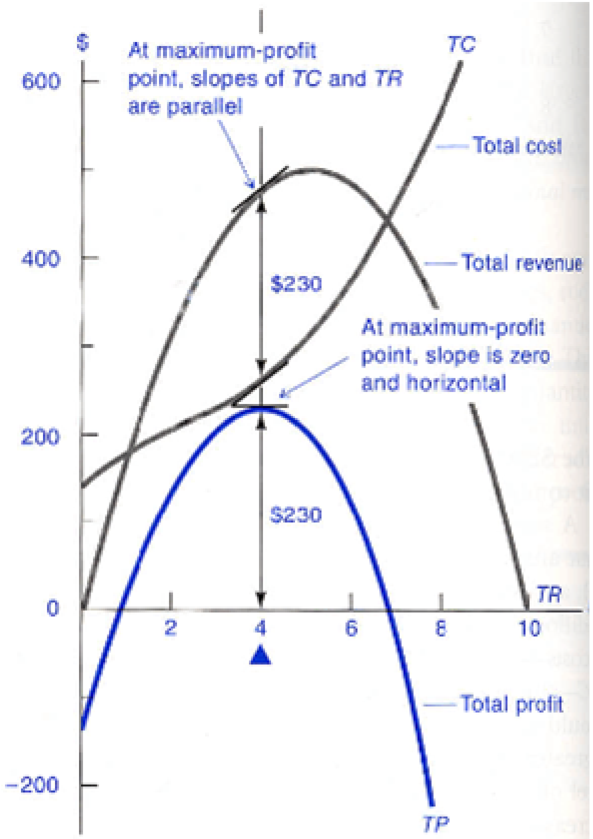
The first situation involves a "dominant firm and a ' fringe' of competitors producing a homogeneous product." Starek & Stockum, 63 Antitrust LJ at 803. In this situation, the dominant firm has a substantial cost advantage over the fringe competitors and, therefore, can restrict output to obtain an above-marginal cost price.

The second situation, and the one here applicable, concerns differentiated products. Starek & Stockum, 63 Antitrust LJ at 803; Guidelines § 2.21. Competition in differentiated product markets, such as ERP products, is often described as "monopolistic competition." There is a notable and interesting literature on this subject commencing with **[**48]** the path-breaking and independent insights of two notable economists. See Edward Chamberlin, The Theory of Monopolistic Competition (Harvard, 1933, 1938); Joan Robinson, The Theory of Imperfect Competition (St Martin's, 1933, 2d ed 1969). The admirably clear exposition found in Paul A Samuelson & William D Nordhaus, Economics 187-89 (McGraw-Hill, 17th ed 2001) makes apparent this nomenclature.

The market demand curve shows the quantity of a good that would be purchased in the market at each price, other things being equal. Id at 760. A seller's "own," or "residual," demand curve shows the quantity of the good offered by the seller that would be purchased from the seller at each price, other things being equal. Under perfect competition, the individual **[*1114]** seller faces a horizontal (each additional unit brings the same revenue), or perfectly elastic, demand curve because nothing the seller can do alters demand for the seller's product. Id at 148. The seller is a price taker. Because the seller's demand curve is horizontal, the seller's marginal revenue curve is also horizontal and the seller continues to produce until its marginal cost is equal to the market price or average **[**49]** revenue and profits, as economists define them, are *zero.* See id fig 8-2 and text at 148-50.



The adjacent figure, borrowed from Samuelson & Nordhaus, Economics fig 9-4 at 178, illustrates the different picture facing the monopolist. Its demand curve is not horizontal but reflects the inverse relationship between price and the quantity demanded. Because it is the only seller of the product, the pure or natural monopolist faces not the horizontal demand curve of the perfectly competitive firm, but the sloping demand curve of the entire market. In the graph, the monopolist is able to maximize profit at the intersection of marginal cost and revenue by reducing output to 4 and raising the price to $ 120, which exceeds marginal cost. The monopolist thus derives a "monopoly rent" equal to the number of units sold times the difference between the market price (G) and the monopolist's average cost (F), algebraically, (G -- F) x 4. It is this reduction in output and elevation of price that has been the historic concern of antitrust.



[*1115]

Firms in perfect competition "produce homogeneous product" so that "price is the only variable **[**50]** of interest to consumers, and no firm can raise its price above marginal cost without losing its entire market share." Jean Tirole, The Theory of Industrial Organization at 277 (MIT, 1988). Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers. Because no product is a perfect substitute of another in a differentiated products market, each seller continues to face a downward sloping demand curve. Like a pure monopolist, the seller of a differentiated product, facing a downward sloping, or less than perfectly elastic, demand curve, maximizes its profit by pricing above marginal cost. See Samuelson & Nordhaus, Economics fig 10-3 and text at 188-89.

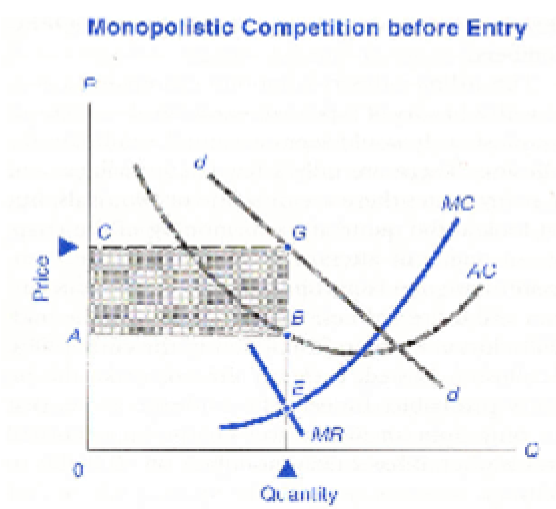


FIGURE 10-3. Monopolistic Competitors Produce Many Similar Goods

[*1116]

HN8[] Like a seller in a perfectively competitive market, however, sellers in a "competitive" differentiated products market do not obtain monopoly rents. In differentiated product markets with few barriers to entry, firms will introduce products that are increasingly close, although not perfect substitutes, for the other products in the market. The introduction of additional products causes the demand curve **[**51]** faced by each seller to shift downward and leftward until, at long run equilibrium, the demand curve intersects the average cost curve of the seller (defined as economists define costs to include a reasonable profit) eliminating the monopolistic rent (ACGB). See id fig 10-4 and text at 188-89.

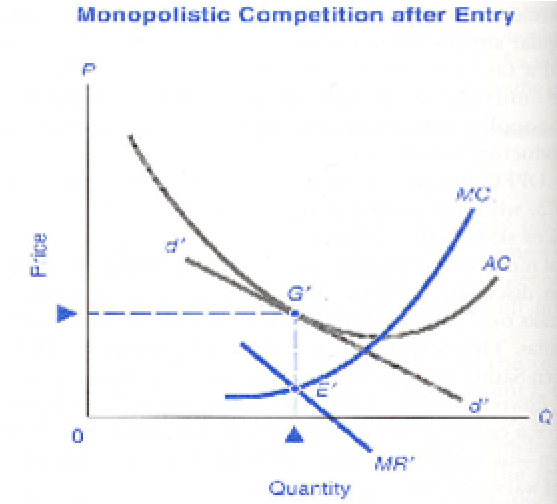


FIGURE 10-4. Free Entry of Numerous Monopolistic Competitors Wipes Out Profit

HN9[] Differentiated product markets hence share some characteristics of both a pure monopoly and perfect competition, in that "prices are above marginal costs but economic profits have been driven down to zero." Id at 189 (describing "economic profits" as supra-normal profits or monopoly rents). Firms selling differentiated **[*1117]** products have some "market power" in that they are able to exert some control over the prices they obtain although this does not rise to the level of "monopoly power." See Shapiro, 63 Antitrust LJ 801 n4 (citing the economic literature).

The Guidelines provide some instruction on the necessary elements of a unilateral effects claim involving differentiated products under *section 7*.

> Substantial unilateral price elevation in a market for differentiated products requires [1] that there be a significant share of sales in the market **[**52]** accounted for by consumers who regard the products of the merging firms as their first and second choices, and [2] that repositioning of the non-parties' product lines to replace the localized competition lost through the merger be unlikely.

Guidelines § 2.21.

Although the Guidelines' discussion quoted above may be a helpful start, the factors described therein are not sufficient to describe a unilateral effects claim. First, the Guidelines' discussion, at least in section 2.21, emphasizes only the relative closeness of a buyer's first and second choices. But the relative closeness of the buyer's other choices must also be considered in analyzing the potential for price increases. The Guidelines later acknowledge as much in section 2.212, which recognizes that if a buyer's other options include "an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices." Accordingly, *HN10*[] a plaintiff must prove not only that the merging firms produce close substitutes but also that other options available to the buyer are so different that the merging firms likely will not be constrained from acting anticompetitively.

Second, **[**53]** the Guidelines require only a demonstration of some "significant share of sales in the market accounted for by customers" that rank the merging firms first and second. Id § 2.21. "Measures of the 'closest substitutes' or 'second choices' of inframarginal purchasers of Product A are only relevant to the degree that inframarginal and marginal consumers have similar preferences. However, essentially by definition, marginal and inframarginal consumers do not share similar preferences." Christopher A Vellturo, Creating an Effective Diversion;

Evaluating Mergers with Differentiated Products, 11 Antitrust 16, 18 (Spring 1997); Gregory J Werden & George A Rozanski, The Application of Section 7 to Differentiated Products Industries: The Market Definition Dilemma, 8 Antitrust 40, 41 (Summer 1994) (" There is no reason why the shares in any delineated market in a differentiated products industry are indicative of the relative importance of each merging firm as a direct competitor of the other.").

In sum, it appears that ***HN11***[] four factors make up a differentiated products unilateral effects claim. First, the products controlled by the merging firms must be differentiated. **[**54]** Products are differentiated if no "perfect" substitutes exist for the products controlled by the merging firms. See Samuelson & Nordhaus, Economics at 187-89; Areeda, Hovenkamp & Solow, 4 ***Antitrust Law*** P 914d ("By 'significant' we mean product differentiation that goes to fairly fundamental differences in product design, manufacturing costs, technology, or use of inputs."). Second, the products controlled by the merging firms must be close substitutes. Products are close substitutes if a substantial number of the customers of one firm would turn to the other in response to a price increase. Third, other products must be sufficiently different from the products controlled by the merging firms that a merger would make a small but significant and non-transitory price increase profitable for the merging **[*1118]** firms. Finally, repositioning by the non-merging firms must be unlikely. In other words, a plaintiff must demonstrate that the non-merging firms are unlikely to introduce products sufficiently similar to the products controlled by the merging firms to eliminate any significant market power created by the merger. These four factors substantially track the analysis in Areeda, Hovenkamp **[**55]** and Solow. Areeda, Hovenkamp & Solow, 4 ***Antitrust Law*** P 914f at 68-69.

The essential elements of such a differentiated products unilateral effects claim are quite similar to those in "standard" antitrust analysis. In standard antitrust analysis, the court considers both "demand elasticity" and "supply elasticity" in determining whether anticompetitive effects are likely. *Rebel Oil, 51 F.3d at 1436*. In other words, courts determine the degree to which price increases will cause marginal buyers to turn to other products or marginal suppliers to increase output of the product. Considerations of demand and supply elasticity also motivate the factors outlined by the court for a differentiated products unilateral effects analysis. The factors considering the relative substitutability of the products of the merging and non-merging firms, factors 1 to 3, essentially address demand-side substitutability and the repositioning factor, factor 4, essentially addresses supply-side substitutability.

Antitrust analysis of differentiated product markets is hardly new. See, e g, *Du Pont, 351 U.S. at 392-93* (describing the concepts of monopolistic competition and **[**56]** differentiated product markets); Areeda, Hovenkamp & Solow, 4 ***Antitrust Law*** P 914c (suggesting that early railroad merger cases could be viewed as unilateral effects cases). Indeed, as noted above, defining a geographic market involves exactly same concept of localized competition that motivates differentiated products unilateral effects analysis.

Areeda, Hovenkamp and Solow persuasively contend that "the appropriate conclusion [under *a* unilateral effects analysis] is that the merger has facilitated the emergence of a new grouping of sales capable of being classified as a relevant market." Id P 913b. This "new grouping of sales" is one "in which the merging firms have either a monopoly or else a dominant share." Id P 914f at 69. In an example of two merging firms, B and C, Areeda, Hovenkamp and Solow state that "the merger does not create such a market because a cartel of firms B and C would also have been able to increase price profitably, indicating that B and C were already a relevant market." Id P 914a at 60. But of course, "before their union, B and C felt one another's competition, as well as that of other firms, more significantly than after the merger." Id. Areeda, **[**57]** Hovenkamp and Solow also later note that "the sufficiently similar output of other firms must be included" in the relevant market. Id P 914f at 70.

HN12[] In a unilateral effects case, a plaintiff is attempting to prove that the merging parties could unilaterally increase prices. Accordingly, a plaintiff must demonstrate that the merging parties would enjoy a post-merger monopoly or dominant position, at least in a "localized competition" space.

Unilateral effects analysis shares many similarities with standard coordinated effects antitrust analysis. But there are also notable differences.

HN13[] Relevant markets defined in terms of "localized competition" may be much narrower than relevant markets defined in typical cases in which a dominant position is required. Judicial experience cautions against the use of qualitative factors to define narrow markets. This judicial experience **[*1119]** arises, in part, from the rise (and fall) of the "submarkets" doctrine.

In Brown Shoe, the Supreme Court stated that submarkets may constitute relevant product markets. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between **[**58]** the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe, 370 U.S. at 325* (citing *Du Pont, 353 U.S. at 593-95*) (footnote omitted).

Properly construed,*Brown Shoe* suggests merely that the technical definition of a relevant market in an antitrust case may be smaller than a layperson would normally consider to be a market. The use of the term "submarket" may be useful in "overcoming the first blush or initial gut reaction" to a relatively narrowly defined market. See *Staples, 970 F. Supp. at 1074* (defining the relevant market as "the sale of consumable office supplies through office supply superstores").

Focusing on "submarkets" may be misleading, however, because "the same proof which establishes the existence of a relevant product market also shows (or * * * fails to show) the existence of a product submarket." *H J, Inc v. International Tel. & Tel. Corp., 867 F.2d 1531, 1540 (8th Cir. 1989)*. See also *Olin, 986 F.2d at 1301*. Defining a narrow "submarket" tends to require a **[**59]** relatively long laundry list of factors, which creates the danger of narrowing the market by factors that have little economic basis. Courts and commentators suggest that the use of the submarkets doctrine has, in fact, misled courts into "identifying artificially narrow groupings of sales on the basis of noneconomic criteria having little to do with the ability to raise price above cost." Areeda, Hovenkamp & Solow, 4 ***Antitrust Law*** P 914a at 60. See also *Allen-Myland, Inc. v. IBM, 33 F.3d 194, 208 n16 (3rd Cir. 1994)*; Satellite Television & Associated Resources v. Continental Cablevision of Va, Inc., 714 .F2d 351, 355 n5 (4th Cir. 1983).

The similarities between the submarkets doctrine generally and localized competition in unilateral effects cases are difficult to miss. Indeed, commentators have been quick to note the potential for "localized competition" analysis to devolve into an unstructured submarket-type analysis. See Areeda, Hovenkamp & Solow, 4 ***Antitrust Law*** P 914a at 60; Starek & Stockum, 63 Antitrust LJ at 814-15 (arguing that the Guidelines' focus on localized competition should not "be used as a tool for rehabilitating discredited **[**60]** 'submarket' analysis").

Furthermore, judicial rejection of markets narrowly defined to a single manufacturer's product has been even more pronounced than judicial skepticism about narrowly defined submarkets. See, e g, *Du Pont, 351 U.S. at 392-93* (refusing to define a market limited to cellophane); *TV Communs. Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)* (refusing to define a market limited to TNT cable provision in the greater Denver area); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 479-80 (3rd Cir. 1992)* (en banc) (refusing to define a market limited to Chrysler products); *Gall v. Home Box Office, Inc., 1992 U.S. Dist. LEXIS 13020, 1992 WL 230245 at *4 (SDNY)* ("The natural monopoly every manufacturer has in its own product simply cannot serve as the basis for antitrust liability."). Cf *Eastman Kodak, 504 U.S. at 481-82* (upholding denial of summary judgment in an installed base context).

As emphasized in Du Pont;

> **[*1120]** One can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production **[**61]** of his own product. However, this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product.

351 U.S. at 393 (footnotes omitted).

HN14[] Merely demonstrating that the merging parties' products are differentiated is not sufficient. Instead, a plaintiff must demonstrate product differentiation sufficient to sustain a small but significant and non-transitory price increase.

Additionally, defining markets in terms of "localized competition" may result in markets defined so narrowly that one begins to question whether the market constitutes a "line of commerce" as required by *section 7*. One concern is that the market is defined so narrowly that it encompasses an insubstantial amount of commerce. In Philadelphia Nat'l Bank, the Supreme Court found a "workable compromise" between a geographic market narrowly defined in terms of bank offices in the immediate neighborhood or more expansively defined to include the banks available only to large borrowers. *374 U.S. at 360-61*. Another concern is **[**62]** that the market is defined so narrowly it fails to capture the potential effects of the merger. For example, it might be inappropriate to focus on a single city in analyzing the effects of a merger between sellers who compete on a much larger scale. Cf *Staples, 970 F. Supp. at 1073* & nn5-6 (analyzing the likelihood of anticompetitive effects in forty-two metropolitan areas).

Even if a narrow market definition would be appropriate, it may be more difficult to identify "clear breaks in the chain of substitutes" sufficient to justify bright-line market boundaries in differentiated products unilateral effects cases. The conventional ideal market boundary divides products within the market, which are freely substitutable with one another, from products outside the market, which are poor substitutes for the products within the market. See *United States v. Rockford Memorial Corp., 717 F. Supp. 1251, 1260 (N.D. Ill. 1989)* (emphasis added), aff'd, *898 F.2d 1278 (7th Cir 1990)*. In differentiated products unilateral effects cases, a "spectrum" of product differences, inside and outside the market boundary, is more likely. *In re Super Premium Ice Cream Distribution Antitrust Litig., 691 F. Supp. 1262 (N.D. Cal. 1988),* **[**63]** aff'd sub nom, Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., *895 F.2d 1417 (9th Cir. 1990)* (table). In discussing unilateral effects, Shapiro has written:

> Any attempt to make a sharp distinction between products "in" and "out" of the market can be misleading if there is no clear break in the chain of substitutes: if products "in" the market are but distant substitutes for the merging products, their significance may be overstated by inclusion to the full extent that their market share would suggest; and if products "out" of the market have significant cross-elasticity with the merging products, their competitive significance may well be understated by their exclusion.

Shapiro, 10 Antitrust at 28. See also Edward Chamberlin, Product Heterogeneity and Public Policy, 40 Am. Econ. Rev. (Papers & Procs) 85, 86-87 (1950).

Additionally, to the extent that clear breaks are difficult to identify, attempts to create defensible market boundaries are likely to be based on relatively vague product **[*1121]** characteristics. ***HN15***[🡅] Product characteristics that are too vague do not meet *section 7*'s requirement that the relevant market be "well-defined. **[**64]** " See *Tenet Healthcare, 186 F.3d at 1052*.

A closer look at product differentiation demonstrates further difficulties in defining the relevant market in differentiated product unilateral effects cases. Price is one, but only one, of many ways in which to differentiate a product. A market of homogeneous goods can be seen as a market in which sellers have only one dimension in which to differentiate their product. One expects sellers in such a market to "differentiate" their products by lowering the price until price equals marginal cost. On the other hand, ***HN16***[🡅] a differentiated product "market" is a market in which sellers compete along more dimensions than price. As a result, products competing against one another in a differentiated product market may have widely different prices. That products with widely different prices may, in fact, be in the same market complicates market definition considerably.

The "Cellophane fallacy" may complicate matters even further. This phenomenon takes its name from an error in the Supreme Court's logic Du Pont. In Du Pont, the plaintiff was the primary manufacturer of cellophane. The Supreme Court held that the relevant market included **[**65]** "all flexible wrappings" because cross-price elasticities of demand indicated that an increase in the price currently charged for cellophane would cause a significant number of purchasers to turn to other flexible wrapping products.

The error in the logic of *Du Pont* is that " the existence of significant substitution in the event of further price increases or even at the current price does not tell us whether the defendant already exercises significant market power.'" *Eastman Kodak, 504 U.S. at 471* (quoting Phillip Areeda & Louis Kaplow, Antitrust Analysis P 340(b) (Aspen, 4th ed 1988)). Stated slightly differently, ***HN17***[🡅] because a monopolist exercises market power by increasing price until the cross-price elasticity of demand is so high that a further price increase would be unprofitable, a high cross-price elasticity of demand at current prices, by itself, does not demonstrate that the seller lacks market power.

The implications of the Cellophane fallacy on market definition in differentiated product market cases would seem to suggest caution. ***HN18***[] Courts should be wary of defining markets so broadly that a seller's existing market power is missed. On the other **[**66]** hand, in differentiated product markets, some measure of market power is inherent and an unduly narrow product market definition proves too much. In merger analysis, the court is concerned primarily with determining whether the merger would enhance market power, not whether market power currently exists.

In sum, defining the relevant market in differentiated product markets is likely to be a difficult task due to the many non-price dimensions in which sellers in such markets compete. Further, it may be difficult to determine currently existing market power and separate this from enhanced market power due to the merger.

HN19[] The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases. As noted by Starek and Stockum, "it is generally misleading to suggest that a firm "controls" a certain market share in the absence of an analysis beyond market concentration." Starek & Stockum, 63 Antitrust LJ at 804. See also Jerry A Hausman & Gregory K Leonard, Economic Analysis of Differentiated Products Mergers Using Real World Data, *5 Geo. Mason L. Rev. 321, 337-39 (1997)*. **[**67]** **[*1122]** Such a concern applies with equal force to differentiated products unilateral effects claims. Furthermore, in differentiated products unilateral effects cases, the merging parties' combined market shares relative to competitors may be less relevant than the size of their market shares in determining whether anticompetitive effects are likely. See Gregory J Werden & Luke M Froeb, The Effects of Mergers in Differentiated Products Industries; Logit Demand and Merger Policy, 10 J L Econ & Org 407, 413 (1994).

Accordingly, a strong presumption of anticompetitive effects based on market concentration is especially problematic in a differentiated products unilateral effects context.

Despite the problems with qualitative analyses, modern econometric methods hold promise in analyzing differentiated products unilateral effects cases. Merger simulation models may allow more precise estimations of likely competitive effects and eliminate the need to, or lessen the impact of, the arbitrariness inherent in defining the relevant market. For example, some merger simulation methods compensate for potential errors in market definition. A model advanced by Werden and Froeb uses a set of "inside **[**68]** goods" and a set of "outside goods." Id at 410. The model contains a parameter, beta, that controls for the substitutability among the inside goods and another parameter, epsilon, that controls for the substitutability between the inside and outside goods. Id. To the extent the set of goods considered as "inside goods" is defined narrowly, epsilon increases. Id at 424-25. The increase in epsilon increases the predicted amount of substitution to outside goods. Accordingly, error in defining the product market too narrowly will be offset, at least to some extent, by the increase in epsilon.

In sum, ***HN20***[] differentiated products unilateral effects analysis shares many similarities to "standard" antitrust analysis. The primary differences are that the relevant market is likely to be smaller and more difficult to define and that quantitative analyses may be robust.

HN21[] In analyzing antitrust claims, courts have considered both "circumstantial" and "direct" evidence of anticompetitive effects. See *Rebel Oil, 51 F.3d at 1434*. Even though "direct" evidence of the potential for anticompetitive harm from a merger is not literally available, merger analyses range from highly **[**69]** qualitative ("circumstantial") to highly quantitative ("direct"), depending on the data available for a particular market. Qualitative analyses of antitrust claims are most often structural. In a structural analysis, anticompetitive effects are presumed if a plaintiff demonstrates undue concentration in a well-defined market. See *Philadelphia Nat'l Bank, 374 U.S. at 363*; *Baker Hughes, 908 F.2d at 982*. A relevant market may be defined by reference to Brown Shoe's "practical indicia." *370 U.S. at 325*. Once the relevant market is defined, market shares are calculated and inferences are drawn from the degree of concentration.

The Guidelines adopt a structural approach for addressing unilateral effects claims that closely mirrors traditional structural analysis. See Guidelines § 2.211. The biggest weakness in the Guidelines' approach appears to be its strong reliance on particular market share concentrations. Under the Guidelines, anticompetitive effects are presumed "where market concentration data fall outside the safeharbor regions of Section 1.5, the merging firms have a combined market share of at least thirty-five percent, and where data **[**70]** on product attributes and relative product appeal show that a significant share of purchasers of one merging firm's product regard the other as **[*1123]** their second choice," unless "rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines." Id at §§ 2.211, 2.212.

A presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted. Indeed, the opposite is likely true. ***HN22***[] To prevail on a differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position. In Rebel Oil, the Ninth Circuit noted that a market share of 30% is "presumptively insufficient to establish the power to control price." *51 F.3d at 1438*.

Market definitions, statistical presumptions and likelihood of unilateral anticompetitive effects are all issues on which the parties contended vigorously and presented much evidence. To these, the court now turns.

CONTENTIONS, EVIDENCE AND FINDINGS

HN23[] "Defining the relevant market is critical in an antitrust case because the legality of the proposed **[**71]** merger [] in question almost always depends upon the market power of the parties involved." *Cardinal Health, 12 F. Supp. 2d at 45*. Yet the precise characteristics that plaintiffs have used to describe the line of commerce allegedly affected by the proposed transaction changed throughout the course of this litigation. And the evidence of market shares presented to enable the court to apply the Philadelphia Nat'l Bank presumptions or make the HHI calculations of the Guidelines is, given the mountain of evidence plaintiffs presented, startling sparse.

Plaintiffs' Proposed Product Market Definition

Plaintiffs offer a product market of high function HRM and FMS and a geographic market of the United States.

Four elements constitute plaintiffs' definition of high function HRM software as alleged in the FAC: "[1] Human Resource Management (HRM) [2] software and accompanying services [3] that can be integrated into suites of associated functions from a single vendor [4] with performance characteristics that meet the demands of multifaceted organizations with high-level functional needs." FAC (Doc # 125) P 23 (a) at 12.

Likewise, four elements constitute plaintiffs' **[**72]** definition of high function FMS software as alleged in the FAC: "[1] Financial Management Services (FMS) [2] software and accompanying services [3] that can be integrated into suites of associated functions from a single vendor [4] with performance characteristics that meet the demands of multifaceted organizations with high-level functional needs." Id P 23(b) at 12-13.

The FAC also notes certain performance characteristics of high function software:

> Customers with high-level functional needs ("enterprise customers") require products that can support their ongoing business processes and reporting requirements that may stretch across multiple jurisdictions (often requiring support for foreign languages and reporting requirements), multiple legal entities or divisions within the organization and multiple lines of business. These **[*1124]** products must have the scale and flexibility to support thousands of simultaneous users and many tens of thousands of simultaneous transactions, and the ability to integrate seamlessly into bundles or "suites" of associated HRM and FMS functions. Most importantly, these products must have the flexibility through configuration options or other **[**73]** means to be matched to the administrative and reporting processes of each unique customer.

Id P 14 at 9.

Plaintiffs clarified their allegations at the request of the court during the trial by submitting a statement of definitions, some of which were joined by defendant. Jt Sub Definitions (Doc # 332). In these definitions, plaintiffs omitted "and accompanying services" from the second element alleged in the FAC. Plaintiffs also relegated the FAC's third element regarding integration to a mere sub-element of the performance characteristics described in the FAC's fourth element. Finally, plaintiffs describe four "performance capabilities." Products in the market are (1) "highly" configurable, (2) "seamlessly" integrated software products that support (3) "multiple" languages, currencies and legal regimes with (4) "virtually unlimited" scalability. See id at 2-4 & n2.

This definition shifted somewhat in plaintiffs' proposed findings of fact and conclusions of law. Plaintiffs clarified the definition to include "licensing and maintenance" rather than "licensing and accompanying services," as alleged in the FAC's second element. See Pls Prop FF (Doc # 356) at PP 3.1.1 -- 3.1.2. **[**74]** Plaintiffs also added an element to the formal definition, claiming that high function software "provides robust functionality that allows organizations to go beyond the basics." Id at P 3.1.3.4.

Even though not stated as part of the formal definition of high function software, plaintiffs scatter throughout their proposed findings of fact other characteristics of ERP software in an apparent attempt further to narrow the relevant market.

First, plaintiffs point to the claimed strength of high function software in "core" applications. See, e g, id at P 3.6.2.1.

Second, plaintiffs emphasize that high function customers purchase high function software. Id (Doc # 356).

Third, plaintiffs emphasize the brand value of the software vendor. Factors that promote vendor brand value include previous experience in a particular industry, research and development spending and local sales forces. See, e g, id (Doc # 356) at PP 3.2.4.3 -- 3.2.4.5.

Fourth, plaintiffs note the incumbent advantage software vendors have in competing for further sales with a customer who has that vendor's product as part of its existing footprint. See, e g, id at P 7.3.2.1.18 (pointing to testimony that "Bearing Point **[**75]** has identified more than 1,200 companies that now have an Oracle Financials and PeopleSoft HR footprint").

Fifth, plaintiffs emphasize the alleged strength of Oracle and PeopleSoft in certain industry verticals, such as insurance. See, e g, id at PP 7.2.3.10 -- 7.2.3.13.

Sixth, plaintiffs describe high-function software as being "Able to Accommodate Rapid Growth, Acquisitions and Reorganizations." Id at P 2.2.5.

Seventh, plaintiffs define high function software as allowing users to consolidate data across multiple organizations while still allowing the user to drill down to the original data. Id at P 2.2.6.

In their post-trial brief too, plaintiffs adjusted their proposed product market definition. They eliminated the "robust functionality" factor and incorporated two of the factors scattered throughout their proposed findings of fact into the more formal definition of high function software. The newly incorporated factors are that high function software must accommodate rapid growth and complicated business structures.

[*1125] At closing argument, plaintiffs disclaimed reliance on high function software's claimed strength in "core" functionality in defining the relevant market and accused **[**76]** Oracle of creating confusion "by limiting the relevant market to basic core' functionality." Pl Post Brief (Doc # 366) at 10 n17.

Added together, plaintiffs propose a very restricted product market definition: HRM and FMS integrated suites sold to large complex enterprises ("high function FMS and HRM market"). See id (Doc # 366) at 8. Plaintiffs have defined the asserted relevant product market using a large number of factors. In sum, the competition between Oracle and PeopleSoft that plaintiffs claim will be impaired bears the following characteristics:

Product characteristics:

. Software licensing and maintenance;

. HRM and FMS (as separate markets);

Customer characteristics:
. High function needs;
. Oracle or PeopleSoft are major vendors in their software footprint;

Performance characteristics:
. Scalable;
. Highly configurable;
. Seamlessly integratable;
. Able to accommodate rapid growth, acquisitions and reorganizations;
. Able to reflect actual units of business; and
. Able to adapt to industry specific requirements.

Plaintiffs contend that this product market does not include mid-market vendors, **[**77]** best-of-breed solutions, incumbent solutions or outsourcing. Id (Doc # 366) at 14-19.

Plaintiffs' Evidence of a High Function HRM & FMS Market

In support of their proposed product market definition and theory of anticompetitive effects, plaintiffs presented at trial or through deposition ten customer witnesses, five industry witnesses, two systems integration witnesses, three expert witnesses, a few others who appear mostly to have been presented to fill a gap or two in the evidence or, because every trial seems to need some, for spice (e g, the Ellison and Phillips videotape deposition testimony) and a plethora of exhibits, some of these also for spice (e g, Ex P2290). The court will not attempt to recount or even summarize the entire evidentiary record. Given the quantity of evidence, that would be unduly time-consuming and is unnecessary. It suffices to note that the laboring oar of the plaintiffs' case was pulled by the customer witnesses (whom plaintiffs' counsel described as their strongest witnesses), by some of the systems integrator and industry witnesses and by the experts.

Customer Witnesses

Michael Gorriz, Vice President of Information Technology Business at **[**78]** DaimlerChrysler (Daimler), testified about his company's large and complex needs regarding HRM software. Tr at 1368 (Gorriz). Daimler has about 365,000 employees worldwide in about 100 manufacturing facilities. Tr at 1368:6-13 (Gorriz). Since 1996, Daimler has used SAP as its financial management software. Tr at 1370:4-10 (Gorriz). Daimler requires highly functional HRM to accommodate its large number of employees and to comply with the differing labor laws and union agreements in different countries. Tr at 1371:9-12 (Gorriz). For its HRM needs, Daimler currently uses PeopleSoft. Daimler chose PeopleSoft based upon its reputation and the fact that companies of comparable size to Daimler have had success with PeopleSoft HRM. Tr at 1375:13-21 (Gorriz). But when Daimler was first searching for an HRM vendor in 1996, Gorriz stated that "only SAP, PeopleSoft **[*1126]** or Oracle could serve [Daimler's] needs for the HR management." Tr at 1376:9-11 (Gorriz). Gorriz stated that Daimler considered no other vendors. Tr at 3716:18-19 (Gorriz). Daimler's legacy system was "too old" for the company seriously to consider upgrading. Tr at 1376:24 (Gorriz). Daimler did not consider outsourcing to be an option **[**79]** because Daimler's HRM requirements were, Gorriz testified, "too complex." Tr at 1377:24-25 (Gorriz). Further, if Oracle, SAP or PeopleSoft were to increase their price for HRM by 10 percent, Gorriz stated that Daimler "would not consider any offer" from any other vendors. Tr at 1381:16 (Gorriz).

Bob Bullock, Senior Vice President and Chief Information Officer of CH2M Hill, testified about the ERP needs of that civil and environmental engineering firm. CH2M Hill has 14,000 employees, 200 worldwide offices and over $ 2 billion in annual revenue. CH2M Hill has used Oracle FMS since 1993, but in 2002 the company decided to replace its legacy HRM software. Bullock stated that through consultation with the Gartner Group, CH2M Hill was given a list of HRM vendors. CH2M Hill did not seriously consider SAP, as it "was a very complex product" and had a "reputation for being a costly product." Tr at 207:19-20 (Bullock). In Bullock's opinion, there were only two candidates, Oracle and PeopleSoft. Id at 208:7-8 (Bullock). CH2M Hill never considered outsourcing, Lawson or remaining on its legacy system. Tr at 210:8, 211:12, 216:8-9 (Bullock). Oracle and PeopleSoft both offered initial bids between **[**80]** $ 1.5 and 41.6 million. Bullock stated that if this price had been 10 percent higher, CH2M Hill would not walked away from the deal with Oracle or PeopleSoft. Tr at 218-19 (Bullock).

Curtis Wolfe, CIO for the State of North Dakota, testified about the state's process of picking an ERP vendor. Tr at 1532 (Wolfe). North Dakota has approximately 10,000 full and part-time employees, 58 state agencies and a budget of $ 5 billion. Tr at 1533 (Wolfe). In 2002, the state decided to buy a full ERP program that included FMS and HRM. Tr at 1534:10-16 (Wolfe). North Dakota had a unique need in that it required that its ERP serve the state's higher education facilities as well. Id. North Dakota had six vendors submit proposals: Oracle, PeopleSoft, SAP, SCT, Jenzabar (a partner of Lawson) and Microsoft's Great Plains. Tr at 1543:21-22 (Wolfe). The state eliminated SAP, Great Plains and Jenzabar almost immediately. SAP was too expensive, while Jenzabar and Great Plains did not have the required functionality. Tr at 1545-46 (Wolfe). SCT did not make the final round; while SCT met the functionality for the higher education area, it could not do so with state agency needs. Tr at 1551:1-4 (Wolfe). Oracle **[**81]** and PeopleSoft were in head to head competition and Wolfe testified that he believes that this caused the state to get a $ 6 to $ 8 million lower final bid from each vendor. Tr at 1561:10-11 (Wolfe). If these final offers had been 10 percent higher, Wolfe stated that North Dakota would not have turned to Lawson, Microsoft, SCT, outsourcing or writing its own software. Tr at 1569-1570 (Wolfe).

Kenneth Johnsen, Chief of Technology for Pepsi Americas, testified as to his concerns about the Oracle/PeopleSoft merger. Pepsi Americas is the second largest bottler of Pepsi-brand soft drinks within the Pepsi system and the third largest bottler worldwide. Tr at 1723:25-1724:1 (Johnsen). Pepsi Americas has over 15,000 employees and annual revenues of about $ 3.2 billion. Tr at 1724:5-10 (Johnsen). Pepsi Americas uses PeopleSoft ERP in its North America operations and SAP ERP in its European operations. Tr at 1727:13-14 (Johnsen). Johnsen testified that he has "a concern" about the impact **[*1127]** of this merger on the long-term effectiveness of the PeopleSoft ERP. Tr at 1734:23 (Johnsen). Johnsen is concerned that a post-merger Oracle, while agreeing to maintain the PeopleSoft ERP, will not provide **[**82]** enhancements to the functionality of the software (i e, upgrades). Tr at 1737: 1-9 (Johnsen). To Johnsen this leaves Pepsi Americas with two options: constantly upgrade with point solutions (not his desired choice) or buy ERP from a new vendor. When asked what vendors he could turn to meet his ERP needs, Johnsen claims there are no options outside of Oracle, PeopleSoft and SAP. Tr at 1739:14 (Johnsen).

Scott Wesson, Senior Vice President and Chief Information Officer of AIMCO, discussed the company's choices for FMS and HRM software. Tr at 1126 (Wesson). AIMCO is the largest owner and operator of apartment buildings in the United States. Tr at 1127:7-8 (Wesson). The company owns approximately 2000 complexes in 47 states and the District of Columbia. AIMCO has over 6,500 employees and an annual revenue of about $ 1.5 billion. Tr at 1127:9-24 (Wesson). For its FMS, AIMCO uses PeopleSoft's financial suite. For its HR payroll systems, AIMCO currently uses Lawson. Tr at 1129:8,21 (Wesson). In 2002, AIMCO began to reevaluate its HRM options and it hired Towers Perrin consult in this process. Towers Perrin told AIMCO that only three vendors could meet AIMCO's HRM needs: PeopleSoft, Oracle **[**83]** and SAP. Tr at 1132:7-8 (Wolfe). (There was no objection to the question that elicited this response). Wesson stated that AIMCO decided not to upgrade to the latest version of Lawson because it would have cost AIMCO "about the same * * * as it would to go with a new system" and also, Lawson" [was] lacking some key features" that AIMCO was looking for. Tr at 1133:5-11 (Wolfe). AIMCO was deciding between Oracle and PeopleSoft when Oracle first made its tender offer to PeopleSoft. Tr at 1143: 9-10 (Wolfe). Wesson stated that because of this proposed merger, he believes PeopleSoft gave him a "very good deal" on the HRM. Tr at 1144:17 (Wolfe). Wesson testified that Oracle agreed to match any price offered by PeopleSoft. Tr at 1145:5 (Wolfe). Wesson said AIMCO ultimately chose PeopleSoft because PeopleSoft had guaranteed to pay AIMCO three times the contract price should there be a "change of ownership" at PeopleSoft. Tr at 1146:14, 1147:6-16 (Wolfe). AIMCO is expecting to implement the PeopleSoft system in late 2004 or early 2005. Tr at 1148:10 (Wolfe). Moreover, Wesson stated, AIMCO does not consider outsourcing to be a viable option because it is not quick to respond to "last minute **[**84]** changes," such as new benefits programs. Tr at 1150:10 (Wolfe). Best of breed solutions are too expensive for AIMCO to consider. Tr at 1150:22-24 (Wolfe).

Richard Cichanowicz, Vice President of Systems Integration of Nextel, testified about the wireless services company's ERP needs. Nextel has 13 million subscribers, over $ 8 billion in annual revenue 17,000 [transcript incorrect] employees. See Tr at 1052:25-1053:3 (Cichanowicz). Before 2002, Nextel had been using PeopleSoft HRM, Oracle FMS and Ariba SCM. Tr at 1058:9-11 (Cichanowicz). In 2002, however, Nextel determined that using one integrated solution would provide more operational efficiency. Tr at 1061:7-9 (Cichanowicz). Nextel received advice from six consulting firms, which informed Nextel that Oracle, SAP and PeopleSoft could meet those software needs. Tr at 1066:13-19 (Cichanowicz). Nextel then sent RFPs to Oracle and Peoplesoft. Tr at 1067:25-1068:3 (Cichanowicz). Nextel did not seriously consider SAP because it was already using Oracle for FMS and PeopleSoft for HRM and believed that conversion costs and risks for those two **[*1128]** vendors would be lower. Tr at 1068:4-17 (Cichanowicz). Nextel ultimately chose Peoplesoft, based **[**85]** on its scoring of vendor criteria such as functionality, ease of integration, scalability, audits, costs and relationship confidence. See Tr at 1071:20-1072-22 (Cichanowicz). Even after it had chosen PeopleSoft, however, Nextel continued to negotiate with Oracle for leverage purposes until the signing of the December 2002 contract with PeopleSoft. Tr at 1073:11-20 (Cichanowicz). Cichanowicz stated that if the price of the Oracle or PeopleSoft licenses had been 10 percent higher, Nextel would not have considered a best of breed approach, writing or building its own ERP software, outsourcing, staying with its previous system or using SAP or any other United States vendor. Tr at 1077:16-1080:25 (Cichanowicz).

Mary Elizabeth Glover, Vice President of Information Technology at Greyhound Lines, testified about her company's foray into the market for HRM software. Greyhound is in the bus transportation business in both the United States and Canada. The company employees some 16,000 people and has annual revenues of around $ 1.2 billion. Tr at 1459-1460 (Glover). For its FMS, Greyhound uses Oracle in the United States and J D Edwards in Canada. Tr at 1464:11-21 (Glover). For its HRM, Greyhound **[**86]** uses a product called HR1 in the United States and HR2000 in Canada. The company outsources its payroll to ADP. Tr at 1465:11 (Glover). Glover stated that the HR incumbent systems are "very old" and no longer meet the needs of the company. Tr at 1466:21-25 (Glover). Further, she testified that outsourcing is too expensive for Greyhound. Tr at 1467:12-15 (Glover). For these reasons, in 2001, Greyhound began a potential procurement process for new HRM software. Tr at 1468:17-18 (Glover). The company hired CDG & Associates to match Greyhound with potential vendors who met their HRM needs. The firm narrowed the selection down to only four vendors: Oracle, PeopleSoft, Lawson and Ultimate Software. Tr at 1470:11 (Glover). Greyhound never considered SAP because the consulting firm believed they were too costly. Tr at 1470:16 (Glover). Ultimate Software was eliminated soon thereafter because of lack of functionality. Tr at 1470:24-25 (Glover). Greyhound eliminated PeopleSoft as being too costly. Between Oracle and Lawson, Greyhound found that Oracle had more functionality; therefore, Lawson was eliminated. But before Greyhound made a final choice, Glover stated that the company decided to **[**87]** give PeopleSoft a second look. Upon reexamination, Greyhound determined that both Oracle and PeopleSoft could meet the company's needs, with the company preferring PeopleSoft over Oracle. Tr at 1483:6-9 (Glover). Unfortunately, the events of September 11, 2001, a new CEO and a decrease in profits caused Greyhound to lose the funds necessary to purchase the software. Tr at 1490:6-11 (Glover). But Glover stated that should Greyhound ever decide to purchase HRM software, this proposed merger would make the purchase more costly, as Greyhound's only choices were Oracle and PeopleSoft. Tr at 1495:13-21. Without the competition between the two, Glover foresees prices increasing. Tr at 1495:13-21 (Glover).

Phillip Maxwell, Senior Vice President and Chief Information Officer of the Neiman Marcus Group (NMG), testified about the ERP needs of the specialty retailer. NMG has properties located throughout the country, approximately 15,000 employees and $ 3 billion in annual sales. Tr at 652:3-13 (Maxwell). NMG formerly had used FMS software that was originally from MSA, a vendor purchased by Dun & Bradstreet and then GEAC subsequent to NMG's installation of the software. Tr at **[*1129]** 655:15-22 (Maxwell). **[**88]** In 2002, NMG decided to replace its FMS software and began conferring with individuals in its business and technology units, three consulting firms and the Gartner Group. See Tr at 662:1-663:11 (Maxwell). After examining vendors' functionality, experience in retail, price and size/stability, NMG narrowed its choices to Oracle and PeopleSoft. Tr at 665:6-20 (Maxwell). NMG did not consider SAP because of SAP's lack of strong presence in the retail vertical and Maxwell's opinion that SAP is "very expensive to implement." Tr at 669:11-16 (Maxwell). Had the cost of Oracle or PeopleSoft FMS software been 10 to 20 percent higher, NMG would not have considered SAP, any other FMS vendor, legacy software or internally developed software. Tr at 669:17-670:15 (Maxwell). Based on price, a high level comparison and detailed GAP analysis, NMG eventually selected Oracle to provide it with FMS software. See Tr at 671:8-673:2 (Maxwell).

NMG also began licensing HRM software from Oracle in 2003, though it has not yet begun to implement that software. See Tr at 674:9-11, 676:14-18 (Maxwell). NMG went through a similar process in evaluating HRM software as it did in evaluating FMS software. Tr at 684: **[**89]** 25-685:20 (Maxwell). As with the FMS software, NMG concluded that Oracle and PeopleSoft were its only viable alternatives. See Tr at 686:13-16 (Maxwell). NMG did not believe that SAP suited its needs as a retailer. See Tr at 686:11-18 (Maxwell). Had the cost of the Oracle or PeopleSoft HRM software been 10 to 20 percent higher, NMG would not have considered other HRM vendors, legacy software, internally developed software or outsourcing. Tr at 686:19-687:13 (Maxwell). NMG eventually selected the Oracle HRM software, but based on a 70 to 80 percent higher target price than previously predicted, NMG has delayed implementation of the Oracle HRM software to look for cost-reducing options. Tr at 676:19-677:13 (Maxwell). But Maxwell testified that, even with the 80 percent price increase, NMG has not abandoned the Oracle HRM. Tr at 677:20-25 (Maxwell).

Laurette Bradley, Senior Vice President of Information Technology at Verizon, testified about Verizon's current procurement of new HRM software. Tr at 577 (Bradley). Verizon is a telecommunications company with a "majority holding in four of five different countries." Tr at 580:22-25 (Bradley). Verizon has minor investments in over 30 countries **[**90]** worldwide with an annual revenue of approximately $ 66 billion. Id. Bradley testified that 49 percent of Verizon's labor is unionized worldwide, which places "significant demands upon [the] ERP systems, particularly [the] HR and payroll systems" because each union contract, from each jurisdiction, must be reflected and managed regarding payroll, vacation, absences, and personal days. Tr at 583:6-15 (Bradley). Prior to October 2003, Verizon had used two different HRM programs, one from PeopleSoft and one from SAP. Tr at 583:23 (Bradley). The PeopleSoft HRM was used to manage the former BellAtlantic part of the company and SAP HRM was used to manage the former GTE part of the company. Tr at 584:1-4 (Bradley). The same is true of Verizon's FMS. But in October 2003, Verizon decided to consolidate the two systems as far as HRM software. Tr at 584:11-12 (Bradley). Verizon chose PeopleSoft HRM for the entire company and as of the date of the trial, the new software was being implemented. Id. Bradley testified that a merger between Oracle and PeopleSoft makes her very concerned that Oracle will not be interested in upgrading or further "developing" current PeopleSoft software. Tr at 592: **[**91]** 5, 593:3-10 (Bradley). Bradley does not want to lose the constant "care, feeding, repair, and evolution" that PeopleSoft now offers to its customers. **[*1130]** Tr at 592:17-18 (Bradley). When asked what other vendors Verizon could turn to in obtaining FMS and HRM that meet Verizon's complex and international needs, Bradley listed only Oracle, PeopleSoft and SAP. Tr at 598:7-8 (Bradley). But Bradley did testify that Verizon is "constantly" considering outsourcing its entire HR management, but so far has determined that the risks are just too high. Tr at 604:20-21 (Bradley).

Bradley admitted that Verizon already outsources its 401(k) stock plans and medical and dental benefits. Tr at 604:12-14 (Bradley). Finally, Bradley stated that if Oracle, PeopleSoft or SAP increased prices by 10 percent, Verizon would not turn to any other vendors for their FMS and HRM. Tr at 606:23-25, 607:1-3 (Bradley). Further, Verizon would not use its off-shore information technology staff to develop an in-house FMS or HRM system in response to a 10 percent increase. Tr at 607:12-15 (Bradley).

Finally, Scott Hatfield, Chief Information Officer of Cox Communications discussed his company's ERP software needs. Tr at 87: **[**92]** 8-11 (Hatfield). Cox is the third largest cable television operator in the United States, delivering video service to about six and half million households. Tr at 89:11-14 (Hatfield). Cox has a presence in 30 states and about 21,000 employees. Cox has annual revenues of over $ 6 billion. Tr at 89:22-25 (Hatfield). Hatfield testified that Cox uses PeopleSoft HRM to handle payroll, recruitment, benefits programs and training. Tr at 94:14-19 (Hatfield). In 1995, during the HRM vendor procurement process, Cox only considered Oracle and SAP as other potential vendors of HRM. Tr at 96:12 (Hatfield). Hatfield testified that while Cox had considered outsourcing its HRM altogether, it had decided against doing so because the company needed to have a "tight integration" between its HRM and CMS, which could not be outsourced. Tr at 97:17-19 (Hatfield).

Regarding FMS, in 2003, Cox decided to change from J D Edwards to a new vendor. Cox hired Accenture to consult in this process. Tr at 114:22-25 (Hatfield). Accenture gave Cox a list of three vendors of FMS that could meet Cox's needs: Oracle, PeopleSoft and SAP. Tr at 115:9-10 (Hatfield). Hatfield stated that no other firms were "brought to his **[**93]** attention." Tr at 121:18 (Hatfield). Cox eliminated SAP because no one in the company had any real experience with SAP and Hatfield did not want to "be starting from scratch." Tr at 118:3 (Hatfield). Hatfield stated that Cox wanted Oracle and PeopleSoft to know they were the final two competing for Cox's FMS business and that Cox asked the two vendors to give their best prices. Tr at 126:1-3 (Hatfield). Cox ultimately chose Oracle as its FMS vendor based upon highest level of functionality ratings. Tr at 129:1-5 (Hatfield). Finally, Hatfield stated that if Oracle or PeopleSoft's prices had been 10 percent higher, Cox would not have turned to Lawson, Great Plains, best of breed solutions, outsourcing or writing its own FMS software. Tr at 136:14-138:23.

In the main, and contrary to the characterization of plaintiffs' counsel before trial, the court found the testimony of the customer witnesses largely unhelpful to plaintiffs' effort to define a narrow market of high function FMS and HRM. Each of these witnesses had an impressive background in the field of information technology. They appeared knowledgeable and well informed about their employers' ERP needs and resources. And the court **[**94]** does not doubt the sincerity of these witnesses' beliefs in the testimony that they gave. What the court questions is the grounds upon which these witnesses offered their opinions on the definition of the product **[*1131]** market and competition within that market.

The test of market definition turns on reasonable substitutability. *Du Pont, 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994*. This requires the court to determine whether or not products have "reasonable interchangeability" based upon "price, use and qualities * * *." *Id. at 404*. What, instead, these witnesses testified to was, largely, their preferences.

Customer preferences towards one product over another do not negate interchangeability. See *R.R. Donnelley & Sons Co., 120 F.T.C. 36, 54 n65 (1995)* (citing Robert Pitofsky, New Definitions of the Relevant Market and the Assault on Antitrust, *90 Colum L Rev 1805, 1816 (1990)* ("There will almost always be classes of customers with strong preferences * * * but to reason from the existence of such classes to a conclusion that each is entitled to * * * a separate narrow market definition grossly overstates the market power of the sellers.")). The **[**95]** preferences of these customer witnesses for the functional features of PeopleSoft or Oracle products was evident. But the issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle. Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle. To be sure, each testified, with a kind of rote, that they would have no choice but to accept a ten percent price increase by a merged Oracle/PeopleSoft. But none gave testimony about the cost of alternatives to the hypothetical price increase a post-merger Oracle would charge: e g, how much outsourcing would actually cost, or how much it would cost to adapt other vendors' products to the same functionality that the Oracle and PeopleSoft products afford.

If backed by credible and convincing testimony of this kind or testimony presented **[**96]** by economic experts, customer testimony of the kind plaintiffs offered can put a human perspective or face on the injury to competition that plaintiffs allege. But unsubstantiated customer apprehensions do not substitute for hard evidence.

While listening to the testimony of these customer witnesses, it became clear to the court that these witnesses represent a group of extremely sophisticated buyers and users of information technology; they have decades of experience in negotiating in this field. This made more evident the failure of these witnesses to present cost/benefit analyses of the type that surely they employ and would employ in assessing an ERP purchase. The evidence at trial established that ERP customers have choices outside the integrated suites of Oracle, PeopleSoft and SAP. Indeed, Glover's testimony showed that -- as Oracle contends -- customers have some leverage by virtue of their existing installed base "to do nothing" and thereby resist anticompetitive price increases by ERP vendors. Although the court is not convinced that this is a long-term option due to the ever changing business and legal environment in which enterprises operate, this option does afford ERP **[**97]** customers some limited protection and leverage. At any rate, plaintiffs' customer witnesses did not, in their testimony, provide the court with data from actual or probable ERP purchases and installations to demonstrate that the witnesses' employers would have had no choice but to submit to a SSNIP imposed by a post-merger Oracle.

[*1132] The court, therefore, finds that these witnesses did not establish by a preponderance of the evidence that the products offered by Oracle, PeopleSoft and SAP are in a distinct line of commerce or product market from those offered by other ERP vendors. The court finds that these witnesses did not establish that it was more likely than not that customers of a post-merger Oracle would have no choice but to submit to a small but significant non-transitory price increase by the merged entity. These findings do not rest alone on the court's skepticism about the testimony of plaintiffs' customer witnesses.

Oracle, too, presented customer witnesses, although a much smaller number of such witnesses. Brian Mearns, Director of Personnel Service Delivery for Bank Of America (BA), testified about BA and Fleet Boston's (Fleet) needs and decisions regarding HRM and FMS **[**98]** software. Tr at 3276:2-21 (Mearns). In April 2004, BA acquired Fleet. Tr at 3276:10 (Mearns). Mearns had held the title of Director of HR Service Delivery at Fleet prior to the acquisition. Mearns stated that Fleet had personnel of over 50,000 worldwide, with investment and mortgage offices in 32 states and throughout South America, Europe and Asia. Tr at 3280:14-3281:11 (Mearns). Mearns testified that Fleet had used PeopleSoft HRM software since 1996. Tr at 3286:18-20 (Mearns). In 2002, Fleet sought to upgrade its PeopleSoft HRM software to encompass increased functionality. But the $ 12 million price tag was too much for Fleet's appropriation committee and Mearns was told that upgrading PeopleSoft was not an option. Tr at 3289-3290:11. Based upon this turn of events, Mearns stated that Fleet instead turned to outsourcing to meet its HRM needs. Tr at 3290:24-25 (Mearns). The search to find an outsourcing firm that could meet all of Fleet's needs led to five candidates: Mellon, Hewitt, Exult, Accenture and Fidelity. Tr at 3293:1-2 (Mearns). Fidelity "best met [the] business objectives and selection criteria" that Fleet required. Tr at 3295:11-12 (Mearns). After implementation of **[**99]** the new outsourcing solution, Mearns stated that Fidelity's systems were "very configurable to meet [Fleet's] requirements." Tr at 3297:12-14 (Mearns). After BA acquired Fleet, Mearns gave a presentation to BA executives about Fleet's experience with outsourcing and the capability of Fidelity. Tr at 3300:14-17 (Mearns). Based upon this presentation, BA decided to outsource all of its HRM functions to Fidelity. Tr at 3300:20-22 (Mearns).

Charles Peters, Senior Executive Vice President for Emerson Electric Company (Emerson), was also called by Oracle to testify about other viable substitutes to high function ERP. Emerson is a global manufacturing company operating in six industries including climate technologies (air conditioning and heating components), motor and appliance components and components for large industrial equipment. Tr at 1190-1191:15 (Peters). Emerson's annual revenue exceeds $ 15 billion and its workforce includes about 110,000 employees in over 50 countries. Tr at 1191:18-25 (Peters). Within these six industries, Emerson has over 40 divisions. Tr at 1193:11 (Peters). Some of these divisions, standing alone, have global operations and revenues in the billions of dollars. **[**100]** Tr at 1193:19-20 (Peters). Many of these divisions operate their own HRM and FMS software. Tr at 1198:7-8 (Peters).

One aspect of Peters' job is to provide "options" to each division regarding their choices for handling FMS and HRM needs. Tr at 1197:6-18 (Peters). Peters stated these "options" include ERP vendors, outsourcing, best of breed solutions, in-house solutions and extending incumbent systems. Tr at 1198:7-19 (Peters). Peters testified that one of his divisions **[*1133]** will not implement Oracle ERP because their in-house software fully meets its needs. Tr at 1211:1-18 (Peters). Further, Peters discussed the increasing role that outsourcing to Asia or the Philippines plays in the HR area of many divisions. Tr at 1214:7-16 (Peters). Finally, Peters stated that he did not believe that Emerson divisions would have to pay more for Oracle ERP if the proposed merger is consummated. Tr at 1235:11-14 (Peters).

In so testifying, Peters cited to a recent negotiation he conducted with Oracle concerning ERP for one division. During the negotiations, Peters stated, PeopleSoft was never a contender. Tr at 1235:16 (Peters). The possibility of using PeopleSoft was not leverage that Peters could **[**101]** use to advantage in seeking to obtain a lower price from Oracle. Emerson still received a competitive price from Oracle. Tr at 1235:18-24 (Peters). Accordingly, Peters stated that he does not believe that the presence or absence of PeopleSoft is a factor that constrains Oracle pricing. Id.

To be sure, the testimony of the Oracle witnesses, like that of the plaintiffs' customer witnesses, entailed some speculation about the presence or absence of PeopleSoft in the market. But the Oracle witnesses testified about concrete and specific actions that they had taken and been able to complete in order to meet their firms' information processing needs, apart from relying on the three ERP vendors that plaintiffs contend are a market unto themselves. Hence, the court finds on this basis, as well as an assessment of the witnesses' credibility, that the testimony of the Oracle customer witnesses was more believable than that of the plaintiffs' witnesses, despite the greater number of the latter.

Plaintiffs' Expert: Iansiti

In addition to the customer witnesses, plaintiffs presented the expert opinion testimony of Marco Iansiti, a professor of business administration at the Harvard Business **[**102]** School. Iansiti's expertise lies in operations management and information technology. Iansiti also has experience as a consultant for companies in the "software space." Tr at 2020:24 (Iansiti). Iansiti thus brought an academic perspective that basically echoed the testimony of the customer witnesses. The court is satisfied that Iansiti is well qualified to opine on features of ERP products.

Iansiti was asked to identify the vendors whose ERP products would meet the needs of a "large and complex enterprise." Tr at 2024:4 (Iansiti). Iansiti examined the product documents and analysts reports of 148 ERP vendors. Tr at 2025:10 (Iansiti). Iansiti testified that only the products of Oracle, PeopleSoft and SAP possess the functionality adequate to meet the needs of such an enterprise. With regard to Lawson, Iansiti testified that its HRM product can handle only three levels of an organization and its FMS product five levels and thus is wholly inadequate for a large and complex enterprise. Tr at 2047:3-5 (Iansiti). By contrast the PeopleSoft and Oracle products can capture "unlimited levels of organization." Tr at 2047:17 (Iansiti).

Iansiti testified that Microsoft Business Solutions (MBS) **[**103]** provides four ERP products: Navison, Axapta, Great Plains and Solomon. Tr at 2054:7-8 (Iansiti). But MBS sells exclusively through resellers and thus lacks the kind of direct relationship necessary to furnish the level and specific services required by large and complex enterprises. Tr at 2054:17-2055:11 (Iansiti). Microsoft will not, in Iansiti's view, have a single product to "rationalize" its present four ERP products until 2009. Tr at 2058:25-2061:10 (Iansiti). Iansiti expressed doubts that Microsoft will be able to develop products competitive with those of PeopleSoft, Oracle **[*1134]** and SAP because Microsoft's business model is radically different from that of these three companies. Tr at 2061:11-2063:15 (Iansiti). Iansiti also saw no developments in internet technology or the integration layer that would likely replace the functionalities of the ERP offerings of PeopleSoft, Oracle and SAP. Tr at 2077:12-2080:11 (Iansiti).

The court finds that Iansiti's testimony fails to establish a product market. Iansiti did not claim to have performed an economic study of the ERP industry. Tr at 2082:5-20 (Iansiti). He conceded that there is not a "clear line or demarcation" to distinguish enterprises **[**104]** that have high functional needs from "lower function or mid-market needs." Tr at 2088:7-2090:21 (Iansiti). Furthermore, Iansiti conceded that a number of companies that would appear to meet the criteria of large and complex enterprises have satisfied their ERP requirements with the products of vendors other than PeopleSoft, Oracle and SAP and have satisfied their needs from outsourcing or from their legacy systems. See Tr at 2091:5-2095:3, 2100:1-2113:15 (Iansiti). Because of his lack of economic analysis and his inability to identify articulable product market boundaries (a key issue in a horizontal merger case), the court finds that Iansiti failed to establish a clearly defined product market along the lines alleged by plaintiffs.

Systems Integrators

Plaintiffs presented the testimony of two systems integrator witnesses in an effort to prove the existence of a separate high function ERP market. One of these witnesses, Perry Keating of BearingPoint, however, rebutted as much as supported plaintiffs' positions regarding market participants and likelihood of entry into the market.

Keating is the Senior Vice President of BearingPoint, one of the largest consulting companies in **[**105]** the world. Tr at 857:12-15 (Keating). BearingPoint is involved in "management consulting" which includes the "implementation of financial [and] human resource * * * solutions." Tr at 858:4-7 (Keating). At the outset of his testimony, Keating made clear that BearingPoint has taken no position either for or against the proposed merger. Tr at 858:11-18 (Keating). Keating stated that BearingPoint "wishes both [Oracle and PeopleSoft] well." Id.

Keating started off by supporting plaintiffs' product market definition, stating that BearingPoint's "large clients, whether it be commercial or public service * * * predominant [ly] * * * choose Oracle, PeopleSoft and SAP" software. Tr at 867:10-14 (Keating). Keating called these large customers "Tier 1" customers, describing their needs with regard to multiple currencies, languages and legal systems. Keating stated that "Oracle, PeopleSoft and SAP are the three clear, you know, players in the marketplace." Tr at 870:9-10 (Keating).

Further, Keating testified that no other vendor could deliver the degree of functionality that these three vendors deliver. Tr at 871:17-20 (Keating). In support of these contentions, plaintiffs introduced **[**106]** *a* questionnaire that BearingPoint had completed for the European Commission's investigation of the merger at bar. Ex P203 at 1. Keating was personally involved in preparing the responses to this questionnaire. In one question, the EC asked BearingPoint: "[Is] there a specific market for supplying EAS * * * to large companies, * * * in which only a few vendors are active?" Id at 11. BearingPoint responded: "Yes, there is such a market. The vendors are SAP, Oracle and PeopleSoft * * *." Moreover, BearingPoint's responses also stated that it believed innovation would be slowed in this market as a **[*1135]** result of the proposed merger between Oracle and PeopleSoft. Id at 16.

Once the topic turned to the likelihood of entry into this marketplace by vendors other than SAP, Oracle or PeopleSoft, Keating's testimony began to undermine BearingPoint's response to the EC. Plaintiffs directed the court's attention to a portion of the EC questionnaire pertaining to ease of entry. When BearingPoint was asked to "indicate at least three companies that are potentially able to enter this [EAS for large companies] market," BearingPoint had listed Microsoft, Siebel and IBM. Id at 14. Moreover, the response **[**107]** stated that the only barrier to entry by these three vendors is "self choice." Id. But when asked at trial by plaintiffs if Keating was surprised by Microsoft's approach to acquire SAP, Keating responded: "No, * * * Microsoft's not a company that plays for second." Tr at 926:22-24 (Keating).

On cross-examination, Oracle delved deeper. When asked if "there was any question in [his] mind that Microsoft has the ability to develop a scalable product," Keating replied "no." Tr at 940:13-15 (Keating). The following testimony presents a good summary of Keating's contribution regarding the potential entry of Microsoft into the high function market:

> Question (by Oracle Counsel): They're [Microsoft] coming aren't they, to the large market space?
> Answer (Keating): Monday they were almost there [referring to the SAP acquisition revelation].
> Question: Indeed they were.
> Answer: I had a conference call with my SAP practice [saying], "you guys might want to get new letterheads." I don't mean to be flip, but it was pretty clear they're coming.

Tr at 942:14-19 (Keating).

Furthermore, Keating's testimony makes it appear that BearingPoint is rolling out the red **[**108]** carpet for Microsoft's arrival. At trial, an "alliance" between Microsoft and BearingPoint came to light under which BearingPoint has agreed to become Microsoft's "go to partner" in the high function ERP software market for customers that have less than $ 2 billion in annual revenues. Ex D5051 at 2.

In the main, the court found Keating's testimony to be credible. Most particularly, Keating's testimony of the alliance between his company and Microsoft substantiates Oracle's contention that Microsoft is a competitor for much ERP business and able to extend its reach into an arena in which plaintiffs contend that only Oracle, PeopleSoft and SAP now compete. Keating's testimony gives evidence that Microsoft's entry into competition may be achieved by a business model different from that followed by Oracle, PeopleSoft or SAP. Microsoft's ERP products through this collaboration with BearingPoint can be customized, configured and adapted to be competitive with the offerings of the three companies that plaintiffs contend make up the market, at least up to a level that is well within the large, complex level of customer demand that plaintiffs contend requires high function ERP.

Nancy Ellen **[**109]** Thomas, the Global and Americas Financial Management Solutions Leader for IBM, also called by plaintiffs, testified about IBM's role as a consultant to "large, global complex clients" procuring FMS software. Unlike BearingPoint, IBM has publicly stated its opposition to the hostile takeover of PeopleSoft by Oracle. Ex D5240R at 13 (stating that a "successful Oracle bid" would be a "negative for IBM * * * [with] possible impact on strong PeopleSoft [and IBM] alliance revenue" and also considering taking a "proactive stance against the [Oracle/PeopleSoft] deal"). Thomas began by echoing many of the same views that Keating expressed **[*1136]** in regard to the ERP needs of large complex customers, including multiple geographies, currencies, languages and regulatory requirements. Tr at 474:9-12 (Thomas). When asked, based upon her experience, which ERP vendors could offer a product that could satisfy the requirements of these customers across multiple countries, Thomas listed only Oracle, PeopleSoft and SAP. Tr at 475:2 (Thomas). When asked what vendors could support reporting requirements for multiple ranges of legal entities, Thomas listed only Oracle, PeopleSoft and SAP. Tr at 476:3 (Thomas). **[**110]** The same three vendors were listed when Thomas was asked about supporting multiple lines of business. Tr at 476:15 (Thomas). Thomas downplayed the role that Lawson plays within this "up market" sector, stating that "the clients * * * we work with are typically not" focusing on Lawson to the extent that they are focusing on Oracle, PeopleSoft and SAP. Tr at 495:10-15 (Thomas).

Plaintiffs also appeared to use Thomas to bolster their contention on "localization" between Oracle and PeopleSoft by asking Thomas about the banking industry and which firms compete for that business. When asked which vendors she would expect to see in the final scoring and recommendation phase of a banking customer's selection process, Thomas stated: "primarily Oracle and PeopleSoft." Tr at 498:21-25 (Thomas).

When Oracle's counsel questioned Thomas about the possible bias of IBM, Tr at 499-503 (Thomas), Thomas admitted that IBM has the "largest PeopleSoft practice of any consulting firm in the world" and that PeopleSoft has "publicly described IBM as PeopleSoft's strongest partner." Tr at 499 (Thomas). Further, IBM has over 150 employees dedicated to consulting and implementing PeopleSoft products, all of **[**111]** whom could lose their jobs if PeopleSoft was merged with Oracle, a company for which IBM has only 75 dedicated consultants. Tr at 500:20-502:10 (Thomas).

Turning to Lawson, when asked about IBM's large and complex implementation of Lawson HRM for the State of Arizona, which has over 60,000 employees, Thomas stated that she didn't have the "Lawson expertise" to talk about that transaction. Tr at 519:12-13. Further, Thomas "was not aware" of IBM's implementation of Lawson software at Montgomery County Schools in Maryland, an entity with over 140,000 students. Nor was she "aware" of IBM's implementation of Lawson for the State of Michigan or IBM's implementation of Lawson for a large school district in Tampa. Tr at 520:7-19 (Thomas).

The court first notes a possible IBM bias due to IBM's potential loss of PeopleSoft implementation business, a significant source of IBM revenue. Furthermore, the court cannot overlook Thomas' lack of knowledge about <u>any</u> potential high function implementation of Lawson software. This makes the court reluctant to afford much, if any, weight to her testimony. Thomas seemed not to be able to identify factors that would keep Lawson from competing in the **[**112]** high function sector. Her testimony failed to substantiate plaintiffs' claim of separate FMS and HRM high function markets.

Industry Witnesses: PeopleSoft and Microsoft

Next, plaintiffs presented the testimony of several industry witnesses in an effort to support the proposed high function ERP market.

Richard Bergquist, Chief Technology Officer, Senior Vice President and PeopleSoft "Fellow," explained to the court how PeopleSoft defines a high function customer versus a mid-market customer. Tr at 255:18-19, 275-276:21 (Bergquist). Not surprisingly, Bergquist's definition of high **[*1137]** function customers and high function software echoed plaintiffs' definitions (or, at least, some of them). First, Bergquist stated that a customer cannot be labeled as high function simply based upon its size or revenue. Rather, one "ha [s] to look all the different dimensions" in order properly to distinguish between these two types of customers. Tr at 276:3 (Bergquist). The "different dimensions" that Bergquist referred to in guiding an explorer through the task of deciding what label to apply to a customer are: functionality, flexibility, scalability, reliability and technology. Tr at 280-282, 283: **[**113]** 18, 289:4-25 (Bergquist). Only after knowing the customer's needs regarding all of these dimensions, which one must learn "through a series of conversations with the customer," can one then place a customer in the correct talismanic column of high function or mid-market. Tr at 276:11-13 (Bergquist).

A high function customer requires software that is highly functional, highly flexible, contains large scalability and is reliable 24 hours per day, seven days a week. Tr at 283-289 (Bergguist). Customers who do not need software with such deep functionality, large scalability or high flexibility are mid-market customers who buy mid-market software. Tr at 300:10-13 (Bergguist). Bergguist succinctly stated that "customers that don't have the needs of large and complex enterprises, we [PeopleSoft] group into the mid-market." Tr at 275:1-2 (Bergguist). Bergguist clearly stated that a market exists for the sale of high function software to high function customers, and in this market PeopleSoft competes with only SAP and Oracle. Tr at 279:17 (Bergguist). Berguist went on to explain that a customer can be high function regardless of its international locations or international currency needs. **[**114]** Tr at 292:20 (Bergguist). "Internationally" was not a dimension for delineating high function from mid-market, rather international needs simply create the need for more function and scalability. Nonetheless, multiple currency, language and nationality capabilities are not requirements for a high function customer, as a customer can be located in the United States only and use only English and still be a high function customer according to Bergguist. Tr at 292:1-15 (Bergguist).

Questions soon turned to Lawson and its role in this high function software market. Berguist stated that PeopleSoft "does not believe" that Lawson sells any HRM or FMS software that has similar functionality to the same software sold by PeopleSoft. Tr at 299:21-25 (Bergguist). Rather, Lawson has FMS and HRM that is "adequate for the basics of what an organization would need." Tr at 300:4-5 (Bergguist). If the organization has simple and repetitive tasks, then "the Lawson product does that very well." Tr at 300:9-10, 304:1-4 (Bergquist). But if a customer starts going beyond those basic tasks, then the customer needs features and functions that Lawson cannot supply. Tr at 300:10-13 (Bergquist). Moreover, Lawson **[**115]** does not have to ability to support Unicode, a common character set for all languages of the world. Since Lawson cannot do that, it is "limited to the US, Canada and UK." Tr at 301:19-25 (Bergquist).

The next topic was AMS and its role in the high function market. Bergquist stated that AMS only has a "financial product that is meant for sale in the public sector." Tr at 309:14-15 (Bergquist). Further, the software was developed only for a minimum level of functionality and requires extensive customization before it can be implemented. Tr at 309:12-17 (Bergquist). Further, AMS does not have an HRM product. Because AMS does not rise to the level of functionality required to be considered high function, AMS is not a high function vendor selling a product that **[*1138]** competes in the proposed market. Tr at 310:4-7 (Bergquist).

Next, Bergquist took aim at the best of breed solutions, stating that a customer "can't assemble point solutions to get the full picture." Tr at 311:12-14 (Bergquist). These point solutions do not provide core functionality, requiring a customer to purchase core functionality from a different vendor, and then having "multiple solutions from point solutions," creating extensive **[**116]** integration costs. Tr at 311:12-25 (Bergquist). Accordingly, best of breed solutions are not a viable option for high function customers and therefore are not substitutes for high function software.

Next, Bergquist set out to prove that outsourcing is also not a viable option for high function customers stating that "we see it [outsourcing] as less capable software than that provided by PeopleSoft, SAP and Oracle." Tr at 314:11-12 (Bergquist).

Finally, Bergquist was questioned about potential localized competition between Oracle and PeopleSoft, thus establishing the likelihood of unilateral anticompetitive effects. Bergquist testified that there are some instances where Oracle is PeopleSoft's closest competitor over SAP. Tr at 319:6-8 (Bergquist). This type of situation arises in the service industries according to Bergquist because Oracle and PeopleSoft both "grew up in the same neighborhood," the services industry neighborhood, thus making Oracle and PeopleSoft strong competitors in this vertical, especially among those who have a "buy-American tendency." Tr at 319:11-16 (Bergquist). Moreover, Bergquist testified that SAP has suffered from the "stereotype of German engineering" **[**117]** that leads many to view SAP software as less flexible and requiring more customization. Tr at 320:11-15 (Bergquist). But Oracle and PeopleSoft are both seen as very flexible, again making them more likely competitors over SAP. Tr at 320:16-18 (Bergquist).

On cross, Bergquist was first asked about the distinction between mid-market and high function customers and software. When asked if there were any PeopleSoft documents which describe this distinction between high function and mid-market customers or software, Bergquist said that he was not aware of any such documents. Tr at 347:22-25 (Bergguist). Further, Bergguist admitted that there are no "clear-cut answers" or "firm dividing lines" that distinguish a mid-market customer from a high function customer. Tr at 353:15-22 (Bergguist).

Next Bergguist was asked about his dismissal of Lawson from the high function market. When asked if PeopleSoft had lost any business from large and complex customers to Lawson, Bergguist replied: "I can't think of any that we have * * * lost." Tr at 364:5 (Bergguist). Oracle then showed Bergguist a document, created by PeopleSoft, tabulating enterprise deals which PeopleSoft had competed for, and the **[**118]** name of the competitor on the deal. Ex D6236A. The data read that Lawson was an enterprise competitor 27 times, with SAP competing 33 times and Oracle 38 times. Id at PS-C077332. But Bergguist stated: "I don't know anything about this document * * * where it came from or how it was." Tr at 375:3-9 (Bergguist).

Bergguist was then asked about specific instances of competition with Lawson. When asked if he knew anything about PeopleSoft's loss to Lawson on the Dean Foods account, Bergguist stated "no." Tr at 377:16-18 (Bergguist). When asked about PeopleSoft's loss to Lawson on the Qwest [transcript misspelling] Communications account, again Bergguist stated that he knew nothing about that lost business. Tr at 377:19-21 (Bergguist). **[*1139]** Moreover, it appears Bergguist was not even aware of instances in which PeopleSoft won business when in competition with Lawson. When asked if he knew anything about PeopleSoft's wins over Lawson on the Maricopa County account, Bergguist replied "no." Tr at 377:22-24 (Bergguist). Bergguist provided the same answer when asked about PeopleSoft's win against Lawson on the San Diego Unified School District account. Tr at 378:2 (Bergguist). Bergquist, like Ms **[**119]** Thomas before him, seemed to have been struck with a singular memory lapse. It appears both witness, while able to testify thoroughly about other vendors, drew a complete blank when asked about potential high function implementations of Lawson. The court began to wonder if this phenomenon, perhaps called "Lawson Amnesia," would strike any more of plaintiffs' witnesses.

The final part of Bergguist's cross came when defense counsel began inquiring about the alleged localization of competition between PeopleSoft and Oracle in the services industry vertical:

> Question (Oracle counsel): Can you identify for me any particular verticals in which you believe that SAP is not competitive with Oracle and PeopleSoft?
> Answer (Bergguist]: SAP may compete in almost all the verticals that are there. * * *. There is relative strength for PeopleSoft and Oracle in the services industries.
>
> Question: I understand that you've said that sir, but my guestion is different. <u>In any of those services industries, is it your testimony that SAP is not competitive with Oracle and PeopleSoft?</u>
> Answer: No.

Tr at 388:1-11 (Bergguist) (emphasis added).

Notwithstanding any bias, Bergguist's **[**120]** testimony served to hurt plaintiffs' claims rather than bolster them. First, Bergguist conceded that no "clear-cut" dividing line exists in labeling a customer as "high function" rather than "mid-market." Finding an articulable division between so-called high function and mid-market ERP is necessary to plaintiffs' burden of establishing a product market. Second, Bergguist conceded that there is not one single services industry vertical in which SAP is not "competitive" with Oracle and PeopleSoft. The court <u>must</u> demarcate such a "node" or area of localized competition between Oracle and PeopleSoft as a prereguisite to finding any likelihood of unilateral anticompetitive effects. Bergguist's testimony was also full of self-serving statements regarding the low functionality of AMS and Lawson, testimony that was shown to be wholly unreliable on cross-examination when Bergguist was rendered unable to remember key information regarding Lawson.

Philip Wilmington, Executive Vice President of PeopleSoft Americas, further testified in support of the plaintiffs' proposed product market. Tr at 1760:4 (Wilmington). Wilmington began by expounding how PeopleSoft characterizes the mid-market **[**121]** versus the "up-market" or high function market. Tr at 1765-1766 (Wilmington). Wilmington stated that the "up-market" is defined as customers that have revenues of $ 1 billion or above and have "complex reguirements." Tr at 1765:16-22 (Wilmington). Prior to the PeopleSoft acguisition of J D

Edwards, the demarcation line between mid-market and up-market had been $ 500 million. Tr at 1847:7-17 (Wilmington). Predictably, Wilmington stated that PeopleSoft only competes in the up-market with Oracle and SAP. Tr at 1773:14 (Wilmington). Oracle and SAP are the "ones [PeopleSoft] runs into all the time." Tr at 1773:19-20 (Wilmington). Only these vendors have "the functionality" and the "references or customer successes" which allow them to **[*1140]** be a competitive presence in the up-market. Tr at 1773:21-1774:2 (Wilmington). Wilmington further testified that when these three competitors compete, it gets "very aggressive." Tr at 1797:20 (Wilmington). Moreover, Wilmington stated that oftentimes PeopleSoft knew the identity of its competitors on any given account, with that information driving higher discounts. Wilmington cited the example of the Oracle and PeopleSoft competition for Target, in which **[**122]** Target would communicate the other competitor's discount offerings to PeopleSoft. Tr at 1797:20-25 (Wilmington).

Wilmington testified that he did not believe that the "do nothing" option was a threat to PeopleSoft or other up-market vendors. Wilmington stated: "Almost never do I see a company that is invested in a [procurement] evaluation * * * just do nothing." Tr at 1792:2-3 (Wilmington). Wilmington stated that incumbent systems may simply "delay the decision" to buy ERP, but it is not a long-term solution for any customer. Tr at 1792:21-22 (Wilmington).

Testimony turned to Lawson and its classification as a mid-market or up-market vendor. "Very, very infrequently do I see Lawson," stated Wilmington in describing the competition for high function customers. Tr at 1803:9 (Wilmington). "They are not a viable competitor for the up-market." 1803:10-12 (Wilmington). Wilmington stated that Lawson competes, and competes well, in the mid-market sector, and perhaps it can be seen sporadically in the up-market healthcare and retail industry. Tr at 1805:13-23 (Wilmington). When Wilmington was asked about the competition between PeopleSoft and Lawson on the Amerigroup account, Wilmington **[**123]** stated that Americgroup "was very much a mid-market opportunity." Tr at 1810:5-6 (Wilmington). Regarding Microsoft, Wilmington stated that PeopleSoft does not compete with Microsoft in the up-market and only sees it from "time to time" in the mid-market. Tr at 1811:14 (Wilmington).

Next, Wilmington was asked about outsourcing and its role in the up-market. Tr at 1812:13-14 (Wilmington). Wilmington stated that he does not see outsourcing as a threat to PeopleSoft; rather, he sees outsourcing as an opportunity. Tr at 1812-17-18 (Wilmington). Wilmington stated that outsourcers have to buy software to manage the client's HR needs, and PeopleSoft tries to be the vendor to supply such software. Tr at 1812:17-18 (Wilmington). Accordingly, outsourcing is a business opportunity, not a threat. When asked about outsourcers who use their own software to manage HR, Wilmington stated that he doesn't feel threatened because that software lacks the "robust functionality that is going to be necessary to successfully meet the needs of [the] up-market." Tr at 1813:12-14 (Wilmington).

Finally, Wilmington testified regarding localized competition between Oracle and PeopleSoft. Wilmington stated that **[**124]** SAP software was "developed for a more rigid business model" and therefore lacks flexibility. Tr at 1815:5-6 (Wilmington). Oracle and PeopleSoft possess such flexibility and therefore are better solutions for up-market customers. Tr at 1815:11-15 (Wilmington). Moreover, Wilmington testified that he believes SAP is more expensive, ranging anywhere from "20 to 50 percent, in terms of higher cost of ownership across the board." Tr at 1817:5-7 (Wilmington). In fact, Wilmington cited one example, the PNC Bank account, in which Oracle, SAP and PeopleSoft were all three competing. But SAP was eliminated because its software did not possess the flexibility that PNC required. Accordingly, PNC narrowed the competition to only Oracle and PeopleSoft. Finally, Wilmington stated **[*1141]** that the PNC scenario was exemplary of the situation in the entire United States banking industry. Tr at 1817-1818 (Wilmington).

On cross, Wilmington was questioned about PeopleSoft's up-market versus mid-market demarcation. It was during this questioning that the court learned that <u>the day prior</u> to Oracle's tender offer for PeopleSoft, the demarcation line was $ 500 million in revenues and/or 2,000 employees but, soon **[**125]** thereafter, the of demarcation line increased to $ 1 billion in revenue only. Tr at 1848:10-16 (Wilmington). Wilmington stated that it was the J D Edwards acquisition, and not the tender offer, which caused the increase. But Oracle's counsel then asked: "If you drew the line at 500 million and/or 2,000 employees for [the] mid-market [roof amount], then the up-market would include players other than Oracle, PeopleSoft and SAP, isn't that right?" Tr at 1849:5-7 (Wilmington). Wilmington had trouble giving a direct answer to this question, choosing instead to argue that other factors were necessary, other than revenue, before being able to classify a customer in the mid-market or up-market. Tr at 1849:8-15 (Wilmington). But Oracle's counsel quickly brought Wilmington's attention to a 2003 PeopleSoft Pricing Policy Document which stated that "[a] mid-market customer is defined as a customer with revenues of up to $ 500 million and/or 2,000 employees." Ex P4965 at 6-7. There is no mention of other factors such as scalability or functionality needs. Further, the document stated that "the revenue-based metric is meant to be <u>the single determinant</u> of the Mid-Market Line * * *." Ex **[**126]** P4965 at 6-7 (emphasis added).

Regarding Lawson, Wilmington stood by his deposition statement that not once in 25 years had Wilmington seen PeopleSoft compete with Lawson for a "enterprise customer." Tr at 1856:21-25 (Wilmington). Wilmington stated that he based this statement upon the new $ 1 billion demarcation line between mid-market and up-market (enterprise) customers. Tr at 1857:5 (Wilmington). But Wilmington conceded that if the $ 500 million/2,000 employee line were used, then PeopleSoft had competed with Lawson for enterprise customers. Tr at 1858:7-8 (Wilmington). Oracle then introduced a document created by PeopleSoft in July 2003, after the Oracle offer and the J D Edwards acquisition, which showed the number of times PeopleSoft had competed with certain vendors on enterprise deals. Tr at 1858:10-17 (Wilmington); Ex D6236. Since the document was created after the J D Edwards acquisition, it would appear that the mid-market demarcation line used would be (or should have been) the $ 1 billion line. The document lists PeopleSoft as having competed with Lawson 27 times for an enterprise customer. Tr at 1859:7-8 (Wilmington). When asked if Wilmington still stood by his testimony, **[**127]** Wilmington stated that he still believed that PeopleSoft "doesn't see Lawson in enterprise deals." Tr at 1859:13-14, 1861:5-7 (Wilmington). Wilmington elected to "stand by his testimony." Tr at 1861:8 (Wilmington). Lawson Amnesia appeared to have claimed yet a third victim.

When asked about PeopleSoft's competition with Lawson for HCA Columbia, Wilmington could not speak to that issue because "he had not been involved in the competition." Tr at 1868:4 (Wilmington). When shown a PeopleSoft document that listed Lawson as "the number one competitor in new market deals" in the western geographic region of the United States, Wilmington stated that he "did not know" if Lawson was really number one. Tr at 1866:13-21 (Wilmington). When competing with Lawson for the Stanford University Medical Center, PeopleSoft documents written by Lynn Duffy, the sales team **[*1142]** leader on the deal, stated that "Lawson is the competition," but Wilmington stated that he "was not sure" if Duffy was right about that point. Tr at 1870:5-6 (Wilmington). When asked about PeopleSoft's loss to Lawson for the State of Michigan account, Wilmington stated that he was "not certain" if PeopleSoft had even competed against **[**128]** Lawson for that account. Tr at 1878:15-16 (Wilmington). When asked about PeopleSoft's loss to Lawson for ManuLife's business, Wilmington stated that he "did not remember losing to them" on that account. Tr at 1896:14 (Wilmington). When asked about the loss to Lawson for the Mayo Clinic account, Wilmington stated that he "was not familiar with the details of that competition." Tr at 1896:22-23 (Wilmington). Since Wilmington apparently was not aware of what PeopleSoft's own documents reveal about Lawson as a competitor and is "not certain" whether PeopleSoft competed against Lawson for several large accounts, the court finds Wilmington's testimony concerning Lawson's absence from the up-market largely incredible.

Regarding outsourcing, Wilmington was shown the same document created by PeopleSoft soon after the Oracle tender offer, which showed that PeopleSoft competed against ADP, an outsourcer, 15 times. Ex D6236. Wilmington stated that he "did not know how this [sic] data was compiled and edited;" therefore, he could not state whether these data meant that PeopleSoft faced competition from ADP for up-market customers. Tr at 1860:5-15 (Wilmington).

Finally, Oracle cross-examined **[**129]** Wilmington about any alleged localization between Oracle and PeopleSoft. Wilmington was shown his video deposition in which he was asked:

> Question (Oracle counsel): Is there <u>any</u> vertical segment of the market in the United States, the ERP market, where you do not consider SAP to be a formidable competitor for large enterprise customers?
> Answer (Wilmington): For large enterprise customers, no. I believe them to be a formidable competitor across the industry.

Tr at 1957:10-21 (Wilmington) (emphasis added). When asked if he had given those answers, Wilmington replied "yes." Tr at 1957:20 (Wilmington).

For the same reasons the court mentioned above in discounting Berquist's testimony, the court cannot accord much weight to Wilimgton's testimony. First, Wilmington admitted that there is not a single vertical industry in which Wilmington does not believe SAP to be a "formidable competitor" undercutting plaintiffs' unilateral effects claim. Further, in describing the way in which PeopleSoft characterizes mid-market customers, Wilmington was impeached by a document created by his own company. Likewise, the same document impeached his testimony about the absence of **[**130]** outsourcers from the up-market. This impeachment, combined with Lawson Amnesia, leads the court to find that Wilmington did not offer reliable evidence establishing an articulable product market containing only Oracle, PeopleSoft and SAP.

Douglas Burgum, Senior Vice President of Microsoft Business Solutions (MBS), was another industry witness called by plaintiffs in order to support their theory of the high function product market and its three participants. Burgum began by describing how he literally "bet the farm" on a small software company called Great Plains in 1983. In 2001 Microsoft acquired Great Plains. Tr at 2974:3-8 (Burgum). In 2002, Microsoft acquired Navison Software, a Danish company. The entire group was rebranded as "Microsoft Business Solutions" (MBS). Tr at 2973:8-9 (Burgum). MBS sells four business application **[*1143]** products: Navison, Great Plains, Solomon and Axapta. Tr at 2996:15-16 (Burgum). Burgum is responsible for the overall performance and market strategies of MBS, as well as ongoing developments of new products and enhancements to existing products. Tr at 2974:18-20 (Burgum). Burgum began by stating that MBS is focused on selling its product to mid-market customers. **[**131]** Tr at 2978:5-8 (Burgum).

To Microsoft, mid-market customers are customers who have employees ranging from 50 to 1000 employees and an average IT spend between $ 10,000 and $ 2 million. Ex P2533R at 6. Further showing that Microsoft is only focused on mid-market customers, Burgum testified that MBS does not have a sales force. Rather, MBS is sold indirectly through reselling partners, companies whose sole purpose is to resell MBS products. Tr at 2986-2988 (Burgum). Moreover, neither partners nor MBS itself offers implementation or consulting services for the products and do not intend to do so in the future. Tr at 2995:3-18 (Burgum). When asked if MBS intended to expand its products' ability to serve the large enterprise sector, Burgum responded "no, * * * that is not a segment we are targeting." Tr at 3001:20-3302:1 (Burgum). Moreover, MBS products do not have the functionality to meet large customers' needs. Tr at 3005:22-25 (Burgum). MBS products, Burgum stated, cannot handle the "multi-multi-multi issues," such as multiple languages and currencies that large organizations tend to need. Tr at 3011:23-25 (Burgum). When asked what firms' software could meet those needs, Burgum responded: **[**132]** Oracle, PeopleSoft and SAP. Tr at 3006:8-9 (Burgum). Burgum stated that while Microsoft competes with these three from time to time, that competition only occurs for mid-market customers. Tr at 3008:3-6 (Burgum).

Burgum cited the lost North Dakota account as an example of the limited functionality of the Great Plains product, both pre- and post-acquisition with Microsoft, and its inability to meet large functional needs. Tr at 3022:3-7 (Burgum). Burgum was asked why Microsoft didn't "just spend a bunch of money" to redevelop the code and the salesforce in order to compete for larger accounts. Tr at 3024:3-10 (Burgum). Burgum stated that undertaking would "be a formidable task" and would "take more money than I would be willing to recommend that Microsoft spend." Tr at 3024:12-18 (Burgum). Plaintiffs asked Burgum about the Microsoft/SAP acquisition proposal. Burgum stated the "leading" reason that Microsoft wanted to acquire SAP was not to enter the high function market for ERP and thereby start competing with Oracle or PeopleSoft. Rather the acquisition was to create "a better value for the customers who would use Microsoft Office to work with and make decisions around the data that **[**133]** would come out of the SAP system." Tr at 3040:9-15 (Burgum). Microsoft simply wanted to purchase SAP in order to help "front-end users" be "better able to communicate with back-end data." Tr at 3039:25-3040:2 (Burgum). See Ex P841R at 1. Apparently, the acquisition was not motivated by any ill-will towards Oracle or any desire to enter the market and begin undercutting Oracle. The discussions between Microsoft and SAP were concluded in early spring 2004, about the time this suit went to trial, with a decision not to move forward with the acquisition. Tr at 3028:9-10 (Burgum).

When asked about Microsoft's alliance with BearingPoint, Burgum testified that Microsoft had only the humblest of intentions in entering into this alliance. Under this agreement, Microsoft was to "provide funding for hiring, recruiting and training of people who would get skilled up on **[*1144]** Axapta." Tr at 3055:15-17 (Burgum). In return, BearingPoint agreed to recommend, install and maintain MBS software, specifically Axapta, to BearingPoint consulting clients. Tr at 3055:15-17 (Burgum); Ex 3249R at 4, 15. MBS had no plan or expectation for BearingPoint to recommend Axapta software to high function customers. Tr at **[**134]** 3053:1-6 (Burgum). To the contrary, this agreement was only entered into for BearingPoint to sell MBS to mid-market customers. Tr at 3054:10-18 (Burgum).

Subsequent to trial, BearingPoint announced that the new Microsoft Business Solutions Axapta was "a compelling ERP solution" which "provides functionality across all key areas of the business * * * including financial management, CRM [and] HR management * * *." See BearingPoint homepage at http://www.bearingpoint.com/solutions/enterprise_solutions/ microsoft_bus_sol.html. The BearingPoint webpage claims the "key" functionalities of Microsoft Axapta include "multiple companies, multiple languages, and multiple currencies." Id. Although these statements do not appear in the trial record, they are consistent with the substantial evidence in the record and afford additional reason to discount Burgum's testimony that MBS is not at least a potential entrant in what plaintiffs characterize as the high function market.

The court accords little weight to Burgum's testimony attempting to prove Microsoft's absence from the so-called high function ERP product market. Burgum's Uriah Heep like humility about Microsoft's intentions regarding **[**135]** the failed SAP alliance and the successful BearingPoint alliance was unconvincing. It strains credulity to believe that Microsoft would offer billions of dollars to acquire SAP merely to make data processing easier for customers who use both Microsoft Office and SAP ERP. Further, this proposition is impeached by Microsoft's actions with BearingPoint concurrently, or soon after, the SAP alliance was discontinued. Finally, the court wholly discounts Burgum's testimony that MBS software, especially Axapta, lacks the functionality to be considered high function ERP. Burgum stated that MBS products cannot provide the "multi, multi, multi" functionality, but BearingPoint is selling Axapta on the basis that it can handle "multiple languages, currencies and businesses." Accordingly, the court discounts Burgum's testimony portraying MBS solely as a mere humble mid-market vendor.

Finally, in attempting to show the high barriers to entry into the high function market, plaintiffs called Richard Allen, former Executive Vice President of Finance Administration and CFO of J D Edwards. Tr at 747:20-25 (Allen). Allen testified that J D Edwards, prior to being acquired by PeopleSoft, had been a company **[**136]** "focused on mid-market customers" that did not need "high levels of configurability," "deep functionality" or high scalability. Tr at 746:20-21, 757:25-758:20 (Allen). But Allen testified that in the early 1990s J D Edwards attempted to reposition itself in order to sell to "up-market customers." Tr at 770:22-771:10 (Allen). J D Edwards had to "create a software architecture to allow [its] products to run on multiple hardware platforms, with multiple databases and multiple operating systems." Tr at 771:16-21 (Allen). But J D Edwards ultimately abandoned this attempted repositioning in 2001. Tr at 777:6 (Allen). Allen stated that "[J D Edwards] came to the conclusion that after about a decade involved in the effort, hundred of millions of dollars of investment, we didn't have the products, services, and ultimately the reputation necessary to satisfy the requirements that up-market customers have." Tr at 777:8-13 (Allen). **[*1145]** Accordingly, plaintiffs argue that no firm could enter the high function FMS and HRM markets within the required two year threshold set by the Guidelines. Pls Post Brief (Doc # 366) at 44 (citing Guidelines § 3.3).

Plaintiffs' Expert: Elzinga

By far the most **[**137]** important of plaintiffs' witnesses was Professor Kenneth Elzinga of the University of Virginia. Elzinga is a well known and highly regarded economist. Tr 2142-2145 (Elzinga); Ex 4014A. The court finds Elzinga to be highly qualified to offer testimony on market definition. Elzinga was the only one of plaintiffs' witnesses who offered testimony from which the court could attempt to calculate market shares and apply the Philadelphia Nat'l Bank presumptions or perform the HHI calculations of the Guidelines.

In reaching his proposed market definition, Elzinga purported to follow the Guidelines approach. Tr. at 2163:18-19 (Elzinga). Elzinga concluded that the relevant market was limited to high function FMS and HRM software. Elzinga testified that a hypothetical monopolist could profitably impose a SSNIP in high function FMS and HRM. Tr at 2149:16-22 (Elzinga). Elzinga posited that if a merged Oracle/PeopleSoft decided to increase the price of its high function FMS and HRM products, consumers would not substitute (1) mid-market solutions (such as those produced by ERP vendor Lawson), (2) best-of-breed solutions (such as those produced by vendor Kronos), (3) incumbent or legacy solutions **[**138]** or (4) the services of outsourcing firms (such as Fidelity and ADP). Tr at 2178:10, 2179:8-14 (Elzinga).

Elzinga reached his conclusions by analyzing several "strains" of evidence: (1) Oracle discount approval forms; (2) reports from independent research firms; (3) information from high function FMS and HRM customers and consulting firms; and (4) internal documents from firms in the enterprise software sector. Tr at 2168:9-11, 2180:4, 2184:10-12, 2188:23-25 (Elzinga). This being established, Elzinga then presented his conclusions on market shares. Tr at 2209-2220 (Elzinga).

Discount approval forms. Elzinga's first strain of evidence, and the one on which he appeared to place the greatest emphasis, was the analysis and tabulation of Oracle discount approval forms (DAF). See Exs P1000-P1944.

Oracle salespersons have the discretion to offer a 20 to 25 percent discount off the list price of HRM or FMS. Tr at 2168:25-2169:2 (Elzinga). If a situation arises in which Oracle is competing with another ERP vendor and this requires the Oracle salesperson to offer a larger discount on the Oracle ERP software, a DAF must be executed and approved by an Oracle official. Tr at 2169:3-9 (Elzinga). **[**139]** In executing a DAF, the salesperson lists the "justification" for pursuing an increased discount. In the justification column of the DAF, "sometimes the particular competitor or alternative [solution] that is justifying * * * or provoking the discount that is being requested" can be found. Tr at 2169:17-19 (Elzinga).

Elzinga analyzed 222 DAFs that Oracle provided to the DOJ. Elzinga only analyzed the "forms that [1] had US customers, [2] pertained to HRM or FMS software, * * * [3] [had a] net transaction price [of] over $ 500,000 and [4] where the justification section listed the competitor [or alternative solution] that was driving the request for the discount." Tr at 2174:14-18 (Elzinga). These criteria decreased the number of DAFs available for analysis to just over 200. Tr at 2175:25 (Elzinga). After analyzing all the justifications that were proffered by Oracle salespersons, Elzinga created a graph that showed the number of times each competitor or alternative solution forced an Oracle **[*1146]** salesperson to request a discount (i e, the number of times each competitor or alternative constrained Oracle's pricing of FMS or HRM). See Ex P3175.

Based upon the graph, Oracle **[**140]** salespersons cited as primary justification, competition from: Peoplesoft, 122 times; SAP, 81 times; Lawson, 16 times; and Microsoft and AMS, each less than 10 times. Pls Post Brief (Doc # 366) at 12; Tr at 2177:10-11 (Elzinga). Elzinga concluded that this discount tabulation is "very powerful, robust evidence" that the relevant product market is high function FMS and HRM. Tr at 2179:7-8 (Elzinga). "I think that [high function FMS and HRM] is [the relevant market] because I don't see alternatives outside * * * of that market, such as mid-market, or [incumbent] or outsourcing, disciplining the Oracle pricing the way the [other] two manufacturers of high function FMS software and HRM software do, and that's SAP and PeopleSoft." Tr at 2179:9-14 (Elzinga).

Market research studies. Independent market research organizations study certain product markets and summarize findings about any number of relevant aspects of that market. Most of these research organizations conduct research and issue reports for "people who buy [the product] and want to implement it, * * * but [these firms are] not writing to an antitrust economist or antitrust lawyer audience." Tr at 2182:12-15 (Elzinga). **[**141]** Elzinga found one such market research report, conducted by the Gartner Research firm, which analyzed the HRM pillar of the software industry. Tr at 2181: 17-18 (Elzinga). In the Gartner report, Gartner had enumerated two characteristics upon which it chose to analyze HRM vendors: (1) "completeness of vision" and (2) "ability to execute." Completeness of vision apparently refers to a vendor's level of desire to have software capable of either broad and complex transactions (deemed "visionaries") or limited and ordinary transactions (deemed "niche players"). Tr at 2182: 17-19 (Elzinga). Ability to execute apparently refers to whether Gartner believed each vendor had the ability to execute its HRM capability "vision" (e g, high levels of functionality and scalability). Tr at 2182:24-25 (Elzinga).

[SEE FIGURE IN ORIGINAL]

According to Elzinga, the Gartner research only identified three firms as "visionaries" with a high ability to execute -- Oracle, PeopleSoft and SAP. Tr at 2183:1-4 **[*1147]** (Elzinga). Elzinga concluded that the Gartner report is again "consistent with the notion that there is <u>something different</u> about high function enterprise software from other alternatives * * * and **[**142]** when it comes to high function software, there is <u>something different</u> about Oracle, PeopleSoft and SAP." Tr at 2183: 16-20 (Elzinga) (emphasis added).

Customers and consulting firms. The next strain of evidence Elzinga relied upon were declarations of ERP customers and the "Big Five consulting firms" that plaintiffs furnished him. Tr at 2184:8-15 (Elzinga). In particular, Elzinga pointed to declarations of Perry Keating of Bearing Point (who also testified) and Deloitte's [David] Dortenzo. See Elzinga demo # 6. Tr at 2185:1-2188:9 (Elzinga). In seeking cost-effective solutions and recommendations in choosing ERP vendors, many consumers employ consulting firms to advise them in their negotiations with the vendors. Accenture, IBM Global Services, BearingPoint, Deloitte and CGEY are the consulting firms collectively known as the "Big Five." At trial, plaintiffs offered the statement of BearingPoint's Senior Vice President, Perry Keating. Tr at 912:15-916:7 (Keating). Keating stated that Oracle, SAP and PeopleSoft "are the only [vendors] that provide a product that will be acceptable to a large company in terms of product capabilities * * *." Id.

Elzinga described the similar **[**143]** testimony of Keating and Dortenzo in declarations as indicating that these Big Five systems integrators most frequently recommend PeopleSoft, Oracle and SAP for ERP implementations. Tr at 2186: 7-2188:9 (Elzinga).

The customers' declarations, Elzinga concluded, "were consistent with the hypothesis that there's a distinction between high function enterprise software and the mid-market * * *. [Mid-market solutions] are not substitutes that a hypothetical monopolist * * * would be constrained [by] in its pricing discretion [of high function FMS and HRM]." Tr at 2184:17-22 (Elzinga).

Internal documents from ERP vendors. Elzinga was also privy to internal company documents, some of which he claimed were informative. Tr at 2189:23-25, 2190:15 (Elzinga). First, Elzinga was privy to customer surveys that had been completed by Oracle ERP customers. These surveys had been given to Oracle customers who were classified by Oracle as having over $ 2 billion in sales. Tr at 2189:5-7 (Elzinga). These 28 surveys asked the Oracle customer to identify any other "vendors [other than Oracle] that were considered." Id at 3-4 (Elzinga). Elzinga summarized the surveys and concluded that PeopleSoft **[**144]** was considered 50 percent of the time by Oracle customers. Ex P3176. SAP was considered 28 percent of the time and Lawson was considered 18 percent of the time. Id. Microsoft was considered only 4 percent of the time. Id.

Also of interest to Elzinga was an internal document produced by Microsoft in response to the government's civil investigative demand (CID), MS-OPCID 1610. The document was labeled "Microsoft Business Solutions: Scorecard Review." See Elzinga demo # 8. In the document, Microsoft is characterized as worried about "Oracle, Peoplesoft, [and] SAP aggressively moving down-market, increasing pricing pressure (discounting levels) and creating new channel programs." Tr at 2192:8-11 (Elzinga). Elzinga concluded that this document showed that Microsoft (1) recognizes a difference between mid-market and high function software and (2) does not consider itself to be in the market for high function ERP. Tr at 2192:13-20 (Elzinga).

From the foregoing, Elzinga crafted a metric to measure the product market.

[*1148] Elzinga's data were calculated exclusively for use in this trial. In estimating the product market from the non-public sales data of Oracle and PeopleSoft and third party **[**145]** vendors obtained through the government's compulsory process, Pls Fact (Doc # 356) 6.2, Elzinga applied a minimum threshold purchase "of $ 500,000 per customer" to identify high function FMS and HRM. Tr at 2210:2-4 (Elzinga). Elzinga used this threshold amount to filter out mid-market and point solution sales. Tr at 2210:4-6 (Elzinga). Accordingly, any sale of FMS or HRM that resulted in at least $ 500,000 in net license revenues to the vendor, Elzinga considered to be a sale of high function FMS or HRM and thus was in the relevant market. Because plaintiffs' product market definition has no widely accepted meaning in the industry, there were no generally available data explicating the proposed market's participants and their relevant shares to backup Elzinga's estimates.

From his numbers, Elzinga calculated the following United States high function FMS market shares: SAP, 39 percent; PeopleSoft, 31 percent; and Oracle, 17 percent. Tr at 2212:22-24 (Elzinga). A merged Oracle/PeopleSoft would, in Elzinga's view, possess a 48 percent market share. Tr at 2212:24-25 (Elzinga). Using the same data, Elzinga calculated the HHI1 in the high function FMS market to be 2800. Tr at 2214:17-18 (Elzinga). **[**146]** Based upon Elzinga's calculations, a merger between Oracle and PeopleSoft would increase the high function FMS HHI2 to 3800. Tr at 2214:20-21 (Elzinga).

For high function HRM, Elzinga calculated PeopleSoft's market share at 50 pecent, SAP at 30 percent and Oracle at 18 percent; hence, in Elzinga's view, a merged Oracle/PeopleSoft would have a market share approaching 70 percent. Tr at 2218:18-23 (Elzinga). Elzinga calculated an HHI1 of 2800 in the high function HRM market. Tr at 2219:7-9 (Elzinga). Post-merger, the HHI2 would increase to 5700. Tr at 2219:10-11 (Elzinga).

Plainly, the levels of concentration reflected in Elzinga's testimony exceed the thresholds for "significant competitive concerns" under the Guidelines. Guidelines § 1.51(c). Both HHI2 amounts exceed 1800, and both? HHI amounts exceed 50 points. Likewise, of course, post-merger market shares of this magnitude would satisfy the conditions to raise the anticompetitive presumption described by the Supreme Court in Philadelphia Nat'l Bank.

But for reasons explained more fully following the discussion of Oracle's expert witnesses, the court finds that Elzinga failed to carry the plaintiffs' burden of (1) establishing **[**147]** an articulable product market and (2) providing post-merger market share and HHI measurements, in a properly defined market, invoking an anticompetitive presumption under *Philadelphia Nat'l Bank* or the Guidelines.

Oracle's Critique of Plaintiffs' Product Market Definition

Oracle painted *a* quite different picture. Oracle assailed plaintiffs' high function software "label," arguing that there is "not a sufficient break in the chain of FMS and HRM substitutes to warrant calling 'high-function' software -- meaning SAP, Oracle and PeopleSoft [FMS and HRM] products -- a market unto themselves." Def Post Brief (Doc # 365) at 17. Oracle argued that the relevant product market is, at least, the entire continuum of FMS and HRM software, including those sold by so-called mid-market vendors. Id. In support of this position, Oracle presented several witnesses.

Systems Integrator Witness

Oracle called Christy Bass, Global Managing Partner of Global Business Solutions for Accenture, to rebut plaintiffs' product **[*1149]** market definition as well as rebut the notion of localized competition between Oracle and PeopleSoft. Accenture is the largest systems integrator in the world, with annual **[**148]** revenue exceeding $ 11.4 billion. Tr at 1610:15 (Bass). Bass testified that "all" of Accenture's clients have high function needs. Tr at 1613:6-7 (Bass). Bass testified that several high function clients, such as Best Buy and BellSouth, had chosen to outsource their entire HR function. Tr at 1648:14-19 (Bass). While some of these outsourcing clients were on a "one-to-one" outsourcing model, in which it took a license directly from an ERP vendor, such as Oracle, Bass stated that Accenture is planning to launch the "one-to-many" model. Tr at 1649:14-1650:13 (Bass). Under this model, the license will be between Accenture and the ERP vendor, with no contractual arrangement between the customer and the vendor. Tr at 1650:3-13 (Bass). Moreover, Bass testified Accenture plans to begin outsourcing FMS on a "one-to-many" model within the next two years. Tr at 1655:6 (Bass).

Bass also testified about best of breed solutions and their potential to constrain high function ERP prices. Bass stated that it was "extremely common" for high function clients to pursue a best of breed approach. Tr at 1668:17 (Bass). Bass stated that these best of breed solutions could possibly offer greater functionality **[**149]** than Oracle, SAP or PeopleSoft. Tr at 1668:24-1669:3 (Bass). She also stated that best of breed solutions put competitive pressure on these ERP vendors. Tr at 1669:19-22 (Bass).

Bass rebutted plaintiffs' assertions that SAP was a "struggling" firm and also plaintiffs' evidence regarding localized competition between Oracle and PeopleSoft. Bass characterized SAP's position in the United States ERP marketplace as "strong." Further, she testified that she considered SAP to have a "stronger" position than either Oracle or PeopleSoft in regards to Global 2000 clients. Tr at 1621:18-23 (Bass). When asked about SAP's complete exclusion from the United States banking industry, Bass conceded that such a situation existed, but opined that change was on the horizon. Bass disclosed that SAP and Accenture have entered into a "strategic alliance" to co-develop a banking solution for European and United States banking firms. Tr at 1633:4-7 (Bass); Ex D5001. Bass stated that Accenture has relationships with all twenty of the largest United States banks, and Accenture "leveraged the experience that [Accenture] has had in the banking industry" in order to get some of these banks to discuss implementing **[**150]** the co-developed software. Tr at 1634:15-16, 1635:3-10, 1636:1-6 (Bass).

The court finds Bass' testimony to be reliable and informative on the issues of outsourcing and localized competition. Regarding high function clients that have chosen outsourcing as an ERP alternative, Bass gave specific examples of companies, both of which would seem to meet plaintiffs' high function definition, that had chosen to outsource their entire HRM needs. Bass' testimony of a lack of localized competition between Oracle and PeopleSoft was likewise supported by her explanation of the SAP/Accenture co-development alliance, under which Bass explicitly stated that Accenture will use its leverage and experience with United States banking firms in order to help SAP gain a larger competitive share in that vertical.

Industry Witnesses: Lawson and SAP

Jay Coughlan, CEO and President of Lawson Software testified regarding his view of the plaintiffs' proposed product market and its relation to Lawson. Tr at 3586:1-13 (Coughlan). Oracle wasted no time in questioning Coughlan about plaintiffs' characterization of Lawson as only a **[*1150]** mid-market vendor. Tr at 3596:5-9 (Coughlan). Coughlan stated that he disagreed **[**151]** with this view, testifying that Lawson has customers that exceed $ 1 billion in revenues, employ more than 10,000 people and are listed among the Fortune 1000. Tr at 3596:6-19 (Coughlan). Coughlan stated that the plaintiffs' perception of Lawson may have been appropriate before 1996, when Lawson made a conscious decision to focus on specific verticals and winning larger shares in those verticals. Tr at 3597:1-8 (Coughlan). The first vertical that Lawson focused on was healthcare and today it is providing procurement and HRM for HCA, the largest health care provider in the world with annual revenues exceeding $ 20 billion. Tr at 3600:1-4 (Coughlan). Coughlan also stated that Lawson provides FMS and procurement to the Mayo Clinic, an account for which Lawson beat both Oracle and PeopleSoft. Tr at 3601:2-6 (Coughlan).

Coughlan stated that Lawson next focused upon the retail vertical and has met with much success. Today, Lawson provides FMS to Safeway, the third largest grocery chain in the United States with approximate revenues of $ 30 billion. Tr at 3604:1-8 (Coughlan). Lawson provides FMS to Walgreens, a convenience store chain with more than $ 30 billion in revenues. Tr at 3604: **[**152]** 12-21 (Coughlan). Lawson provides FMS for Target, a department store chain with more than 300,000 employees and $ 50 billion in revenues. Tr at 3605:2-13 (Coughlan). The same is true for Williams-Sonoma. Tr at 3606:16-19 (Coughlan). In the apparel area, Lawson provides HRM and FMS to Ralph Lauren and Gucci. Tr at 3605:19-25 (Coughlan). Lawson provides HRM to McDonald's, a food retailer with over 100,000 employees. Tr at 3607:4-19 (Coughlan).

In the public sector vertical, Lawson has won major accounts with school districts in Florida, Virginia and Maryland, all of which Lawson competed for, and won, against Oracle and PeopleSoft. Lawson provides HRM to the States of Michigan and Arizona. Tr at 3615:4-15 (Coughlan). Lawson provides HRM for the City of Dallas and the University of Wisconsin. Tr at 3613:4-12 (Coughlan). Coughlan's testimony continued to describe Lawson accounts in insurance and financial services verticals as well as individual customers including Johnson & Johnson (HRM) and Sara Lee and McGraw-Hill (HRM and FMS). Tr at 3636-3640 (Coughlan). See also Ex D7140.

Moreover, Coughlan testified that Lawson software systems run in English, French and Spanish. Tr at 3645:13-17 (Coughlan). **[**153]** Coughlan testified that Lawson software is able to handle multiple currencies as well, citing one Lawson customer, Schlumberger, a major supplier to the oil industry with $ 10 billion in revenues, 10,000 employees and international operations. Tr at 3641:23-3642:11 (Coughlan). Schlumberger is utilizing Lawson FMS in close to 100 countries, but not the United States, thus showing that the Lawson software can handle currencies beyond the United States dollar. Tr at 3642:16-3643:9 (Coughlan).

Finally, Oracle asked Coughlan about Professor Elzinga's data expounding the market shares for high function HRM and FMS. Tr at 3648:16-3655:19 (Coughlan). Oracle offered into evidence the DOJ subpoena to which Lawson had responded by telling the DOJ of a large number of HRM and FMS shipments that had been made in late 2002 and throughout 2003. Ex D7079R. This list included FMS sales to Dollar Tree Store, Louisiana Pacific Corporation and ManuLife, with each sale totaling more than $ 500,000. Ex D7079R; Tr at 3650:3-8 (Coughlan). Moreover, FMS suites were sent to Schlumberger, **[*1151]** Sara Lee and Johnson & Johnson, with each spending more than $ 1 million on the suites. Id. Accordingly, Coughlan stated **[**154]** that he was perplexed when told that according to Professor Elzinga's statistics, Lawson had no market share of the high function FMS market because Lawson had made no sales of FMS over $ 500,000. Tr at 3653:10-13 (Coughlan). Further, Coughlan was told that Elzinga's HRM data listed Lawson as having made only one sale above $ 500,000, a sale for $ 995,000, leading Elzinga to call Lawson a "fringe player" in the HRM high function market. Tr at 2219:16 (Elzinga). In response, Coughlan stated that he disagreed with Elzinga's calculations, citing that Lawson "had one deal alone in HRMS in [2003] that was more than one million dollars." Tr at 3654:1-2 (Coughlan). Coughlan stated that he disagreed with plaintiffs' attempts to characterize Lawson as "not a serious player [in the high function market]." Tr at 3655:15-19 (Coughlan).

On cross-examination, the plaintiffs were able to delve more deeply into the customer relationships that Lawson has with several of the customers discussed on direct. The City of Dallas had extensive problems with Lawson's HRM software, Coughlan admitted, and its ability to handle overtime payroll functionality, leading Dallas to withhold payments to Lawson. **[**155]** Tr at 3699:15-19 (Coughlan). Coughlan claimed the problem had been corrected. Tr at 3700:11 (Coughlan). Next, an internal Lawson memo showed that McGraw-Hill was exploring the option of replacing Lawson, as was another client, Cendant. Ex P3297. Moreover, the document stated that Johnson & Johnson was "not purchasing much in the way of additional applications." Id. In summation, the document seemed to call into question Lawson's ability to meet the HR needs of global organizations. Id. Coughlan conceded that the Mayo Clinic has had problems with its Lawson FMS software. Tr at 3715:10-23 (Coughlan). Plaintiffs went through a series of Lawson customers that have had some implementation or service problem with Lawson software. Tr at 3699-3711 (Coughlan).

This evidence was elicited in an attempt to show that Lawson is not a player in the high function ERP market. The evidence did show the existence of implementation or service problems. But the customers all appeared to fit plaintiffs' definition of high function customers. Hence, this line of inquiry did not appear to demonstrate Lawson's absence from this or any such market, only that some Lawson customers have had problems with its **[**156]** software. The court, therefore, discounts Coughlan's cross-examination testimony for the purpose for which it was apparently offered. Plaintiffs did not show that implementation or service problems were absent or less frequent in Oracle, PeopleSoft or SAP products. Accordingly, the court credits Coughlan's testimony regarding large and complex customers that have chosen Lawson ERP to meet their FMS and HRM needs. Not only was this evidence uncontradicted, but the testimony was amply supported by many exhibits.

Richard Knowles, Vice President of Operations for SAP America, was called by Oracle to refute the plaintiffs' product market definition as well as to poke holes in plaintiffs' theory of unilateral anticompetitive effects. Tr at 2805:4-9 (Knowles). At the outset, Knowles clarified some of the terms used in this case, or at least as those terms are understood by SAP. "High function" has no meaning apparently. SAP looks to customer characteristics in determining whether a vendor is mid-market or high function. SAP considers a customer to be mid-market if it has revenues less than $ 1.5 billion, but more than $ 200 million. Tr at 2818:9-19 (Knowles). **[*1152]** A customer above $ 1.5 billion **[**157]** is considered a "large enterprise." Tr at 2819:14-15 (Knowles). But Knowles stated that characterizing a customer as one or the other was far from "an exact science." Tr at 2820:18-19 (Knowles).

Oracle then proceeded to "name drop" a large number of SAP clients: Deloitte & Touche, Accenture, Halliburton, MCI, SBC, T-Mobile, AOL, Starbucks, Nike, Home Depot and Barnes & Noble, all clearly up-market customers. Tr at 2829:6-2831:19 (Knowles). This evidence tended to rebut the suggestion that SAP was a struggling firm with substantial disadvantages in the United States. Next, Oracle questioned Knowles regarding two specific examples in which SAP had competed head to head against Oracle and other ERP vendors. First, Oracle presented an SAP DAP regarding a proposed ERP license transaction with ExpressJet, a company with approximately $ 1.5 billion in revenues, thus making it a large enterprise. D5641R at 1; Tr at 2839:23 (Knowles). As with the DAFs used by Oracle, the SAP DAFs had a column for denoting the competitor that was requiring or motivating the increased discount request. D5641R at 1. In the case with ExpressJet, SAP was originally competing against PeopleSoft, Lawson, Exact, Microsoft, **[**158]** Oracle and Ultimate. Ex D5641R at 2. Knowles stated that he recognized the name Lawson and that SAP "of course" competes with Lawson. Tr at 2841:8-12 (Knowles). Moreover, once ExpressJet had narrowed the six vendors down to three, it was a contest with Lawson, Oracle and SAP. Tr at 2842:23-2843:5 (Knowles).

Knowles stated that SAP was "agnostic" about which competitor makes it to the final round, because SAP is going to give the same level of discount regardless of the competitor. Tr at 2848:7-10 (Knowles). Oracle then introduced another SAP DAF, this time for Kellogg, Brown & Root, a subsidiary of Halliburton. Ex D5649R at 1. This form listed the justification for the discount as the "extreme competition" between Oracle and SAP. Id. Knowles stated that this type of scenario was to be expected, as SAP views Oracle to be "highly aggressive" on pricing. Tr at 2856:10-11 (Knowles).

Next, Oracle introduced an email from Bill McDonald, the CEO of SAP America. Ex D5636. The email contained Microsoft's second quarter earnings for 2004. Id at 1. The document began by reading: "These guys are here!". Id. Knowles stated that McDermott was referring to Microsoft's 32 percent year-over-year **[**159]** increase in the EAS market. Tr at 2892:4-23 (Knowles).

Finally, Oracle questioned Knowles about any apprehensions SAP felt regarding increased prices should the proposed merger of Oracle and PeopleSoft be consummated. Tr at 2858:9-11 (Knowles). Knowles responded that SAP has a neutral opinion on the merger. Knowles stated his belief that the merger will actually make the ERP market more competitive. Tr at 2858:20-21 (Knowles).

On cross, Knowles conceded that the reason SAP America exists is because customers in the United States "want to have somebody here present to deal with in buying the type of software that [SAP] sells." Tr at 2902:12-15 (Knowles). Next, Knowles stated that SAP views Lawson as a "mid-market company." Tr at 2924:24 (Knowles). This characterization appears to rest on SAP's labeling as mid-market of customers with less than $ 1.5 billion in revenues, a substantially different demarcation from plaintiffs' labeling of a mid-market customer as one that does not buy software packages exceeding $ 500,000. See Tr at 2924:5-7 (Knowles). Accordingly, the court accords no weight to Knowles' statement inasmuch as it was offered to **[*1153]** show that Lawson does not compete in the **[**160]** high function market. Otherwise, the court finds Knowles' testimony to be reliable and uncontradicted.

Outsourcing Witnesses

Michael Sternklar, Executive Vice President of Fidelity Human Resources Services Company, testified regarding Fidelity's outsourcing solutions for HR needs. Tr at 3124-3126 (Sternklar). Sternklar stated that Fidelity currently has a license with Oracle for HRM software. Tr at 3130:2-7, 3135:3-8 (Sternklar). Sternklar listed several of Fidelity's "large" customers: Bank of America, IBM, American Corporation and Asea Brown Boveri (ABB). Tr at 3136:13-3137:8 (Sternklar). Sternklar described the procurement process by which Fidelity won the ABB account. ABB made its choice between buying an in-house system from PeopleSoft or SAP, or instead, outsourcing ABB's HRM needs through Fidelity. Tr at 3138:14-25, 3139:10-13 (Sternklar). ABB chose Fidelity over PeopleSoft and SAP. Tr at 3140:17-18 (Sternklar). Sternklar stated several reasons why a customer would choose outsourcing over an in-house ERP system. One important reason, Sternklar stated, was the "continued investment" involved in buying an in-house ERP system based upon the need continuously to upgrade such **[**161]** a system. Tr at 3139:23-25 (Sternklar).

Jay Rising, President of National Accounts at ADP also testified about what he called "upgrade treadmill" and "hidden costs" that are involved in package software. Tr at 4094:15-22 (Rising). Both Sternklar and Rising testified that there are no such costs associated with outsourcing because the outsourcer itself, not the customer, handles all upgrades and maintenance. Tr at 3140:2-5 (Sternklar); 4093: 12-16 (Rising). The client need not bother with such hassles.

Both witnesses also testified that outsourcing companies are able to handle the HR needs of companies with large numbers of employees. ADP has 1000 customers that have over 1000 employees. Tr at 4097:21-25 (Rising). ADP's client list includes Comcast, Sysco, Xerox and Tyco. Tr at 4100:13-24 (Rising). Fidelity outsources for Bank of America which currently has between 170,000 and 180,000 employees. Tr at 3145:18-25 (Sternklar).

Finally, Sternklar stated that Fidelity was currently in the process of creating its own software called HR Access. Tr at 3152:3-3153:13 (Sternklar). Fidelity's goal is to move all customers onto HR Access within the next two years and cease using Oracle software **[**162]** completely. Tr at 3154:9-15 (Sternklar).

The evidence of both of these outsourcing witnesses was reliable and amply supported by specific examples of high function customers that had chosen to outsource with Fidelity or ADP as an ERP alternative. Accordingly, the court credits this testimony in determining whether outsourcing solutions have a price-constraining effect on ERP vendors.

Expert Witnesses: Hausman and Campbell

Oracle did not propose a product market definition. Instead, Oracle picked apart plaintiffs' market definition piece by piece. Two expert witnesses, Professor Jerry Hausman, an industrial organization economist at MIT, and Tom Campbell, dean of the Haas Graduate School of Business at the University of California (Berkeley) testified for Oracle. Among other important positions in government, Campbell served as director, Bureau of Competition, at the FTC. Both Hausman and Campbell assailed plaintiffs' product market definition, describing it as vague, unrealistic and underinclusive. As with Elzinga, the court finds both Hausman and Campbell to be **[*1154]** well qualified to offer their opinion testimony.

Vague. Hausman characterized the "high function" label as vague **[**163]** and too "hard to get your arms around." Tr at 3807:14-15 (Hausman). He cited plaintiffs' changing description of "high function" ERP as illustrating the unreality of plaintiffs' proposed product market definition. Tr at 3809:20-3810:9 (Hausman). At first, plaintiffs argued for a customer-based product definition. Campbell characterized this initial customer-based market definition as "unprecedented" and "unusual." Tr at 2704:6 (Campbell). Hausman asserted that plaintiffs, in reaching this strange product market, clearly worked backwards from their desired result: finding a group of customers all of which had purchased SAP, Oracle or PeopleSoft ERP, then claiming that those customers were "similarly situated" and defined the market. But, at trial, Hausman noted, plaintiffs shifted ground and argued that the high function market was based upon "product characteristics" of the software, such as functionality and scalability, not the customers who buy it. Tr at 3809:20-3810:3 (Hausman). See also Pls Post Brief (Doc # 366) at 3-4.

Even accepting the plaintiffs' second version of high function software, both experts asserted that the term is too imprecise to define a market. Hausman **[**164]** contended that Elzinga himself admitted that the high function definition contained no "quantitative metrics" that could be used to distinguish a vendor of high function ERP from a vendor of mid-market software. Tr at 3807:16-17 (Hausman). See Tr 2151:18-2152:3 (Elzinga). Hausman illustrated his point by reference to ManuLife Insurance Company, the fifth largest insurance company in the United States with offices throughout North America. ManuLife has complex needs and transactions and thus by any objective measure would fit in plaintiffs' high function market. But plaintiffs, for a reason Hausman said plaintiffs left unexplained, considered ManuLife to be a mid-market purchaser and therefore excluded from the plaintiffs' market definition. Tr at 3840:17-3841:13 (Hausman). The same applies to Johnson & Johnson and Safeway, both considered by plaintiffs as mid-market customers because they bought ERP solutions from vendors that Elzinga and plaintiffs put in the mid-market. But plainly these firms fit plaintiffs' description of enterprises having high functional needs. So, concluded Hausman, plaintiffs have provided no objective way to distinguish ERP licenses in the high function market **[**165]** from those in the mid-market.

Both Hausman and Campbell made the obvious point that if the market is not precisely defined, then the market participants and their relative shares will be "economically inaccurate." Tr at 2702:16-19 (Campbell); 3793:9-11 (Hausman). Referring to plaintiffs' customer witnesses, Hausman asserted that surveys that ask customers what their preferences are or what their hypothetical actions "would be" are known to be unreliable and subjective. Id.

Oracle summarized Hausman's vagueness argument by claiming "there must be a clear break in the chain of substitutes in order for separate markets to be found." Def Post Brief (Doc # 365) at 17. According to Oracle, "[T] here is clearly not a sufficient break in the chain of FMS and HRM substitutes to warrant calling * * * software [sold by] Oracle, PeopleSoft and SAP, a market unto themselves." Id. If such a clear break exists, plaintiffs have not proven it by a preponderance of the evidence, Oracle argued in closing. Id.

Disconnected. Oracle also argued that plaintiffs' product market definition "does not address the market reality" of the way **[*1155]** software is sold, a point to which Hausman testified. **[**166]** Def Post Brief (Doc # 365) at 1. Hausman posited that FMS and HRM are not products in and of themselves. Rather, "90 percent" of companies "are buying more than just FMS, more than just HRM. * * * [they are] buying bundles of software." Tr at 3815:10-12, 3813:12-22 (Hausman).

Hausman gave as an example a consumer purchasing a single package of software from PeopleSoft that included FMS, HRM, EPM and CRM pillars. In such a bundle, PeopleSoft would not offer discounts based on the individual pillars. Rather, PeopleSoft would give a "blended discount" across all products in the bundle in order to ensure that the consumer buys all the pillars from PeopleSoft. Tr at 3814:3-22 (Hausman). If the vendor does not offer an acceptable discount, then the consumer can threaten to buy one of the pillars, such as CRM, from a best of breed vendor such as Siebel. Tr at 3815:1-6 (Hausman). Based upon this analysis, Hausman opined that the presence of best of breed vendors constrains the prices that the ERP vendors can charge for a bundle of software. Tr at 3814:18-22 (Hausman).

Underinclusive. Finally, Oracle's witnesses stated that even if one assumes that a "high function HRM and FMS" market **[**167]** does exist and the market can be demarcated from other solutions, there are viable substitutes for high function ERP that must be included in the product market. Specifically, Oracle argued that (1) mid-market vendors, (2) outsourcing, (3) incumbent systems, and (4) best of breed solutions, discussed above, must all be included in the product market, as all are potential substitutes constraining a post-merger SSNIP.

Incumbent systems, also called legacy systems, refer to the FMS and HRM software systems that the DOJ's "enterprise customers" already have in operation. These are the systems that the new software from Oracle or PeopleSoft or SAP will replace, should a consumer choose to purchase an integrated suite from one of the high function vendors. Oracle argued that if a post-merger Oracle/PeopleSoft imposed a SSNIP, consumers could constrain that SSNIP by simply refusing to buy high function FMS and HRM and choosing to use already existing products. Tr at 3821:1-9 (Hausman). Hausman stated that the cost of maintaining and upgrading incumbent systems has been decreasing recently so that these systems have become a "credible threat" to ERP vendors. Tr at 3821:13 (Hausman). Accordingly, **[**168]** if a customer finds a post-merger price offer too high, it can almost always credibly claim it will not buy the product and instead continue to operate its incumbent system. Tr at 3821:13-14 (Hausman).

Campbell stated that "20 to 30 percent of the time, even after negotiations have started, the purchaser will opt to drop out" and remain with the system it already has. Tr at 2708:23-25 (Campbell). Campbell claimed that this factor must be taken into account when calculating market shares, otherwise "you've made a very serious mistake in calculating your market shares," because 20 to 30 percent of the relevant customers' actual behavior is being ignored. Tr at 2709:1-6 (Campbell).

Regarding outsourcing, Hausman presented evidence of over twenty large enterprises, such as Bank of America and A T & T, who currently outsource all or some of their HRM needs. Tr at 3825:19-25 (Hausman). And this phenomenon was occurring long before Oracle made its take-over offer to PeopleSoft. These large enterprise customers would not be outsourcing if they did not find this option to be equal to or better than the purchase of high function software from a vendor. Tr **[*1156]** at 3828:19-23 (Hausman). If this **[**169]** many corporations can currently have their HRM needs effectively met by outsourcing, it only follows that many more customers could follow suit should a post-merger SSNIP occur in the high function market. Tr at 3829:1-3 (Hausman).

Hausman gave the example of MIT, his employer, outsourcing its HRM to Fidelity, who he claims do "a heck of a lot better" than MIT personnel. Tr at 3825:4 (Hausman). Hausman presented evidence that many companies have chosen outsourcing; these include: Bank of America, Motorola, International Paper, McKesson, American Express and Sony. Tr at 3829:21-23 (Hausman). These are "sophisticated" companies, with a lot of complex transactions, and they have clearly found outsourcing a satisfactory alternative. Id. Hausman's demonstratives alone listed seven outsourcing firms capable of handling the HR for large companies; these include Fidelity, Accenture, ACS, Exult and Mellon, among others. Hausman demo # 10.

Accordingly, both Campbell and Hausman asserted that any product market must include outsourcing solutions as a viable substitute to which consumers can turn in the event that a merged Oracle/PeopleSoft imposes a SSNIP.

Finally, Oracle attempted to show **[**170]** that the products of so-called mid-market vendors, such as Lawson and AMS are reasonably interchangeable for those of the alleged high function vendors, Oracle, PeopleSoft and SAP. Accordingly, Hausman stated that any market definition that is devoid of these vendors is too narrow. Tr at 3939-3940 (Hausman). Hausman presented evidence of over thirty consumers, all of which have large and complex needs, and all of which had chosen to use Lawson or AMS for their FMS and HRM needs. Lawson's customers include: Johnson & Johnson, Walgreens, Target, Williams-Sonoma, Jack in the Box, the Federal Reserve Bank and Safeway. Hausman demo # 11. AMS' customers include: United States Environmental Protection Agency, United States Postal Service, Library of Congress, Internal Revenue Service and the DOJ. Id. Very telling to Hausman was the fact that the DOJ, two weeks after bringing this case, chose to buy AMS FMS for $ 24 million, ranking AMS better than Oracle or PeopleSoft in the DOJ's view for the DOJ's needs. Tr at 3842:7-13 (Hausman).

Hausman admitted that these vendors are "not PeopleSoft," nor do they "aspire to be." Tr at 3839:4-6 (Hausman). He also admitted that these three "cannot currently **[**171]** satisfy the entire market as defined by the DOJ." But "you do not have to beat PeopleSoft to constrain it" argued Hausman. Tr at 3839:20-21 (Hausman). The question is not whether the entire market <u>would</u> switch to these other vendors in the event of a SSNIP, the question is whether enough consumers <u>could</u> potentially turn to a product to meet their needs, thereby making a SSNIP unprofitable. Clearly, if the high function needs of Johnson & Johnson and the DOJ are met by these mid-market vendors, then many other companies could also do so in the wake of a SSNIP. Accordingly, these two mid-market vendors should be included in the product market.

Infrastructure layer. Two of defendant's expert witnesses discussed the infrastructure layer and its impact on the product markets. Tr at 4138-4145 (Kutnik); Tr at 4364-4369, 4397-4398 (Teece). Traditionally, ERP software contained both business logic and applications services. Business logic is the logical structure of the business process being automated. Applications services are tools that support business logic across different business applications. Applications services **[*1157]** include directory services, security features and content **[**172]** management tools. Web services are a type of applications service.

Recent innovations in software technology have led to a "decoupling" of business logic from applications services. These innovations have resulted in the creation of an "infrastructure layer" that standardizes many of the applications services that were once incorporated with the business logic in an EAS program. The infrastructure layer has also been referred to as the "integration layer," the "applications services" layer and the "composite applications" layer. Tr at 325-31 (Bergguist).

Infrastructure layer products and ERP software share some degree of substitutability in that both address integration. Developments in infrastructure layer technology allow greater interoperability and easier horizontal integration. Ex D7143 (Mills 5/27/04 Dep) at Tr 59-61; Tr 2886-89 (Knowles); Tr 4150:9-19 (Kutnick). Similarly, pre-integration in ERP software suites allows greater interoperability and easier horizontal integration. Because one can choose more robust infrastructure layer products instead of pre-integration, the infrastructure layer is a partial substitute for the pre-integration in ERP software suites.

Oracle's **[**173]** experts Kutnick and Teece testified that the emergence of the infrastructure layer constitutes a paradigm shift in ERP software products and affects the proper product market definition.

The following facts suggest that infrastructure layer products should not be included in the same relevant market as ERP software. First, the overlap in substitutability between infrastructure layer products and ERP software is limited. ERP software products perform a large number of functions that are not performed by infrastructure layer products, and vice versa. Accordingly, sellers of infrastructure layer products likely could not constrain market power of a hypothetical monopoly over ERP software.

Second, the integration offered by infrastructure layer products is a poor substitute for pre-integration in ERP software suites. Pre-integration allows tighter integration than the integration offered by infrastructure layer products. Certain functions previously performed within the ERP software layer are now performed in the infrastructure layer. Infrastructure layer products, however, do not contain business logic. Tr at 4144:8-11, 4187 (Kutnik); Tr at 1813-1814 (Wilmington); Tr at 331-332 (Bergquist). **[**174]** Because infrastructure layer products do not contain business logic, a purchaser could not choose a more robust infrastructure layer product instead of ERP software. Accordingly, the decoupling of the infrastructure layer from the ERP software layer does not suggest that the infrastructure layer products are partially substitutable for ERP software.

Oracle's experts Kutnick and Teece contend that the emergence of the infrastructure layer constitutes a paradigm shift in ERP software products. The age of infrastructure layer products calls into question this contention. See D7143 (Mills 5/27/04 Dep) Tr at 30-31 (stating that IBM's middleware products have been in the market for nearly twenty years); Tr at 420 (Kutnik) (testifying that applications servers have been available for seven to eight years); Tr at 3414:2-18 (Wohl) (noting that Oracle's applications server has been through several versions); Tr at 328 (Bergquist) (testifying about the evolution of web services protocols).

Even if the emergence of the infrastructure layer will have a substantial impact on the EAS software industry, more robust infrastructure layer products both enhance and diminish the likelihood of stack competition. **[**175]** **[*1158]** On the one hand, decoupling applications services from the business logic provides the interoperability standard necessary to create multi-seller clustering. See Tr at 4378-4379 (Teece). On the other hand, enhanced infrastructure layer products increase interoperability with other stacks. See Tr at 2885-2889 (Knowles); Tr at 1637:7-22 (Bass); P3337; D7143 (Mills 5/27/04 Dep) Tr 59-61; Tr at 4150:9-19 (Kutnik).

Findings of Fact: Product Market Definition

In order to sustain plaintiffs' product market definition the court must find, by a preponderance of the evidence, that plaintiffs' have shown an articulable and distinct product market for HRM and FMS sold by Oracle, PeopleSoft and SAP only that does not include mid-market software, outsourcing solutions, best of breed solutions, legacy systems or the infrastructure layer.

Based upon a review of the law and the evidence, the court concludes that the plaintiffs have not met their burden of establishing that the relevant product market is limited to so-called high function FMS and HRM sold by Oracle, PeopleSoft and SAP. The equivocal and vague evidence presented by plaintiffs at trial does not permit the court to exclude mid-market **[**176]** vendors, outsourcing or best of breed solutions from any product market that includes ERP software sold by Oracle, PeopleSoft and SAP.

For reasons discussed above, the court cannot rely upon the testimony of the customer witnesses offered by plaintiffs in determining if plaintiffs have met their burden. Likewise, the testimony of all three industry witnesses offered by plaintiffs affords no reliable or articulable basis to distinguish a high function product market. Ironically, much of plaintiffs' testimony supports a finding of no clear or articulable distinction.

Accordingly, the full weight of the plaintiffs' product market burden fell at trial upon Elzinga. In resolving the battle of the expert witnesses on product definition, the court must conclude that Oracle's witnesses presented the better and more convincing case. Elzinga for all his indubitable credentials as an economist seemed mostly to apply the techniques of his avocational interest in mystery writing. See Ex P4014A. The evidence Elzinga marshalled was circumstantial and highly qualitative.

Elzinga's tabulations of concentration statistics from responses to the DOJ CIDs, Elzinga demo ## 10-11, suffer from several **[**177]** shortcomings. Elzinga defined high function ERP as any sale in excess of $ 500,000. As the DAFs establish, ERP vendors sell a cluster of products. Sales exceeding a half-million dollars, therefore, are likely in many instances, if not most, to include pillars other than FMS and HRM. Elzinga's chosen demonstrative, Ex 4015A, will make the point. The sale in question, to Teradyne Corporation, met the $ 500,000 threshold. Ex 4015A at ORLITE0086650. Yet the discount Oracle offered on the HRM pillar license fee was 100 percent, and the bundle included modules in the SCM pillar along with modules in the HRM pillar. Despite this, Elzinga tabulated this entire transaction as an Oracle HRM sale, even though Oracle appeared to give away for free an HRM license in order to sell modules in the SCM pillar. Id at ORLITE0086654. The court has not attempted to retabulate market shares to correct for these problems.

Elzinga's other statistical tabulations are sketchy at best. The tabulation of Oracle customer surveys was a tiny sample of only twenty-eight sales opportunities. Elzinga demo # 7. The roster of Oracle DAFs was also short. Elzinga demo # 3. But even more troubling, as pointed out in **[*1159]** connection **[**178]** with the Teradyne sale, is that these tabulations did not break out FMS and HRM sales from the bundles in which they were sold. Again, the DAFs register prices and discounts on a mixture of different pillars and modules. Metaphorically, Elzinga did not separate the wheat from the chaff.

Not only does the court find Elzinga's data to be unreliable in establishing a distinct and articulable product market, but Elzinga himself admitted that plaintiffs' product market has no "quantitative metric" that could be used to determine the distinction between a high function product and a mid-market product. Tr at 2311:3-17 (Elzinga). Rather, Elzinga kept telling the court that there is "something different" about the products sold by Oracle, SAP and PeopleSoft. But the court cannot delineate product boundaries in multi-billion dollar merger suits based upon the mere notion that there is "something different" about the merging products and all others, especially when that "something different" cannot be expressed in terms to make a judgment of the court have meaning. More is required.

Accordingly, based upon the evidence presented at trial, the court concludes that the following products cannot **[**179]** be excluded from the relevant product market for purposes of analyzing the effects of this merger.

Outsourcing. Professor Hausman presented evidence of over twenty large enterprises that currently outsource all or some of their HRM needs. Furthermore, the testimony of Peters, Bass, Sternklar and Rising all support Hausman's contention that large companies can, and do, have their HRM needs effectively met by outsourcing. Accordingly, outsourcing solutions cannot be excluded.

Plaintiffs argue that because several of the outsourcing firms themselves use Oracle, SAP or PeopleSoft, these outsourcing firms do not count as independent competitors. But the court finds the testimony of Bass and Sternklar regarding "blanket licenses" or "one-to-many" licenses to be the most reliable on how outsourcing works. Most outsourcers that handle HRM needs for large enterprises either have, or soon will have, a type of blanket contract with an ERP vendor. Under these contracts, the software vendors agree to provide software to the outsourcer at a set price up to a certain number of employees, or "seats," usually numbering well into the millions of employees. Fidelity's contract with Oracle provides **[**180]** for a "seat" capacity of 2 million employees, with Fidelity having the option to increase the number of employees at a pre-set fee. Ex D7158. So if Company X chooses to outsource through Fidelity, which may be operating on Oracle software, there is no direct connection between Oracle and Company X. There is no license between Oracle and Company X and no chance for Oracle to take advantage of Company X which has no "post-merger" choice in ERP software. Company X is merely more "seats" in Fidelity's millions of empty seats under its blanket contract.

Moreover, several outsourcing firms currently use their own proprietary software, such as Hewitt and ADP. Fidelity has also begun the process of migrating clients from Oracle software to Fidelity's own software. Tr at 3154:3-15 (Sternklar).

Mid-market vendors. The court is perplexed about plaintiffs' position that "mid-market solutions" are not part of the product market for high function ERP. Plaintiffs claim that mid-market vendors, such as Lawson and AMS could not constrain a post-merger SSNIP. Pls Post Brief (Doc # 366) at 14. Such a statement clearly implies that plaintiffs do not view Lawson and AMS as high function vendors. **[**181]** But Elzinga's high function market share calculations **[*1160]** showed Lawson and AMS each had market shares. See Elzinga demo ## 10-11. Further, Elzinga stated that his calculations probably understated Lawson's market share in the high function market. Lawson and AMS plainly cannot have market shares in the high function market if they are not a part of it. Accordingly, plaintiffs' own evidence shows that either (1) Lawson and AMS are a substitute for high function vendors or (2) no substantive demarcation between these two types of vendors exists. This evidence glaringly shows that plaintiffs have failed to prove a distinct relevant product market for this court to analyze.

As surprising as plaintiffs' evidence and statistics on the mid-market is one of the plaintiff's actual behavior. Plaintiffs characterize vendors that serve the mid-market as "having limited capacity to support customers with diverse operations such as multiple geographic locations, distinct legal entities * * * or numerous lines of business." FAC (Doc # 125) P 12 at 8. But, soon after filing its complaint, the United States Department of Justice itself -- which surely meets at least two of these criteria -- chose **[**182]** AMS, a so-called mid-market vendor, to meet its HRM and FMS needs. The DOJ chose AMS over Oracle and PeopleSoft.

Plaintiffs' statistics, expert witness and behavior all treat mid-market vendors Lawson and AMS as part of the high function market. The court sees no reason why it should not follow suit.

Microsoft. As discussed above the court finds Burgum's testimony regarding Microsoft's entry into the up-market to be incredible. The testimony of Keating, as well as BearingPoint's homepage, make it clear that Microsoft has every intention of using Axapta and BearingPoint to compete for so-called up-market business. Furthermore, Allen's testimony about the struggle of J D Edwards in trying to enter the up-market does not apply to Microsoft. Microsoft has the money, the reputation and now, due to the BearingPoint alliance, it has the sales force necessary to become a major competitor for up-market business. Accordingly, the court finds that Microsoft will be a viable substitute for a significant number of consumers should a post-merger Oracle impose a SSNIP in its pricing of ERP software.

Best of breed solutions. The court does not dismiss defendant's bundle argument as an "elaborate **[**183]** distraction" or "economical nonsense" as plaintiffs urge. Pls Post Brief (Doc # 366) at 21-22. The reality of this industry is that 90 percent of consumers purchase software "bundles" containing several pillars; rarely does a consumer purchase a single pillar. Tr at 3815:10-13 (Hausman). FMS and HRM pillars typically are sold in a bundle along with additional kinds of EAS, such as CRM or SCM. Further, the discounts that are offered to potential consumers are based on the value of the entire bundle, not simply based upon the presence of an HRM or FMS pillar. Tr at 3813:23-3814:1 (Hausman). Accordingly, when Oracle or PeopleSoft offer a discount on a bundle, they are doing so in order to ensure that the customer purchases all the pillars from Oracle or PeopleSoft, rather than turn to a best of breed vendor.

Incumbent solutions. The court, however, is not persuaded that incumbent solutions would be able to constrain a post-merger Oracle from imposing a SSNIP. Companies can, and apparently do, threaten to "do nothing," in hopes of getting a better price on ERP software. See Campbell demo ## 20-21. But it is highly unlikely that any monopolist would see this threat as "credible," thereby **[**184]** preventing a SSNIP. Given the ever-changing conditions of both the regulatory and technological aspects of human resources and financial **[*1161]** management, it is hard to sustain the idea that large corporations would rather employ an antiquated software system than pay 10 percent more for modern and continuously maintained products. Such a choice in today's business world would be extremely risky and unlikely.

Accordingly, without a relevant market having been established, the court cannot conduct a burden-shifting statistical analysis under *Philadelphia Nat'l Bank*, much less hold that plaintiffs are entitled to such a presumption. Nor, of course, can the court apply the concentration methodology of the Guidelines. See Guidelines § 1.51.

Plaintiffs' Proposed Geographic Market

Assuming that high function FMS and HRM is the relevant product market, plaintiffs claimed that the relevant geographic market is the United States. Pls Post Brief (Doc # 366) at 22. Again, plaintiffs relied heavily on Elzinga's testimony. In reaching this market definition, Elzinga ironically enough did not rely upon the oft-used Elzinga-Hogarty (E-H) test, which he admitted has been used in "dozens and dozens **[**185]** of merger cases" and which he himself co-developed. Tr at 2154:22-23 (Elzinga).

In informal terms, the E-H test "measures the accuracy of a market delineation by determining the amount of either imports into or exports from a tentative market. The test is based on the assumption that if an area has significant exports or imports, then that area is not a relevant geographic market. Under the [test], exports or imports greater than 10% suggest that the market examined is not a relevant market." *United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 672 n2 (D Minn 1990)*.

Elzinga stated that he did not believe the E-H test "fit this particular antitrust case." Tr at 2154:25-25 (Elzinga). Instead, Elzinga relied solely upon the Guidelines "hypothetical monopolist" test in determining the geographic market. Tr at 2204:1-11. (Elzinga). See Guidelines § 1.21. "I am persuaded that the United States [is the geographic market because] if someone were the sole supplier of high function FMS and HRM * * * in the US, and [he imposed a SNNIP], he would not be thwarted or undercut by economic * * * agents outside the United States." Id.

Elzinga cited several relevant factors **[**186]** that led him to believe the Guidelines required a United States-only geographic market. Tr at 2203:24-25 (Elzinga).

Where software code is written is not relevant to geographic market. "The [product] market here is high function FMS and HRM, and that is not just code. What you buy when you buy this product * * * is a relationship." Tr at 2154:10-14 (Elzinga) (emphasis added). Plaintiffs urged the court to exclude from the geographic market the site of manufacture. Hence, Elzinga urged the court to look beyond the location of manufacture for FMS and HRM. Since all of SAP's software is manufactured in Germany and SAP indisputably produces high function ERP, inclusion of SAP's site of manufacture would wholly undermine plaintiffs' proposed geographic market.

Rather, Elzinga stated that the relevant factor in determining the geographic market is how the products are "marketed and supported" (i e, the relationship) between the ERP vendor and the consumer. Tr at 2202 (Elzinga). Elzinga argued that purchasing high function FMS and HRM entails installation, implementation, maintenance and upgrades -- a relationship that has an inherently "local" aspect. Tr at 2154:21-25 (Elzinga). **[**187]** Accordingly, since the relevant factor is the marketing and support of the software (which occurs in the United States) and not the "shipment" of the software from the manufacturing **[*1162]** site (which could occur outside the United States), the E-H "shipments" test is not appropriate for this merger analysis. Tr at 2205:11-14 (Elzinga).

Under the Guidelines, because the relevant factor of "relationship" occurs only within the United States for United States customers, these customers could not seek substitutes abroad in the event of a SSNIP, thus making the United States the geographic market, according to Elzinga.

No arbitrage exists in this market. ***HN24***[] Arbitrage occurs when a consumer of a product buys the product from a vendor in one geographic location at a low price, but then sells the product to another consumer in a different geographic location for a higher price. Tr at 2157:15-19 (Elzinga). Arbitrage is a factor that Elzinga stated can "stitch" together two geographic locations into "one geographic market" for merger analysis. Tr at 2157:20-22 (Elzinga). Elzinga illustrated the phenomenon of arbitrage for the court via a precious stone hypothetical. "If the price of diamonds got **[**188]** relatively high in the United States, compared to * * * Europe, * * * arbitragers could buy diamonds where the price is low [Europe] and ship them to where the price is high * * * thereby eliminating the price difference [between] the two parts of the world." Tr at 2157:16-19 (Elzinga).

But, according to Elzinga, arbitrage is not a factor that can "stitch" the United States high function FMS and HRM markets to the same markets in other parts of the world. Tr at 2205:21 (Elzinga). Arbitrage does not exist in the high function FMS and HRM markets for two reasons, he testified. First, the products that consumers buy from Oracle, PeopleSoft or SAP are licensed products; accordingly, the consumers "do not have the legal authority" to resell the software to other consumers. Tr at 2158:6 (Elzinga). Second, high function FMS and HRM is tooled to "work * * * and meet the specific configurations and capabilities [of only one consumer], it won't work [on another consumer's computers]." Tr at 2158:18-21 (Elzinga). Therefore, lack of the "arbitrage factor" reinforced Elzinga's proposition that consumers cannot find substitute products outside of the United States, he testified.

Prices **[**189]** *in the United States are not affected by prices in other parts of the world.* Elzinga posited that United States consumers of high function FMS and HRM cannot expect to be charged the same price that a European consumer is paying. Tr at 2206:7-11 (Elzinga). "The United States is not affected by prices or output of [high function FMS and HRM] outside the United States. And the flip side is also true. Prices charged outside of the United States aren't affected by prices charged inside." Tr at 2206:10-12 (Elzinga).

Oracle's Proposed Geographic Market

Oracle asks the court to reject the plaintiffs' proposed geographic market. Oracle argues that the geographic market in this case is "so clearly [a global market] that reasonable people ought not be debating it." Def Post Brief (Doc # 365) at 22. Further, Oracle noted that this is not the first time the DOJ has tried (unsuccessfully) to claim a United States-only market in the face of overwhelming evidence of a worldwide market. Def Post Brief (Doc # 365) at 23 n19 (citing *United States v. Eastman Kodak, 63 F.3d 95 (2d Cir. 1995))*.

Oracle assailed plaintiffs' severance of SAP into two distinct companies. "The proposed **[**190]** United States-only market is a way of * * * making SAP appear smaller' than it really is and simultaneously making Oracle and PeopleSoft appear bigger' than they really are." Def Post Brief (Doc # 365) at 23. While SAP America is responsible for all sales of SAP software in **[*1163]** the United States and Canada, it sells software that was manufactured in Germany. SAP America has no North American manufacturing sites. Def Fact (Doc # 357) P 100 at 50. Further, all large discount rates offered to United States customers by SAP America must be approved by SAP AG. Tr at 2836:22-24 (Knowles). Accordingly, without SAP AG, SAP America would (1) have nothing to sell and (2) not be able to offer competitive discounts.

Moreover, simply because SAP has a larger market share in Europe does not mean that the geographic market should be limited to the United States. "Shares are not determinative of how you define the [geographic] market" Hausman testified. SAP -- all of SAP -- must be included he stated.

Once SAP is seen as a single entity, defendant claims that there are four different ways of analyzing the geographic market in this case, all of which point to a worldwide market. Tr at 3793:18-19 (Hausman).

[191]** First, Hausman analyzed the geographic market under the "hypothetical monopolist" test from the Guidelines. Tr at 3794:9-10 (Hausman). See Guidelines § 1.21. Even assuming SAP America is distinct from SAP AG, Hausman stated that if a hypothetical monopolist in the United States imposed a SSNIP, SAP AG could "of course hire plenty of salespeople * * * and come in and compete." Tr at 3795:2-6 (Hausman). "[SAP AG's] product would do just fine in the United States." Id. Accordingly, "if [the court] looks at this market from a Merger Guidelines approach, you need to look at this on a worldwide basis." Tr at 3795:1-12 (Hausman).

Second, Hausman analyzed the geographic market under the plaintiffs' description of the "high function needs" of the customers who buy high function software. Tr at 3795:24-25 (Hausman). Hausman described the DOJ's product definition as "multi, multi, multi," referring to the functionality that the DOJ claims high function software possesses. Tr at 3796:1-2 (Hausman). The software must be able to handle multiple currencies, from multiple jurisdictions, while understanding multiple languages. Different currencies and different languages are clearly "international **[**192]** or worldwide features," and therefore "bring a worldwide aspect" to the analysis. Tr at 3798:7-8, 18-20 (Hausman).

Third, Hausman employed the E-H test that was rejected by its own creator. Tr at 3800-3804 (Hausman). Hausman stated that this is a point that both he and Elzinga agree upon: the E-H test would only be satisfied if the geographic market were defined worldwide. Tr at 3801:7-11 (Hausman). Hausman stated that Elzinga's rejection of the E-H test was "inappropriate" for two reasons. First, there are several markets, other than the high function ERP market, where the client buys a "relationship" with the vendor (e g, the purchase of a mainframe computer or server). But, it has never been argued that the computer market is not a worldwide market. Tr at 3802:1-15 (Hausman). "We see [this kind of relationship] in all sorts of high-technology markets. Yet, people agree that those are all world markets." Tr at 3802:13-15 (Hausman). Second, the E-H test has "often" been applied to several cases involving services based upon a relationship with customers, such as hospital merger cases. Tr at 3803:12-20 (Hausman). Accordingly, the E-H test is appropriate for this type of relationship-oriented **[**193]** scenario as well, and all agree that the E-H test mandates a worldwide market.

Finally, Hausman opined that there is empirical evidence showing that prices in Europe constrain prices in the United **[*1164]** States, and vice versa. Tr at 3805 (Hausman). Hausman studied the PeopleSoft DAFs submitted to the DOJ. He found that the average discount rates for PeopleSoft in the United States was 45.2 percent. Tr at 3805:19 (Hausman). In Europe, the average discount was 45.1 percent. Tr at 3805:20 (Hausman). Hausman stated that these discount rates are "virtually identical." Tr at 3805:22. If the competitive conditions in Europe and the United States were wholly independent of each other, one would expect to see completely different discounts in both regions. But these facts demonstrate, in Hausman's view, that the market needs to be analyzed on a global scale. Tr at 3806 (Hausman).

Accordingly, Oracle urged the court to look at concentration figures based upon a global market of all FMS and HRM software. Def Fact (Doc # 357) at 56. Using these product and geographic market definitions, Oracle offered the following global FMS market shares: SAP, 19.2 percent; Oracle, 16.8 percent; and PeopleSoft, **[**194]** 12 percent. Ex P0825 at 21. A merged Oracle/PeopleSoft would, in Oracle's view, possess a 28.8 percent market share in the FMS market.

For global HRM, Oracle offers the following market shares: SAP, 11.9 percent; PeopleSoft, 11.3 percent; and Oracle, 3.04 percent. Ex D5815 at 9. A merged Oracle/PeopleSoft would possess only a 14.3 percent market share in the HRM market.

Findings of Fact: Geographic Market

The court finds that the relevant geographic market ("the area of effective competition") in this case is a worldwide market. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*.

At the outset, the court must address the plaintiffs' attempt to sever SAP into two companies -- SAP America and SAP AG. The court finds this argument wholly unpersuasive. SAP America, while critical to SAP's success in North America, is not an independent company. This fact was clearly shown by the testimony of Knowles who stated that any large discount (usually above 70 percent) that SAP America offers, clearly in the face of competition, must get that discount approved by SAP AG in Germany. Further, while the source of the code is not determinative **[**195]** of this severance inquiry, it is important to note that all of SAP America's software is manufactured and shipped from SAP AG. So without SAP AG, SAP America would have nothing to sell, and even if it did have its own manufacturing, SAP America would still have to get competitive discount rates approved by SAP AG. To view these two dependent branches of SAP as separate entities would be asking the court to ignore the reality of how the industry presently operates. Accordingly, the court finds that SAP must be viewed as one single entity.

Next the court must decide the geographic boundaries within which the market participants effectively compete. This court (per Judge Chesney) has used the E-H test in defining the relevant geographic market for merger analysis. See *California v. Sutter Health Systems, 84 F. Supp. 2d 1057, 1069 (N.D. Cal. 2000)* ("The analytical process [of defining the geographic market] generally begins with an application of the Elzinga-Hogarty test * * *."). Furthermore, the results of employing the E-H test are undisputed. See Tr at 2155:9-10 (Elzinga) (admitting that the E-H test would dictate the court to view the market as a global market). Elzinga's **[**196]** basis for rejecting the E-H test is unpersuasive. The court, while agreeing that "relationships" are important in ERP sales, does not find that such relationships render the E-H test inapplicable. First, the court can think of a number of sales transactions that involve marketing and negotiation as well as installation and **[*1165]** maintenance "relationships" between seller and vendor: computer sales, copier sales, motor vehicles to name a few. But to argue that these markets, all involving major foreign vendors, are limited to the United States would be untenable.

Second, the E-H test has been used when important vendor-customer relationships are involved. A clear example is Sutter Health, where Judge Chesney used the E-H test in a hospital merger case to determine whether patients seeking medical treatment outside of the Bay area required a geographic market expansion. No one can argue that medical treatment is not a "relationship" between the patient and the doctor. But the E-H test controlled the analysis, not the location of the "relationship" between the doctor and the patient. Further, Judge Chesney is not alone in applying the E-H test to hospital merger cases. See *United States v. Mercy Health Services, 902 F. Supp. 968, 980 (N.D. Iowa 1995).* **[**197]**

Finally, the court cannot allow this "relationship" factor to solely dictate the geographic boundaries for this case, as the court has already found that "non-relationship" solutions (i e, outsourcing) cannot be excluded from the product market.

Accordingly, the court holds that the E-H test is an appropriate method of determining the "area of effective competition" between vendors in this relevant market. *Tampa Electric, 365 U.S. at 327*. Elzinga, creator of the test, admitted that applying the E-H test would mandate a global market. The court therefore finds that the geographic market in this case is global.

Findings of Fact: Market Shares and Concentration

In addition to failing to meet their burden of proving a distinct product market, plaintiffs have failed to prove that the relevant product market in this case is geographically bound to the United States. Accordingly, the market share and concentration statistics presented by Elzinga are wholly inapplicable to the court's analysis. The court is left with a new product market definition which includes, at least: (1) ERP sold by Oracle, SAP, PeopleSoft, Lawson, AMS and Microsoft; (2) outsourcing solutions; **[**198]** and (3) best of breed solutions. Further, this product market must be analyzed as a global one.

Not surprisingly, plaintiffs did not offer any market share data other than those of Elzinga. Oracle, while successfully picking apart plaintiffs' market definition did not provide a definitive alternative of its own. The only statistical data Oracle offered showed the 2002 global HRM shares of Oracle, PeopleSoft and SAP, but did not include HRM data on AMS or Microsoft's share since the BearingPoint alliance. Moreover, Oracle offered even less in the way of FMS shares or concentration.

But it is plaintiffs, not defendant, who carry the burden of proving market shares and concentration in order to invoke the presumptions of the case law or to sustain a showing in accordance with the Guidelines. The court cannot furnish its own statistics.

Without the benefit of presumptions, the burden remains upon plaintiffs to come forward with evidence of actual anticompetitive effects.

Anticompetitive Effects

Plaintiffs' Evidence of Coordinated Effects

Plaintiffs presented no evidence at trial on coordinated effects. This was a wise decision, as proving the probability of such collusion **[**199]** would definitely be an uphill battle for two reasons. First, the products in the relevant market are not homogeneous. Plaintiffs themselves even argue against homogeneity. Pls Post Brief (Doc # 366) at 30 (stating that the products **[*1166]** in the high function HRM and FMS market are "highly differentiated"). Second, there is no price transparency in this market. Prices and discount rates for software are known only to the vendor and the customer, both of whom take great pains to keep such information confidential. Without homogeneity or transparency, the market conditions are not conducive to coordinated effects, either tacit or express. Plaintiffs recognized this unlikelihood. Id at 38 ("The fact that high function software is a differentiated product and that pricing is not transparent make price coordination between Oracle and SAP unlikely.").

But in plaintiffs' post-trial brief they unexpectedly included an entire section arguing that a post-merger Oracle and SAP could tacitly collude in allocating customers or markets. Id at 38-40. Plaintiffs argue that "Oracle is strong in the high technology and telecommunications" area while "SAP dominates the oil and gas industry." Id at 39. Accordingly, **[**200]** Oracle and SAP could reach a tacit understanding based upon "mutual trust and forbearance" and stop competing against each other in those relevant areas. Pls Post Brief at 38 (quoting *Hospital Corp. of Am. 807 F.2d at 1391*). But the court has searched in vain for any testimony or exhibits regarding tacit territorial or market divisions by Oracle and SAP. With no evidence in the record regarding such a speculative coordinated effects argument, the court finds this new theory to be without merit.

Plaintiffs' Evidence of Unilateral Effects

Plaintiffs rest their theory of anticompetitive effects on an attempt to prove that Oracle and PeopleSoft are in a "localized" competition sphere (a "node") within the high function FMS and HRM market. This sphere does not include SAP or any other vendors, and a merger of Oracle and PeopleSoft would, therefore, adversely affect competition in this localized market. Pls Post Brief (Doc # 366) at 31-36; Tr at 2448-2450 (McAfee). Plaintiffs also offered evidence to show that SAP could not reposition itself to replace the localized competition that would allegedly be lost if Oracle and PeopleSoft merge. Pls Post Brief (Doc # 366) at **[**201]** 32-33.

In attempting to prove localized competition between Oracle and PeopleSoft, plaintiffs relied on virtually the same kind of evidence used to prove the product market, including internal corporate documents, SAP executive testimony, customer and consultant firm testimony and expert testimony.

Internal documents. Plaintiffs rely upon several quarterly "win/loss analysis" documents that were compiled by Oracle during 2003 to show that Oracle and PeopleSoft are each other's "closest competitors." Pls Post Brief (Doc # 366) at 31. In Quarter 1 of 2003, plaintiffs offered evidence that Oracle lost to PeopleSoft 37 percent of the time when the two were in competition, while Oracle lost to SAP only 15 percent of the time the two competed. Ex P2090. Plaintiffs then offered evidence from Quarter 3 in which Oracle "explicitly states" that "PeopleSoft is our Number # 1 competitor" and "SAP is our Number # 2 competitor." Ex P2093.

But what plaintiffs failed to mention regarding the Quarter 3 findings is that Oracle lost to PeopleSoft 54 percent of the time, while they lost to SAP 53 percent of the time. Accordingly, what separates the "# 1 competitor" and "# 2 competitor" of Oracle **[**202]** is merely one percent. Ex P2093. Moreover, these roughly equal loss ratios continued into Quarter 4 when Oracle lost to PeopleSoft 59 percent of the time, while losing to SAP 50 percent of the time. Ex P2095. Accordingly, the court can draw no conclusions from the conflicting data within the win/loss reports upon which **[*1167]** plaintiffs focus. In fact, these documents arguably negate a showing of localization between Oracle and PeopleSoft more than they support such a finding.

SAP executive testimony. Plaintiffs attempt to localize PeopleSoft and Oracle by showing that many customers have a negative "perception" of SAP and that SAP is at a "substantial disadvantage" when it comes to competing for customers in the United States (the geographic market that the court has already rejected). Pls Post Brief (Doc # 366) at 31-32. In proving these negative perceptions, plaintiffs pointed to the testimony of SAP America's Knowles. At trial, Knowles agreed that SAP has had to deal with "perceptions" that SAP is "too costly and difficult to implement." Tr at 2950:8-12 (Knowles). Further, plaintiffs cited evidence from consulting firms and Knowles stating that SAP has had "trouble" breaking into **[**203]** certain verticals in the United States. See Ex P3037 (Knowles dep

5/3/04) at Tr 67:21-68:7 (difficulty breaking into services sector); Tr at 1698:1-8 (Bass) (difficulty in entering banking industry).

In deciding the merits of this argument, the court is again perplexed by the inconsistency within plaintiffs' own evidence. In trying to prove Oracle and PeopleSoft are in localized competition, plaintiffs tried to downplay SAP's presence in the United States and characterize SAP has being "disadvantaged" and unable to enter several markets. But plaintiffs' own evidence on market shares negates such a finding. Even assuming the relevant geographic market in this case was the United States, Elzinga's calculations of market shares in so-called high function FMS has SAP ranked highest (above Oracle and PeopleSoft) with a 39 percent market share. Elzinga demo # 10. Moreover, in the HRM high function market, plaintiffs' expert ranked SAP second with a 29 percent market share (beating Oracle). Elzinga demo # 11. SAP is not a "disadvantaged" and "troubled" competitor in the United States. If it were, SAP should not be beating Oracle in both markets and beating PeopleSoft in the FMS market. **[**204]** Accordingly, the court cannot credit plaintiffs' argument that SAP is suffering from negative customer perceptions or is disadvantaged in competing against Oracle and PeopleSoft.

Customer and consulting firm testimony. In furtherance of this localization theory, plaintiffs argued that customer testimony shows that "Oracle and PeopleSoft present better alternatives in the United States than SAP." Pls Post Brief (Doc # 366) at 32. Plaintiffs support this assertion by citing the testimony of five customers who eliminated SAP from the final round of negotiations and instead chose to deal with Oracle and PeopleSoft. Id (citing testimony *of* North Dakota, Neiman Marcus, Greyhound, AIMCO and Cox).

The court finds this evidence unpersuasive for two reasons. First, the court cannot take the self-interested testimony of five companies which chose to eliminate SAP from consideration, and from that sample draw the general conclusion that SAP does not present a competitive alternative to Oracle and PeopleSoft. Drawing generalized conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible. See *Sungard Data Sys., 172 F. Supp. 2d at 182-83*. **[**205]** Second, ***HN25***[] the most persuasive testimony from customers is not what they say in court, but what they do in the market. And as Elzinga's statistics showed, customers are buying SAP FMS more than Oracle and PeopleSoft FMS. Elzinga demo # 10. Customers are buying SAP HRM more than that of Oracle. Elzinga demo # 11.

[*1168] Plaintiffs rely upon two of the Big Five consulting firms' testimony stating "they believe SAP is often the third choice of many US customers." Pls Post Brief (Doc # 366) at 32. According to BearingPoint's Keating, SAP has long been the least flexible of the three vendors in the way it has sold its HRM and FMS software. Tr at 901:6-20, 946:18-20 (Keating). Also, Accenture's Bass testified that SAP was "less likely to discount than Oracle and PeopleSoft." Pls Post Brief (Doc # 366) at 32; P3198 (Bass Dep) at Tr 132:08-133:07. But the plaintiffs' own evidence discounts this argument. While it may be true that SAP has been the least flexible and least likely to discount, the evidence introduced by Elzinga shows that customers apparently are not deterred by SAP's inflexibility or higher pricing. Customers still buy SAP software over Oracle and PeopleSoft. See Elzinga demo ## 10-11.

[206]** Taken as a whole, the customer and consulting firm testimony falls short of proving that Oracle and PeopleSoft engage in competition to which SAP is simply not a party. Moreover, both PeopleSoft industry witnesses conceded there is no vertical in which SAP is not competitive with Oracle and PeopleSoft. Tr at 388:1-11 (Bergquist); 1957:10-21 (Wilmington).

Expert testimony. Finally, plaintiffs offered the testimony of Professor McAfee to show that PeopleSoft and Oracle are engaged in localized competition to which SAP is not a party. McAfee conducted three independent analyses to reach his conclusions. Pls Post Brief (Doc # 366) at 34.

First, McAfee examined, in detail, twenty-five of Oracle's DAFs in which Oracle salespersons had listed PeopleSoft as their justification for seeking a higher discount. Second, McAfee, using charts of discount trends provided by Oracle, ran a regression analysis to assess the effect of PeopleSoft's presence on Oracle's discount levels. Third, using the market statistics calculated by Elzinga, McAfee conducted a "merger simulation" to assess the theoretical effects of an Oracle/PeopleSoft merger. Tr at 2447-2449 (McAfee). Based upon these three independent **[**207]** studies, McAfee concluded that in many instances PeopleSoft and Oracle are each other's closest competitor and a merger between the two would cause significant anticompetitive effects. Tr at 2466:8-13, 2449:22-24 (McAfee).

Twenty-five case studies. At trial, McAfee showed the court several DAFs in which the presence of PeopleSoft had justified an Oracle salesperson seeking a steep discount. McAfee then picked out explicit language from the justification column to prove that when Oracle and PeopleSoft compete, they do so vigorously. For example, when seeking a discount on the Hallmark account, a salesperson's justification for a discount was an "EXTREMELY competitive situation against" PeopleSoft. Because of this competition, a "higher discount was warranted." Tr at 2464:15-21 (McAfee). Likewise, in trying to win the Greyhound account Oracle wanted to cause a "third straight loss" for PeopleSoft and "only aggressive proposals" would win Greyhound over. Tr at 2466:14-20 (McAfee).

These two examples are representative of the many that McAfee showed the court -- clear examples of how vigorously PeopleSoft and Oracle compete when they go "head to head" against each other, he asserted. **[**208]** McAfee concluded that such head to head competition between Oracle and PeopleSoft would be lost if this merger were consummated. Tr at 2488:13-25 (McAfee).

Regressions. Next, in trying to show localized competition, McAfee used a regression technique to calculate what effect, **[*1169]** if any, the presence of PeopleSoft or another competitor has on the discounts offered by Oracle. Tr at 2495:22-25 (McAfee). McAfee ran two regression analyses. In the first, McAfee was privy to sales representative surveys identifying the discount percentages given to Oracle customers that had purchased the E-Business Suite. The surveys also identified the competitor that Oracle had beaten to get the account. Tr at 2497:10-14 (McAfee). McAfee narrowed the sample to all sales that were over $ 500,000, in order to equate the sample with Elzinga's market definition. McAfee used these variables (competitor, net revenue, discount percentage) and ran the regressions. Tr at 2498:3-20 (McAfee). The data led McAfee to conclude that "PeopleSoft has a .097 (9.7 percent) effect" on the discount Oracle offers. Tr at 2499:22-25 (McAfee). In other words, when Oracle competes against PeopleSoft for the sale of Oracle's E-Business **[**209]** Suite, the consumer obtains a 9.7 percent greater discount than when Oracle competes against no one in selling the suite.

Wanting to look at more than just the sale of the E-Business suite, McAfee then analyzed all of the DAFs that Elzinga had used in defining the product market and matched those with the data from the sales representative forms to create a larger sample with more variables. Tr at 2504:22-25 (McAfee). The DAFs listed the percentage requested along with the competitor justifying such a discount. Once McAfee ran this second regression, he concluded that PeopleSoft had a .136 effect on Oracle's discount rates (i e, 13.6 percent greater discount). Tr at 2507:6-11 (McAfee). Accordingly, McAfee concluded that when PeopleSoft is competing against Oracle, Oracle's discounts are 9 to 14 percentage points greater. Tr at 2508 (McAfee).

Based upon these DAF studies and regression analyses, it is safe for the court to conclude that Oracle and PeopleSoft do compete frequently for ERP customers and when they do compete, that competition can be vigorous. But these two contentions are not disputed by anyone in the case. Oracle concedes that PeopleSoft is a frequent rival. Def Post **[**210]** Brief (Doc # 365) at 34. The court fails to understand what this undisputed fact is supposed to show about whether Oracle and PeopleSoft are competing head to head in a product space in which SAP is not a party. McAfee himself stated that from these twenty-five DAFs, he drew the "broad conclusion that in many instances PeopleSoft and Oracle are each others' closest competitors." Tr at 2466:10-12 (McAfee). But these DAFs tell the court nothing about how often SAP competes against PeopleSoft or Oracle (a key factual issue if trying to exclude SAP) or whether that competition is equally fierce. What would have been more helpful to the court would have been the DAFs of PeopleSoft and SAP as well. Defendants introduced several SAP DAFs during trial, one showing a very aggressive competition against Oracle, so it is clear that such forms exist. Ex D5649R A more complete DAF record would perhaps have evidenced localized competition between Oracle and PeopleSoft. But plaintiffs did not provide such DAFs to McAfee, nor is it clear whether they even sought to obtain such documents during discovery.

Simply because Oracle and PeopleSoft often meet on the battlefield and fight aggressively does **[**211]** not lead to the conclusion that they do so in the absence of SAP.

Merger simulation. Finally, McAfee conducted a merger simulation analysis. There are several merger simulation models that can be used depending on the characteristics of the industry. Tr at 2511:12-19 (McAfee). McAfee chose the "English auction" model (also called the **[*1170]** oral ascending auction) because one of the features of this model is its allowance of multiple bidders and multiple rounds of bidding. Tr at 2511:19-22 (McAfee). The simulation works by putting in necessary variables and assumptions, such as market shares and percentage of wins in head to head competition. Once these variables were accounted for, McAfee still had to set a variable for "how competitive the market [was] pre-merger." Tr at 2526:17-22 (McAfee). One way of creating such a measurement is by estimating the "total value of the product that accrues to the buyer" (i e, how "much of the value of the software to the buyer actually accrues to the buyer and how much accrues to the vendors in the form of price"). Tr at 2517:1-4 (McAfee). McAfee ran the simulation based upon five different "buyer accrual" estimates: .5 (only 50 percent accrual) **[**212]** to .9 (90 percent accrual). McAfee used the market shares calculated by Elzinga as his market shares variable. Once all the data are compiled and the variables accounted for, the merger is simulated by merging the shares of the two merging firms. Once this is done, data can be calculated showing how much the price of the relevant product is expected to increase. McAfee asserted that in the high function FMS market, after the Oracle/PeopleSoft merger, he expects price to increase anywhere from 5 percent (.50 accrual variable) to 11 percent (.90 accrual variable). In the high function HRM market, McAfee concluded that the price would increase by 13 percent (.50 accrual variable) to 30 percent (.90 accrual variable). Ex P4024.

McAfee asserted that this merger simulation, using Elzinga's market share statistics, shows that a merger between Oracle and PeopleSoft will lead to a unilateral price increase in both markets.

But the court has already found that Elzinga's market share statistics are not a reliable indicator of Oracle, SAP and PeopleSoft's positions in the ERP market. Accordingly, because this merger simulation is based upon these unreliable data, the court concludes that the **[**213]** simulation results are likewise unreliable.

Oracle's Competitive Effects Rebuttal

Oracle takes issue with all of the plaintiffs' evidence regarding the likelihood of anticompetitive unilateral effects.

First, Oracle claims that the present case is not the type of case for which the doctrine of unilateral effects was created. Oracle offered Campbell's expert testimony that a fundamental assumption of the unilateral effects theory is not present in this case. Tr at 2721:3-5 (Campbell). Campbell testified that the "unilateral effects doctrine is posited on the notion of a localized market powered by a seller and a group of purchasers located in product space or geographic space around that particular seller." Tr at 2721:5-9 (Campbell). This "product space" is defined by characteristics of the product or products within the space. Campbell offered a homey example of product space using breakfast cereal. Tr at 2721:15-18 (Campbell). A number of customers have characteristic preferences for their breakfast cereal that could create a product space within the entire breakfast cereal market. For example, some customers prefer cereal to be crunchy, sugar-free and high in fiber. These **[**214]** characteristics of the product will narrow the entire market down to a "space" in which only crunchy, sugarless, high fiber cereals occupy the space and only those companies that produce such cereal are competitors. Campbell called this space a "node," with the buyers being centered around this node. The unilateral effects theory is concerned about there being only one vendor operating inside the node, thereby being able to increase the price unilaterally. Tr at **[*1171]** 2721:19-23 (Campbell). Plaintiffs attempted to carve out a "node" for high function FMS and HRM software in the United States in which only Oracle and PeopleSoft compete. Accordingly, if a merger takes place, there will be only one vendor in this node with the ability unilaterally to reduce output and raise price within the node.

Campbell asserted that the unilateral effects theory is predicated on the fundamental assumption that the consumers in the node have no "buyer power." He testified that the theory assumes that customers are unsophisticated buyers who will not be able to rebuff a price increase. Tr at 2721:23 (Campbell). This fundamental assumption does not hold in the case of the products in suit. Campbell asserted **[**215]** that the buyers of high function FMS and HRM are extremely sophisticated and knowledgeable and engage in extensive and intensive one-on-one negotiations with vendors. These customers clearly have a lot of power during these negotiations, Campbell claimed, and they are aware of this power. Tr at 2722:1-4 (Campbell). Campbell gave examples of high function consumers such as Emerson Electric and Daimler whose representatives testified that their companies have "leverage" and "power over people they deal with," and use their "size" and "the size of the deal" to gain better deals on software. Campbell demo # 25 (citing Tr at 1287:22-1288:2 (Peters); Tr at 1407:20-1408:1 (Gorriz)). Campbell concluded that the unilateral effects theory is "dogma developed for a totally different context" from the present case. Tr at 2728:6-7 (Campbell).

Even assuming arguendo that a unilateral effects theory is appropriate for this case, Oracle attacks each piece of evidence that plaintiffs put forward attempting to prove localization between Oracle and PeopleSoft.

Oracle objected to plaintiffs' characterization of SAP as a struggling firm with a substantial disadvantage which prevents it from being in **[**216]** a localized space with Oracle and PeopleSoft. Def Post Brief (Doc # 365) at 33. Oracle claims that these SAP "struggling" assertions are "not remotely true" and are belied by the fact that SAP has over 22,000 professional service customers. Id. While Oracle admits that SAP does not "dominate" the United States in the manner that it may "dominate elsewhere," non-domination does not equate with "struggling." Id.

Finally, Oracle takes aim at McAfee's expert testimony on anticompetitive effects. First, Oracle claims that McAfee's "case studies" based upon the Oracle DAFs do nothing more than "show Oracle and PeopleSoft are frequent rivals." Id at 34. This evidence reveals nothing about localization between Oracle and PeopleSoft in a product space in which SAP is not encompassed. McAfee offered no insights regarding the characteristics of high function FMS and HRM that create the alleged product space between Oracle and PeopleSoft. Further, these case studies are devoid of any information about whether head to head competition between Oracle and SAP, or PeopleSoft and SAP, is equally vigorous.

With regards to McAfee's regression analysis, Oracle argued the analysis was flawed from the **[**217]** outset. The data upon which McAfee based his regression were "not based on any set of data identifying * * * high function HRM and FMS software, but only on data involving broader suites of EAS." Id at 36. Accordingly, it is impossible to know if these alleged increased discount rates were the product of high function FMS and HRM, other ERP pillars or the bundling of all. Without this crucial information, the regression analysis shows nothing in regards to localization **[*1172]** between Oracle and PeopleSoft in a high function FMS and HRM product space. Id at 37.

Furthermore, Oracle assails McAfee's merger simulation as "simplistic" and "spurious." Id. Oracle cites two major flaws in the merger simulation. First, the "auction" model is wholly inappropriate for the present market because (1) the customers in this market are extremely powerful at bargaining and (2) vendors of ERP do not simply "bid" for business; rather these negotiations are extensive and prolonged, with the purchaser having complete control over information disclosure. Id. Second, the "market shares -- the only input having any connection to real-world data -- were those produced by Elzinga using the plaintiffs' market definition. **[**218]** " Id at 38. Because Oracle wholly rejects plaintiffs' "gerrymandered" market definition, market statistics based upon this definition are equally flawed. Accordingly, the merger simulation's prediction of price increases after the merger are inaccurate and unreliable, based as it is on an inappropriate model using inaccurate data.

Finally, and perhaps most importantly, Oracle contends that plaintiffs have offered no "econometric calculations in trying to prove localization." Id at 31. Oracle argues that proving localization requires "extensive econometric analysis," such as diversion ratios, price-cost margins and the like, of which plaintiffs have offered none. When Oracle cross-examined plaintiffs' expert witnesses, both admitted that they "did not even attempt to calculate diversion ratios, or cross-elasticities, or any other economically meaningful measurement of whether the products of Oracle and PeopleSoft are uniquely close substitutes for each other." Id. See Tr at 2293:23-25 (Elzinga); Tr at 2599:3-8 (McAfee).

Findings of Fact: Unilateral Effects

The court finds that the plaintiffs have wholly failed to prove the fundamental aspect of a unilateral effects case -- they **[**219]** have failed to show a "node" or an area of localized competition between Oracle and PeopleSoft. In other words, plaintiffs have failed to prove that there are a significant number of customers (the "node") who regard

Oracle and PeopleSoft as their first and second choices. If plaintiffs had made such a showing, then the court could analyze the potential for exercise of monopoly power over this "node" by a post-merger Oracle or the ability of SAP or Lawson to reposition itself within the node in order to constrain such an exercise of monopoly power.

Plaintiffs' attempt to show localized competition based upon customer and expert testimony was flawed and unreliable. Moreover, plaintiffs' evidence was devoid of any thorough econometric analysis such as diversion ratios showing recapture effects. Both the Kraft Gen Foods and Swedish Match courts, the only other courts explicitly to address unilateral effects, based their rulings in part upon econometric evidence submitted by the parties. *Kraft Gen. Foods, 926 F. Supp. at 356* (relying on econometric evidence of the cross-price elasticity of demand between Post cereal brands and Nabisco brands); *Swedish Match, 131 F. Supp. 2d at 169* **[**220]** (relying upon the diversion ratio between two brands of loose leaf tobacco).

Plaintiffs claim they were unable to present the court with such econometric data because "this [the high function HRM and FMS market] is a market that's shot through with price discrimination," and therefore such data would be unreliable. Tr at 2291:15-16 (Elzinga). But the court finds plaintiffs' price discrimination argument unpersuasive. First, "this" market which Elzinga claims is plagued by price discrimination, is the so-called high function FMS and HRM market that the court has already rejected as being the relevant **[*1173]** product market in which to examine the effects of the proposed merger. Second, assuming that the high function FMS and HRM market were the relevant market, which it clearly is not, plaintiffs only evidence regarding price discrimination came from Elzinga's analysis of the Oracle DAFs. Elzinga stated that there was a wide range of discounts offered by Oracle to these 222 customers. Tr at 2222:13-19 (Elzinga). Elzinga stated that because Oracle charged different discounts to these customers, Oracle must be able to determine what price it can charge a customer before the customer eliminates **[**221]** Oracle as a potential vendor (i e, Oracle price discriminates). And since Oracle price discriminates, then SAP and PeopleSoft must price discriminate as well.

But Elzinga admitted he conducted no formal studies of price discrimination in "this" market. Tr at 2343:14-20 (Elzinga). Nor did he examine the discounts given by PeopleSoft or SAP to their respective customers. Tr at 2351:10-14 (Elzinga). Elzinga's assertion that this market is "shot through" with price discrimination because "somehow" Oracle was able to determine what level of discount it could offer to different customers uncannily resembles his argument that there is "something different" about Oracle, PeopleSoft and SAP. Again, the court refuses to sustain plaintiffs' inarticulable contentions.

In sum, the court finds that plaintiffs have failed to show an area of localized competition between Oracle and PeopleSoft.

Oracle's *Efficiency Defense*

Oracle offers an efficiency defense to rebut plaintiffs' claim of anticompetitive effects. Def Post Brief (Doc # 365) at 39-40. Oracle claims that the merger will result in two overall efficiencies: (1) significant cost-savings for Oracle in many areas of business, and (2) **[**222]** an increase in Oracle's scale (i e, customer base), thereby fueling more competition with SAP, Siebel and Microsoft resulting in higher innovation and lower costs. Def Fact (Doc # 357) PP 234-237 at 113, PP 247-251 at 118-21.

Oracle's cost-savings evidence came from a spreadsheet originally compiled in May 2003 when Oracle wanted to acquire J D Edwards. The spreadsheet was revamped in June 2003 when Oracle sought to acquire PeopleSoft. It was finalized in July 2003 when Oracle looked at acquiring both. Tr at 3469:5-12, 3470:19-20 (Catz); Ex D7132. (Acquisition Efficiencies Analysis) (AEA). The AEA lists, as of July 2003, PeopleSoft's total costs for the areas of sales and marketing (S & M), research and development (R & D) and general and administrative (G & A). Id. For 2003, PeopleSoft's total cost of S & M was $ 769.3 million, R & D was $ 466.9 million and G & A costs were $ 214 million. Id. The AEA projects that one year after Oracle has acquired PeopleSoft, the cost of S & M will decrease to $ 34 million ($ 735.3 million in savings), R & D will decrease to $ 201.3 million ($ 265.6 million in savings) and G & A will decrease to $ 37.4 million ($ 176.6 million in savings). Id. Accordingly, **[**223]** Oracle argues that post merger, it will achieve cost-savings of over $ 1 billion. Def Fact (Doc # 357) P 234 at 113. Moreover, the cost savings are annual. So Oracle would save $ 1 billion in 2005, $ 1 billion in 2006, and so forth. Tr at 3493:2-5 (Catz).

Catz further testified to the efficiencies that would result if Oracle's scale were expanded to include PeopleSoft's customers. Tr at 3438-3439 (Catz). Catz stated that one of the main reasons, aside from cost savings, that led Oracle to make a tender offer for PeopleSoft was the potential acquisition of PeopleSoft's "customer base." Tr at 3438:20 (Catz). The scale of a company is a source of annuity revenue, revenue which allows a company to invest **[*1174]** more in research and development of its products. Id. By acquiring PeopleSoft, Oracle would capture the extra revenue of PeopleSoft's customer base as well as the potential for revenue from sales of add-on products. Tr at 3439:6-12 (Catz). This additional revenue and customer base would allow Oracle to expand its R & D, thereby fueling more innovation of Oracle software. Specifically, Catz testified about a new "superset product line" that would have the "best features from Oracle" and **[**224]** the "best features and modules from PeopleSoft." Tr at 3451:2-7 (Catz).

Further, the larger customer base and increased innovation would allow Oracle to compete with larger competitors, such as Microsoft, and compete better in other ERP markets, such as SCM and CMS. Tr at 3440:3-7 (Catz); Def Fact (Doc # 357) P 251. Reduced costs, increased innovation and more competition are efficiencies Oracle claims outweigh, and thus rebut, any showing of anticompetitive effects plaintiffs have put forward.

Plaintiffs' Efficiency Rebuttal

Plaintiffs rebutted the efficiency defense by calling Professor Zmijewski, a professor of business from the University of Chicago. Zmijweski was asked to verify the arithmetic in the AEA spreadsheet that Oracle claims explicate its large cost-saving efficiencies. To verify the spreadsheet, Zmijewski was required to "tease out" all of the inputs (i e, the pre-merger costs and the post-merger costs of all departments) that had been plugged in by Oracle, verify that those inputs were true (based in fact) and then recalculate the numbers to verify that the final efficiency amounts were the same as the amounts represented on the AEA. Tr at 4509:16, 4517-4518 (Zmijewski).

[225]** Zmijewski teased out the inputs successfully then began looking at information provided by Oracle and the SEC for some "factual foundation" for these inputs and post-merger assumptions Oracle had used in calculating the AEA. Tr at 4520:5 (Zmijewski). But Zmijewski hit a "dead end" every time he tried to find some factual basis for any of the inputs in the spreadsheet. Id. A four month search through the documents left Zmijewski with "essentially none" of the information he needed to verify the AEA inputs. Tr at 4520:11 (Zmijewski). Zmijewski's uneasiness about his fruitless search was relieved when he found that there was no factual basis for the inputs. Catz had "used her personal judgment" based upon consultation with Larry Ellison and others in determining the inputs that went into the AEA. Tr at 4520:14-23 (Zmijewski); 3558:1-8 (Catz). Further, there were no documents that could explain how Catz and others had reached these personal judgments on the inputs. Tr at 3558:21 (Catz). This led Zmijewski to conclude that the AEA is "not verifiable" and therefore not reliable under the verification standards used by many professionals, including the SEC. Tr at 4519:24, 4516:5-12 (Zmijewski). **[**226]** Plaintiffs claim that cost-saving efficiencies require defendant to "'explain the methods used to calculate'" the cost-saving numbers. Pls Post Brief (Doc # 366) at 47 (quoting *Staples, 970 F. Supp. at 1089*). According to plaintiffs, Oracle has provided no explanation of the methods used to calculate the AEA other than the judgment of Catz and her colleagues.

Finally, plaintiffs urge the court to put no stock in Oracle's innovation claims, as they are unverified and not merger-specific. Pls Post Brief (Doc # 366) at 49-50. When Catz was cross-examined about the superset product line, the innovative hybrid of Oracle and PeopleSoft, she did not have any documents discussing this proposed innovation, nor did she know any details about when the product would be available. Pls Post Brief (Doc # 366) at 50; Tr at 3533:8-16 (Catz). Plaintiffs **[*1175]** claim this "vague" assertion of a superset product line is not a cognizable innovation claim under case law or the Guidelines. Pls Post Brief (Doc # 365) at 49 (citing *Heinz, 246 F.3d at 723* (requiring "reliable and significant evidence that the merger will permit innovation that otherwise could not be accomplished * **[**227]** * * ."))

Findings of Fact: Efficiencies

HN26[] In order for a claimed efficiency to be "cognizable," it must be "substantiate[d]" and "verfi[able]." Guidelines § 4.0. The court finds Oracle's evidence on the claimed cost-savings efficiency to be flawed and unverifiable. Catz and Ellison's personal estimations regarding the potential cost-savings to Oracle are much too speculative to be afforded credibility. Oracle's efficiency defense based upon future innovations (e g, the superset product) was not verified by internal documents. Oracle presented no evidence regarding the functionality or characteristics the innovative product will contain, nor any evidence regarding its date of availability.

Accordingly, both claimed efficiencies are much too vague and unreliable to rebut a showing of anticompetitive effects.

Conclusions Of Law

This court has jurisdiction over this action pursuant to *28 U.S.C. §§ 1331*, *1337(a)* and *1345* and Section 15 of the Clayton Act, *15 U.S.C. § 25*. Venue is proper in this district pursuant to *15 U.S.C. § 22* and *28 U.S.C. § 1391(c)*.

In order to succeed on their claim, plaintiffs **[**228]** must prove by a preponderance of the evidence (1) the relevant product and geographic market, and within this market (2) the effect of Oracle's acquisition of PeopleSoft may be substantially to diminish competition. See *Penn-Olin, 378 U.S. at 171*.

Plaintiffs alleged a product market limited to HRM and FMS software licensed by Oracle, PeopleSoft and SAP. Plaintiffs also alleged a geographic market limited to the United States.

Plaintiffs have proven that the relevant product market does not include incumbent systems or the integration layer. But plaintiffs failed to prove that outsourcing solutions, best of breed solutions and so-called mid-market vendors should be excluded from the relevant product market. Furthermore, plaintiffs have failed to establish that the area of effective competition is limited to the United States. Accordingly, plaintiffs have failed to meet their burden of proving the relevant market for *section 7* analysis.

Because plaintiffs have failed to meet this predicative burden, plaintiffs are not entitled to a presumption of illegality under *Philadelphia Nat'l Bank* or the Guidelines.

Plaintiffs have failed to prove the likelihood that a post-merger **[**229]** Oracle and SAP would tacitly coordinate by allocating customers or markets. Accordingly, the plaintiffs have not met their burden of establishing anticompetitive coordinated effects.

Plaintiffs have failed to prove an area of localized competition between Oracle and PeopleSoft in which a post-merger Oracle could profitably impose a SSNIP. Accordingly, plaintiffs have not met their burden of establishing the likelihood of anticompetitive unilateral effects.

Notwithstanding that plaintiffs have failed to carry their burden to be entitled to relief, Oracle has not proved by a preponderance of the evidence cognizable efficiencies sufficient to rebut any anticompetitive effects of Oracle's acquisition of PeopleSoft.

Because plaintiffs have not shown by a preponderance of the evidence that the merger of Oracle and PeopleSoft is likely substantially to lessen competition in a **[*1176]** relevant product and geographic market in violation of *15 USC § 7*, the court directs the entry of judgment against plaintiffs and in favor of defendant Oracle Corporation.

This order is stayed 10 days to permit plaintiffs to apply for appellate remedies.

IT IS SO ORDERED.

VAUGHN R WALKER

[230]** United States District Chief Judge

Freedom Holdings, Inc. v. Spitzer

United States District Court for the Southern District of New York

September 14, 2004, Decided ; September 14, 2004, Filed

02 Civ. 2939 (AKH)

Reporter

447 F. Supp. 2d 230 *; 2004 U.S. Dist. LEXIS 18296 **; 2004-2 Trade Cas. (CCH) P74,573

FREEDOM HOLDINGS, INC., d/b/a, NORTH AMERICAN TRADING COMPANY, and INTERNATIONAL TOBACCO PARTNERS, LTD., Plaintiffs, -against- ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and ARTHUR J. ROTH, in his official capacity as Commissioner of Taxation and Finance of the State of New York, Defendants.

Subsequent History: Reconsideration denied by *Freedom Holdings, Inc. v. Spitzer, 2004 U.S. Dist. LEXIS 20078 (S.D.N.Y., Oct. 6, 2004)*

Affirmed by *Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 2005 U.S. App. LEXIS 8886 (2d Cir. N.Y., 2005)*

Adhered to, Judgment entered by, Stay lifted by *Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684, 2009 U.S. Dist. LEXIS 1788 (S.D.N.Y., Jan. 12, 2009)*

Prior History: *Freedom Holdings, Inc. v. Spitzer, 363 F.3d 149, 2004 U.S. App. LEXIS 5600 (2d Cir., 2004)*

Disposition: Plaintiffs' motion for preliminary injunction granted in part and denied in part.

Core Terms

market share, cigarette, Escrow, sales, manufacturers, allocable share, Contraband, cartel, anti trust law, anticompetitive, prices, provisions, settlement, repeal, costs, tobacco, percent, volume, benefits, payment obligation, per se violation, billion, effects, levels, output, preliminary injunction, public health, grandfathered, plaintiffs', statistical

LexisNexis® Headnotes

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

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Per Se Rule & Rule of Reason, Per Se Violations

Where a state statute restricts competition, the question whether the statute is preempted by the Sherman Act is determined by a two-step analysis: The plaintiff must first show that the scheme of market control created by the statute would constitute a per se violation of the Sherman Act if brought about by an agreement among private parties. Even if a per se violation is shown, the alleged anticompetitive scheme may still be immunized under the Parker state action doctrine if: (i) the restraint in question is clearly articulated and affirmatively expressed as state policy and (ii) the policy is actively supervised by the state itself.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] Injunctions, Preliminary & Temporary Injunctions

Generally, preliminary injunctive relief is appropriate when a plaintiff establishes (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in plaintiff's favor. In several circumstances, however, a heightened standard must be satisfied.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Grounds for Injunctions, Likelihood of Success

Regarding preliminary injunctions, one of the circumstances where a heightened standard applies is where (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits. An injunction in such a case is considered "mandatory" because it is said to alter the status quo by commanding some positive act. In such a situation, plaintiffs must show a greater likelihood of success and make a clear showing that the moving party is entitled to the relief requested, or that extreme or very serious damage will result from a denial of preliminary relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] Injunctions, Preliminary & Temporary Injunctions

Regarding preliminary injunctions, one of the circumstances where a heightened standard is appropriate is where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme. In such a situation, the moving party must establish a probability of success on the merits. Accordingly, plaintiffs may not obtain an injunction by showing a reasonable question on the merits plus a balance of hardships tipping in their favor. Plaintiffs must instead satisfy the stricter preliminary injunction standard, by demonstrating both a clear showing of irreparable injury in the absence of such an injunction, and a greater likelihood of success on the merits.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] **Remedies, Damages**

15 U.S.C.S. § 26 eases the requirement of standing for suit under the antitrust laws, allowing suit for threatened rather than actual harm. It does not affect the standard for granting a preliminary injunction. Indeed, the text of the statute provides that an injunction can be obtained under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

"The essential inquiry" of both the per se rule and the rule of reason remains the same--whether or not the challenged restraint enhances competition. Stating that there is often no bright line separating per se rules from Rule of Reason analysis," the U.S. Supreme Court has instructed that because under both tests the criterion to be used in judging the validity of a restraint on trade is its impact on competition, the per se rule, despite its name, may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se rule should be carefully limited to "naked" restraints, which are restraints that lack redeeming social benefits. Accordingly, when legitimate objectives are served, conduct constituting price fixing in the lay sense is not defined as the "price fixing" that is per se unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

There is no bright line between the per se rule and the rule of reason. The proper analysis should be thought of as a spectrum, rather than a dichotomy: There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, with justifications for the restriction to be taken into account. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

For a statute to be preempted, the conduct contemplated by the statute must be in all cases a per se violation of the federal antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN10[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

For a state statute to be considered a per se antitrust violation, it must mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases, or place irresistible pressure on a private party to violate the antitrust laws: A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN11[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Horizontal price fixing, output limitations, and market division are classic characteristics of a cartel. A cartel is defined as a combination of producers or sellers that join together to control a product's production or price. Competing firms form a cartel when they replace independent decisions with an agreement on price, output, or related matters. A cartel is strongest when it controls a large market share or when it is supported by market-based or external enforcement mechanisms. But even an ineffective cartel may be invalid: The cartel need not attain the profit-maximizing price or output to be profitable and socially harmful; indeed, even relatively poorly functioning cartels can be quite profitable. As a result, while many horizontal arrangements are beneficial and lawful, they generally receive the highest level of antitrust scrutiny. Thus, if the offensive elements of a cartel are present, the cartel is likely to be held illegal per se under the Sherman Act, even if the cartel is less effective than its participants would like.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN12[] **Per Se Rule & Rule of Reason, Per Se Violations**

Horizontal agreements among competing sellers to fix prices or restrict output are, absent more, per se violations of § 1 of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The trend in favor of recognizing competing policies in the antitrust arena should apply where the considerable public health policies regarding cigarettes militate in favor of decreased consumption, particularly by young people, even if higher prices cause that end to be served, and even if higher prices are often considered antithetical to the goals served by ***antitrust law***. Classic antitrust analysis must take into consideration the right of states to seek to further other, and equally important, social goals, even at the expense of pure antitrust analysis. It would thus seem that the court should choose the first strand of per se analysis; in determining whether an antitrust violation has occurred, the court should consider not only whether prices have risen and output has been restricted, but also the state's justifications for the statutes that have allegedly caused the rising prices and output restraints.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

A price fixing agreement is no less unlawful if the parties to it fail to carry it out effectively.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN15[] **Regulated Practices, Price Fixing & Restraints of Trade**

In searching for irreparable harm, the existence of a cartel is irrelevant; the question instead is what ongoing damages plaintiffs have suffered and are likely to suffer because of the alleged cartel. Further, damages which can be remedied at the close of trial are definitionally not irreparable. Thus, a loss of earnings on account of the cartel may not necessarily be irreparable, because if plaintiffs prevail at trial, they may recover their losses from the manufacturing defendants, plus interest. A loss of market share, however, is difficult to quantify and represents the loss of an opportunity which may not be quickly or easily regained, and thus may be considered irreparable.

Counsel: **[**1]** For Freedom Holdings, Inc., International Tobacco Partners, Ltd., 1010 Northern Boulevard, Suite 208, Great Neck, NY 11021, on behalf of themselves and all others similarly situated, Plaintiff: David F. Dobbins, Walter M. Luers, Patterson, Belknap, Webb & Tyler, L.L.P., New York, NY.

Judges: ALVIN K. HELLERSTEIN, United States District Judge.

Opinion by: ALVIN K. HELLERSTEIN

Opinion

[*233] ***OPINION AND ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PRELIMINARY INJUNCTION***

ALVIN K. HELLERSTEIN, U.S.D.J.:

On January 6, 2004, the Court of Appeals for the Second Circuit, affirming and reversing my decision of May 14, 2002, remanded this case to me for further proceedings not inconsistent with its rulings. *Freedom Holdings Inc., et al., v. Spitzer, et al., 357 F.3d 205 (2d Cir. 2004)* (*Freedom Holdings I*), *reh'g denied*, *Freedom Holdings Inc., et al., v. Spitzer, et al., 363 F.3d 149 (2d Cir. 2004)* (*Freedom Holdings II*). The Court of Appeals affirmed my dismissal of the dormant *Commerce Clause* claim, reversed my dismissal of the *Sherman Act* claim, and vacated my dismissal of the Equal Protection claim.

The Mandate issued on April 30, 2004. Almost immediately **[**2]** afterwards, plaintiffs filed an amended complaint, a motion for summary judgment (the briefing of which is incomplete), and, by Order to Show Cause, a motion for a preliminary injunction. This last motion is before me now, and was the subject of oral argument on May 24 and June 2, 2004. For the reasons stated below, I grant the motion in part and deny it in part. I deny plaintiffs' motion to the extent that it seeks an injunction against enforcement of the Master Settlement Agreement between forty-six states and the four major cigarette companies and subsequently agreeing cigarette companies. I deny plaintiffs' motion to the extent that it seeks an injunction against enforcement of the Escrow Statute, *N.Y. Pub. Health Law §§ 1399-nn-pp*, and the Contraband Statute, *N.Y. Tax Law §§ 480(b)*, *481*, *1846*. However, I grant plaintiffs' motion to the extent that it seeks an injunction against enforcing the repeal of the Allocable Share Release provision of the Escrow Statute, *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003.

I. Factual Background

Cigarette smoking **[**3]** is a scourge to our society. Before modern prohibitions against smoking in public institutions, cigarette smoke hung like a pall over baseball, basketball, and hockey stadia, fouled the air in the offices where we worked and the homes where we lived, and coated our lungs with tars and other poisons, shortening our lives and injuring our health. In recent decades, many injured parties sued the tobacco companies, with mixed results. In the 1990s, governmental entities brought their own lawsuits, seeking to recover their damage -- billions of dollars spent on Medicaid and other health costs caused by cigarette smoking - and to restrict and prevent various advertising and marketing practices of the cigarette manufacturers that tended to popularize cigarette smoking and cause young people to become addicted.

On November 23, 1998, a settlement was reached between forty-six states, the District of Columbia and several territories, and the four major cigarette companies, Philip Morris, Inc. ("Philip Morris," now Altria Group, Inc.), R.J. Reynolds Tobacco Co. ("R.J.Reynolds"), Brown and Williamson Tobacco Co. ("Brown & Williamson"), and Lorillard Tobacco Co. ("Lorillard"). The Master Settlement **[**4]** Agreement ("MSA"), a long and complicated agreement with many annexes, provided for substantial payments by the cigarette companies **[*234]** to the states, an ability to recoup settlement costs by passing them on to consumers, incentives to other cigarette companies to join the settlement and protections against those that would not join, and various marketing and advertising restrictions intended to reduce the attraction of cigarettes, especially to young people.

A. The MSA

The manufacturers who signed the MSA consented to a variety of marketing and advertising restrictions. Signatory manufacturers agreed that they would not "take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products." MSA Art. III(a). They agreed not to use cartoons such as Joe Camel in advertising or promotions, MSA Art. III(b), sponsor concerts or major sporting events using tobacco brand names, MSA Art. III(c)(1), or advertise on billboards, in shopping malls, or in transit systems. MSA Art. III(d). They agreed to refrain from selling clothing or other merchandise bearing a tobacco brand name, MSA Art. III(f), and from **[**5]** giving free samples or gifts based on proofs of purchase to youths under age eighteen. MSA Art. III(g), (h). They pledged not to pay for product placement in movies, television shows, theatrical performances, or video games, MSA Art. III(e), nor to enter into agreements restricting anti-tobacco advertising. MSA Art. III(d)(4).

Participating manufacturers also accepted limitations on their lobbying rights. They are prohibited from opposing state or local legislation "intended . . . to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products." MSA Art. III(m)(1). They also may not support congressional legislation which would override the MSA, or challenge state tobacco-related statutes, MSA Art. III(m)(3), V, or promote the diversion of MSA proceeds to uses that are not health-related. MSA Art. III(n). The MSA requires participating manufacturers to develop corporate principles that express their commitment to reducing youth smoking, to communicate those principles clearly to employees and customers, and to designate an executive level manager responsible for identifying methods of reducing youth smoking. MSA Art. III(i)(1), (2).

The MSA provides for the **[**6]** dissolution of several tobacco industry nonprofit research or trade organizations, and provides for state governmental oversight of any new tobacco-related trade organizations. MSA Art. III(o), (p). The MSA establishes a National Public Education Fund, financed by proceeds from payments under the MSA, to study and support the reduction of youth smoking and of smoking-related diseases. MSA Art. VI(a). For instance, the fund is authorized to support "sustained advertising and education programs" to counter youth smoking. MSA Art. III(g).

The four major tobacco companies, who were the original participating manufacturers to the settlement ("OPMs"), agreed under the MSA to make three sets of payments for a combined value of approximately $ 2.4 billion in the first year and $ 225 billion dollars over twenty-five years. *See* MSA Art. IX(b), (c). [1] **[**8]** The payments **[*235]** of the OPMs were to be adjusted each year to reflect inflation, miscalculations of relative shares, and various other factors. *See* MSA Art. IX(b), (c). A Volume Adjustment, MSA Art. II(aaa), Exh. E, adjusts aggregate payments by

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[1] One set of payments was to be made immediately after the MSA was executed and annually thereafter, on January 10, from 2000 through 2003. These base payments totaled $ 12,741,925,944. MSA Art. IX(b). The second set of payments was to be made annually "on April 15, 2000 and on April 15 of each year thereafter in perpetuity," increasing from $ 4.5 billion in 2000 to $ 9 billion annually beginning in 2018. The second set of payments totals $ 207.89 billion between 2000 and 2025. MSA Art. IX(c)(1). The third set of payments was to be made annually "on April 15, 2008 and on April 15 each year thereafter through 2017." The payments were in the amount of $ 861 million per year, or $ 8.61 billion in total. MSA Art. IX(c)(2). The three sets of payments combined have been called "the largest privately negotiated redistribution of wealth in world history." Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, *33 Conn. L. Rev. 1143, 1171 (2001)*.

the OPMs according to yearly changes in the quantity of cigarettes that they ship in or to the **[**7]** United States. If total shipments increase, the base payment is increased proportionally; if total shipments decrease, the base payment is decreased by 98 percent of the proportion of decrease. MSA Exh. E(A), (B)(i). [2]

The payments of each individual OPM were to be adjusted yearly as well, according to changes in its share of the entire United States market for cigarette sales, relative to the shares of the other three OPMs. As an OPM's market share increased relative to the other OPMs' shares of the market, so did that OPM's burden of payments relative to those of the other OPMs; as its relative market share decreased, so did its relative burden. MSA Art. II(mm). [3]

[9]** The settling states and territories agreed to allocate amongst themselves the moneys derived from the OPMs' payments under the MSA. Art. II(f), at 4, Exh. A. The percentages, or allocable shares, were negotiated among the settling states to reflect total smoking population, health care costs, and other relevant considerations. By far the largest allocable shares are those of California, 12.7639554 %, and New York, 12.7620310 %. The next largest allocable share is Pennsylvania's, which is 5.7468588 %, less than half of New York's. Kentucky's allocable share is 1.7611586 %.

The MSA provides an incentive for other cigarette manufacturers to join the payments scheme. Subsequent participating manufacturers ("SPMs") who agreed to join the MSA within the first sixty days after its execution by the OPMs were "grandfathered" into their 1998 market share or 125 % of their 1997 market share, whichever is greater. Grandfathered SPMs become liable for payments to the states only to the extent that their market share increases above those grandfathered levels; above those levels, their required payments are measured by the degree to which their yearly market shares increase relative, not to the **[**10]** entire market, but to the aggregate market share of the OPMs. MSA Art. IX(i). The relationship is reflected in the formula: (current market share - 1998 [or 125 % of 1997] market share) / (current aggregate market share of OPMs). [4] As the Court of Appeals observed, **[*236]** the formula imposes on SPMs a payment obligation that increases by more than its proportional growth of market share:

> If the denominator were current aggregate market share of OPMs and SPMs, gaining market share from OPMs would be less harmful for SPMs, because the denominator would not change even when the numerator increased. But under the MSA, if the numerator increases because the SPM has taken market share from an OPM, the denominator decreases by the amount of the increase. Thus, the SPM's proportion of the annual payment increases by more than its proportion of overall market share.

Freedom Holdings II, 363 F.3d at 153. Thus, SPMs pay nothing to the states for their cigarette sales at or below their base of 1998 (or 125 % of their 1997) market share, but disproportionately higher payments for cigarette sales that increase their market shares above those levels, relative to the market **[**11]** shares of the OPMs.

The MSA provides a different protection relative to non-participating manufacturers ("NPMs"), by providing incentives to the states to enact legislation aimed at preventing NPMs from benefiting competitively by avoiding the onus of payment obligations to the states. The Escrow and Contraband Statutes, passed in virtually every signatory state, are the result of these provisions of the MSA. *N.Y. Pub. Health Law §§ 1399-nn-pp* **[**12]** ; *N.Y. Tax Law §§*

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[2] The 2% disproportion seems to mitigate slightly an aggregate decrease in payments to the states. Any decrease in payments under the Volume Adjustment is subject to reduction - that is, the OPMs' payments are adjusted downwards somewhat less, according to a complex formula - if the aggregate operating income of the OPMs from yearly sales of cigarettes in and to the United States exceeds $ 7.195 billion (adjusted upward for inflation). MSA Art. II(aaa), Exh. E(B)(ii).

[3] All payment calculations in the MSA are made on the basis of statistical data of the previous year. Thus the payments due on April 15, 2004, for instance, are based on audited and certified manufacturers' 2003 statistics regarding volume of sales, percentage of market share, and the like. *See*, *e.g.*, MSA Art. II(mm), Exh. E(C).

[4] For non-grandfathered SPMs, 1997 and 1998 market share are defined as zero, so that the formula collapses to current market share divided by current aggregate market share of OPMs. MSA Art. IX(i)(4). Any manufacturer which consented to join the MSA more than sixty days after its initial execution by the OPMs becomes a nongrandfathered SPM. MSA Art. IX(i)(4). Both by number of manufacturers and by volume of sales, the majority of manufacturers which became SPMs did so within the first sixty days after the MSA's execution and became grandfathered.

480(b), 481, 1846. The MSA provides an NPM Adjustment, reducing payment obligations of PMs to the extent they lose market share to NPMs. [5] However, the NPM Adjustment does not take effect if a state enacts Escrow or similar statutes imposing payment obligations on NPMs to the states. If a state fails so to legislate, payment obligations of the participating manufacturers ("PMs") are reduced by triple the PMs' aggregate market share loss for market share loss of between zero and 16 2/3 %. If the market share loss increases above 16 2/3 %, the trebling provision is replaced by a complex formula potentially increasing the PMs' discount. MSA Art. IX(d)(1)(A).

The NPM Adjustment is subject to several other conditions. It does not apply **[**13]** until cigarette shipments fall below 1997 levels. MSA Art. IX(d)(1)(D). The independent auditor appointed to administer the MSA must certify "that the disadvantages experienced as a result of the provisions of this Agreement were a significant factor contributing to the Market Share Loss." MSA Art. IX(d)(1)(C). And, as noted, the NPM Adjustment will not apply to any state which enacted an Escrow Statute, "and diligently enforced the provisions of such statute." MSA Art. IX(d)(2)(B). [6] The Escrow Statute is intended to "effectively and fully neutralize[] the cost disadvantages vis-a-vis Non-Participating Manufacturers." MSA Art. IX(d)(2)(E).

The Escrow Statute, passed by New York on November 27, 1999, "imposes a **[*237]** per-pack fee on NPM-manufactured cigarettes that adds to the resale price of the product." *Freedom Holdings I, 357 F.3d at 212.* **[**14]** This fee, which is paid to an escrow account from which NPMs can recover under several eventualities, is currently $ .0167539 per cigarette sold, or $ 3.35078 per carton, and increases slightly over time. [7] NPMs are entitled to receive interest on their payments while in escrow. MSA Exh. T; *N.Y. Pub. Health Law § 1399-pp(2)(b)*. NPM payments are not made variable according to changes in their market shares, as are the payment obligations of the OPMs. Unlike SPMs, NPMs are not "grandfathered" and entitled to exclude a certain percentage of their sales below a base level. While PMs' payments are tax deductible, NPM escrow payments are probably not tax deductible, with the possibility (disputed) that they could become tax deductible if rights to reversion and interest were to be surrendered.

[15]** Under the Escrow Statute as initially enacted, *see* MSA Exh. T., *N.Y. Pub. Health Law § 1399-pp* (McKinney 2002), 1999 N.Y. Laws 536, eff. Nov. 27, 1999, an NPM could recover funds that it placed into escrow under three circumstances. First, the funds placed into escrow could satisfy a judgment or settlement on a tobacco-related claim. Second, an NPM could recover funds that it placed into escrow in a particular state to the extent that those funds exceeded the amount that that state would have received from that manufacturer as its allocable share, had the manufacturer been an SPM. Third, to the extent that an NPM does not recover from the escrow fund through those two methods, its funds are to be released from escrow after twenty-five years. *Id. § 1399-pp(2)(b)*. The statutory provision allowing for the second of these three methods of releasing funds, *N.Y. Pub. Health Law § 1399-pp(2)(b)(ii)*, is commonly known as the Allocable Share Release provision.

The Contraband Statute was passed by New York on December 28, 2001, as an enforcement mechanism for the Escrow Statute. As described by the Court of Appeals, ***[**16]*** *Freedom Holdings I, 357 F.3d at 213-15*, it requires each manufacturer to certify annually that it is either a PM making payments under the MSA, or in compliance with the Escrow Statute. If a manufacturer fails so to certify or if the Commissioner of Public Health determines that the manufacturer is in violation of the Escrow Statute, state tax stamp agents are prohibited from stamping that manufacturer's cigarettes. Penalties for violation of the Contraband Statute include seizure and forfeiture of

[5] The NPM Adjustment applies to the second and third sets of OPM payments, which account for all but $ 12.74 billion of the OPMs' aggregate payments. MSA Art. IX(c)(1), (2). The NPM Adjustment also applies to SPM payments. MSA Art. IX(i)(3).

[6] If a state enacts and fully defends the model escrow statute, but it is invalidated by a court, the state may still avoid 65% of the NPM Adjustment. MSA Art. IX(d)(2)(F).

[7] The escrow payment was $ .0094241 per cigarette, or $ 1.88482 per carton, in 1999, and it rises to $ .0188482 per cigarette, or $ 3.76964 per carton, beginning in 2007. MSA Exh. T; *N.Y. Pub. Health Law § 1399-pp(2)(a)(1)*, *(v)*. A pack contains twenty cigarettes and a carton contains ten packs, so that a carton equals 200 cigarettes.

cigarettes, monetary liability, and suspension or cancellation of the manufacturer's license. N.Y. Tax Law §§ 480-b, 481, 1846.

The Allocable Share Release provision was amended, effective in New York on October 15, 2003, and to date the same amendment has been passed in approximately thirty states. Under the amended law, an NPM can recover funds it placed into escrow only to the extent that they are greater than the total amount of payments that manufacturer would have been required to pay to all states had it been an SPM. N.Y. Pub. Health Law § 1399-pp, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003. The statutory **[**17]** amendment provides, in effect, that escrowed amounts formerly returned to NPMs would now be **[*238]** retained in escrow for 25 years, and in the interim would be available only to satisfy a judgment or settlement on tobacco-related claims.

B. Statistical Data

The payment obligations of the OPMs are stated in base amount in the MSA, but are adjusted according to several formulae which take market share and other factors into account. The payment obligations of the SPMs are based on their relative market shares and those of the OPMs. By contrast, the NPMs' payments are a flat fee per cigarette sold. The contrast makes the various types of payments difficult to compare, leaving it open to question which manufacturers have, in practice, paid higher or lower amounts under the MSA, or whether any such differences are material. Statistical data provided by PriceWaterhouse Coopers, the independent auditor responsible for overseeing the calculations to be made pursuant to the MSA, show that payments per carton have been as follows:

Year	**OPM**	**SPM** [8] **Grandfathered**	**SPM Not Grandfathered**	**NPM**
1999	$3.92600	$0.48336	$2.02476	$2.01656
2000	$4.34052	$0.69332	$2.36810	$2.34180
2001	$5.15794	$1.1656	$3.13972	$3.12976
2001	$4.98840	$1.61918	$3.28210	$3.27330
2003	$4.16913	$1.83088	$3.97212	$3.96144

[18]**

According to these figures, in any given year, the OPMs have had the highest per cigarette payment obligations, and the SPMs who have had the benefit of averaging their costs because of the benefits given to them under the grandfather clause, have had the lowest. NPMs' payment obligations have been between these two poles. NPMs' payment obligations have consistently been less than, although very close to, those of SPMs who did not have the benefit of the grandfather clause. [9]

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[8] This figure represents the average of cigarettes sold without payment, pursuant to the grandfather clause and cigarettes sold with payments of increasing proportions for sales above grandfathered levels.

[9] Because the Escrow Statute required NPMs to pay a stated amount per cigarette sold, the figures for payments per carton should, in theory, be strict multiples of the figures for payments per cigarette provided by the Escrow Statute. For instance, the Escrow Statute provides that in 2003, NPMs pay $ .0167539 per cigarette sold; because there are 200 cigarettes in a carton, one would expect that the figure for NPM payments per carton should be $ 3.35078. The figures provided by PriceWaterhouse for NPM payments per carton, per year, are somewhat higher: $ 3.96144 per carton for 2003, for example. Presumably the

[19]** Plaintiffs also allege that NPMs' escrow payments are taxed, while the MSA payments of PMs are tax deductible. In response, New York State (the "State") submits an affidavit by Marvin Chirelstein, tax professor at Columbia Law School, who maintains that the NPMs' payments could be structured as tax deductible, if the NPMs were willing to cede their reversionary and interest rights in those payments. The State supports this assertion with an affidavit by Todd Kerner, a New **[*239]** York State taxation agent, who maintains that if an NPM would attempt to cede its reversionary rights and structure its payments as Professor Chirelstein suggests, New York (and presumably other states) would accept the payments as fully deductible. Plaintiffs contend that they have tried that in other states, but have been blocked from doing so, and that PriceWaterhouse has also taken the position that escrow payments are not tax deductible. [10] Moreover, the State has submitted no evidence on the position of the IRS regarding the relative tax treatment of PM and NPM payments.

[20]** Of equal importance to the volume of payments is their effect on, or reflection of, competition. According to the data provided by PriceWaterhouse, the volume of OPM sales has decreased since the signing of the MSA, from 455 billion cigarettes in 1998 to 344 billion cigarettes in 2003, a reduction of 24 percent. Prices charged by the OPMs increased during this period, not only to cover the cost of the settlement with the states, estimated at $ .19 per pack, but by $ .45 per pack when the MSA was signed in November 1998 and, including subsequent increases, by a total of $ 1.27 through April 2002. The average retail price of an OPM-manufactured pack of cigarettes was $ 1.49 per pack before the MSA was signed in November 1998 and $ 2.76 per pack in April 2002, an increase of over 85 percent.

As the volume of OPM sales fell between 1998 and 2003, the volume of SPM sales rose from 14.12 to 30.08 billion cigarettes, or 113 percent. The volume of NPM sales rose even more during this same period, from 2.43 to 33.31 billion cigarettes, or 1271 percent. The market share of the OPMs shrank over this time period from 96.5 % to 84.5 %. The market share of the SPMs grew from 3 % to 7.4 %, and **[**21]** the market share of the NPMs grew from 0.5 % to 8.2 %. The following chart reflects the shift in volume and market share from 1998 to 2003. [11]

Year	**OPMs**		**SPMs**		**NPMs**		**Total**
	(billions;%)		**(billions;%)**		**(billions;%)**		
1998	455.22	96.5%	14.12	3%	2.43	0.5%	471.77
1999	422.00	92.3%	18.00	3.9%	17.10	3.7%	457.10
2000	401.49	91.4%	22.63	5.2%	14.89	3.5%	439.01
2001	383.31	89.4%	26.70	6.2%	18.70	4.4%	428.71
2002	364.31	86.1%	30.67	7.2%	28.20	6.7%	423.18
2003	344.61	84.5%	30.08	7.4%	33.31	8.2%	408.00
2004	335	83.75%	30	7.5%	35	8.75%	400

difference stems from the Escrow Statute's requirement that its figures be adjusted for inflation. *See* *N.Y. Pub. Health Law § 1399-pp(2)(a)*. Neither party presented arguments regarding this point.

[10] Jeffrey Avo Uvezian, the President of plaintiff International Tobacco Partners, Ltd. ("ITP"), states that his company imports Grand Tobacco cigarettes, which had an escrow obligation to Hawaii of less than ten dollars and does not intend to sell more cigarettes in that state. "To avoid the time and expense of opening an escrow account and maintaining it for 25 years for about ten dollars, ITP . . . offered to pay the amount due directly to Hawaii. . . . No matter how we proposed to structure the transaction, [Hawaii] refused to accept the money, stating that . . . the only way for ITP to fulfill its obligation was for ITP to sign an escrow agreement, establish the required sub-account, name a registered agent, and hold the money for 25 years."

[11] This data was provided by plaintiffs and attributed to PriceWaterhouse. The figures have been rounded. The State provided figures attached to the Declaration of Patricia Tilton, a principal at PriceWaterhouse. The figures attached to the Tilton Declaration are similar to those above, with slight and generally inconsequential variations. An exception is the figures for 2001, when a different categorization altered the market size by 15 billion cigarettes. The figures used here give a more accurate picture of the 2001 market, and are otherwise closely enough confirmed by the Tilton Declaration figures that I accept them as reliable.

Year (est.)	OPMs (billions;%)	SPMs (billions;%)	NPMs (billions;%)	Total

[*240] **[**22]**

The percentages of market shares among the OPMs have also changed, although not to as large an extent. In 1998, Brown & Williamson made 15.4 percent of total sales by OPMs. By 2003, that figure had declined to 11.5 percent, a loss of over 25 percent of its relative market share. Philip Morris gained commensurately; as a percentage of total OPM sales, its share rose from 50.5 percent in 1998 to 54.7 percent in 2003. The relative market shares of Lorillard and R.J. Reynolds, as percentages of total OPM sales, have remained relatively consistent since the MSA was signed. Lorillard's relative market share has stayed between 9.4 percent and 10.8 percent. R.J. Reynolds's relative market share has hovered between 23.5 percent and 25.1 percent.

The statistical trend of declining volume and market share on the part of the OPMs, and increasing volume and market share of NPMs, has been the subject of concern to the OPMs. In the months following the signing of the MSA, the OPMs' share prices fell steeply, but the prices began rising in early 2000 and substantially recovered by early 2002. During 2002, in order to hold market share, the OPMs began offering a variety of promotions, including **[**23]** buy-two-get-one-free giveaways. In response, the OPMs' stock prices once again began to decline. Philip Morris announced on September 26 and November 12, 2002 that it would not meet growth forecasts, and its share price fell further, declining from approximately $ 58 per share in June 2002 to under $ 30 per share in early 2003. R.J. Reynolds's share price fell from over $ 70 per share to $ 27 per share in the same time period. Altria, which in 2002 became the new name of the parent company which was formerly Philip Morris, began the Business Review section of its 2002 Annual Report by listing "heightened competition" among the factors responsible for the weakened position of its domestic tobacco manufacturing subsidiary, Philip Morris USA:

> The year was characterized by the convergence of several factors, including a weak economic environment and resulting consumer frugality, sharp increases in state excise taxes and heightened competition. Industry shipment volume in 2002 . . . declined by 3.7 % to 391.4 billion units, while PM USA's shipment volume declined 7.5 % to 191.6 billion units.

Altria explained, however, that it had "strategies in place" to ensure a stronger market **[**24]** position in the future, and in the Business Review section of its 2003 Annual Report, Altria described its strategies in more detail, including lobbying for

> federal and state initiatives that are designed to provide governments with additional tools to ensure that cigarette manufacturers comply with their Master Settlement Agreement (MSA) payment obligations or the escrow deposit requirements of related state laws, that the availability of counterfeit cigarettes is significantly reduced, and that the illegal sale of cigarettes and non-payment of taxes are dealt with effectively. Significant progress has been made on many of these issues.

Prior to 2003, only eight states had passed Contraband Statutes; during 2003, thirty-one did. On March 20, 2003, West Virginia became the first state to repeal its Allocable Share Release provision and, by year's end, eighteen states, including New York, had followed suit. The OPMs' stock prices began to rise in May 2003, and have generally continued in the same direction **[*241]** since then. Altria described its market position more positively in its 2003 Annual Report, noting that "Philip Morris USA Inc. (PM USA) volume began to stabilize and **[**25]** its retail share increased sequentially during each quarter of 2003, with improved results in the fourth quarter."

The record does not provide a satisfactory economic analysis as to the cause of the statistical trends which have seen OPMs' market shares decline steadily since 1998, notwithstanding the enactment of Escrow and Contraband Statutes, and which have seen SPMs' and NPMs' market shares rise. The Court of Appeals, accepting the allegations of the complaint, ruled that the MSA created the constituent elements of a cartel, *Freedom Holdings I, 357 F.3d at 226*, but the statistical trends are not consistent with those rulings and, indeed, contradict them. The plaintiffs alleged, and the Court of Appeals assumed, a large degree of inelasticity of demand, but the price increases imposed by the OPMs have resulted in loss of market share to OPMs, in favor of both SPMs and NPMs. The Escrow and Contraband Statutes were enacted by the states in response to the incentives provided to them under the MSA to create equivalent obligations on NPMs to those imposed on OPMs and SPMs. *See* MSA Art. IX(d)(2)(E) (Escrow Statute "effectively and fully neutralizes" competition **[**26]** from NPMs). Yet the statistical trends have shown no adverse competitive impact on the NPMs following passage of those Statutes.

An explanation offered by the NPMs may be found in the workings of the Allocable Share Release provision. As explained above, the MSA allocates among the various settling states the moneys paid by PMs according to each state's allocable share. MSA Art. II(f), at 4; Exh. A. Under the Escrow Statute as initially enacted, *see* MSA Exh. T., *N.Y. Pub. Health Law § 1399-pp* (McKinney 2002), 1999 N.Y. Laws 536, eff. Nov. 27, 1999, an NPM could recover funds that it placed into escrow in a particular state to the extent that those funds exceeded the amount the state would receive from that manufacturer as its allocable share, had the manufacturer been an SPM. Thus, an NPM, by concentrating its distribution regionally, to just a few states, could recover a greater percentage of the total money it placed into escrow because those states were allowed to retain only their relatively small percentage shares.

In practical effect, the Allocable Share Release provision provided NPMs with substantial competitive advantages from concentrating **[**27]** their efforts on regional cigarette distribution. If an NPM distributed its cigarettes nationally, and its distribution patterns approximated those of the national market, its payment obligations on its national sales would be apportioned 100 percent among the settling states, with the result that something close to 100 percent of its payments would, in the aggregate, be retained under the Escrow Statute and not released under the Allocable Share Release provision. However, if an NPM were to concentrate its business to the New York-New Jersey-Connecticut area, for instance, it could gain a competitive advantage in that region, because it would make 100 % of its sales there and would be able to recoup the payments on all but roughly 16.5 % of them, these being approximately the percentage shares of those states. While the OPMs and SPMs would be required to continue 100 % of their payments under the MSA, an NPM which focused on the New York metropolitan area could be exempt (aside from the time-value of its money between when it was escrowed and when it was released) to **[*242]** the extent of over 80 % of its business. [12]

[28]** The Declaration of Everett W. Gee III, submitted by plaintiffs, demonstrates this strategy. Gee, the Vice President and General Counsel to S&M Brands, Inc., a Virginia-based NPM, explained that his company was presented with the option of (1) signing the MSA, becoming an SPM, and reducing its ability to increase sales beyond their 1998 (or 125 % of their 1997) levels; or (2) not signing the MSA, "but remaining regional so as to avoid making payments on a national scale. . . . Thus, S&M gave up its dream to be national, settling into the MSA's rules even as an NPM by remaining a regional presence." By selling only in the Southeast, S&M was able to keep its prices lower and continue its growth within that regional market.

Plaintiffs allege that the repeal of the Allocable Share Release provision has halted this process. An NPM can effectively no longer recover funds it placed into escrow, except to pay a judgment or settlement against it, or after 25 years. *See* *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003. Thus, according to plaintiffs, the barriers against NPMs have been heightened dramatically, and the ability **[**29]** of an NPM to gain a competitive advantage within a regional market has been essentially arrested. However, no independent statistical information has been presented to confirm, or rebut, this thesis; the change in law is too recent.

C. Procedural Background

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[12] Because New York's allocable share is high, plaintiffs explain, many NPMs avoided selling cigarettes in New York and decided to sell instead elsewhere in the country, where they could recover a higher percentage of their escrow payments. For instance, plaintiff International Tobacco Partners, Ltd. ("ITP") has sold no cigarettes in New York since before 2000, but sold approximately 23 million Tough Guy cigarettes and 61 million Boston cigarettes in Kentucky in 2002, and 38 million Tough Guys and 44 million Boston cigarettes in 2003. ITP made escrow deposits for both Tough Guys and Bostons sold in Kentucky in 2003; because Kentucky's allocable share is 1.7611586%, ITP could recover over 98% of the escrow payments it made on sales in Kentucky. Logically and arithmetically, however, an NPM could just as effectively concentrate its distribution into the New York market, with its large smoking population, and gain regional competitive advantage in this market.

In April 2002, Freedom Holdings Inc. and International Tobacco Partners, Ltd., two cigarette importers who were not participants to the settlement, and who imported cigarettes from foreign manufacturers who were also not participants to the settlement, filed this lawsuit on behalf of themselves and others similarly situated. By their lawsuit, they sought to enjoin New York State from enforcing the MSA to the extent that it preserved the market domination of the OPMs amongst themselves and against others, and the statutes passed by the State to enforce the MSA against non-participating companies like plaintiffs. The State moved to dismiss, and I granted its motion. Relying on *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, I held that the anticompetitive provisions notwithstanding, the State had acted pursuant to its traditional police powers, and such action was protected against the reach of **[**30]** the federal antitrust laws.

The Court of Appeals reversed, holding that plaintiffs had alleged valid claims for relief as to their antitrust and equal protection counts, and remanded the case to me. Two of the three judges constituting the panel [13] held that the State had not **[*243]** sufficiently articulated the policy goals that made it necessary to allow the major cigarette manufacturers to organize themselves into a cartel, and all three judges held that the State had not regulated the anticompetitive features of the settlement to minimize their anticompetitive effects in relation to the states' concerns for the public health of their citizens.

The Court of Appeals ruled that ***HN1***[] where a state statute restricts competition, the question whether the statute is preempted by the *Sherman Act* "is **[**31]** determined by a two-step analysis":

> The plaintiff must first show that the scheme of market control created by the statute would constitute a per se violation of the *Sherman Act* if brought about by an agreement among private parties. . . . Even if a per se violation is shown, the alleged anticompetitive scheme may still be immunized under the *Parker* state action doctrine . . . if: (i) the restraint in question is "clearly articulated and affirmatively expressed as state policy" and (ii) the policy is "actively supervised" by the state itself.

Freedom Holdings I, 357 F.3d at 222-23 (quoting *Cal. Regional Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980))*. Based on the allegations of the complaint and on the Third Circuit's decision in *A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239 (3d Cir. 2001)*, the Court of Appeals ruled:

> The alleged arrangement, even without the protection of the Contraband Statutes as enforced by wholesalers, would be a per se violation because it is a naked restraint on competition, albeit one subject to erosion by NPMs. With the **[**32]** Contraband Statutes in force, the scheme as alleged threatens to become a permanent, nationwide cartel. . . . We therefore hold that appellants have sufficiently alleged a per se violation of the *Sherman Act*.

Freedom Holdings I, 357 F.3d at 226. A flat state tax on all manufacturers and importers of cigarettes, measured by their sales rather than their market shares, and without the protective features of the MSA tending to preserve market shares, could have just as easily vindicated the interests of the states. However, the Court of Appeals held, the per se violation of the *Sherman Act* notwithstanding, the restraint on competition imposed by the MSA and the statutes enacted pursuant to the MSA could be saved from illegality if the *Parker v. Brown* exception, exempting state action from the preemptive effect of the *Sherman Act*, were to apply. As the Court of Appeals explained, the exception for state action applies "only if (i) the restraint in question is 'clearly articulated and affirmatively expressed as state policy,' and (ii) the policy is 'actively supervised' by the State itself." *Freedom Holdings I, 357 F.3d at 226* (quoting *Midcal, 445 U.S. at 106*). **[**33]**

On the first of these two prongs, the Court of Appeals ruled that the action was in fact taken by the State, and it reduced the question to whether "the State's policy goals are sufficient to qualify for the *Parker* immunity - simply protecting private parties from competition is not a sufficient goal." *Id. at 227*. Reviewing the legislative history of the

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[13] Judge Ralph K. Winter wrote the decision on behalf of Judge Sonia Sotomayor and himself. *357 F.3d at 208*. Judge Robert D. Sack concurred in a separate opinion. *Id. at 235* (Sack, J., concurring).

Escrow and Contraband Statutes, the Court of Appeals ruled that the State's interest in protecting and enhancing the revenue it expected from the MSA animated the passage of the statutes far more than the conclusory rationale of protecting the public health. *Id. at 227-31*. Because, the Court of Appeals held, "the MSA requires the PMs to pay a fixed **[*244]** fee per cigarette but leaves them free to set whatever price they choose, the resolution of the price/sales/public health conflict is left by the MSA to the PMs," whose concern is for profits rather than public health. *Id. at 230*. Accordingly, the Circuit held that "the relationship of such [public health] benefits to the restraint on competition is not obvious and may even be counterproductive." *Id. at 230-31*.

Addressing whether the allegedly anticompetitive provisions **[**34]** are "actively supervised" by the State, the second prong of *Midcal*, the Court of Appeals held that they are not. *Id. at 231*. Finally, the Second Circuit rejected the State's argument that the MSA reflected *Noerr-Pennington* rights, rights under the *First Amendment* to petition the state governments for relief. The Court of Appeals held that the *First Amendment* doctrine is irrelevant to the issues arising from the complaint. *Id. at 233*.

The Court of Appeals, with respect to all these rulings, emphasized that it was dealing with only the allegations of the complaint, and was assuming the truth of facts and conclusions alleged by the plaintiffs. [14]

[35]** Judge Sack, concurring, agreed with the majority that the State had not satisfied the second *Midcal* prong, requiring the State's active supervision of the anticompetitive features of the MSA, but differed with the majority as to the first *Midcal* prong. That prong, Judge Sack stated, "requires only that the state offer a clear articulation of a state policy to authorize anticompetitive conduct," and "seems easily met here, or at least seems as though it would be capable of proof before the district court on remand." *Id. at 236*. As Judge Sack put it, "The 'clear articulation' standard is not strict." *Id.* Judge Sack thus expressed doubt that the majority should have impugned the State's motivation for entering into the MSA, and questioned whether comparing the MSA's payment provisions with a flat tax was appropriate. *Id. at 238-39*. He commented that since "this action is being returned to the district court for further proceedings . . . the State may be able to satisfy both *Midcal* factors as a matter of fact." *Id. at 238*.

Defendants petitioned the panel for reconsideration, but the Court of Appeals confirmed its rulings, **[**36]** in an opinion dated March 25, 2004. The State argued that "the complex market share arrangements of the MSA" were not anticompetitive, as the Court of Appeals had ruled, but "have no purpose other than to impose a flat levy per cigarette sold." *Freedom Holdings II, 363 F.3d at 152*. The Court of Appeals rejected the State's arguments, commenting that on the State's view, the MSA's payment provisions would amount to "a superfluous maze leading to a result that could have been achieved in a simple, straight-forward manner." *Id.* Judge Winter, again writing for the panel and "construing the complaint's allegations most favorably to the plaintiffs," *id.*, ruled that the MSA (1) confers tax benefits on SPMs over NPMs; (2) confers benefits on SPMs who joined the MSA within sixty days of its execution over those SPMs who joined later; and (3) confers benefits on OPMs over SPMs, by penalizing SPMs for increases in market share to an extent greater than their actual market gains. **[*245]** *Id. at 153*. Judge Winter ruled that these features, and others, gave rise to a cartel favoring the OPMs, inter se and against SPMs and NPMs, and constituted a per se violation **[**37]** of the antitrust laws.

The Court of Appeals reaffirmed that the State's policy goals failed to exempt it from antitrust liability. *Parker v. Brown* did not apply, the Court of Appeals held, because the State did not relate the anticompetitive features of the Escrow and Contraband Statutes to the legitimate State policies of protecting public health and forcing cigarette manufacturers to assume the costs of health care caused by their marketing and sale of cigarettes. As the Court of Appeals explained, the State "never states how the alleged market-sharing scheme furthers those goals. It simply denies that the market-sharing scheme is anticompetitive, leaving the purpose of this complex, carefully drafted set of rules an enigma." *Id. at 156*.

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[14] *See*, *e.g.*, *357 F.3d at 208* ("appellants allege - and at this stage we must assume their allegations to be true"); 209 ("Because this appeal is from a dismissal on the pleadings, we assume the factual allegations of the complaint to be true."); 216 ("We accept as true the material facts alleged in the complaint and draw all reasonable inferences in plaintiffs' favor."); 225 (subsection (ii) entitled "The Allegations of the Complaint"); 230 ("at this stage in the proceeding and given the allegations of the complaint").

Clarifying its earlier decision, the Court of Appeals allowed that *Parker v. Brown* might be satisfied even without the State's articulation of how the MSA furthered legitimate State policies, so long as the State "actively supervised" the cartel created by the MSA. Referring to the requirement that the State articulate why the anticompetitive features of the MSA express legitimate State policy as the "ancillary purpose" **[**38]** of the first prong of *Midcal*, Judge Winter stated, "the *Parker* analysis and the ancillary purpose of the *Midcal* prong are interchangeable," and the "failure to meet the ancillary purpose test alone - where *Parker* was clearly satisfied . . . - would not be enough to upset a statute." *Id. at 155*. The holding of the Court of Appeals, Judge Winter stated, "expressly relied on the challenged scheme's failure to meet the second *Midcal* prong," the requirement of the State's active supervision. *Id. at 157*. In so ruling, the Court of Appeals emphasized, it was deciding on a *Rule 12* motion, and accepting the allegations of the complaint as if proved, without having ascertained if plaintiffs could actually prove the anticompetitive facts they alleged. [15] Thus, the Court of Appeals reversed my decision of May 14, 2002 and reinstated the complaint. *Id. at 151*.

[39]** Following remand, plaintiffs amended their complaint and moved for a preliminary injunction, seeking to enjoin New York State from enforcing the MSA, and the statutory enactments ancillary to the MSA, as respects Non-Participating Manufacturers and importers. Specifically, they seek to enjoin enforcement of the Escrow Statute, *N.Y. Pub. Health Law § 1399-pp*; the Contraband Statute, *N.Y. Tax Law §§ 480-b*, *481*, *1846*; and the recently amended Allocable Share Release provision, *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003. They argue that these laws enforce a cartel which has the purpose and effect of maximizing the OPMs' profits and discouraging the sales of cigarettes by NPMs.

[*246] New York State, opposing the motion, argues that the statistical evidence of competition, compiled by a neutral and nationally recognized firm of certified public accountants appointed pursuant to the MSA, is inconsistent with the existence of a cartel, and disproves it. All that is happening, the State argues, is that NPMs are not being allowed to skim the market, to take advantage **[**40]** of the fact that competitor cigarette manufacturers responsibly pay for the public health costs they create while the NPMs do not, and in so doing unfairly jeopardize the public health purposes that the MSA advances. The NPMs, the State argues, are being asked to pay no more into escrow than the amounts that PMs are required to pay, so that all incremental costs in relation to cigarette sales, from whatever source, are equal, per cigarette sold. Furthermore, the State argues, the articulation of a public purpose animating the MSA is plain and clear to see: (1) the MSA effectively shifts the costs of injury to the public health from the states to the companies that caused those injuries, and (2) the shifting of such costs by cigarette manufacturers to consumers, adding to the price of cigarettes, along with severe restrictions on future advertising and marketing by cigarette manufactures, particularly as directed towards young people, effectively deters consumers from purchasing the volume of cigarettes that they once did.

Plaintiffs argue that the MSA, and the ancillary statutory enactments, have created a cigarette cartel, well beyond any legitimate state interest. The MSA, they **[**41]** argue, provided for yearly adjustments of payments to the states according to percentage changes of market control, thus tending to reward market-share stability. Furthermore, the NPM Adjustment, by reducing payment obligations of OPMs corresponding to three times their losses of market share from sales gained by NPMs unless states enact and defend measures against NPMs, creates incentives to states to enforce the MSA against NPMs and deter competition from NPMs. As to contrary statistical trends, plaintiffs attribute the sales growth of NPMs to a certain slowness by the states in enforcing the MSA. The recent amendment by New York and most other participating states of the Allocable Share Release provision should, it is

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[15] *See*, *e.g.*, *363 F.3d at 151* ("the anticompetitive effects of the MSA involved disputed issues of fact for trial"); 151-52 ("We therefore accept as true the material facts alleged in the complaint and draw all reasonable inferences in the plaintiffs' favor. Nevertheless, we may, as we did in our earlier opinion, view those allegations in light of the full terms of the Escrow and Contraband Statutes . . . and the MSA." (citations omitted)); 152 ("construing the complaint's allegations most favorably to the plaintiffs"); 153 ("if these allegations are true" . . . "again viewing the allegations in the light most favorable to appellants"); 154 ("Given the allegations of the complaint, we cannot dismiss a challenge to this scheme on the grounds that it is not, as a matter of law, anti-competitive. For reasons stated in our earlier opinion and here, the complaint alleges such an effect and plaintiffs are entitled to attempt to prove it."); 157 ("It is too soon to say whether the state will ultimately be able to elicit evidence sufficient to meet this second prong.").

expected, reverse the secular trends and protect the market share of the PMs. Indeed, according to plaintiffs, insuring a continuing flow of money from PMs gives the states a strong incentive to enact ever more stringent laws to assure that the PMs' market positions remain secured, protected by their settlements with the states.

I have carefully reviewed the record supporting, and opposing, plaintiffs' motion for a preliminary injunction, and heard both sides in extended **[**42]** argument, spreading over two days. I hold that plaintiffs have shown neither a likelihood of success on the merits nor irreparable damage with respect to the MSA, the Escrow Statute, or the Contraband Statute sufficient to justify preliminary injunctive relief. However, the recent repeal of the Allocable Share Release provision threatens to jeopardize the ability of the NPMs to compete with the SPMs and OPMs, and thereby to cause them serious and irreparable injury. To that extent only, a preliminary injunction will be granted. Since this issue, and all others, will have to be fully explored at trial, my ruling will have the effect of preserving the competitive status quo until the trial and final judgment.

II. Discussion

A. Standard for Preliminary Injunction

HN2[] Generally, "preliminary injunctive relief is appropriate when a plaintiff establishes **[*247]** (1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in [plaintiff's] favor." *Wisdom Import Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 108 (2d Cir. 2003)* **[**43]** (brackets in original). In several circumstances, however, a heightened standard must be satisfied. Two such circumstances are present here.

HN3[] First, a heightened standard applies "where (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34 (2d Cir. 1995)*. An injunction in such a case is considered "mandatory" because it "is said to alter the status quo by commanding some positive act." *Id.* In such a situation, plaintiffs must show "a greater likelihood of success" and make "a clear showing that the moving party is entitled to the relief requested, or [that] extreme or very serious damage will result from a denial of preliminary relief." *Id.*; *see also Great Earth Int'l Franchising Corp. v. Milks Development, Inc., 302 F. Supp. 2d 248, 251 (S.D.N.Y. 2004)*. Although no positive act would be required by an injunction here, the scope of injunctive relief requested by plaintiffs would significantly **[**44]** alter the status quo, give plaintiffs substantially all the relief they seek, and cost defendants revenue in ways that they claim could not be undone. Accordingly, the heightened *Tom Doherty* standard applies here.

HN4[] A heightened standard is also appropriate "where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989)*; *see also Bery v. New York City, 97 F.3d 689 (2d Cir. 1996)* (quoting *Plaza Health Labs*). In such a situation, the moving party must establish "a probability of success on the merits," *Plaza Health Labs, 878 F.2d at 580*. Accordingly, plaintiffs may not obtain an injunction by showing a reasonable question on the merits plus a balance of hardships tipping in their favor. Plaintiffs must instead satisfy the stricter preliminary injunction standard, by demonstrating both a clear showing of irreparable injury in the absence of such an injunction, and a greater likelihood of success on the merits. *Plaza Health Labs, 878 F.2d at 580*; *see also Tom Doherty, 60 F.3d at 34* **[**45]** (requiring irreparable injury and "a more substantial showing of likelihood of success"); *Tunick v. Safir, 209 F.3d 67, 70 (2d Cir. 2000)* (equating the *Tom Doherty* and the *Plaza Health Labs* standards).

Plaintiffs argue that the *Clayton Act* provides a less stringent standard, requiring a showing of only "threatened loss or damage." *15 U.S.C. § 26* (covering any "violation of the antitrust laws"). But plaintiffs are mistaken.***HN5***[] This provision eases the requirement of standing for suit under the antitrust laws, allowing suit for threatened rather than actual harm. It does not affect the standard for granting a preliminary injunction. *See Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1358 (6th Cir. 1985)* ("the courts have recognized a lower threshold standing requirement" under this provision; nevertheless, "although there is a lesser threshold standard, plaintiffs must nonetheless make a sufficient showing of potential or threatened antitrust injury to meet the customary requirements **[*248]** for a grant of preliminary injunctive relief"); *Kay Instrument Sales Co. v. Haldex Aktiebolag, 296 F. Supp. 578, 579 (S.D.N.Y. 1968)* **[**46]** ("In determining whether to issue a preliminary injunction, however, there is nothing exceptional by reason of the presence of antitrust elements; the normal principles of equity are applicable."). Indeed, the text of the statute provides that an injunction can be obtained "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." *15 U.S.C. § 26*. Accordingly, the heightened standard applies. *See* Tr. June 2, 2004, at 4.

B. *Likelihood of Success on the Merits*

In order to show a likelihood of success on the merits, plaintiffs must show, first, a likelihood that the MSA, Escrow Statute, Contraband Statute, and amended Allocable Share Release provision establish a cartel constituting a per se violation of the federal antitrust laws, *see* *Freedom Holdings I, 357 F.3d at 222-23*, and second, a likelihood that the antitrust violations are not exempt from the reach of the antitrust laws under the doctrine of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. I address the two issues in turn, recognizing that the two decisions **[**47]** of the Court of Appeals state the law of the case which I must follow but that they are based, not on fact, but on plaintiffs' allegations of fact that they claim to be able to prove. The facts as proved, however, tell a quite different story, giving rise to very different applications of the same principles of law.

1. *Per Se Violation*

The opinions of the Court of Appeals did not define what conduct constitutes a "per se violation" of the antitrust laws. The caselaw and literature suggest several strands of understanding, giving rise to different legal conclusions. Under one strand of understanding, the term could be shorthand for a category of cases where a court, instead of having again to consider alleged defenses that previous cases have rejected, might sweep away these failed justifications, shortcut the traditional "rule of reason" analysis, and peremptorily hold the conduct invalid. But the term also could be applied to hold an entire class of activities invalid per se, without even considering any justifications. In the instant case, upon the facts presented, it is unclear that the MSA and the challenged statutes amount to a per se restraint on competition.

[48]** The first strand of caselaw may be best viewed through the lengthy discussion of the per se rule found in *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)* (*NCAA*). In that case, the NCAA had established a limit on the number of college football games which could be televised. The University of Oklahoma contracted to televise more games than the NCAA would permit, and it challenged the NCAA's limitation as an antitrust violation. The Supreme Court explained that the per se standard would normally be applied to cases involving price fixing and output limitations, since these practices "always or almost always tend to restrict competition and decrease output." *Id. at 100* (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979))*. The Court declined to apply the per se rule, however, holding that horizontal restraints were desirable "in order to preserve the character and quality of the 'product,'" college football. *Id. at 104*. The Court proceeded to analyze the restriction under the rule of reason, explaining that **[*249]** ***HN6***[] "the essential inquiry" **[**49]** of both the per se rule and the rule of reason "remains the same - whether or not the challenged restraint enhances competition." *Id.* Stating that "there is often no bright line separating per se rules from Rule of Reason analysis," the Court instructed that because under both tests "the criterion to be used in judging the validity of a restraint on trade is its impact on competition," the per se rule, despite its name, "may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *Id. at 104* & n.26. The Court cited the example of *Jefferson Parish Hospital District No. 2 v.* *Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*, which held that because the conduct at issue may have had beneficial justifications, it was "inappropriate to condemn without considerable market analysis." *NCAA, 468 U.S. at 104 n.26*.

The foremost treatise on ***antitrust law*** also observes that the per se and reasonableness approaches may be seen as a "single inquiry with varying presumptions." VII Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1511, at 418 (2d ed. 2003). As Professor Areeda explains it, the **[**50]** per se rule developed as "merely a special case of the rule of reason," because it was an analysis that was "generalized for a class of behavior or for a class of claimed defenses" which could be analyzed similarly in almost all cases. *Id.* P 1509a, at 396. In many instances, the behavior could be analyzed similarly because "the conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power that is likely to be exercised adversely to the public." *Id.* at 400. For this reason, Professor Areeda states that ***HN7***[] the per se rule should be "carefully limited to 'naked' restraints, which are restraints that lack redeeming social benefits." *Id.* P 1509c, at 403. Accordingly, "when legitimate objectives are served, conduct constituting price fixing in the lay sense is not defined as the 'price fixing' that is per se unlawful." *Id.* P 1511a, at 419.

In *California Dental Ass'n v. FTC, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999)*, the Dental Association had imposed advertising restrictions on its members, which the FTC had found to be anticompetitive. The Court of Appeals affirmed the **[**51]** FTC's decision, and affirmed its decision to employ an abbreviated, or "quick-look," rule of reason analysis, an intermediate analysis between the per se rule and the rule of reason. The Supreme Court vacated and remanded for more scrutiny of the nature of the restrictions. Relying principally on *NCAA* and on Professor Areeda's analysis, the Court reiterated that ***HN8***[] there is no bright line between the per se rule and the rule of reason. The proper analysis, it ruled, should be thought of as a spectrum, rather than a dichotomy: "There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case," *id. at 780-81*, with justifications for the restriction to be taken into account. "The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow . . . ." *Id. at 781*.

Under this analysis of the per se rule applied to the facts of record, the plaintiffs **[**52]** have not shown a likelihood that the MSA and the challenged statutes constitute a per se violation of the *Sherman Act.* The record shows that the settlement between the states and the tobacco manufacturers **[*250]** was intended to have, and in fact has had, important and redeeming social benefits, namely, the public health concerns to reduce tobacco consumption, particularly among youth, *see* MSA Art. I, at 2, to restrict the scope of cigarette manufacturers' advertising and marketing programs, and to shift to the tobacco manufacturers the health care costs caused by sales of their products. The New York Supreme Court, in approving the settlement between New York State and the OPMs, reflected in the MSA, compared the prayer for relief in the amended complaint with the provisions of the MSA in relation to the public interest, *State of New York, et al., v. Philip Morris, Inc., et al., 179 Misc. 2d 435, 686 N.Y.S.2d 564, 568 (N.Y. Sup. Ct. 1998)*, *aff'd*, *263 A.D.2d 400, 693 N.Y.S.2d 36 (N.Y. App. Div., 1st Dep't 1999)*, and found that the most important demands of the complaint had been achieved: an injunction against cigarette sales to minors, and against advertisements **[**53]** targeting them; greater disclosure of the health effects of tobacco and nicotine; and funding of educational and clinical programs intended to increase awareness and treatment of the health risks associated with cigarette smoking. Indeed, the court noted, some provisions of the MSA could not have been achieved through litigation, or even through legislation, such as the waiver by the participating manufacturers of their *First Amendment* rights to advertise and to lobby against adverse legislation. *Id. at 568 & 569 n.6*; *see* MSA Art. III(d), (m), V. The court concluded:

> With all of these and the monetary provisions of the MSA, the court is confronted with a settlement that goes well beyond what could have been achieved in plaintiffs' fondest dreams for the result after a protracted and risky trial, that excels over the [earlier] Minnesota settlement, and that painstakingly accommodates the public interest.

686 N.Y.S.2d at 569.

> The MSA [and a companion settlement, the Smokeless Tobacco Master Settlement Agreement] adequately protect the public interest . . . The economic and noneconomic benefits for New York State are substantial [and] **[**54]** are consistent with and advance the objectives of New York public policy as set forth in the amended complaint."

Id. at 567.

This evidence suggests that the MSA and the Escrow and Contraband Statutes were intended not as "naked restraints on trade," as plaintiffs allege, but as restraints enacted for public health purposes. Under the reasoning of *NCAA* and Areeda, these restrains should not be tested without considering their redeeming social benefits, and accordingly may not violate a rule of per se illegality without such evaluation. *See* *Freedom Holdings I, 357 F.3d at 223* ***HN9***[] ("For a statute to be preempted, the conduct contemplated by the statute must be 'in all cases a per se violation' of the federal antitrust laws." (quoting *Battipaglia v. N.Y. State Liquor Authority, 745 F.2d 166, 174 (2d Cir. 1984)* (quoting *Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982)))*. The second strand of caselaw pays attention to the character of the restraint in question rather than to why it might be justified. This definition of "illegal per se" was articulated most concisely in *Rice*, where defendant challenged **[**55]** a California law regulating the importation of alcohol. The Court held that ***HN10***[] for a state statute to be considered a per se antitrust violation, it must mandate or authorize "conduct that necessarily constitutes a violation of the antitrust laws in all cases," or place "irresistible pressure on a private party to violate the antitrust laws":

> **[*251]** [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1 of the Sherman Act* when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is **[**56]** facially inconsistent with federal antitrust laws.

Id. at 661. This formulation has been accepted by a number of subsequent cases. *See* *Fisher v. Berkeley, 475 U.S. 260, 265, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986)* (quoting *Rice*); *324 Liquor Corp. v. Duffy, 479 U.S. 335, 342, 345, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987),* (quoting *Rice*). Despite the outcome in *NCAA*, the Supreme Court in that case acknowledged that horizontal price fixing and output limitations are ordinarily considered illegal per se because they "always or almost always tend to restrict competition and decrease output":

> Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. In such circumstances a restraint is presumed unreasonable without inquiry into the particular market **[**57]** context in which it is found.

468 U.S. at 100; *see also* VII Areeda & Hovenkamp, ***Antitrust Law***, P 1510a, at 405 (calling this the "oldest meaning of 'per se illegality,'" and citing *United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898)*, *modified as to decree & aff'd*, *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*; and *FTC v. Superior Ct. Trial Lawyers Ass'n, 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990))*.

HN11[] Horizontal price fixing, output limitations, and market division are classic characteristics of a cartel. A cartel is defined as "[a] combination of producers or sellers that join together to control a product's production or price." Black's Law Dictionary 206 (7th ed. 1999). "Competing firms form a cartel when they replace independent decisions with an agreement on price, output, or related matters." IIA Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 405a, at 26 (2d ed. 2002). A cartel is strongest when it controls a large market share or when it is supported by market-based or external enforcement mechanisms. **[**58]** *See id.* P 405c, at 29. But even an ineffective cartel may be invalid:

> The cartel need not attain the profit-maximizing price or output to be profitable and socially harmful; indeed, even relatively poorly functioning cartels can be quite profitable. As a result, while many horizontal arrangements are beneficial and lawful, they generally receive the highest level of antitrust scrutiny.

[*252] II Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 405c, at 29 (2d ed. 2002). Thus, if the offensive elements of a cartel are present, the cartel is likely to be held illegal per se under the *Sherman Act*, even if the cartel is less effective than its participants would like. *See* *Fisher, 475 U.S. at 265*; *NCAA, 468 U.S. at 100*; *Rice, 458 U.S. at 661*; XI Herbert Hovenkamp, ***Antitrust Law*** P 1902a, at 190-91.

The Second Circuit Court of Appeals quoted both *Rice*, *see* *Freedom Holdings I, 357 F.3d at 222* (quoting *Fisher, 475 U.S. at 265* (quoting *Rice, 458 U.S. at 661*)), and the approving language of *NCAA*, *see* *id. at 225* (quoting *NCAA, 468 U.S. at 100*), to **[**59]** support its holding that ***HN12***[] "horizontal agreements among competing sellers to fix prices or restrict output are, absent more, per se violations of Section I of the *Sherman Act*." *Id. at 225*. Under this understanding of the per se rule, my examination of the record in relation to the MSA and the related statutory enactments should focus on whether they "mandate[] or authorize[] conduct that necessarily constitutes a violation of the ***antitrust law*** in all cases," or place "irresistible pressure on a private party to violate the ***antitrust law***," and should not focus on the justifications for the alleged restraints. *Rice, 458 U.S. at 661*.

The question at hand is which strand of analysis of the per se rule to apply. Classically, arrangements among oligopolists and a state that reward price and output stability are considered socially harmful, and therefore invalid, without further consideration of redeeming social justifications. *See* *15 U.S.C. § 1*; *Fisher, 475 U.S. at 268-69* (citing *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745, 60 Ohio Law Abs. 81 (1951)* and *Midcal*); *cf.* *A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 534-35 & 531 n.9, 79 L. Ed. 1570, 55 S. Ct. 837* (1935) **[**60]** (quoting *§ 3 of the National Industrial Recovery Act* as declaring "the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; . . . to eliminate unfair competitive practices, [and] . . . to avoid undue restriction of production (except as may be temporarily required)," and invalidating the provision on other grounds). The Court of Appeals ruled to that effect, and immediately went on to question whether the *Parker v. Brown* exception rescued the antitrust restraint from invalidity. *Freedom Holdings I, 357 F.3d at 225-26*.

Cigarettes, however, are different from most other products, given the social ills caused by cigarette smoking and the perceived pernicious effects resulting from aggressive and extensive advertising and marketing of cigarettes. Classically, the public good is enhanced by free competition in pricing and vigorous and relatively unfettered advertising and marketing. Cheaper prices make goods more available, and drive free markets. But with respect to cigarettes, the public good can be furthered by higher prices and strong restraints on advertising and marketing, **[**61]** especially to young people. Higher prices and restrictions on advertising and marketing reduce the demand for cigarettes, lessening the injury to the public's health. Plaintiffs do not contest that cigarettes may be legitimately the subject of state governmental regulation, and any antitrust analysis of the effects of such regulation cannot be performed without giving proper consideration to the social purposes that state governments propose to achieve by such regulation.

[*253] Recent trends in ***antitrust law*** reflect a growing concern with potentially conflicting social policies. Labor law, for example, will permit a competitive restraint which classic antitrust analysis is likely to forbid. *See* *29 U.S.C. § 158* (protected activities under *Labor Management Relations Act*); *see, e.g.*, *Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004)*. This is so even where the restraint deals with applicants to a labor pool, for example, star high school football players forbidden to enter a hiring lottery run for the benefit of professional football teams, *see id.*, and even where the enforcement of such restraints potentially would create **[**62]** a violation, not only of classical ***antitrust law***, but also of closed shop provisions of the Taft-Hartley amendments to the *Labor Management Relations Act*. *See* *Communications Workers of America v. Beck, 487 U.S. 735, 747-54, 101 L. Ed. 2d 634, 108 S. Ct. 2641 (1988)* (reviewing the legislative history of the *Taft-Hartley Act of 1947*, and concluding that concerns over barriers to free employment were outweighed by concerns that unions' health not be eroded by free rider employees who declined to join but reaped the benefits of the unions' presence); *Marquez v. Screen Actors Guild, 525 U.S. 33, 36, 142 L. Ed. 2d 242, 119 S. Ct. 292 (1998)* (following *Beck*). In other fields, too, courts will refrain from strict application of antitrust doctrine because of sensitivity to other valuable social policies that potentially conflict with the interest of having free and unfettered markets, particularly where the conflicting social policy is expressed in a statute. *See, e.g.*, *Jung v. Ass'n of Am. Med. Colleges, 02 Civ. 873, 339 F. Supp. 2d 26, 2004 U.S. Dist. LEXIS 16099, 2004 WL 1803198 (D.D.C. Aug. 12, 2004)* (dismissing antitrust suit challenging medical residency matching **[**63]** system, based on recently passed *15 U.S.C. § 37b*); *Friedman v. Salomon/Smith Barney, Inc., 313 F.3d 796, 797 (2d Cir. 2002)* (alleged price-fixing scheme "enjoys implied immunity from antitrust laws because the antitrust laws conflict with securities regulatory provisions"); *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.), 317 F.3d 134, 150 (2d Cir. 2003)* (same). Judicial sensitivity to other policies potentially conflicting with antitrust laws has extended also to consider important social policies that may not be specified by statute. *See, e.g.*, *United States Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736, 158 L. Ed. 2d 19, 124 S. Ct. 1321, 1329 (2004)* (the "nationwide, public responsibilities of the Postal Service" render it outside the reach of ***antitrust law***); *Clarett, 369 F.3d at 130* (limiting discussion to "non-statutory exemption").

HN13[] This trend in favor of recognizing competing policies in the antitrust arena should apply here, where the considerable public health policies regarding cigarettes militate in favor of decreased consumption, particularly by young people, even if higher prices cause **[**64]** that end to be served, and even if higher prices are often considered antithetical to the goals served by ***antitrust law***. Classic antitrust analysis must take into consideration the right of states to seek to further other, and equally important, social goals, even at the expense of pure antitrust analysis. *See* John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, *20 Yale. J. on Reg. 269, 313-16 (2003)* (calling *Bedell* "[a] particularly troublesome case" because "it is one thing to thwart a mandate that has little purpose other than to facilitate collusion, but it is another to inhibit a government from taking action that may sensibly serve a legitimate public interest, even if it may also create an environment favorable to tacit collusion"). It would thus seem that I should choose the first strand of per se analysis; in determining whether an antitrust **[*254]** violation has occurred, I should consider not only whether prices have risen and output has been restricted, but also the State's justifications for the statutes that have allegedly caused the rising prices and output restraints.

As discussed **[**65]** above, were I to choose this strand of per se analysis, I would find that plaintiffs have shown no likelihood of being able to prove a per se violation of the antitrust laws. The MSA had, as a principal goal, limiting the scope of advertising and marketing, particularly to young people, a goal that would be likely to result in fewer sales and higher prices. The substantial payments required of cigarette companies also would be likely to result in higher prices and fewer sales. The justifications behind the MSA and the related statutory enactments are substantial and, as the New York Supreme Court found, *State v. Philip Morris, 686 N.Y.S.2d at 568-69*, are closely tied to the payment provisions embodied in the MSA. Sales of cigarettes were checked by the MSA's ban on advertising to youth and numerous other measures, and by high cigarette prices. Cigarette companies accepted the onus of paying substantially for the injuries to public health caused by cigarette smoking, and this reimbursement of expenses was made to apply to all cigarette companies selling cigarettes in and to the settling states, not only to signatories of the MSA. A payment stream was created extending **[**66]** into the future, anticipating public health needs that would continue to flow from future sales of cigarettes. This system created by the MSA could not be effective unless roughly equivalent burdens would be imposed on all other companies engaged in selling cigarettes in a particular state, as well as on the signatories to the MSA. The payment provisions accordingly do not represent a "naked restraint" on competition. *Cf.* VII Areeda & Hovenkamp, ***Antitrust Law*** P 1509c, at 403. Rather, the higher cigarette prices directly further legitimate state goals.

Ultimately, however, it may not matter which strand of per se analysis to apply. Even under the strand of per se analysis that limits the investigation to the nature of the restriction and discounts any consideration of potentially meritorious justifications, plaintiffs have not shown a likelihood that the MSA and the Escrow and Contraband Statutes constitute a per se violation of the *Sherman Act.* That is because the effects of the MSA and the Escrow and Contraband Statutes have proved not to be anticompetitive, as demonstrated by the sales and market share data compiled by PriceWaterhouse. Nor is it clear that the contested MSA **[**67]** and statutory provisions were intended and promulgated as market restrictions.

The proofs thus far presented in the record show that the MSA and the Escrow and Contraband Statutes have not demonstrably restricted the competitiveness of the NPMs. The record shows clearly that the NPMs have made substantial gains in volume and market share since the settlement was executed. Between 1998, when the MSA was executed, and 2003, NPM sales have increased from 2.43 billion to 33.31 billion cigarettes, for an increase in market share from 0.5 % to 8.2 %. Their gains in market share have been taken mostly from the OPMs but also from the SPMs, and the SPMs also have taken market share from the OPMs. Sales by OPMs have declined over 110 billion, from 455.22 billion to 344.61 billion, for a decline of over 24 % of sales by OPMs, resulting in a decline of 12 % of the OPMs' market share. SPM sales have increased from 14.12 billion to 30.8 billion cigarettes, a substantial gain against the OPMs but a decline as measured against the NPMs. These facts are inconsistent with the allegations **[*255]** of a cartel, alleged in the Amended Complaint.

HN14[] A price fixing agreement is no less unlawful, however, if the parties **[**68]** to it fail to carry it out effectively. II Areeda & Hovenkamp, ***Antitrust Law*** P 405c, at 29. The Court of Appeals has also ruled that that the MSA, as alleged by plaintiffs and incorporated into the complaint, contains features of a cartel, and I must accept those rulings. *Freedom Holdings I, 357 F.3d at 226*; *Freedom Holdings II, 363 F.3d at 154*. Accordingly, if market conditions fail to bear out the arguments that the effect of the MSA's terms are anticompetitive, I must consider plaintiffs' arguments that the MSA's terms are anticompetitive in their intent or on their face. The Court of Appeals was required to accept these arguments in the posture of reviewing a motion to dismiss. In the present context, I may look to the evidence in the record and the competing interpretations of the MSA by the plaintiffs and the State.

Plaintiffs argue that the MSA and related statutory enactments establish a state-supported cartel; that the allocation of substantial payments among OPMs according to their relative market share, with adjustments that vary directly with their sales volume, provides a disincentive to gain market share at each other's expense and an **[**69]** incentive to increase their prices, rather than their output, as the way to maximize their profits. Thus, as plaintiffs argue, the OPMs have been increasing their prices even beyond that necessary to recoup their payments to the states, while experiencing decreased sales volume and market share. [16]

[70]** The MSA enables the OPMs to pay large sums to the states, and to continue paying large sums annually, by financing payments from future sales of cigarettes. The cigarette companies that signed the MSA presumably expected that they would be able to increase their prices to gain the extra revenue that would enable them to make the large payments due each year to the states. Since, in a normal market, companies without such burden could undersell the OPMs and eventually jeopardize the revenue stream upon which the states settled with the major cigarette companies, the MSA, in order to remain effective, had to protect the revenue stream due from the OPMs by creating an equivalent cost structure applicable to non-signatories.

The MSA accomplished that objective in two ways. First, manufacturers and importers of cigarettes who agreed to become signatories of the MSA within a sixty day period after the OPMs had executed the agreement gained an exemption from paying anything to the states to the extent their future annual sales remained at or below either 125 percent of their 1997 sales, or their 1998 sales, whichever sales level was higher; those SPMs also agreed to pay disproportionately **[**71]** greater amounts to the states than the OPMs to the extent their future sales exceeded those base levels. **[*256]** MSA Art. IX(i). [17] The effect, plaintiffs argue, was to entice manufacturers to join the MSA by offering them the benefits of the grandfather clause, and then to encourage these SPMs to follow the price leadership of the OPMs in order not to increase market share and thereby lose some of the cost advantage given to them if they maintain their sales at or below the base level. And the effect, plaintiffs argue, is significant since the PMs collectively control upwards of 90 percent of the cigarette market.

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[16] A manufacturer, suffering an increase of costs, will normally wish to raise prices even more than necessary to recoup costs, in order to maintain desired profit margins and to compensate for reduced sales volume at the higher price level. The MSA provides, in such event, that the manufacturer's profits may prevent it from being entitled to the discount to the extent otherwise available for reduced sales volume. MSA Exh. E(b)(ii) reduces the OPMs' benefit from the Volume Adjustment if their income rises while volume of sales falls. However, the clause provides for only a percentage decrease in the Volume Adjustment, and it is possible, therefore, that OPMs may still increase their profits from price increases, even if they result in lower sales. The proofs did not treat this issue.

[17] The formula of increase is provided in MSA Art. IX(i)(2). *Freedom Holdings II, 363 F.3d at 153*, cites it as an example of an unlawful restraint on trade.

As to manufacturers and importers who did not join the MSA, the MSA provided the states with a strong incentive to enact measures to deter them from seeking a free ride based on a cost structure not including substantial, contractually **[**72]** required payments to the states. If PMs suffered a loss of sales and market share to the NPMs because of "disadvantages experienced as a result of the [MSA]," MSA Art. IX(d)(1)(C), the states would become subject to a trebled reduction in income from the PMs unless they passed and "diligently enforced" the Escrow Statute. MSA Art. IX(d)(2)(B). The states accordingly enacted the Escrow Statutes, requiring NPMs to make payments to the states based on their volume of sales. MSA Art. IX(d)(2)(B), (E), Exh. T. NPMs, not having become signatories to the MSA within the sixty-day period provided, are not granted an exempt base of sales, as are grandfathered SPMs, and thus are not benefited by the reduced, average cost base that SPMs enjoy. Furthermore, NPMs' escrow payments, because they are reversionary annually for interest accumulations and excess contributions, and reversionary after 25 years if states fail to sue or settle with them for having incurred expense because of injuries to the public health caused by cigarette smoking, are not tax deductible, as are the payments made to the states under the MSA by OPMs and SPMs.

The MSA provides a strong incentive for the states to "diligently **[**73]** enforce[]" the Escrow Statutes. MSA Art. IX(d)(2)(B). When the Escrow Statutes appeared not to be sufficiently effective, the states enacted Contraband Statutes. These used the tax stamp practices of the states to assure that manufacturers and importers complied with the Escrow Statutes, for if they failed to bring themselves within its payment obligations, they would not be issued tax stamps and their cigarettes would be considered "contraband" if sold or distributed within the affected state. However, the Contraband Statutes appeared not to be any more effective than the Escrow Statutes, as the statistics of growing sales and market share of the NPMs, set out above, clearly show. One stratagem employed by the NPMs became the subject of the next enactment, the amendment of the Allocable Share Release provision, enacted by thirty states, including, on October 15, 2003, by New York. NPMs that distributed cigarettes to only a few states paid their per-cigarette tax directly to the states in which they made sales, satisfying the Escrow and Contraband Statutes. But these states could retain only their allocable shares of the aggregate payments made by the NPMs; the balance had to be **[**74]** returned annually to the NPMs under the Allocable Share Release provisions as initially enacted. As a result, it appears that the NPMs continued to have a competitive advantage in comparison to the cost burdens of the OPMs and SPMs. The Allocable Share Release provisions were amended in order to limit the NPMs' ability to arbitrage the allocation relationships among the states, **[*257]** by terminating the states' obligations to the extent of such arbitrage.

The many critics of the MSA contend that it creates a state-protected cartel. *See* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, *33 Conn. L. Rev. 1143, 1171 (2001)*. They accuse the states of countenancing high prices to enable the OPMs to finance the substantial amounts they undertook to pay to the states, and of protecting the market shares of the OPMs at 1997 or 1998 levels by enacting Escrow Statutes, followed by Contraband Statutes, followed by amendments to the Allocable Share Release provisions. As Little states:

> Economists and legal analysts have written extensively on the anticompetitive effects of the MSA and the four **[**75]** state settlements. They have leveled pointed criticisms at the provisions of the MSA that create high barriers to entry, that entrench the current market shares of the settling tobacco companies, and that eliminate price competition and facilitate price fixing among the settling tobacco companies. . . . The consensus of the academic commentators who have analyzed the MSA and the four separate settlement agreements is that they pose serious antitrust concerns and are anticompetitive in their effects.

Little, *A Most Dangerous Indiscretion*, *33 Conn. L. Rev. at 1173-74*. The Court of Appeals agreed with these observations.

The State takes issue with plaintiffs' assertions that the payment provisions of the MSA are anticompetitive, arguing instead that they are neutral and serve legitimate state interests. Apportioning payments obligations among OPMs represents a fair way to divide the burden and to reflect changes in relative volume of annual cigarette sales; of greater relevance, apportionment among OPMs is an internal matter which does not affect the ability of NPMs to compete in any material way. Likewise, the Volume Adjustment is a means of advancing the goal **[**76]** of reduced cigarette sales; it rewards decreasing sales and punishes increases. The granting of exemptions for SPM payments, if market positions did not grow from 1997 or 1998 levels, and disproportionately higher payments obligations if and to the extent SPMs gained market share above those levels, provided an incentive to SPMs to join the MSA and be bound by its restrictions, but limited or removed those cost benefits to the extent SPMs sought to take advantage of them and gain a competitive edge through the incentives provided by the MSA. *See* Lopatka & Page, *State Action and the Meaning of Agreement*., *20 Yale J. on Reg. at 315* (noting that "nothing in the MSA or the [Escrow] Statutes explicitly authorized the Majors to set prices jointly" and that "the best anticompetitive story that can be told" is that the large increase in OPMs' prices suggested that the payment provisions indirectly "fostered tacit collusion").

Noting the dictum of the Court of Appeals that a flat tax on cigarettes would not raise antitrust concerns, *Freedom Holdings I, 357 F.3d at 229*, New York State argues that the payment obligations provided by the MSA are the equivalent. Thus, **[**77]** NPM payments, by being fixed per cigarette sold, constitute a flat tax and, although differently expressed, amount to less than the per cigarette cost to OPMs and non-grandfathered SPMs. And the cost to grandfathered SPMs, although less on average because of the exemption based on 1997 and 1998 sales, are the same or greater with respect to incremental sales above the grandfathered levels. As the testimony of experts showed, production decisions are driven more by incremental **[*258]** than by average costs. The conclusion urged by New York State is that the MSA does not establish a cartel, particularly as it might affect the competitive abilities of NPMs. The State argues, further, that the repeal of the Allocable Share Release provision of the Escrow Statute is irrelevant, because New York has not in practice been releasing to depositors any portion of escrow payments beyond New York's allocable share.

Faced with these competing explanations of the intrinsic nature of the MSA and the Escrow and Contraband Statutes, I cannot accept plaintiffs' arguments at face value without supporting evidence, at least not in connection with a motion for a preliminary injunction. *See* Lopatka & Page, **[**78]** *State Action and the Meaning of Agreement*., *20 Yale J. on Reg. at 318* (calling for "intent evidence" to identify restraints). And the evidence plaintiffs have offered on the record is insufficient to prove an anticompetitive intent underlying the MSA. *See* *NCAA, 468 U.S. at 100* (per se condemnation attaches to a restriction where "the probability that these practices are anticompetitive is so high" that "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output"). Rather, the evidence seems to fit more closely with the State's view. The escrow payments required of NPMs are essentially a flat tax, assessed at a flat rate per cigarette sold, which the Court of Appeals ruled could be enacted. *Freedom Holdings I, 357 F.3d at 229*; *cf.* *Freedom Holdings II, 363 F.3d at 152*. The statistical data, as provided above, show that NPM payments are less than the payments of OPMs and of non-grandfathered SPMs. As compared with those manufacturers, the assessment on NPMs' sales is, if anything, more favorable than a flat tax, and the NPMs have no basis to complain.

It is true that **[**79]** NPM escrow payments are higher per cigarette sold than payments made by SPMs averaged down by the basis of 1997 or 1998 levels provided by the grandfather clause. A comparison of average costs, however, is not necessarily relevant. Jonathan Gruber, an MIT economist who submitted an affidavit on the State's behalf, teaches that marginal costs, not average costs, drive manufacturers' decision regarding how to price their products and how many cigarettes to sell. Manufacturers have an incentive to continue producing so long as the marginal costs incurred in making an additional sale are less than the revenue anticipated from that sale. Additional sales will be profitable up to that point, and accordingly, price and output levels are determined by costs on the margin, rather than by average costs. Grandfathered SPMs have lower average costs, but for all sales beyond their base levels (the number of sales which meets their 1998 or 125 % of their 1997 market shares), their marginal costs stemming from the MSA will continually rise - and at a higher rate than the marginal costs of NPMs stemming from the Escrow Statutes. NPMs, which pay a flat fee, will maintain the same MSA-derived marginal **[**80]** costs throughout their production. There was no proof that the pricing structure of the NPM payments yields a disadvantage, vis-a-vis the grandfathered SPMs, that would deter them from continuing to produce and promote their products. Instead, the increased marginal costs to the SPMs above the grandfathered levels can be viewed as a means of recouping those funds which were lost to the states through the grandfather provision.

The NPMs also argue that their payments suffer in comparison with those of all PMs because their payments are not tax deductible, while those of the PMs are. This fact, however, cannot by itself conclusively show that the NPMs suffer a competitive **[*259]** disadvantage. The structure of the NPMs' escrow payments also differs from the structure of PM payments in other respects that are more beneficial to the NPMs: the NPMs retain reversionary rights to annual interest on their payments, and, the amendment to the Allocable Share Release provision aside, to the entirety of their payments above the level of the State's allocable share. Further, the NPMs retain a reversionary interest in the entirety of their escrow payments to the extent the State cannot collect on a lawsuit **[**81]** against them, or settlement with them, within 25 years. These benefits, which are not available to the PMs, appear to be substantial, and there has been no evidence to indicate that they are outweighed on the whole by the tax liability. I also note that if the tax liability of the escrow payments does in fact outweigh their relative benefits, the State argues that the tax liability may be traded away in exchange for those benefits. Although plaintiffs have attested that such an exchange is not possible in other states, New York State has maintained that it would be possible here, and neither side has submitted any evidence regarding the stance of the IRS on this issue.

Accordingly, plaintiffs have failed to show a likelihood that the MSA, or the Escrow or Contraband Statutes, constitute per se violations of the antitrust laws. Even were I to select the strand of per se analysis that looks to the nature of the restriction and not to its justifications, there is no indication from the evidence that the challenged provisions of the MSA and the Escrow and Contraband Statutes have the effect of stifling competition, or that they are facially anticompetitive. [18] I therefore hold that plaintiffs **[**82]** have failed to establish a likelihood of success that the MSA and the statutes enacted pursuant to it constitute a per se violation of the *Sherman Act*.

I hold to this effect with respect to both the Escrow and Contraband Statutes. However, the October 15, 2003 amendment to the New York Allocable Share Release provision presents a different set of considerations. Each state, under the MSA, can retain only an agreed percentage of an NPM's aggregate contributions and must return any excess to the contributor. The states thus have agreed that the **[**83]** net escrow thus provided is sufficient to secure them against that manufacturer's or importer's eventual liability for a cigarette-based lawsuit. Any excess that the states wish to retain is, by the MSA's definition, surplus to their needs, and discriminatory against the NPMs, intended only to discourage the NPMs' competitive practices. On the record as it currently stands, the states have not shown any legitimate need to enact the Allocable Share Release provisions, except to give more aid and comfort to the OPMs than they should have to redress competitive disadvantage imposed by the MSA. Indeed, the State has failed to elicit any justification whatsoever for its passage of the amendment to the Allocable Share Release provision, stating only that the amendment is inconsequential because the provision had never been invoked. It appears from the record - including the fact that the repeals of the Allocable Share Release provision began occurring shortly after the OPMs fixed on them as lobbying goals, as reflected in their corporate literature - that the states passed these amendments **[*260]** purely at the behest of the OPMs, and without any serious consideration of balancing the anticompetitive **[**84]** effects and any additional public health benefits that might be produced. I hold, therefore, that the plaintiffs have shown a likelihood of success with respect to the amendment to the Allocable Share Release provision.

2. *Parker v. Brown*

The Court of Appeals accepted plaintiffs' complaint as validly alleging that the MSA and ancillary statutes constituted a per se violation of the antitrust laws, and, assuming the truth of that allegation, proceeded to address whether they should be exempted from liability under the doctrine of *Parker v. Brown*. I assume, for the purposes of this section, that the MSA and ancillary statutory enactments constitute a per se antitrust violation, and I turn to consider, under *Parker v. Brown*, whether "(i) the restraint in question is 'clearly articulated and affirmatively expressed as state policy,' and [whether] (ii) the policy is 'actively supervised' by the state itself." *Freedom Holdings*

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[18] To the extent that any payment whatever could be seen as raising prices and restricting output, the Court of Appeals has laid such arguments to rest by ruling that a flat tax would be permissible, and such payments do not constitute per se violations of the antitrust laws because they are substantially justified by the public health gains which they advance. *Freedom Holdings I, 357 F.3d at 229*; *cf. Freedom Holdings II, 363 F.3d at 152*.

I, 357 F.3d at 205 (quoting *Midcal, 445 U.S. at 105*); *see also* *Freedom Holdings II, 363 F.3d at 155, 157*. Judge Winter, for the majority, ruled that the State likely failed both criteria. Judge **[**85]** Sack, concurring, found that the State likely satisfied the first criterion, but failed the second. However, the true test of plaintiffs' allegations requires that they be tested against the actual proofs, and this is my task in the context of this motion for a preliminary injunction. *Freedom Holdings II, 363 F.3d at 157*.

In his rulings, Judge Winter elaborated that the restraint had to be not only "an express act of the state," a requirement that the State had met, but the State's purposes in agreeing to, and enforcing, the restraint had also to be "revealed" and shown to have a valid nexus to the restraint imposed. *Freedom Holdings II, 363 F.3d at 155* (quoting *Freedom Holdings I, 357 F.3d at 227*). Elaborating further, Judge Winter held that even though the State had not adequately revealed its purpose, that failure, alone, would not be crucial. *Id.* The crucial issue is whether or not the State "actively supervised" the effects of its policy to prevent undue anticompetitive repercussions. *Freedom Holdings I, 357 F.3d at 231*. Thus, all three judges agreed that plaintiffs' allegation, that the State was not actively **[**86]** supervising the antitrust characteristics of the MSA and ancillary statutory enactments, was sufficient to uphold the complaint.

On the basis of the factual record presented to me, I now find that plaintiffs have not demonstrated a likelihood of success in showing either that the State has failed to reveal its underlying policies or that the State has failed to supervise actively the effects of its enactments. The several states, New York among them, settled with the four leading cigarette companies on the basis of the complaint they brought against them. As described earlier, the states sought substantial equitable and legal relief against the cigarette companies: compelling them to pay large sums to compensate for causing major injury to the public health and, by various measures, dampening future demand for cigarettes and restricting the cigarette companies' marketing and distribution strategies and behavior. *See* *New York v. Philip Morris, 686 N.Y.S.2d at 568-70*. The states substantially accomplished their objectives by their settlement with the cigarette companies, as reflected in the approval of the New York settlement by the New York Supreme Court. *Id.* The **[**87]** State accomplished its objectives in part through increasing production costs to all manufacturers: the increase in costs, passed along to consumers in the form of increased **[*261]** prices, drove down demand, and the increased costs facing every manufacturer prevented any manufacturer from selling at an artificially low price, thereby taking advantage of others' compliance and spoiling the settlement. Clearly, the MSA, and the statutory enactments that implemented the MSA, reflect the policies expressed in its lawsuit against the OPMs.

As for the issue of "active supervision," the Court of Appeals observed:

> We are directed to no mechanism in the MSA or any of the related legislation whereby New York may "review[] the reasonableness" of the pricing decisions of tobacco manufacturers. *Midcal, 445 U.S. at 105*. Nor is there provision for New York to "monitor market conditions or engage in any 'pointed reexamination' of the program." *Id. at 106*. The PMs are therefore free to charge the profit maximizing price, the classic monopoly result.

Id. at 231.

New York State takes issue with these observations. The MSA provides a mechanism of monitoring: **[**88]** careful and reliable collection of statistical information by a nationally recognized firm of certified public accountants, for review by the states, the public, and actual and potential competitors, like plaintiffs. The statistical information shows, very clearly, that the MSA and the Escrow and Contraband Statutes have not had anticompetitive effects, and so long as that remains true, a careful collection and review of the data is all the supervision that is necessary to check any undue anticompetitiveness, and thus all that can be demanded by the law.

The statistical data show, as has been noted above, that the NPMs have successfully gained market share during the life of the MSA. Moreover, the data show that the demand curves for cigarettes are not inelastic, as plaintiffs alleged, but price-sensitive. Further, the NPMs' payment structure is not tied to that of the PMs or to their market share, and, contrary to plaintiffs' allegations, their incremental costs do not rise with their volume of sales, and they are not in any manner obliged to increase their prices in lock-step with the OPMs. In consequence, the price increases charged by the OPMs to finance their payment obligations **[**89]** to the states have caused them to lose substantial market share to the NPMs. That is, price increases have resulted in reduced sales, followed by additional price increases to compensate for lost sales, resulting in even more lost sales. The NPMs have succeeded to take away market share from the PMs, and not even the Escrow and the Contraband Statutes have succeeded in reversing the trend.

Because the State has closely tracked the competitive effects of the MSA and found no anticompetitive impact, no further active supervision is necessary. Further, the market dynamics created by the MSA have been the equivalent of "active supervision." As long as the NPMs can compete, the dangers of cartelization are checked. Even assuming that the MSA does enable a cartel, the *Parker v. Brown* exemption should apply, for the State has articulated its policies for the MSA explicitly in its underlying complaint, the terms of the MSA are appropriately tied to those policies, and the State remains poised through watchful statistical collection to correct undue restraints. Indeed, the New York Attorney General recently pressed claims to enforce the provisions of the MSA restricting cigarette companies **[**90]** from marketing cigarettes to youthful populations. And SPMs have recently sued the State because of its failures to enforce protective (and, presumably, anticompetitive) measures desired by the SPMs. *See* **[*262]** Daniel Wise, News in Brief, *Spitzer Accuses Company of Marketing Kools to Youths*; and Daniel Wise, News in Brief, *Tobacco Firms Accuse Five States of Failing Obligations*, N.Y.L.J., June 17, 2004, at 1.

Plaintiffs have not shown a likelihood of success of being able to prove their allegations that the PMs have gained the ability to raise prices without losing market share, or that the Escrow and Contraband Statutes were passed for a discriminatory purpose, rather than to prevent NPMs from undermining the settlement and the public health purposes that the settlement was intended to serve. The Escrow and Contraband Statutes have prevented NPMs from free-riding on the payments required of OPMs and SPMs, by requiring NPMs to set aside proportionately equivalent funds to assure the states compensation will be available to them for injuries to the public that the NPMs are causing and will continue to cause by selling and distributing cigarettes within the settling states.

That **[**91]** is not the case, however, with respect to the recent repeal by the State of the Allocable Share Release provision, applicable to NPMs. As explained above, no compelling case has been advanced by the State showing a need for this enactment. The only purpose appears to be a desire to accommodate the PMs, and to protect them unduly against competition from the NPMs. Moreover, no nexus has been shown between protecting the health goals of the MSA and restricting the terms on which escrowed funds can be released. Plaintiffs have shown a likelihood that *Parker v. Brown* does not exempt the repeal of the Allocable Share Release provision of the Escrow Statute.

C. *Irreparable Injury*

Plaintiffs contend that they are irreparably harmed by the alleged cartel, which erects high barriers against entry into the cigarette market in New York State. Even if they did enter the New York market, plaintiffs assert, they would be penalized for any increase in market share, so that the Escrow and Contraband Statutes would effectively keep their market share minimized. Plaintiffs allege that by exacting penalties on sales by SPMs and NPMs which represent an increase in market share, the output cartel **[**92]** established by the MSA and the related statutes allows the OPMs to set cigarette prices at the levels of their choosing and requires SPMs and NPMs to follow suit. According to plaintiffs, this scheme effectively fortifies the market position of the OPMs, and requires SPMs and NPMs to resign themselves to accepting smaller market positions.

I initially take care to circumscribe the issue on this prong of the motion for preliminary injunction.***HN15***[] In searching for irreparable harm, the existence of a cartel is irrelevant; the question instead is what ongoing damages plaintiffs have suffered and are likely to suffer because of the alleged cartel. Further, damages which can be remedied at the close of trial are definitionally not irreparable. *See* *Great Earth, 302 F. Supp. 2d at 253* (citing *Pacific Electric Wire & Cable Co. v. Set Top Int'l, Inc., 2003 U.S. Dist LEXIS 23270 (S.D.N.Y. Dec. 30, 2003))*. Thus, a loss of earnings on account of the cartel may not necessarily be irreparable, because if plaintiffs prevail at trial, they may recover their losses from the manufacturing defendants, plus interest. [19] A loss of market **[*263]** share, however, is difficult to quantify **[**93]** and represents the loss of an opportunity which may not be quickly or easily regained, and thus may be considered irreparable. *Cf.* *Cook Inc. v. Boston Scientific Corp., 2002 U.S. Dist. LEXIS 19223 (N.D. Ill. Oct. 1, 2002)*, *aff'd as modified*, *Cook Inc. v. Boston Scientific Corp., 333 F.3d 737 (7th Cir. 2003)* (granting injunction where the parties were competing in a race to the market, because damages based on loss of market share would be difficult to quantify); *Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982)* (affirming grant of preliminary injunction under *Parker v. Brown* because Nevada milk pricing laws harmed plaintiff's ability to compete by setting higher sale prices). And plaintiffs allege that the cartel prevents them from entering or gaining any foothold in the New York market.

[94]** Many provisions of the MSA have no bearing whatever on the NPMs' market share, and thus are not suitable subjects of a preliminary injunction. The payment structure for OPMs and SPMs, by themselves, are irrelevant as regards the NPMs. The allocation of payments among PMs, as well, has no bearing on NPM sales or market share. Although the OPM payments are adjusted based on volume, there is no indication that such an adjustment impacts NPMs' ability to gain market share. The payment aspects of the NPM Adjustment similarly do not impact NPMs, since the NPM Adjustment is effectively blocked by the universal passage of Escrow Statutes. If the NPM Adjustment affects the competitiveness of NPMs, it is in the incentives to the states to pass Escrow and Contraband Statutes, not in the NPM Adjustment's payment provisions standing alone.

The grandfather clause, by decreasing the payment obligations and therefore also the production costs of grandfathered SPMs, appears to give a competitive advantage to the SPMs against the NPMs, and perhaps to impact negatively the competitiveness of NPMs. This disadvantage may not constitute irreparable harm, however. As explained by the State's expert, because **[**95]** manufacturers and distributors make production and pricing decisions based on incremental costs rather than on average costs, incremental costs are the more important measure of competitive effect. And because the SPMs' incremental costs are higher - they must pay an increasingly high percentage as their market share rises above grandfathered levels, *see* *Freedom Holdings II, 363 F.3d at 153* - the NPMs should not be deterred from producing and selling cigarettes based on the competition from grandfathered SPMs, and as such are not irreparably harmed by the grandfather provision.

Plaintiff faces another, more crucial problem in demonstrating irreparable harm: the evidence shows no adverse impact on NPMs' market share stemming from the MSA or the Escrow or Contraband Statutes. Instead, the statistical evidence shows, and plaintiffs acknowledge, that the SPMs and NPMs have in fact gained market share over the life of the MSA, in comparison with the OPMs, who have lost market share. Further, the data show, and plaintiffs acknowledge, that the NPMs have gained market share more rapidly and to a larger extent than the SPMs. As such, it is difficult to see how the NPMs have **[**96]** been irreparably harmed **[*264]** by the alleged restrictions on their gaining market share.

The Court of Appeals was aware of this issue, and, in 12(b)(6) posture, accepted plaintiffs' explanation for it. As Judge Winter explained it, the OPMs suffered a loss in market share because of "difficulties in enforcing the Escrow Statute, in particular against foreign manufacturers." *Freedom Holdings I, 357 F.3d at 231*. However, the Contraband Statutes were passed "in response to this threat," *id.*, with the effect, as alleged by plaintiffs, that the cartel would tighten, the loopholes would be closed, and plaintiffs and other NPMs would not be able to sell cigarettes outside of the settlement structure, thereby having to adhere to price and output leadership by the majors.

If this explanation were accurate, however, the market shares of the SPMs and OPMs would have leveled off or declined beginning with the passage of the Contraband Statutes on December 28, 2001. Yet the evidence shows, and plaintiffs acknowledge, that the reverse continued to happen; SPMs, and even more prominently NPMs,

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[19] I do not intend any implication regarding the State's exposure to a monetary judgment in an antitrust case under the *Eleventh Amendment*. *See*, *e.g.*, *Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363-64, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001)* (*Eleventh Amendment* immunity from suit).

continued to gain market share, to the detriment of the OPMs. The evidence thus belies **[**97]** not only plaintiffs' allegations, but also their interpretation of the facts.

At oral argument on the present motion, plaintiffs again alleged that the State had "turned the corner." Tr. June 2, 2004, at 26. Plaintiffs argued that the repeal of the Allocable Share Release provision would force NPMs into submission; that from the date of the repeal onward, the cartel would be fully and firmly established; and that plaintiffs and all others would find it impossible to gain market share in New York, and presumably in the other twenty-nine states which have repealed that provision.

Before I analyze that claim, I note its significance. Plaintiffs filed suit in 2002, alleging that the cartel was already firmly in place and the barriers to their entry into the New York market were already prohibitive. As defendants observed at oral argument, plaintiffs now are essentially admitting that the evidence, as of the time they filed suit, was insufficient to sustain their claim, and they are asking me now to focus not so much on the evidence relating to the prior enactments, as on the evidence since October 15, 2003, the effective date of the repeal of the Allocable Share Release provision, and **[**98]** on what may be likely in the future. In effect, plaintiffs concede that the passage of the Escrow and Contraband Statutes did not sufficiently cause them to lose market share. Indeed, the statistics of sales and market shares collected by PriceWaterhouse require that concession. Plaintiffs thus concede, as the facts of record require, that they are not able to prove a likelihood of irreparable injury, except for speculation what the future might bring. I thus decline to grant a preliminary injunction, enjoining enforcement of the Escrow and Contraband Statutes, or the MSA. I now turn to analyzing the repeal of the Allocable Share Release provision.

As explained above, the repeal of the Allocable Share Release provision, *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003, took away the NPMs' reversionary right to escrow payments beyond the rights or needs of particular states, and provided a windfall to those states. The repeal discriminated against NPMs and served to deter them from competing in local and regional markets, where they otherwise could have concentrated costly marketing and distribution expenses, minimized **[**99]** their payments to the states, and competed effectively against the cigarette majors. Thus the barriers against NPMs have been heightened dramatically by the **[*265]** repeal, and the ability of an NPM to compete within a regional market has been arrested. Plaintiffs submit affidavits from executives at several NPMs which aver that because their payment obligations have been dramatically increased, they have been forced to raise prices, and as a result their sales have substantially decreased. S&M Brands, which chose to maintain low prices and increase its market share in the southeast, has suffered a competitive disadvantage in Tennessee and Kentucky. CigTec Tobacco, LLC, another NPM which competed vigorously under the Escrow and Contraband Statutes, was forced by the repeal to increase its price from $ 7.50 to $ 10.60 per carton. As a result, between the first and second halves of 2003, it suffered a 69 percent decline in sales in Louisiana and a 39 percent decline in sales in Alabama. ITP, the second named plaintiff, suffered similarly. After raising its prices in the face of the repeal of Indiana's statute, its sales dropped over forty percent, from approximately 400,000 to approximately **[**100]** 232,000 cigarettes a month. Four months after Indiana repealed its statute, ITP could no longer afford to sell cigarettes in Indiana.

This evidence suggests, therefore, that plaintiffs, and other NPMs on whose behalf they also bring suit, are likely to be caused - and in some cases appear already to have been caused - irreparable injury stemming from the repeal of the Allocable Share Release provision. The evidence is, undoubtedly, still preliminary. Most of the affidavits regarding the economic impact of the repeal of the Allocable Share Release provision came into the record on supplemental briefing, and as such have not been subjected to testing or to a full opportunity for the State to oppose them. The State thus may yet defeat any requested permanent injunction. Nonetheless, plaintiffs have adequately shown a likelihood of irreparable harm from the repeal of the Allocable Share Release provision. In the absence of adequate state justifications for repeal, other than to defer to the OPMs and discriminate against the NPMs, I hold that plaintiffs have made a sufficient showing of irreparable injury with regard to the repeal of the Allocable Share Release provision, and I grant plaintiffs' **[**101]** motion to enjoin enforcement of the repeal.

III. Conclusion

I find that plaintiffs have demonstrated neither a likelihood of success on the merits nor irreparable harm with regards to the MSA, the Escrow Statute, and the Contraband Statute. I thus deny plaintiffs' motion for preliminary injunction inasmuch as it is directed against these provisions. I find, however, that plaintiffs have made a showing of likelihood of success and of irreparable harm as regards the repeal of the Allocable Share Release provision. Accordingly, to that extent, plaintiffs have satisfied the requirements for, and I accordingly grant, a preliminary injunction, enjoining the amended version of *N.Y. Pub. Health Law § 1399-pp*, as amended, 2003 N.Y. Laws 666, eff. Oct. 15, 2003.

The parties shall appear before me on October 4, 2004, at 4:00 p.m. for a status conference, to discuss the status of the pending motion for summary judgment and future proceedings.

SO ORDERED.

Dated: New York, New York

September 14, 2004

ALVIN K. HELLERSTEIN

United States District Judge

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Gutzwiller v. Visa U S A Inc.

Minnesota District Court, County of Clay, Seventh Judicial District

September 15, 2004, Decided; September 15, 2004, Filed

Court File No C4-04-58

Reporter
2004 Minn. Dist. LEXIS 19 *; 2004 WL 2114991

Gordon Gutzwiller, on behalf of himself and all others similarly situated, Plaintiff vs Visa U S A, Inc and MasterCard International, Inc, Defendants

Core Terms

consumer, anti trust law, merchants, purchaser, debit card, antitrust, plaintiff's claim, indirect, competitor, damages, debit, Defendants', restrained, retailers, factors, indirectly, products, parties, prices, credit card, courts, federal court, lack standing, artificially, MEMORANDUM, overcharge, inflated, antitrust violation, standing to sue, consumer goods

Judges: **[*1]** Honorable Galen J Vaa, Judge of District Court.

Opinion by: Galen J Vaa

Opinion

ORDER AND MEMORANDUM

The above-entitled matter came before the undersigned Court on the 29th day of July, 2004, at the Clay County Courthouse, Moorhead, Minnesota, upon motion of the Defendants to Dismiss the Plaintiff's Complaint for Failure to State a Claim Upon which Relief can be Granted, pursuant to Rule 12.02 (e) of the Minnesota Rules of Civil Procedure.

The following attorneys appeared as counsel for the parties Drew Hanson and Michael J Williams appeared on behalf of the Plaintiff, David Crosby and Steven Bomse appeared on behalf of Defendant Visa U S A, Inc, and Peter Gleekel and Gary Carne appeared on behalf of Defendant MasterCard.

Having heard and/or read the oral and written submissions of counsel for the parties and being further advised in the premises, the Court now enters the following **ORDER**

1 Defendants' Motion to Dismiss Plaintiff's claim for failure to state a claim upon which relief can be granted is hereby **GRANTED**, and
2 Court Administration shall enter a Judgment, forthwith, dismissing the Plaintiff's Complaint with prejudice, and
3 The attached Memorandum is incorporated by reference herein

Dated this 15th day of September, 2004

/s/ Galen J Vaa

Honorable Galen J Vaa **[*2]**

Judge of District Court

MEMORANDUM

I. Procedural History

In October of 1996, a series of class action lawsuits were filed in the United States District Court for the Eastern District of New York, *In re Visa Check/MaterMoney Antitrust Litig (a/k/a Wal-Mart Stores, Inc et al v Visa U S A. Inc and MasterCard Int'l, Inc*) (hereafter the Wal-Mart action) No 96-CV-5238 (JG), by certain retailers and retail trade associations against the Defendants. Generally, the retailers alleged that Visa and MasterCard violated federal antitrust laws by forcing merchants who accepted their credit cards to accept Visa and MasterCard branded debit cards. Plaintiffs claimed that defendants' actions caused merchants to pay excessive fees on Visa and MasterCard off-line debit transactions, which injured competition, merchants and consumers. The retailers sought (1) an injunction prohibiting Defendants from engaging in the alleged violations of the federal antitrust laws (including the elimination of the alleged forced acceptance of the Visa and MasterCard-branded debit cards by merchants who accept Visa and MasterCard-branded credit cards), and (2) damages for the alleged excess portion of fees paid.

In February **[*3]** 2000, the federal court certified a nationwide class of more than four million merchants who had accepted Visa or MasterCard cards within the statute of limitations period *See* *In re Visa Check/MasterMoney Antitrust Litig., 192 F R D 68, 90 (E D N Y 2000)*, *aff'd*, *280 F 3d 124 (2d Cir 2001)*, *cert denied*, *536 U.S. 917, 122 S. Ct. 2382, 153 L. Ed. 2d 201 (2002)*. The class action was settled in April 2003, on the eve of trial, and the federal court recently issued an order providing final approval of the settlements. *In re Visa Check/MasterMoney Antitrust Litig, 297 F Supp 2d 503 (E D N Y 2003)*. Pursuant to the settlements, Visa and MasterCard have eliminated the asserted tying of credit and debit services to merchants, thereby allowing merchants to reject consumers' Visa or MasterCard branded debit cards but still accept consumers' Visa or MasterCard branded credit cards. Additionally, Visa and MasterCard will also collectively pay, over ten years, more than three billion dollars into a settlement fund *Id. at 507-09*.

The current action is one of several lawsuits filed in a number of state courts throughout the country. In this case, Plaintiff brings this contemplated class action on behalf of Minnesota consumers who have purchased goods from merchants who (1) accepted Visa and MasterCard credit cards as a form of payment, and (2) were effectively forced by Visa and MasterCard to accept *Visa Check* and *MasterMoney* signature debit **[*4]** cards as a condition of accepting Visa and MasterCard credit cards.

Plaintiff's complaint is based on the same wrongful conduct allegedly committed by Visa and MasterCard that was at issue in the federal merchant class action. Specifically, Plaintiff here claims to be a Minnesota resident who "has made purchases within the state of goods and services from one or more retailers that were forced by Visa and/or MasterCard to accept *Visa Check* and/or *MasterMoney* debit cards as a condition of being able to accept Visa and/or MasterCard credit cards". Complaint ¶ 13 Plaintiff brings this action on behalf of a class of all persons who purchased goods in Minnesota from merchants who accepted Visa and/or MasterCard cards *Id.* at ¶17.

Plaintiff asserts that as a result of the alleged wrongful conduct of Visa and MasterCard, trade was restrained in the market for debit card services *Id.* at ¶ 48. Plaintiff further asserts that the alleged restraint caused merchants to pay "supra-competitive prices for the debit card products of Visa and MasterCard," and in return passed the overcharge onto the consumers *Id.* at ¶¶ 57-58. Plaintiff claims the purported overcharge is passed onto the consumer in the **[*5]** price of all goods bought by consumers — "not only consumers who use the debit card products, but by all consumers who shop at merchants that accept Visa and MasterCard". Complaint ¶ 7 Thus, Plaintiff claims he paid higher prices on all purchases made from merchants who accept Visa and/or MasterCard, regardless of the method of payment (i e credit, debit, check or cash) and regardless of the product purchased (i e clothing, food, gas, or dry cleaning).

Based upon said allegations, Plaintiff claims that the alleged wrongful conduct of Visa and MasterCard constitutes a tying arrangement in violation of the Minnesota ***Antitrust Law*** under *Minn Stat § 325D.51*. Complaint ¶¶ 61-67. Plaintiff is seeking damages and attorney's fees for the alleged violation by the Defendants *Id* at ¶ 66.

In summary, Plaintiff alleges in his Complaint that thousands of merchants located throughout Minnesota who have accepted Visa and MasterCard credit cards as a form of payment, have had to artificially inflate the prices of retail goods sold to Minnesota consumers to recoup the supra-competitive, artificially inflated amounts that they paid when they were forced to accept *Visa Check* and *MasterMoney* debit cards. Notwithstanding **[*6]** the fact that the merchants received a multibillion-dollar settlement with the Defendants in the federal lawsuit, Plaintiff's complaint alleges that the actual costs of Defendants' monopolistic conduct was borne by the American consumer, including Minnesota consumers.

Plaintiff's sole claim for relief in the Complaint is based on the Minnesota ***Antitrust Law*** Complaint ¶¶ 61-67. *Minn Stat § 325D.51* (2002), provides that a "contract, combination or conspiracy between two or more person in unreasonable restraint of trade or commerce is unlawful". Further, section 325D.51 provides a damages remedy to "any person injured directly or indirectly by a violation of sections 325D.49 to 325D.66."

II. Summary of Claims Advanced by the Parties

In their memorandum, Defendants claim that Plaintiff's complaint must be dismissed pursuant to Rule 12.02 (e) of the Minnesota Rules of Procedure tor the following reasons

> 1 Plaintiff lacks standing to sue because any injuries incurred are too "remote" in nature,
>
> 2 Plaintiff has no standing to bring this action, because he is neither a direct and/or indirect purchaser of the Visa/MasterCard goods or services that were the subject of the Defendants alleged antitrust activities

In response, Plaintiff alleges that **[*7]** *Minn Stat § 325D.49* cloaks him with standing to sue, because he is a consumer that was "indirectly" injured by the Defendants alleged violation of Minnesota ***Antitrust law***(s). Thus, Plaintiff claims that Minnesota law does not require that a Plaintiff be either a direct or an indirect purchaser to have standing to pursue a claim under the Minnesota ***Antitrust law***. Further, Plaintiff requests that the Court adopt the "target area" test for standing advocated by Supreme Court Justice Brennen in his dissent in the case of *Illinois Brick Co v Illinois, 431 U.S. 720, 760, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

III. Standard of Review

Rule 12.02 (e) of the Minnesota Rules of the Civil Procedure, reads as follows

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion.
>
> (e) failure to state a claim upon which relief can be granted

The question before the Court in a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings set forth a legally sufficient claim for relief *Witzman v Lehrman, Lerhman & Flom, 601 N.W.2d 179, 185 (Minn 2003)*. A "complaint should be dismissed if there are no facts **[*8]** alleged that could support the claim" *Rohricht v O'Hare, 586 N. W. 2d 587, 588 (Minn App 1998)*. At the oral heating relative to this matter, counsel for the parties agreed that Rule 12.02 (e) could be invoked if the facts alleged in the Plaintiff's complaint clearly indicates that the Plaintiff lacks standing to pursue the pending action.

IV. Minnesota ***Antitrust Law***

In 1971, the Minnesota Legislature enacted the Minnesota ***Antitrust law*** *Minn. Stat. § § 325D.49 to 325D.66*. Specifically, *Minn. Stat. § 325D 51* (2002) provides that a "contract, combination or conspiracy between two or more person in unreasonable restraint of trade or commerce is unlawful." In 1984, the legislature amended the original Act by providing a damages remedy to "any person injured directly or indirectly by a violation § 325D.49 to § 325D 66".

Historically, Minnesota Appellate Courts have interpreted Minnesota's antitrust laws in a manner which is consistent with the federal courts construction of federal ***antitrust law*** *Minnesota Twins P'ship v State by Hatch, 592 N. W. 2d 847, 851 (Minn 1999)*, *Howard v Minnesota Timberwolves Basketball Ltd P'ship, 636 N. W. 2d 551, 556 (Minn App 2001)*. ("Minnesota ***antitrust law*** should be interpreted consistently with federal court interpretations of federal ***antitrust law*** unless Minnesota law clearly conflicts"). *Keating v Philip Morris, Inc, 417 N. W. 2d 132, 136 (Minn App 1987)* (citing *State v Duluth Board of Trade, 107 Minn 506, 517, 121 N. W. 395, 399 (1909))*. The underlying rationale for this rule was that the general purpose of the Minnesota ***antitrust law*** was the same as the general purpose of the federal **[*9]** ***antitrust law*** and therefore, Minnesota Appellate Courts could properly look to the decisions made under the federal law in order to achieve consistency in this area of the law However, Plaintiff claims that in its amendment to the Minnesota Antitrust Act in 1984, the Minnesota legislature "expressly departed" from federal antitrust standing principles enunciated by the United States Supreme Court in *Associated Gen Contractors of Cal. Inc v Cal State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Specifically, Plaintiff alleges that when the legislature's intent is clear from plain and unambiguous statutory language, the courts cannot engage in further construction and instead must look to the plain meaning of said statutory language. *State v Bluhm, 676 N. W. 2d 649, 651 (Minn 2004)*.

V. Decision

Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court *Sierra Club v Morton, 405 U.S. 727, 731-32, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)*. A party who has only an abstract or tenuous connection to the subject matter of the case, lacks standing *State by Humphrey v Philip Morris, Inc*, No C1-94-8565, 1995 WL 1937124 (Minn Dist Ct 1995). If a plaintiff lacks standing to bring a suit, the attempt to do so must fail Standing is acquired in two ways either the plaintiff has suffered some "injury-in-fact" or the plaintiff is the beneficiary of some legislative enactment granting standing. *Snyder's Drug Stores, Inc. v Minnesota State Board of Pharmacy, 301 Minn 28, 31-32, 221 N. W. 2d 162, 165 (Minn 1974)*. The primary **[*10]** goal of the "standing" requirement is to ensure that the factual and legal issues before the courts will be vigorously and adequately presented. *Channel 10, Inc v Ind School Dist No 709, St Louis County, 298 Minn 306, 314, 215 N. W. 2d 814, 821 (Minn 1974)*.

In 1977, the United States Supreme Court ruled that an indirect purchaser of concrete products that were the Subject of previous price fixing conspiracies had no standing under the federal ***antitrust law*** *Illinois Brick Co v Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707(1977)*. As previously stated, the Minnesota legislature responded to this decision by broadening the scope of individuals entitled to seek redress under the Minnesota Antitrust Act, by allowing any person injured "directly or indirectly" to seek judicial relief under the act. In *Keating v Philip Morris, 417 N. W. 2d 132 (Minn App 1987)*, the Minnesota Court of Appeals specifically stated that the 1984 amendment was intended to allow "a cause of action to indirect *purchaser*" (emphasis added) *417 N. W. 2d at 136*. Specifically, the *Keating* concluded that the legislative history of the 1984 amendment clearly established that file legislation was in direct response to the decision of the U S Supreme Court in *Illinois Brick Co v Illinois*

In 1996, the Minnesota Supreme Court ruled that the broad grant of standing under the 1984 amendment to the Minnesota Antitrust Act conferred standing to Blue Cross Blue Shield of Minnesota (BCBSM) **[*11]** to sue a number of tobacco companies (under *Minn Stat § 325D.51*) for reimbursement of health care expenses incurred by its subscribers secondary to medical treatment for tobacco related diseases. In reaching this conclusion, the Supreme Court reasoned that the 1984 amendment's broad grant of standing to maintain private antitrust suits, reached the injuries suffered by BCBSM. *State by Humphrey v Philip Morris, Inc, 551 N. W. 2d 490, 495 (Minn 1996)*. Significantly, the Supreme Court agreed with the decision of the Minnesota Court of Appeals in *Keating*, that the 1984 amendment to the Minnesota Antitrust Act was in direct response to the U S Supreme Court decision in the *Illinois Brick* case Relative to this issue, the high court stated as follows

> We concur with this analysis and conclude it was the intent of the Minnesota legislatures to abolish the availability of the pass through defense by specific grams of standing within statutes designed to protect Minnesota citizens from sharp commercial practices as the pass through defense is unavailable to the tobacco companies, Blue Cross has standing to sue under the various consumer protection theories, including antitrust alleged in its complaint.

551 N. W. 2d at 496.

In entering its decision relative to this issue, the Minnesota Supreme Court did **[*12]** not address standing requirements under federal law as enunciated by the U S Supreme Court in the *Associated Gen Contractors* decision, supra. Unfortunately, it does not appear that the Court was presented with the precise issue of whether the five "standing" factors as set forth by the U S Supreme Court in the *Associated Gen Contractors* case should be applied to Minnesota's amended antitrust act. Therefore, it becomes necessary for this Court to determine whether any (or all) of the five factors enunciated by the U S Supreme Court in *Associated Gen Contractors* remain in effect in Minnesota in light of the *Philip Morris* decision.

In the *Associated Gen Contactors* case, the Supreme Court identified the following five factors to assess in determining whether the relationship between the plaintiff's harm and the defendant's conduct is sufficiently close to confer standing (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market, (2) whether the injury alleged is a direct, first-hand impact of the restraint alleged, (3) whether there are more directly injured plaintiff with motivation to sue, (4) whether the damages claims are speculative, and (5) whether the **[*13]** plaintiff's claims risk duplicative recoveries and would require a complex apportionment of damages *459 U.S. 519, 538-45, 103 S. Ct. 897, 74 L. Ed. 2d 723*. As previously stated, Minnesota ***antitrust law*** must be interpreted consistently with federal court interpretations of federal ***antitrust law***, unless Minnesota law clearly conflicts *Howard v Minnesota Timberwolves Basketball Ltd P'ship, 636 N. W. 2d 551, 556 (Minn App 2001)*.

In light of the legislative history provided by counsel for the parties in the enactment of the 1984 amendment, and the clear language of the statute providing a remedy for any person directly or indirectly injured by a violation, it is apparent that factors (2) and (3) of the *Associated Gen Contractors* case do clearly conflict with present Minnesota statutory law. However, the Court finds no language in the 1984 legislative amendment, legislative history, or the *Philip Morris* decision which establishes that application of factors (1), (4), and (5) in determining the issue of standing, would clearly conflict with Minnesota state law. Utilizing factors (1), (4) and (5) of the *Associated Gen Contractors* case in assessing the issue of standing, is consistent with the concerns addressed by the state legislators who debated the 1984 amendment prior to its passage, and consistent with federal law. Therefore, the **[*14]** Court must apply those three factors in this case to determine if the Plaintiff lacks standing under Minnesota state law.

The antitrust laws were intended for the protection of competition and therefore, standing is generally limited to consumer and competitors *Associated Gen Contractors, 459 U.S. at 538*. In this case, it is apparent that the Plaintiff is not a consumer or a competitor in the allegedly restrained market. In the alleged restrained market, the merchants are the consumers of Visa and MasterCard debit card services, and other debit networks are the competitors of Visa and MasterCard. Thus, there is no connection between the Plaintiff's purchases of general consumer goods and the Defendants' alleged unlawful tying of debit services.

Thus, the instant case is dearly distinguishable from the facts in the *Philip Morris* case, where the district court concluded that BCBSM was "clearly a link in the chain of interacting parties" and from a practical standpoint, was the "natural plaintiff best able to pursue the claim " *State by Humphrey v Philip Morris, Inc*, 1995 WL 1937124 *36 (Minn Dist Ct). The special role of BCBSM in the healthcare filed and its role as a major payor of healthcare expenses was an essential factor in the decision of the *Philip Morris* court to grant standing to that entity. **[*15]** The Supreme Court (in the *Philip Morris* case) emphasized that BCBSM was a proper party to assert an antitrust claim since the company was the direct purchaser of health care, and thus had a right to sue to collect overcharges, even though each payment was made on behalf of an individual patient *551 N. W. 2d at 497 FN1* (citing *Blue Cross &*

Blue Shield United of Wis v Marshfield Clinic and Security Health Plan of Wis, Inc., 65 F 3d 1406 (7thCir 1995), *cert. denied*, *516 U.S. 1184, 116 S. Ct. 1288, 134 L. Ed. 2d 233(1996)*.

The Eighth Circuit Court of Appeals has repeatedly applied *Associated Gen Contractors* factor (1), in rejecting the antitrust claims of plaintiffs who are neither consumers nor competitors in the allegedly restrained market. In S D Collectibles, Inc. v Plough, Inc, 952 F 2d 211 (8thCir 1991), a plaintiff who solicited orders for a company's zinc oxide sun screen product claimed that the defendant had restrained trade in the market for such products. The Eighth Circuit rejected the plaintiff's antitrust claim on the ground that as a mere broker, the plaintiff was neither a consumer nor competitor in the market for the purchase and sale of such products. It reasoned, "standing is generally limited to actual market participants, that is, competitors or consumers" and "[plaintiff] is neither" Id at 213 Numerous other Eighth Circuit decisions have reached the same result.

In *South Dakota v Kansan City S Indus. Inc*, the Eighth Circuit rejected **[*16]** the claims of the state of South Dakota, stating that "standing has been generally limited to the actual participants in the relevant market" and the "State's injuries were 'purely an incidental result of anti-competitive activity in another segment of the economy.'" 880 F 2d 40, 47-49 (8thCir 1989) (internal citation omitted). Additionally, in *Alpha Shoe Serv V. Fleming Cos*, the court rejected claims because the defendant's "activities occurred in the grocery market" and "[t]he plaintiffs were not competitors, participants, or consumers in that relevant market" 849 F 2d 352, 354 (8th Cir 1988). Finally, in *General Indus. Corp v Hartz Mountain Corp*, the Eighth Circuit rejected plaintiff's claim because it "was not a consumer of goods or services subject to restraint or an injured competitor of [defendant], the party engaging in the claimed restraint" 810 F 2d 795, 809 (8thCir 1987).

In his Memorandum in Opposition to the pending motion, Plaintiff refers to decisions from other state courts *construing* antitrust statutes similar to or identical to Minnesota's, and argues that said decisions provide persuasive authority relative to the interpretation of Minnesota's ***antitrust law***. *See* Conway v Todd County Highway Dept, 187 Minn. 223, 244 N.W. 807, 808-09 (Minn 1932). However, in all of the state court decisions cited by the Plaintiff, the underlying facts indicate **[*17]** that the Plaintiff occupied some link in the industry or market that was the subject of the antitrust claim, either as an indirect purchaser of a product or service or as a competitor That link or nexus is missing in this case. As previously stated, there is no connection between the Plaintiff's purchases of consumer goods throughout the state of Minnesota from merchants who accept Visa or MasterCard cards, and the Defendants' alleged antitrust activities (i e tying of debit services). There is no allegation in the Complaint that the debit network systems of Visa or MasterCard contributes in any way to the research, manufacture, production, distribution, or advertising of the consumer goods for which Plaintiff contends he paid inflated prices.

As previously stated, the Minnesota appellate courts have ruled that the 1984 amendment to Minn Stat § 325D.57 simply removed the bar created by the *Illinois Brick* decision to actions commenced by indirect purchasers. State by Humphrey v Philip Morris, Inc, 551 N. W. 2d 490, 496 (Minn 1996), Keating v Philip Morris, 417 N. W. 2d 132, 136 (Minn App 1987) However, a close reading of the Supreme Court decision in *Philip Morris*, confirms that in order to have standing, a plaintiff must be a purchaser or competitor, either directly or indirectly, of goods or services in the market allegedly restrained **[*18]** by an antitrust violation. Specifically, in the *Philip Morris* case, BCBSM claimed that it had incurred damages "resulting from the fact that it has paid and will pay substantially higher amounts to its contracted healthcare providers due to the increased cost of healthcare services for treatment of smoking related illnesses in its nicotine addicted consumer/patients." 551 N. W. 2d at 492. Deciding in favor of BCBSM, the Minnesota Supreme Court acknowledged that Blue Cross was a direct purchaser in the market allegedly restrained (i e the market for healthcare services) and as such, would have standing to sue even absent the statutory grant of authority under Minn Stat § 325D.57 Id. at 497 FN1.

Relative to this issue, counsel for the Plaintiff claims the Minnesota ***antitrust law*** does not require an indirect purchaser to have repurchased the allegedly restrained product or service (in this case debit card services) in order to have standing under state law. In support of this contention, Plaintiff's counsel refers to federal court decisions and/or legal authorities which have authorized indirect purchaser actions of products which have substantially changed form Specifically, Plaintiff's counsel refers to the follow quote from Judge **[*19]** Richard A Posner of the Seventh Circuit Court of Appeals, in a law review article

> Many producers do not sell directly to their ultimate consumers The producer of a consumer good may, for example, sell it to a wholesaler who will resell it to a retailer who in turn will resell it to the ultimate consumer, and even if there is no wholesale stage of distribution, the ultimate consumer will ordinarily be the direct purchaser from a retailer and only an "indirect purchaser" from the producer The product may be used as an input into a final consumer good — for example, the flour sold to a baker who makes it into bread that is sold to the consumer *The product map not even appear physically in the final good — for example, the oven used by the baker in making the bread* In these cases as well, *the ultimate consumer is only an indirect purchaser of the flour or the oven, the cast of which will be reflected in the price of the bread*.

William M Landes & Richard A Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U CHI L REV 602, 602 (1979) (emphasis added) Commenting upon the above quotation, Plaintiff's counsel argues that Gutzwiller **[*20]** is an indirect purchaser of the debit card services because the monopoly overcharge on Defendants' debit card services is reflected in the artificially inflated prices of the consumer goods he purchases.

The Court finds that Plaintiff's analysis relative to this issue must fell, because unlike Judge Posner's above illustration, there is no industry, business, or market nexus or link between the monopoly overcharge on Defendants' debit card services and the alleged artificially inflated prices of all consumer goods sold at stores that accept Visa and MasterCard cards. Stated otherwise. Judge Posner's example identifies specific products or services (i e flour, bread, ovens, etc) which may have been the subject of artificially increased prices due to monopolistic business activities. In this case, Plaintiff does not allege the original product (debit card services or any subsequent and/or modified debit card services) were indirectly purchased by him at an artificially inflated price.

In assessing the standing issue in this case, counsel for the Plaintiff invites the Court to adopt the "target area" test advocated by Justice Brennen in his dissent in *Illinois Brick Co v. Illinois, 431 U.S. 720, 760-61, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In his dissent, Justice Brennen argued **[*21]** that standing should be determined not by asking whether the plaintiff's injury was "derivative" or "remote," but by asking whether the plaintiff was in the "target area" of the antitrust violation, a concept analogous to whether the plaintiff's injury is a "reasonably foreseeable consequence" of the defendant's illegal conduct.

However, the "target area" test has never been adopted by the Minnesota Supreme Court, the United States Supreme Court and/or the Eighth Circuit Court of Appeals (or any other federal court) as an appropriate test for determining standing under the federal ***antitrust law***. Therefore, it would be inappropriate for the Court to assume that the "target area" test is an appropriate factor under Minnesota law.

Also, the Court agrees with Defendants assertion that Plaintiff's damages claims are inherently speculative. In this case, Plaintiff asserts that he paid overcharges on every single purchase that he made for several years from merchants who accepted Visa or MasterCard cards A brief illustration of an "exemplar" purchase confirms the inherently speculative nature of Plaintiff's claim.

Assume that Plaintiff purchased an item at a K-Mart store which accepted Visa **[*22]** and MasterCards, on March 1, 2003. To recover damages, Plaintiff would first need to prove that as a result of Defendants' alleged restraint of trade in providing debit card services to that K-Mart store, K-Mart paid excessive debit fees. Plaintiff would then need to prove that K-Mart did not absorb any such excess debit fees by making less profit, or in some other non-monetary way, such as by hiring fewer employees and/or not making major repairs to its building, but instead passed on the excess debit fees in the price of the items sold to consumers. Plaintiff would then need to prove that some identifiable portion of the item was not attributable to any factors such as competitive pricing, the wholesale cost of the item, and any myriad of other factors which might affect the price of that item on that specific date. Plaintiff would then need to make the same offer of proof for any item sold by the K-Mart store not only on March 1, 2003, but for every other day in issue, and would have to make the same offer of proof relative to every other merchant involved in his claim.

In raising the above example, the Court has not even discussed the financial difficulties that K-Mart (and numerous **[*23]** other retailers) has experienced in the past that are unique to that corporation and which might have a very significant effect on the price of its item. This simple example establishes that Plaintiff's damages claim is inherently and hopelessly speculative Again, the *Philip Morris* case is readily distinguishable relative to this issue. Evidence in the *Philip Morris* case clearly established that the costs of health services related to smoking were substantially increased due to the Defendant's misrepresentations with respect to its product, and that BCBSM paid for and/or incurred a significant portion of said increased costs. Thus, the damages claim in the *Philip Morris* case was far less speculative than the Plaintiff's claim for damages in this case.

Further, Plaintiff's claims risk duplicative recoveries and would require an apportionment of damages so complex as to be impossible. Plaintiff's claims in this case are based on the very same conduct of Visa and MasterCard that was the subject of litigation in the federal merchant clam action. Plaintiff's claims would require apportionment of damages of virtually every single purchase that Plaintiff (and his class) made during the years **[*24]** in which he seeks damages. The Court is convinced that no expert witness would be capable of accurately assessing a fair and impartial "apportionment" of the damages to the respective parties, including the prior merchant plaintiffs. Moreover, in light of the previous multibillion-dollar settlement in the federal venue, tins is obviously not a situation where the antitrust violators will go unpunished, because the parties who are directly injured (the merchants) will not sue.

VI. Plaintiff's Request for Leave to File an Amended Pleading

In his response to the Defendants' motion, Plaintiff argues in the alternative that he should be granted leave to file an Amended Complaint, re-defining the class to consist only of Minnesota residents who purchased goods or services using a Visa or MasterCard-branded debit card. The Court must deny this Motion because it does not comply with Rule 115.03 or 115.04 of the Rules of Practice for the District Courts of Minnesota or Rule 15 of the Minnesota Rules of Civil Procedure. Under these rules, a party filing a motion must serve notice of the motion, motion, proposed order, memorandum of law, and any affidavits and exhibits to be submitted in conjunction with the motion, a designated period of time prior to the **[*25]** bearing relative to said motion. Plaintiff has not filed a motion to amend under these rules and instead, has requested "leave" to file the amended pleading in his responsive brief Since the Defendants have not had the opportunity to fully respond to this new issue raised by the Plaintiff, it would be unduly prejudicial and unfair to the Defendants for the Court to entertain that issue at this time.

VII. Summary

Despite the broad language of the Minnesota ***antitrust law*** as set forth in *Minn Stat § 325D.57* (2002), and the broad language contained in the *Philip Morris* decision of the Minnesota Supreme Court, not every person claiming some remote or tangential injury from an antitrust violation can maintain a suit under the Minnesota antitrust laws. A literal reading of the Minnesota statute is broad enough to encompass any harm that can be attributed either directly or indirectly to the consequences of an antitrust violation. Even though the language of the statute is clear and unambiguous, the Court must interpret the statute in a manner which will not lead to an illogical or absurd result *Mut Serv Cas Ins Co v League of Minn Cities Ins Trust, 646 N.W.2d 546, 549 (Minn App 2002)*, *review granted* (Minn Sept 17, 2002), *Minn Stat § 645.17 (1)*(2004).

In this case, the Plaintiff's proposed interpretation of the **[*26]** Minnesota ***antitrust law*** would lead to a decision that would provide a remedy in damages for any injury (however minor) that might conceivably be traced to the antitrust violation in issue. In short, the Plaintiff's proposed construction of the Minnesota ***antitrust law***, carried to its logical conclusion, would provide the general public and/or general tax payer standing to sue for most antitrust causes of action. In this case, the Plaintiff's proposed class (all consumers who purchased products from a merchant who accepted Visa and/or MasterCard) is likely as large, or larger, than a class limited to Minnesota residents who pay property or income taxes. Clearly, the legislature did not intend the 1984 amendment to *Minn Stat § 325D.57* to be interpreted in such a broad and illogical manner. *See* Comments of Sen Sieloff, March 19, 1984, in the Civil Law Subcommittee of the Judiciary Committee of the Minnesota Senate; in connection with S F 1807, a bill to amend *Minn Stat § 325D 57*. In this case, Plaintiff has only an abstract or tenuous connection to the subject matter of the case. Therefore, he lacks standing to sue for the injuries he claims to have incurred *See State by Humphrey v Philip Morris, Inc*, No C1-94-8565, 1995 WL 1937124 (Minn Dist Ct 1995).

Dated this **[*27]** 15th day of September, 2004

/s/ Galen J Vaa

Honorable Galen J Vaa

Judge of District Court

MetroNet Servs. Corp. v. Qwest Corp.

United States Court of Appeals for the Ninth Circuit

September 24, 2004, Filed

No. 01-35406

Reporter
383 F.3d 1124 *; 2004 U.S. App. LEXIS 20107 **; 2004-2 Trade Cas. (CCH) P74,559

METRONET SERVICES CORPORATION; METRONET TELEMANAGEMENT CORPORATION, Plaintiffs-Appellants, v. QWEST CORPORATION, Defendant-Appellee.

Subsequent History: US Supreme Court certiorari denied by *MetroNet Servs. Corp. v. Qwest Corp., 2005 U.S. LEXIS 4202 (U.S., May 23, 2005)*

Prior History: **[**1]** On Remand from the Supreme Court of the United States. D.C. No. CV-00-00013-JCC.

Metronet Servs. Corp. v. US W. Communs., 329 F.3d 986, 2003 U.S. App. LEXIS 9796 (9th Cir., 2003)

Disposition: On remand, prior opinion superseded and district court affirmed.

Core Terms

pricing, consumers, resellers, antitrust, seller, discount, features, facilities, arbitrage, customers, ticket, lines, competitors, anticompetitive, Skiing, sharing, resale, retail price, volume, small business, effective, profits, disfavored, mountain, rates, anti trust law, price list, eliminating, short-term, network

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's grant of summary judgment. The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the substantive law. The appellate court may not weigh the evidence or determine the truth of the matter; rather, it may determine only whether there is a genuine issue for trial.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

HN2[] **Regulated Industries, Communications**

The "essential facilities" doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis. In order to prevail on an essential facilities claim, the plaintiff must prove (1) that the defendant is a monopolist in control of an essential facility, (2) that the plaintiff, as the defendant's competitor, is unable reasonably or practically to duplicate the facility, (3) that the defendant has refused to provide the plaintiff access to the facility and (4) that it is feasible for the defendant to provide such access.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

HN3[] **Regulated Industries, Communications**

Even though the essential facilities doctrine is followed in the United States Court of Appeals for the Ninth Circuit and other circuits, the United States Supreme Court has never recognized such a doctrine. In Verizon, the Supreme Court found no need either to recognize the doctrine or to repudiate it because the Supreme Court concluded that the plaintiff could not state a claim under the doctrine. The Supreme Court reasoned that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN4[] **Regulated Industries, Communications**

Under the Telecommunications Act of 1996 (the 1996 Act), *47 U.S.C.S. § 151 et seq.*, a requesting competitive local exchange carrier (CLEC) can obtain access to an incumbent local exchange carrier's (ILEC) network in three ways: it can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the ILEC's network on an unbundled basis; and it can interconnect its own facilities with the ILEC's network. The ILEC can negotiate an agreement with the CLEC without regard to the duties it would otherwise have under *47 U.S.C.S. § 251(c)*, but if private negotiations fail, either party can petition the relevant state commission to arbitrate unresolved issues. *47 U.S.C.S. § 252*. Thus, the 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. Where a state or federal agency is authorized to compel access to a competitor's infrastructure, as under the 1996 Act, the United States Supreme Court's decision in Verizon states that an essential facilities claim should be denied.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications

HN5[] Regulated Industries, Communications

The essential facilities doctrine makes a facility that is essential to competition in a given market available to competitors so that they may compete in that market. A facility is "essential" only if it is otherwise unavailable and cannot be reasonably or practically replicated. The doctrine does not guarantee competitors access to the essential facility in the most profitable manner.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Evidence > Burdens of Proof > General Overview

HN6[] Sherman Act, Claims

15 U.S.C.S. § 2 of the Sherman Act makes it illegal to monopolize any part of the trade or commerce among the several states. To prevail on a claim under *§ 2*, a plaintiff must prove that the defendant (1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Monopolies & Monopolization, Actual Monopolization

The United States Supreme Court in Verizon stated that as a general matter there is no duty to aid competitors. The Supreme Court articulated three reasons for this general proposition. First, compelling firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Second, enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill-suited. Third, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Although recognizing that under certain circumstances, a refusal to cooperate with rivals can constitute anti-competitive conduct and violate *15 U.S.C.S. § 2* of the Sherman Act, the Supreme Court noted that it has been very cautious in recognizing such exceptions.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Regulated Industries, Communications**

Verizon teaches that the regulatory context is an important consideration in deciding whether to recognize an expansion of the contours of *15 U.S.C.S. § 2* of the Sherman Act. To determine whether a court should expand the contours of *§ 2* liability in a regulated industry, the court must weigh the benefits of antitrust intervention against a realistic assessment of its costs.

Antitrust & Trade Law > Regulated Industries > Communications

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Regulated Industries, Communications**

In Verizon, the United States Supreme Court noted that where a regulatory structure designed to deter and remedy anticompetitive harm exists, the additional benefit to competition provided by antitrust enforcement will tend to be small.

Counsel: James L. Phillips, Miller Nash LLP, Seattle, Washington, for the plaintiffs-appellants.

Thomas L. Boeder, Julia Parsons Clarke and Brent Snyder, Perkins Coie LLP, Seattle, Washington, for the defendant-appellee.

Jonathan M. Askin, Association for Local Telecommunications Services, Washington, D.C., and James E. Hartley, Thomas P. Howard and Thorvald A. Nelson, Holland & Hart LLP, Denver, Colorado, for amicus curiae Association for Local Telecommunications Services.

Judges: Before: James R. Browning, Raymond C. Fisher and Richard C. Tallman, Circuit Judges. Opinion by Judge Fisher.

Opinion by: FISHER

Opinion

[*1126] FISHER, Circuit Judge:

The Supreme Court vacated our prior decision in this antitrust case, *MetroNet Serv's Corp. v. U.S. West Communications, 329 F.3d 986 (9th Cir. 2003)*, and remanded for further consideration in light of its recent decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. *Qwest Corp. v. MetroNet Servs. Corp., 540 U.S. 1147, 157 L. Ed. 2d 1040, 124 S. Ct. 1144 (2004).* **[**2]** Qwest Corp., formerly U.S. West Communications, is the incumbent local exchange carrier ("ILEC") serving the state of Washington. [1] After Qwest offered volume discounts on phone services to businesses with more than 20 phone lines, MetroNet Services Corp. and MetroNet Telemanagement Corp. (collectively "MetroNet") began purchasing those services from Qwest and reselling them to small businesses with 20 or fewer phone lines.

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[1] We refer to Qwest Corp. and its predecessors simply as "Qwest."

MetroNet received the volume discounts by aggregating the phone lines of these small businesses. In 1997, in order to eliminate resale of its services, Qwest changed the pricing structure of its calling features and required that customers have at least 21 lines at each location in order to receive the volume discount.

In 2000, MetroNet filed suit alleging that Qwest violated *Section 2 of the Sherman Act* by illegally maintaining a monopoly over the market for small business local telephone services in the Seattle/Tacoma **[**3]** area, and by denying MetroNet access to an essential facility. [2] After MetroNet and Qwest engaged in settlement discussions, MetroNet moved to enforce a written, unsigned settlement agreement. The district court denied the motion and subsequently granted summary judgment in favor of Qwest on the remaining antitrust claims. In our original decision, we reversed the grant of summary judgment and affirmed the denial of MetroNet's motion to enforce its settlement agreement with Qwest.

In light of *Verizon*, we now affirm summary judgment in favor of Qwest. MetroNet cannot prove an essential facilities claim, because the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *47 U.S.C. § 151 et seq.* ("1996 Act"), provides **[**4]** the means for MetroNet to obtain access to Qwest's local exchange network. In addition, Qwest's change in pricing in order to eliminate arbitrage does not amount to exclusionary conduct under the Supreme Court's refusal to deal precedents as interpreted by *Verizon*. Finally, we decline to expand antitrust liability to encompass MetroNet's claims because of their novel nature, the existence of a regulatory structure designed to deter and **[*1127]** remedy anti-competitive harm and the record of the regulatory agency's attentiveness to the anticompetitive conduct alleged in this antitrust suit.

I. FACTUAL AND PROCEDURAL BACKGROUND

Qwest sells two types of business phone services relevant to this antitrust suit: flat-rate local exchange called "1FB" [3] and "Centrex." Centrex consists of two components: multiple telephone line access that allows a company's employees to make internal calls using a four-digit extension and external calls via the Qwest central office switch (the access component), and calling features such as call forwarding, call waiting and call hold (the features component). [4] Although each component is priced separately, Qwest sells them as one bundled service, requiring **[**5]** customers who buy one component to buy the other as well. [5]

Qwest originally developed Centrex for the large business market as an alternative to private branch exchange ("PBX"), a switch owned by large businesses and located on their property. [6] Qwest initially offered volume discounts to large businesses with more than 20 phone lines. Small businesses with 20 or fewer lines could purchase Centrex without the discount, **[**6]** or purchase 1FB lines from Qwest as well as features for an additional fee. [7]

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[2] MetroNet also asserted a state law cause of action for breach of con-tract and the implied covenant of good faith and fair dealing. This cause of action was dismissed without prejudice by the district court on May 2, 2000 and is not before us.

[3] "F" stands for "flat-rate" and "B" stands for "business." Flat-rate residential service is known as "1FR."

[4] MetroNet stresses that the access component itself consists of two subcomponents: the physical line between the customer and Qwest's switch, called the network access channel ("NAC"), and a device that limits the number of lines that have access, called the network access register ("NAR"). Because our analysis does not depend on this further level of detail, we do not refer to it in the text.

[5] MetroNet has not alleged or argued that Qwest has engaged in illegal tying.

[6] A PBX allows four-digit internal calling and can provide some features. External dialing is done through Qwest's local network using a "trunk line" that connects the customer's PBX to the Qwest network.

[7] It is unclear from the record whether small business customers choosing to purchase 1FB lines could also buy features from providers other than Qwest.

Qwest priced Centrex on a "per system basis," *i.e.* based on the number of phone lines included in the Centrex package, regardless of whether those lines ran to a single location or multiple, separate locations. This "system pricing" scheme allowed resellers to receive the volume discounts by aggregating the telephone lines of several variously located small businesses. As early as 1985, MetroNet and other resellers began purchasing volume discounted Centrex lines from Qwest and reselling them to aggregations of small businesses, each with 20 lines or fewer. MetroNet **[**7]** sold Centrex at a price above what it cost MetroNet to purchase Centrex from Qwest but below what MetroNet's customers would have had to pay for 1FB lines plus features.

By 1991, Qwest had taken note of the significant resale market for Centrex created by the differential pricing of Centrex and 1FB lines. Qwest sought to introduce a new version of Centrex, Centrex Plus, with a pricing structure designed to eliminate or reduce the arbitrage between Centrex and 1FB lines. Under the new "per location pricing" structure, Qwest required customers to have more than 20 lines *at each location* in order to receive a volume discount for the service to that location. Because the resellers' customers have 20 or fewer lines, Qwest's shift to per location pricing eliminated the resellers' ability to obtain the Centrex volume discounts.

The Washington Utilities and Transportation Commission ("WUTC") is authorized **[*1128]** to regulate the rates, services, facilities and practices of telecommunications companies in the state of Washington. *Wash. Rev. Code § 80.01.040(3)*(2004). Qwest filed tariff changes with the WUTC for the new per location pricing structure, which would apply **[**8]** not only to the features component of Centrex, but also to the access component. [8] The WUTC conditionally approved per location pricing of Centrex Plus on November 18, 1993, and finally approved it on November 30, 1994. However, a year and a half later, on April 11, 1996, the WUTC abolished per location pricing and ordered that system pricing be reinstated. Qwest viewed the WUTC order as "exasperating dramatically the existing revenue arbitrage situation" and appealed. The Washington Supreme Court upheld the WUTC order. *U S West Communications, Inc. v. Wash. Utils. & Transp. Comm'n, 134 Wn.2d 74, 949 P.2d 1337, 1364 (Wash. 1998)*.

In December 1996, with system pricing back in place, Qwest concluded that:

> The current Washington tariff structure for Centrex Plus, [1FB], and features offers a profitable, relatively low risk opportunity **[**9]** for Centrex resellers to win significant market share of 1FB customers (mainly small business) in Washington. In essence, it appears that resellers can operate with positive margins while reselling [Centrex] at anywhere from 10 to 35 percent discounts to [1FB lines], not including features.

Qwest estimated that it was losing more than $ 300,000 in revenues per month to MetroNet and other resellers, and that the revenue loss was having a "significantly negative" impact on profitability. In addition to these financial concerns, Qwest was greatly troubled that the loss of its direct relationship with customers due to resale would deprive it of the opportunity to cross-sell additional products and services. Qwest concluded that "no existing or forthcoming product . . . effectively addresses Centrex resale competition," and set about developing strategies to win back market share. On April 18, 1997, Qwest filed a price list with the WUTC reinstating per location pricing for the features component of Centrex. This later imposition of per location pricing is the subject of the present suit.

II. STANDARD OF REVIEW

HN1[↑] We review de novo a district court's grant of summary judgment. **[**10]** *Balint v. Carson City, 180 F.3d 1047, 1050 (9th Cir. 1999)* (en banc). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there exist any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.* We may not weigh the evidence or determine the truth of the matter; rather, we may determine only whether there is a genuine issue for trial. *Id. at 1054*.

III. ESSENTIAL FACILITIES

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[8] To be more precise, the per location pricing scheme applied to the NAC subcomponent of Centrex access, not the NAR subcomponent. *See* note 4 *supra*.

MetroNet claims that Qwest denied resellers like MetroNet access to its local exchange network, an essential facility, by eliminating opportunities for Centrex resale. ***HN2***[] "The 'essential facilities' doctrine imposes on the owner of a facility that cannot reasonably be duplicated and which is essential to competition in a given market a duty to make that facility available to its competitors on a nondiscriminatory basis." *Ferguson v. Greater Pocatello Chamber of Commerce, Inc., 848 F.2d 976, 983 (9th Cir. 1988)*. In order to prevail on its essential facilities claim, MetroNet must prove (1) that Qwest is a monopolist in control of an essential facility, (2) **[*1129]** that **[**11]** MetroNet, as Qwest's competitor, is unable reasonably or practically to duplicate the facility, [9] (3) that Qwest has refused to provide MetroNet access to the facility and (4) that it is feasible for Qwest to provide such access. [10] *See City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992)*.

HN3[] Even though the essential facilities doctrine is followed in this and other circuits, the Supreme Court **[**12]** has "never recognized such a doctrine." *Verizon, 124 S. Ct. at 881*. In *Verizon*, the Court found "no need either to recognize [the doctrine] or to repudiate it" because the Court concluded that the plaintiff could not state a claim under the doctrine. *Id.* The Court reasoned "the indispensable requirement for invoking the doctrine is the unavailability of access to the 'essential facilities'; where access exists, the doctrine serves no purpose." *Id.* Thus, "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." *Id.* (quoting Areeda & Hovenkamp, ***Antitrust Law*** P 773e, at 150 (2003 Supp.)).

The Court's reasoning in *Verizon* compels affirmance of the district court's grant of summary judgment with respect to MetroNet's essential facilities claim. MetroNet cannot establish the first element of its claim, because the 1996 Act provides the WUTC with the effective power to compel Qwest to share its local exchange network with competitors. Specifically, ***HN4***[] under the 1996 Act, a requesting competitive local exchange carrier ("CLEC") can obtain access to an incumbent **[**13]** carrier's network in three ways: "it can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the [ILEC's] network 'on an unbundled basis'; and it can interconnect its own facilities with the [ILEC's] network." *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*; *see 47 U.S.C. § 251(c)(2)-(4)(2004)*. The incumbent carrier can negotiate an agreement with the competitive carrier without regard to the duties it would otherwise have under *§ 251(c)*, but if private negotiations fail, either party can petition the relevant state commission to arbitrate unresolved issues. *See 47 U.S.C. § 252 (2004)*; *AT&T, 525 U.S. at 372-73*. Thus, "the 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." *Verizon, 124 S. Ct. at 881*; *see Covad Communications Co. v. Bellsouth Corp., 374 F.3d 1044, 1050 (11th Cir. 2004)* ("Where a state or federal agency is authorized to compel access to a competitor's infrastructure, as under the [1996 Act], [*Verizon* **[**14]**] states that an essential facilities claim should be denied.").

MetroNet contends that the compelled sharing provisions of the 1996 Act are irrelevant here because they have no effect on MetroNet's resale business. This argument misapprehends the purpose of the essential facilities doctrine. ***HN5***[] The doctrine makes a facility that is essential to competition in a given market available to competitors so that they may compete in that market. A facility is "essential" only if it is "*otherwise unavailable* and cannot **[*1130]** be reasonably or practically replicated." *City of Anaheim, 955 F.2d at 1380* (emphasis added). The doctrine does not guarantee competitors access to the essential facility in the most profitable manner. Even assuming that MetroNet can no longer profitably buy Centrex in the retail market and resell it to small businesses, MetroNet can still obtain access to Qwest's local exchange network through the compelled sharing provisions of the 1996 Act. *See 47 U.S.C. § 251(c)*. Because reasonable access to the essential facility exists -- even if not in a way that is conducive to MetroNet's existing business model -- MetroNet cannot establish an essential facilities **[**15]** claim.

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[9] "The second element is effectively part of the definition of what is an essential facility in the first place. That is to say, if the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all." *City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992)*.

[10] "The fourth element basically raises the familiar question of whether there is a legitimate business justification for the refusal to provide the facility." *City of Anaheim, 955 F.2d at 1380*.

MetroNet also argues that the WUTC has no *effective* power to compel sharing due to the realities of the regulatory scheme. MetroNet relies on testimony by its expert that Qwest has considerable latitude in setting prices because of the WUTC's limited statutory authority, limited resources and other constraints of the regulatory process. Even were we to credit this testimony and find that the WUTC is unable to regulate *prices*, this would not show that the WUTC lacks effective power to compel *sharing*. The WUTC's statutory authority to compel sharing stems from the same 1996 Act provisions that the Court relied upon in *Verizon* to reject the plaintiff's essential facilities argument. *See* *Verizon, 124 S. Ct. at 876*. Moreover, the record shows that Qwest has entered into an interconnection agreement with MetroNet and that other telecommunications carriers have successfully petitioned the WUTC to arbitrate and approve interconnection agreements with Qwest. Thus, we conclude that the WUTC has the effective power to compel sharing under the 1996 Act.

IV. MONOPOLIZATION

We must also consider the impact of *Verizon* on MetroNet's monopolization **[**16]** claim under Section 2 of the Sherman Act. *See* *15 U.S.C. § 2 (2004)* ***HN6***[] (making it illegal to "monopolize . . . any part of the trade or commerce among the several States"). To prevail on this claim, MetroNet must prove that Qwest (1) possessed monopoly power in the relevant market, (2) wilfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury. *See* *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997)*. *Verizon* does not address the meaning of monopoly power or antitrust injury, but does examine the element of exclusionary conduct. [11] *See* *Verizon, 124 S. Ct. at 879*.

[17] [*1131] A. Refusal to deal**

HN7[] The Court in *Verizon* stated that as a general matter "there is no duty to aid competitors." *Id. at 881*. It articulated three reasons for this general proposition. First, "compelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id. at 879*. Second, "enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing -- a role for which they are ill-suited." *Id.* Third, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.*

Although recognizing that "under certain circumstances, a refusal to cooperate with rivals can constitute anti-competitive conduct and violate *§ 2*," the Court noted that it has been "very cautious in recognizing such exceptions." *Id.* The Court concluded that *Verizon* did not fit within the existing exceptions carved out by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985),* **[**18]** or *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*.

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[11] MetroNet argues that *Verizon* has no impact on its case because of the differences in procedural posture. *Verizon* was decided on a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, *see* *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 305 F.3d 89, 95-96 (2d Cir. 2002)*, whereas the district court resolved this case on a motion for summary judgment. MetroNet says that our previous conclusion that it had created triable issues of fact is not disturbed by *Verizon*.

Nonetheless, *Verizon* affected whether Qwest's conduct can be considered anticompetitive as a matter of law. *See* *Verizon, 124 S. Ct. at 879*; *see also* *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996)* ("Whether specific conduct is anti-competitive is a question of law reviewed de novo."). Contrary to MetroNet's contention, the procedural differences, if anything, make it more difficult for Metro-Net's claims to survive summary judgment because the Court's dismissal in *Verizon* implied that the plaintiff could prove no set of facts that would entitle it to relief. *See id.* ("A complaint should not be dismissed [under *Rule 12(b)(6)*] unless it appears beyond doubt that [the] plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Thus, *Verizon* raises the threshold with respect to the facts that MetroNet must plead and prove to establish an antitrust violation.

In *Aspen Skiing*, the defendant owned three of the four mountains in the Aspen, Colorado ski area, and the plaintiff owned the fourth mountain. They had jointly offered for many years a multiple-day, multiple-area ticket that gave skiers admission to all of the mountains (the "joint ticket"). *Aspen Skiing, 472 U.S. at 589-90*. The joint ticket was often cheaper than purchasing multiple single-day tickets. *Id. at 589*. Revenues from the joint ticket were divided between the parties according to the relative percentage that buyers with the joint ticket used each mountain. *Id*. The defendant decided to discontinue the joint ticket by giving the plaintiff "an offer that it could not accept": the defendant would continue participating in the joint ticket only if the plaintiff agreed to receive a fixed percentage of joint ticket revenues that was considerably lower than the historical average based on actual usage of the fourth mountain. *Id. at 592*. After the plaintiff rejected the offer, the defendant sold a joint ticket featuring only **[**19]** its three mountains. *Id. at 593*. The plaintiff attempted to market its own multiple-day, multiple-area package by offering ski passes to the fourth mountain along with vouchers, each equal to the retail price of a single-day ticket to one of the defendant's mountains. *Id. at 593-94*. The defendant refused to accept these vouchers and to sell any lift tickets to the plain-tiff at retail price. The Supreme Court upheld a jury verdict in favor of the plaintiff on its claim that the defendant had monopolized the market for downhill skiing services in Aspen. *Id. at 605*.

In *Verizon*, the Court explained *Aspen Skiing* in this way:

> The Court . . . found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

Verizon, 124 S. Ct. at 879-80 (citations **[**20]** omitted). The Court then distinguished *Verizon* from *Aspen Skiing*. Because there were no allegations that Verizon had "voluntarily engaged in a course of dealing with its rivals, or would ever have done so **[*1132]** absent statutory compulsion," Verizon's prior conduct "shed[] no light upon the motivation of its refusal to deal -- upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice." *Id. at 880*. The Court also observed that "in *Aspen Skiing,* what the defendant refused to provide to its competitor was a product that it already sold at retail," whereas in *Verizon*, "the services allegedly withheld are not otherwise marketed or available to the public." [12] *Id.* Thus, the Court "concluded that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.*; *see also* *Covad, 374 F.3d at 1048*.

[21]** MetroNet attempts to fit the present case into *Aspen Skiing*'s exception to the general "no duty to deal" rule. Although this case is similar in certain respects, it does not fit comfortably in the *Aspen Skiing* mold. The circumstances that *Verizon* found significant for creating antitrust liability are not present here.

The first fact found relevant in *Verizon* was the unilateral termination of a voluntary and profitable course of dealing. *Verizon, 124 S. Ct. at 880*. In the Court's view, this fact "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* Here, although Qwest voluntarily sold Centrex to its customers, including resellers like MetroNet, on a per system price from 1985 to 1991, Qwest attempted to change this prior course of dealing after it realized that the resale of Centrex by MetroNet and others was having a "significantly negative" impact on its own profitability. Hence, Qwest was not forsaking short-term profits by switching from system pricing to per location pricing, but rather was attempting to increase its short-term profits. Qwest's termination of its prior course of dealing therefore **[**22]** "sheds no light" upon whether Qwest was "prompted not by competitive zeal but by anticompetitive malice." *Id.*

The second fact in *Aspen Skiing* to which *Verizon* attached significance was the defendant's refusal to sell tickets to the plaintiff "*even if compensated at retail price*," thus "suggesting a calculation that its future monopoly retail price would be higher." *Id*. Similar to the unilateral termination of a prior profitable course of dealing, the defendant's refusal to sell to the plaintiff at the prevailing retail price, in the Court's view, indicated a willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition. *See Aspen*

[12] The Court also distinguished *Otter Tail* on this basis. *See* *Verizon, 124 S. Ct. at 880*.

Skiing, 472 U.S. at 608. Here, Qwest has been willing to sell and has sold Centrex to Metro-Net at its retail price. However, Qwest has set its retail price in a way that has made it unprofitable for MetroNet to buy and resell Centrex. [13] Thus, Qwest's per location pricing is analogous to the offer that the defendant in *Aspen Skiing* made to the plaintiff -- an offer that the defendant anticipated would not be profitable for the plaintiff to accept. **[**23]** An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal. *Cf.* Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 179-80 (2d Cir. 1990) (holding that even if there is no "outright refusal to deal," a denial of an essential **[*1133]** facility can occur "if the terms of the offer to deal are unreasonable").

Nonetheless, Qwest's choice to switch to per location pricing does not have the same economic significance as the defendant's refusal to sell to the plaintiff at the retail price in Aspen Skiing. Qwest's switch to per location pricing does not entail a sacrifice of short-term benefits. Rather, it enables Qwest to maintain a price discrimination structure established before resellers entered the market for local **[**24]** telephone services. [14] Because Qwest voluntarily implemented the volume discount pricing structure before Centrex resale began to undercut its sales to small businesses, that pricing structure was presumably maximizing Qwest's profits. Therefore, by price discriminating through per location pricing, Qwest has not set its retail price at an unprofitable level in the short run merely to exclude competition in the long run.

[25]** The third fact the Court emphasized in *Verizon* was that the defendants in *Aspen Skiing* and *Otter Tail* refused to provide to their competitors products that were already sold in a retail market to other customers. Verizon, 124 S. Ct. at 880. The importance of this fact relates to the Court's concern about the administrability of a judicial remedy. One of the reasons for a general "no duty to deal" rule is that enforced sharing "re-quires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing -- a role for which they are ill-suited." Id. at 879. If the defendant already sells the product in an existing market to certain customers but merely refuses to sell to its competitors, the court can impose a judicial remedy that does not require the court to "assume the day-to-day controls characteristic of a regulatory agency." Id. at 883 (quoting Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)). The court can simply order the defendant to deal with its competitors on the same terms that it already deals with others in the **[**26]** existing retail market, without setting the terms of dealing. In contrast, if the defendant does not already provide the product in an existing market or otherwise make it available to the public, the court will have to delineate the defendant's sharing obligations, and "an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations." *Id*.

In this case, Centrex is a service already sold in a retail market. Qwest, however, has not refused to sell this retail service to MetroNet, but has sold it to MetroNet on the same terms that it sells to direct consumers. [15] Like direct consumers, MetroNet must have more than 20 lines at the same location in order to receive a volume discount on Centrex features. Thus, MetroNet is essentially asking this court to "identify[] the proper price" that Qwest should charge in the retail market -- a role **[*1134]** the Supreme Court has deemed courts ill suited to perform. Id. at 879.

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[13] The record contains conflicting evidence about MetroNet's profitability after Qwest implemented per location pricing in 1997, but we take the facts in the light most favorable to MetroNet as we must on summary judgment.

[14] Price discrimination describes the practice of charging different prices to different customers for essentially the same product or service. More technically, price discrimination occurs when a firm sells to different groups of customers at differing ratios of price to marginal cost. *See* 3 Areeda & Hovenkamp, ***Antitrust Law*** P 721b, at 262 (2d ed. 2002). It appears that Qwest is able to price discriminate among consumers because small businesses have a lower elasticity of demand than large businesses. In other words, large businesses are more sensitive to changes in price due to the availability of substitutes to Centrex, namely PBXs. Small businesses are willing to pay a higher price for Centrex because fewer substitutes for Centrex are available to them.

[15] Qwest discriminates in price among different types of direct consumers (small businesses versus large businesses) but does not discriminate between competitors and direct consumers.

[27]** In sum, *MetroNet* does not fall within the *Aspen Skiing* exception to the general "no duty to deal" rule, because Qwest's switch to per location pricing does not entail a sacrifice of short-term profits for long-term gain from the exclusion of competition and because Qwest has not refused to deal with MetroNet on the same terms that it deals with direct consumers. Therefore, MetroNet does not have an actionable antitrust claim under the Supreme Court's existing refusal to deal precedents as explained and limited by *Verizon*.

B. Elimination of arbitrage

In our previous decision, we did not rely on the existing refusal to deal doctrine to conclude that Qwest could be liable under the Sherman Act for monopolization. *MetroNet, 329 F.3d at 1006-08*. Instead, analogizing to cases which had condemned collaborative efforts to eliminate discounters, we extended antitrust liability to Qwest's unilateral attempt to eliminate discount resellers like MetroNet. *Id. at 1007*. ***HN8***[] *Verizon* teaches, however, that the regulatory context is an important consideration in "deciding whether to recognize an expansion of the contours of *§ 2*." *Verizon, 124 S. Ct. at 881.* **[**28]** [16] To determine whether we should expand the contours of *Section 2* liability in a regulated industry, we must weigh the "benefits of antitrust intervention" against "a realistic assessment of its costs." *Id. at 882*.

With regard to the benefits of antitrust intervention, we recognize that imposing antitrust liability on sellers who unilaterally attempt to eliminate resellers can deter attempts to eliminate arbitrage that is beneficial to consumer welfare. A reseller can engage in arbitrage when a seller price discriminates among its consumers. In particular, if a seller charges a higher price to some consumers (the "disfavored consumers") and a lower price to others (the "favored consumers"), a reseller can take advantage of this price differential by buying **[**29]** the product or service at the lower price intended for the favored consumers and reselling it to the disfavored consumers at a price below the price the seller charges the disfavored consumers. *See* 3 Areeda & Hovenkamp, ***Antitrust Law*** P 721b, at 263 (2d ed. 2002).

Prohibiting sellers from eliminating arbitrage thus can enhance consumer welfare under certain conditions. For instance, if the seller's increase in profits from a greater number of sales due to the discounted price outweighs the loss in profits from the decrease in sales at the higher price due to customers switching to the reseller, the seller would find it profitable to continue to offer the product or service at a discounted price despite the presence of arbitrage and an inability to eliminate it. Consequently, favored consumers would still be able to purchase the product or service at the lower discounted price from the seller. In addition, some disfavored consumers who were willing to pay the seller's higher price could buy the product or service at a lower price from the reseller, and other disfavored consumers who were unwilling to pay the seller's higher price might be willing to buy the product at the reseller's **[**30]** lower price. Under these conditions, deterring the seller from eliminating arbitrage would increase consumer welfare and allocative efficiency.

HN9[] In *Verizon*, however, the Supreme Court noted that where "a regulatory structure designed to deter and remedy anticompetitive harm . . . exists, the additional **[*1135]** benefit to competition provided by antitrust enforcement will tend to be small." *124 S. Ct. at 881*. Such a regulatory structure exists in this case. Under the Washington regulatory scheme, Qwest must file tariff schedules with the WUTC regarding its rates, which must be "fair, just, reasonable and sufficient," and may not change its filed tariff rates unless it gives 30 days notice to the WUTC and the public. *Wash. Rev. Code §§ 80.36.080*, *.100*, *.110(1)(a)*. The WUTC can suspend proposed changes within this 30-day period or before they are due to go into effect, whichever is later. *Id. § 80.36.110(1)(a)*. In addition, the WUTC may on its own initiative or upon complaint hold a hearing to determine whether the rates being charged are "unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of law. **[**31]** " *Id. §§ 34.05.413*, *80.36.140*. If the WUTC finds in the affirmative, it "shall determine the just and reasonable rates" and fix such rates by order. *Id. § 80.36.140*.

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[16] The Supreme Court recognized, however, that the regulatory scheme created by the 1996 Act does not shield regulated entities from antitrust scrutiny altogether under the doctrine of implied immunity. *Verizon, 124 S. Ct. at 878*.

The WUTC may classify a telecommunications service as competitive if it is subject to "effective competition," which "means that customers of the service have reasonably avail-able alternatives and that the service is not provided to a significant captive customer base." *Id.* *§ 80.36.330(1). The WUTC* may require a competitive service to be provided under a price list, and 10 days notice must be given to the WUTC and customers for changes to rates filed in a price list. *Id.* *§ 80.36.110(1)(b)*, *.330(2)*. Moreover, the WUTC "may investigate prices for competitive telecommunications services upon complaint," in which case Qwest would have to prove that the prices charged are "fair, just, and reasonable." *Id.* *§ 80.36.330(4). The WUTC* may also "reclassify any competitive telecommunications service if reclassification would protect the public interest." *Id.* *§ 80.36.330(7)*.

In addition to the regulatory structure that exists, the record shows that the WUTC has been attentive to Qwest's attempts to eliminate **[**32]** Centrex resale and to price discriminate through per location pricing. The WUTC classified Centrex features as a competitive service in 1987 after hearing testimony from Dr. Nina Cornell, MetroNet's expert in this case, that Qwest's ability to price discriminate prevented effective competition. The WUTC nevertheless concluded that Centrex features were subject to effective competition. In 1992, after Qwest filed a price list revision to implement per location pricing for Centrex, the WUTC on its own initiative issued a complaint and instituted an investigation into whether Centrex features should be reclassified as noncompetitive. After conducting several days of hearings, the WUTC found that reclassifying Centrex features as noncompetitive would not protect the public interest. In 1995, the WUTC suspended Qwest's tariff revisions and ordered Qwest to refile tariffs for Centrex with-out the per location requirement, which Qwest did. When Qwest filed a price list in 1997 re-implementing per location pricing for Centrex *features*, the WUTC held an open meeting during which MetroNet urged the WUTC to reject the price list, arguing that the per location pricing was designed to eliminate **[**33]** resellers and was thus inconsistent with the WUTC's prior orders. [17] Despite this testimony, the WUTC accepted its staff's recommendation to allow the price list to go into effect without taking any action.

[*1136] In sum, the record demonstrates that the WUTC has been attentive to Qwest's attempts to eliminate resale through per location pricing and has taken corrective action when it found Qwest's conduct to be in violation of the regulatory framework. Thus, the additional benefits of antitrust intervention would tend to be small given the existence of a regulatory structure designed to deter and remedy anticompetitive harm and the record of the WUTC's attentiveness to the alleged anticompetitive conduct. *See* *Verizon, 124 S. Ct. at 881-82*; Areeda & Hovenkamp, ***Antitrust*** **[**34]** ***Law*** P 242, at 39 (2004 Supp.).

On the other side of the scale, the costs from antitrust intervention might be significant. Prohibiting a seller from eliminating arbitrage can diminish consumer welfare and allocative efficiency in the long run under some circumstances. For instance, a seller may charge different prices to favored and disfavored consumers in order to recover the common costs of serving both sets of consumers. *See* Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants are not Predatory -- and the Implications for Defining Costs and Market Power*, *112 Yale L.J. 681, 732-33 (2003)*. If the seller cannot eliminate arbitrage, its sales to the disfavored (and higher-paying) consumers might be significantly -- if not completely -- undercut by the reseller to the extent that the seller can no longer recoup its common costs. As a result, the seller might choose not to incur common costs that are necessary for the development of economically beneficial facilities.

Alternatively, the seller might choose not to offer a discounted price in the first place and instead charge a uniform price to all consumers. If the uniform price it would set is as high **[**35]** as the price the seller would have charged the disfavored consumers if price discrimination could be maintained, consumer welfare would diminish. All consumers, including those who otherwise would have been favored if price discrimination were sustainable, would have to pay the high uniform price, and some potential consumers who are not willing to pay the high uniform price but would have been willing to pay a lower price that is above the marginal cost to provide the service or product would forgo it. *See* 3 Areeda & Hovenkamp, ***Antitrust Law*** P 721d1, at 266-68 (2d ed. 2002). Hence, consumer welfare would diminish, and allocative efficiency would be distorted.

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[17] There is no evidence in the record, however, that MetroNet filed a petition to reclassify Centrex features as a noncompetitive service or a complaint that per location pricing for Centrex features was unfair, unjust or unreasonable.

Although courts ideally would not impose antitrust liability on a seller for eliminating arbitrage under such circumstances, a mistaken inference by a factfinder in an antitrust suit could result in the false condemnation of an attempt to preserve a price discrimination scheme that increases consumer welfare or allocative efficiency. The Court observed in *Verizon* that "mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to **[**36]** protect." *Verizon, 124 S. Ct. at 882* (internal quotation marks omitted). Here, a false condemnation could hurt the very interest the antitrust laws seek to protect -- consumer welfare. *See* *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* ("Congress designed the Sherman Act as a 'consumer welfare prescription.' ") (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)); *accord* *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. Moreover, the risk of false condemnations and the resulting imposition of treble damages in private suits may be enough to deter sellers from attempting to eliminate arbitrage that is not beneficial to consumer welfare or from engaging in socially desirable price discrimination in the first place. Thus, **[*1137]** "the cost of false positives counsels against an undue expansion of *§ 2* liability." *Verizon, 124 S. Ct. at 882*.

We recognize that a unilateral attempt by a seller to eliminate arbitrage can result in anticompetitive harm. If "there [were] nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust **[**37]** [would be] worth its sometimes considerable disadvantages." *Id. at 881* (internal citation and quotation marks omitted). Even in the presence of such a regulatory scheme, a plaintiff may be able to pursue an antitrust claim based on existing antitrust standards. *See* *Covad, 374 F.3d at 1052* (reversing the dismissal of a price squeeze claim after *Verizon*). However, given the novel nature of MetroNet's claims, the regulatory structure that exists and the record of agency action in this case -- and guided by *Verizon* -- we decline to expand the scope of *Section 2* liability to Qwest's attempts to eliminate arbitrage by MetroNet.

V. CONCLUSION

We affirm the district court's grant of summary judgment on MetroNet's essential facilities and monopolization claims. We also affirm the denial of MetroNet's motion to enforce its purported settlement agreement with Qwest for the reasons stated in our previous opinion. *See* *MetroNet, 329 F.3d at 1013-15*. In all other respects, our prior opinion is superseded by our opinion today. Each party shall bear its own costs.

AFFIRMED.

Applera Corp. v. MJ Research, Inc.

United States District Court for the District of Connecticut

September 29, 2004, Decided

3:98cv1201 (JBA)

Reporter

2004 U.S. Dist. LEXIS 21100 *; 2004-2 Trade Cas. (CCH) P74,598

Applera Corporation and Roche Molecular Systems, Inc., plaintiffs, v. MJ Research Inc. and Michael and John Finney, defendants.

Prior History: Applera Corp. v. MJ Research, Inc., 2004 U.S. Dist. LEXIS 1072 (D. Conn., Jan. 28, 2004)

Core Terms

thermal, cycler, end user, authorization, tied product, rights, automated, Salt, tie, machine, patents, reconsideration, suppliers, license, buy, motion in limine, process patent, tying product, plaintiffs', argues

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN1[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The standard for addressing an antitrust claim based on an invalid tying arrangement is well established and is not disputed. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into a purchase of a tied product that the buyer either did not want, or might have preferred to purchase elsewhere on different terms. To prevail on a tying claim, a plaintiff must establish that (1) the tying and the tied products are separate and distinct products; (2) the seller has forced purchasers of the tying product to buy the tied product also; and (3) the tie forecloses a substantial volume of commerce in the market for the tied product.

Counsel: For Roche Molecular Systems, Inc., Plaintiff: Aimee Jennifer Wood, LEAD ATTORNEY, Pullman & Comley, Bridgeport, CT; Asim Varma, Jean C. Kalicki, Michael J. Klyce, Jr., LEAD ATTORNEYS, Arnold & Porter, Washington, DC; James Sicilian, Jennifer K. Lawson, LEAD ATTORNEYS, Day, Berry & Howard-Htfd-CT, Hartford, CT.

For Applera Corp, Plaintiff: Aimee Jennifer Wood, LEAD ATTORNEY, Pullman & Comley, Bridgeport, CT; David J. Lender, LEAD ATTORNEY, David Greenbaum, Weil, Gotshal & Manges - NY, New York, NY; John Josef Molenda, Patrick J. Hoeffner, Sharon Yang, LEAD ATTORNEYS, Rita Lynn Berardino, Orrick, Herrington & Sutcliffe, New York, NY; Paul Ehrlich, Weil, Gotshal & Manges - CA, Redwood Shores, CA.

For MJ Research, Inc, Defendant: Albert L. Jacobs, Jr., Gerard F. Diebner, Joseph M. Manak, LEAD ATTORNEYS, Greenberg Traurig, New York, NY; C. Allen Foster, David S Panzer, Kevin E. Stern, Timothy C. Bass, LEAD ATTORNEYS, Greenberg Traurig, LLP, Washington, DC; Christine Cora True-Frost, David A. Hoffman, John E.

Beerbower, LEAD ATTORNEYS, Cravath, Swaine & Moore, New York, NY; Daniel A. Ladow, LEAD ATTORNEY, Graham & James, New York, NY; Donna Nelson Heller, Harold Bolton Finn, III, Meghan A. Laganza, Patrick J. McHugh, LEAD ATTORNEYS, Finn Dixon & Herling, Stamford, CT; Joseph B. Darby, III, LEAD ATTORNEY, Greenberg & Traurig, Boston, MA.

For Michael Finney, John Finney, Defendants: Gerard F. Diebner, Joseph M. Manak, LEAD ATTORNEYS, Greenberg Traurig, New York, NY; C. Allen Foster, David S Panzer, Kevin E. Stern, Timothy C. Bass, LEAD ATTORNEYS, Greenberg Traurig, LLP, Washington, DC; Christine Cora True-Frost, David A. Hoffman, LEAD ATTORNEYS, John E. Beerbower, Cravath, Swaine & Moore, New York, NY; Daniel A. Ladow, LEAD ATTORNEY, Graham & James, New York, NY; Donna Nelson Heller, Meghan A. Laganza, LEAD ATTORNEY, Patrick J. McHugh, LEAD ATTORNEY, Finn Dixon & Herling, Stamford, CT.

For MJ Research, Inc, Counter Claimant: Daniel A. Ladow, LEAD ATTORNEY, Graham & James, New York, NY; Patrick J. McHugh, LEAD ATTORNEY, Finn Dixon & Herling, Stamford, CT.

Judges: [*1] Janet Bond Arterton, United States District Judge

Opinion by: Janet Bond Arterton

Opinion

Ruling on Motion of MJ Research, Inc. and Michael and John Finney For Reconsideration of the Court's Order Precluding MJ's Evidence and Arguments Claiming that PCR Rights are Tied to Authorized Thermal Cyclers [Doc. # 897]

On January 28, 2004, this Court granted plaintiffs' motion in limine to exclude MJ's evidence and arguments claiming PCR rights are tied to authorized thermal cyclers. Defendants now move for reconsideration. The motion is granted, and for the reasons discussed below, the Court declines upon reconsideration to change the substance of its earlier decision.

HN1[] The standard for addressing an antitrust claim based on an invalid tying arrangement is well established and is not disputed. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into a purchase of a tied product that the buyer either did not want, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)*. To prevail on **[*2]** a tying claim, MJ must establish that (1) the tying and the tied products are separate and distinct products; (2) the seller has forced purchasers of the tying product to also buy the tied product; and (3) the tie forecloses a substantial volume of commerce in the market for the tied product. *See id. at 11-16*.

This Court's January 28, 2004 decision concluded that plaintiffs did not unlawfully tie the rights to practice PCR to the purchase of thermal cyclers, and based its holding on three separate grounds. First, the Court found that to the extent the parties defined the "tying product" as the PCR process patent right, and the "tied product" as an "authorized" thermal cycler, then there were not two separate products, because "the PCR process patent right (the tying product) is the same as the "authorization" on the thermal cycler (the tied product). There can be no demand for an 'authorized' thermal cycler separate and distinct from the demand for a PCR process patent right." *See* Ruling on Motion in Limine [Doc. # 874] at 8. The Court found that MJ defined the tied product as an authorized thermal cycler based in part on counsel's unambiguous assertion that **[*3]** "the illegal tie underlying plaintiffs' anti-competitive licensing scheme is the requirement that in order to have the rights to the PCR process patents (the 'tying' product) an end user must use an 'authorized' thermal cycler (the 'tied' product)." Memorandum of MJ Research, Inc. In Opposition to Plaintiffs' Five Motions to Exclude Evidence and Arguments Relating to MJ's Antitrust Counterclaims and Patent Misuse Defense [Doc. # 682] at 15 n.17. In addition, the Court noted that MJ's argument about the coercive effect of the alleged tying scheme relied on the "authorization" aspect of the thermal cycler market. The Court acknowledged, however, that MJ appeared to inconsistently define the tied product, and had at various points defined the tied product as a thermal cycler in general, not simply an "authorized" thermal cycler. Thus, as an alternative holding, the Court assumed two separate products existed, and examined the coercive effect of the tying arrangement.

To establish coercion, there must be evidence that end users were forced to purchase thermal cyclers that they "did not want at all, or might have preferred to purchase elsewhere on different terms," *Jefferson Parish, 466 U.S. at 12,* **[*4]** in order to obtain the right to the PCR process patents. The Court found that end users were not required to purchase an authorized thermal cycler, or any thermal cycler, because they could purchase PCR patent rights through Applera's End User Authorization Program ("EAP"). The Court found the EAP to be a "viable" program that operated independently from the sale of thermal cyclers. The Court rejected defendants' arguments that the EAP itself was an illegal tie, because the EAP did not require end users to buy thermal cyclers, and because the use of a thermal cycler to perform PCR was patented, so that it was not improper to require end users to obtain authorization for this purpose.

The Court acknowledged, however, MJ's argument that the EAP was a sham, because Applera pressured thermal cycler suppliers to join the Supplier Authorization program ("SAP"), and if all suppliers joined the SAP, then the EAP would not be used. As a result, the Court assumed that the SAP was the only authorization program available, and in a second alternative holding, concluded that the SAP did not have a coercive effect, and was not an unlawful tie. In particular, the Court noted that because automated **[*5]** PCR requires the use of a thermal cycler, then "any end user who wished to perform automated PCR would, by necessity, have to obtain a thermal cycler of some kind. The SAP does not restrict the choices of the end user, because it does not determine which thermal cycler machines are available on the market, nor does it require end users to purchase a particular thermal cycler machine." *See* Ruling on Motion in Limine [Doc. # 874] at 8. The Court acknowledged that in a scenario in which all suppliers join the SAP, those purchasers who do not use thermal cyclers to perform PCR may be forced to pay for a PCR process authorization that they do not want or need, but concluded that such a result is not a tie, not least because the PCR process patents gave the plaintiffs a lawfully monopoly on PCR rights.

In its motion for reconsideration, defendants argue that the Court's first holding "misinterprets MJ's claim," the second "overlooks a significant factual dispute," and the third "misreads the law." Defendant's Memorandum of Law [Doc. # 898] at 3. The Court disagrees. While MJ now argues that the tied product is the generic thermal cycler, not an "authorized" thermal cycler, the **[*6]** force of its argument that Applera's authorization program has a coercive and anti-competitive effect continues to stem from the "authorization" aspect of the thermal cycler market. MJ references *Int'l Salt Co. v. United States, 332 U.S. 392, 395-96, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*, in which the Supreme Court found an illegal tie where International Salt required customers to use only salt sold by International Salt in the machines bought from International Salt. MJ argues that even though "International Salt forbids customers from using its machines unless they also acquire salt sold by International Salt (i.e. 'authorized salt')," the machine and the "authorized" salt were still deemed separate products. *See* Defendants' Memorandum of Law [Doc. # 898] at 4. Defendants lose sight of the nature of the process patent at issue this case. Automated PCR requires the use of a thermal cycler, and authorization of a thermal cycler provides the right to perform automated PCR. Thus, the demand for an "authorized" thermal cycler is exactly the same as the demand for automated PCR process rights. And as discussed in this Court's earlier ruling, those end users who wish to perform automated **[*7]** PCR are not forced to buy a product (a thermal cycler) that they do not want or need, because thermal cyclers are required to perform automated PCR.

MJ also argues that the Court's conclusion that the EAP was a viable way for end users to obtain a license to perform PCR impermissibly resolved a genuine dispute of material fact in plaintiffs' favor. MJ asserts, for example, that the authorization fee for the EAP was too high relative to the SAP to make it an economical choice for end users, that Applera refused to allow MJ to buy end user licenses and resell them to end users buying MJ thermal cyclers, and that Applera refused to allow MJ to distribute to its customers EAP forms so as to facilitate end user participation. MJ estimates that only one half of one percent of the thermal cyclers sold were licensed through the EAP. The Court agrees, therefore, that its statement that a "substantial number of EAP agreements have been reached," Ruling on Motion in Limine [Doc. # 874] at 10, was improperly conclusory. Nonetheless, the factual disputes about the extent to which end users participated in the EAP do not disturb the undisputed facts that were central to this Court's finding of **[*8]** viability; namely that the EAP existed as a program, and that there were identifiable end users who purchased licenses through the EAP.

More importantly, however, the Court's earlier ruling acknowledged that the viability of the EAP was subject to change, particularly if all suppliers were pressured by Applera into joining the SAP. Thus, the Court considered the scenario in which the SAP remained the only authorization program available. MJ now argues that the Court's holding as to the exclusive SAP scenario misstated the law, in that *Jefferson Parish* prohibits any coercion of the buyer to purchase a product that the buyer "might have preferred to purchase elsewhere on different terms." *Jefferson Parish, 466 U.S. at 12*. MJ argues that "if all suppliers of thermal cyclers are SAP participants, then the prices of all thermal cyclers will be increased because plaintiffs extract an 'authorization fee' for each and every sale of a machine, regardless of whether the machine is actually ever used to perform 'automated PCR' in PE/Applera's fields." Defendants' Memorandum of Law [Doc. # 898] at 7. That authorization fee, however, is the license for performing automated **[*9]** PCR, which is the same product as the PCR process patent right. To the extent that defendants argue that purchasers of thermal cyclers may be forced to buy unwanted PCR rights, such a result is not a tie. As this Court's January 28, 2004 decision concluded, the "PCR Process Patents give the plaintiffs a lawful monopoly on PCR rights and thus, as a matter of law, plaintiffs cannot be found to 'unlawfully restrain free competition in the market for the tied product. . . .'" Ruling on Motion in Limine [Doc. # 874] at 13 (quoting *Coniglio v. Highwood Servs., Inc., 495 F.2d 1286, 1291 (2d Cir. 1974)*.

For the foregoing reasons, the Motion of MJ Research, Inc. and Michael and John Finney For Reconsideration of the Court's Order Precluding MJ's Evidence and Arguments Claiming that PCR Rights are Tied to Authorized Thermal Cyclers [Doc. # 897] is granted, and upon reconsideration, the Court declines to amend its January 28, 2004 decision granting plaintiffs' Motion to Exclude MJ's Evidence and Arguments Claiming PCR Rights are Tied to Authorized Thermal Cyclers [Doc. # 667 (2)].

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, [*10] this 29th day of September, 2004.

End of Document

Nelson v. Pilkington PLC (In re Flat Glass Antitrust Litig.)

United States Court of Appeals for the Third Circuit

June 22, 2004, Argued ; September 29, 2004, Filed

No. 03-2920

Reporter

385 F.3d 350 *; 2004 U.S. App. LEXIS 20504 **; 2004-2 Trade Cas. (CCH) P74,554; 65 Fed. R. Evid. Serv. (Callaghan) 530

IN RE FLAT GLASS ANTITRUST LITIGATION (MDL No. 1200); BRIAN S. NELSON, d/b/a Jamestown Glass Service; MEL'S AUTO GLASS, INC.; A. WAXMAN & CO., on behalf of itself, and all others similarly situated; DESIGNER WINDOWS, INC., on behalf of itself and all others similarly situated; MOSES MOORE ALL GLASS ASPECTS, INC., on behalf of itself and all others similarly situated; AAA GLASS, INC., on behalf of itself and all others similarly situated, d/b/a The Glass Doctor; THE LURIE COMPANIES, INC.; VSTB ENTERPRISES, INC., d/b/a Perfecto Auto Glass & Upholstery and its successors; PORT CITY GLASS & MIRROR, INC., on its own behalf and on behalf of all others similarly situated; JOHN HEALY, JR.; COUNTY AUTO GLASS, INC., on behalf of themselves and all others similarly situated; GERARD J. CLABBERS, on behalf of himself and all others similarly situated; KIRSCHNER CORPORATION, INC., t/a Berwyn Glass Company, on behalf of itself and all others similarly situated; HARTUNG AGALITE GLASS CO., d/b/a Hartung Glass Industries; ALL STAR GLASS, INC., on behalf of itself and all others similarly situated; SUPERIOR WINDSHIELD INSTALLATION, INC., on behalf of itself and all others similarly situated; JOVI, INC., on behalf of itself and all others similarly situated, t/a Easton Area Glass; ENGINEERED GLASS WALLS, INC., on behalf of itself and all others similarly situated; BAILES GLASS CO.; INTERSTATE GLASS DISTRIBUTORS, INC., on behalf of itself and all others similarly situated; ORLANDO AUTO TOP, INC.; MAYFLOWER SALES CO., INC., on behalf of itself and all others similarly situated; CARDINAL IG; REED'S BODY SHOP, INC.; BELETZ BROTHERS GLASS COMPANY, INC.; COMPLAST, INC.; WESTERN STATES GLASS, on behalf of itself and all others similarly situated; GRIMES AUTO GLASS, INC.; D&S GLASS SERVICES, INC.; GEORGE BROWN & SON GLASS WORKS, INC.; THERMAL CHEK, INC.; MOBILE GLASS, INC., individually and as a representative of a class; JELD-WEN, INC., an Oregon Corporation; JELD-WEN CANADA LIMITED, a Canadian corporation; JELD-WEN ARIZONA, INC., an Arizona corporation; AVANTI INDUSTRIES, INC., an Arizona corporation; LAKEWOOD CITY GLASS, INC.; CAROLINA MIRROR; ALLSTATE INSURANCE COMPANY; ALLSTATE INDEMNITY COMPANY v. PILKINGTON PLC; PILKINGTON LIBBEY-OWENS-FORD CO., INC.; AFG INDUSTRIES, INC.; GUARDIAN INDUSTRIES CORPORATION; PPG INDUSTRIES, INC.; LIBBEY-OWENS-FORD CO., INC.; ASAHI GLASS CO., LTD.; FORD MOTOR CO.; PILKINGTON HOLDINGS; ASAHI GLASS AMERICA, INC.; UNITED STATES OF AMERICA (Intervenor in D.C.) (D.C. No. 97-mc-00550), Class Plaintiffs and Grimes Auto Glass, Appellants

Subsequent History: Rehearing denied by *Nelson v. Pilkington PLC (In re Flat Glass Antitrust Litig.), 115 Fed. Appx. 570, 2004 U.S. App. LEXIS 22776 (2004)*

Application denied by *PPG Indus. v. Nelson, 160 L. Ed. 2d 596, 125 S. Ct. 819, 2004 U.S. LEXIS 8179 (U.S., 2004)*

US Supreme Court certiorari denied by *PPG Indus. v. Nelson, 2005 U.S. LEXIS 2800 (U.S., Mar. 28, 2005)*

Prior History: [1]** On Appeal from the United States District Court for the Western District of Pennsylvania. (Dist. Court No. 97-mc-00550). District Judges: Hon. Donetta W. Ambrose and Hon. Donald E. Ziegler.

Nelson v. Pilkington PLC (In re Flat Glass Antitrust Litig.), 288 F.3d 83, 2002 U.S. App. LEXIS 7650 (3d Cir. Pa., 2002)

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

glass, prices, increased price, flat, competitors, replacement, automotive, announced, district court, conspiracy, producers, summary judgment, firms, truckload, products, plaintiffs', fabricated, manufacturers, antitrust, price fixing, list price, circumstances, conspired, fix prices, interdependence, coconspirator, price-fixing, effective, factors, collusion

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

An appellate court exercises plenary review over a district court's grant of summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

HN2[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. Despite its broad language, *§ 1* only prohibits contracts, combinations, or conspiracies that unreasonably restrain trade. Certain restraints of trade are per se unreasonable, while others require more searching analysis under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Restraints of trade are per se unreasonable when they are manifestly anticompetitive or would always or almost always tend to restrict competition. Because of their pernicious effect on competition and lack of any redeeming virtue, these restraints of trade are conclusively presumed to unreasonably restrain competition without elaborate inquiry as to the precise harm it has caused or the business excuse for its use.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN4[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Horizontal price-fixing occurs where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] **Cartels & Horizontal Restraints, Price Fixing**

Horizontal restraints of trade are per se unreasonable. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. Such restraints are all banned because of their actual or potential threat to the central nervous system of the economy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN6[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Plaintiffs alleging horizontal restraints of trade need only prove that the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7[] **Antitrust & Trade Law, Sherman Act**

The existence of an agreement is the very essence of a claim under *15 U.S.C.S. § 1*. The Sherman Act is interpreted to require some form of concerted action. There must be a unity of purpose or a common design and understanding or a meeting of minds, or a conscious commitment to a common scheme.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN8[] **Summary Judgment, Opposing Materials**

When faced with whether a plaintiff has offered son a *15 U.S.C.S. § 1* claim, a court must generally apply the same summary judgment standards that apply in other contexts. A court shall render summary judgment when the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed R. Civ. P. 56(c)*. In making this determination, a court must view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment. The court should not tightly compartmentalize the evidence put forward by the nonmoving party, but instead should analyze it as a whole to see if it supports an inference of concerted action.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN9[] **Summary Judgment, Opposing Materials**

Antitrust law limits the range of permissible inferences from ambiguous evidence in a case brought under *15 U.S.C.S. § 1*. In other words, certain inferences may not be drawn from circumstantial evidence in an antitrust case. That higher threshold is imposed in antitrust cases to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition. The evidentiary limitation does not apply where the plaintiff provides direct evidence of a conspiracy, no inferences are required from direct evidence to establish a fact and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Courts are cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists. The basis for this circumspect approach is the theory of interdependence.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN11[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The theory of interdependence posits the following: In a market with many firms, the effects of any single firm's price and output decisions would be so diffused among its numerous competitors that they would not be aware of any change. In a highly concentrated market dominated by few firms, however, any single firm's price and output decisions will have a noticeable impact on the market and on its rivals. Thus when a firm in a concentrated market, that is, an "oligopolist" is deciding on a course of action, any rational decision must take into account the anticipated reaction of the other firms.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN12[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Under the theory of interdependence, is that firms in a concentrated market may maintain their prices at supracompetitive levels, or raise them to those levels, without engaging in any overt concerted action.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not proscribe noncompetitive "conscious parallelism."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN14[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Conscious parallelism is described as the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN15[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

To establish illegal concerted action based on consciously parallel behavior, a plaintiff must show (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decisionmaking process; and (3) certain "plus" factors. Courts have identified at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. In other words, it is evidence that the structure of the market was such as to make secret price fixing feasible. Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. In a competitive industry, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs. In analyzing this factor, a court looks to evidence that the market behaved in a noncompetitive manner.

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

The most important evidence of a plus factor as evidence of a price fixing conspiracy is generally noneconomic evidence that there was an actual, manifest agreement not to compete. That evidence may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN18[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

An agreement to fix prices is a per se violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, even if most or for that matter all transactions occurred at lower prices.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Privileges > Self-Incrimination Privilege > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

HN19[] **Abuse of Discretion, Evidence**

An appellate court reviews a district court's determination to not compel a witness to testify for an abuse of discretion.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Evidence > Privileges > Self-Incrimination Privilege > General Overview

HN20[] **Miranda Rights, Self-Incrimination Privilege**

As a general matter, a court should allow a witness to invoke his *Fifth Amendment* privilege only if the hazard of incrimination is substantial and real, and not merely trifling or imaginary. However, the trial judge should order the witness to answer questions only if it is perfectly clear, from a careful consideration of all the circumstances in the case that the answer cannot possibly tend to incriminate the witness.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Governments > Legislation > Statute of Limitations > General Overview

HN21[] **Miranda Rights, Self-Incrimination Privilege**

A promise by the government not to use the testimony to be compelled, even if approved by a court, does not strip the recipient of the protection of that privilege.

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Self-Incrimination Privilege

Governments > Legislation > Statute of Limitations > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

HN22[] **Miranda Rights, Self-Incrimination Privilege**

If a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to testify.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > ... > Statements as Evidence > Hearsay > Hearsay Within Hearsay

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

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN23[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's decisions to admit or exclude evidence for abuse of discretion, although its review is plenary as to the interpretation or application of a legal standard underlying such a decision.

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Hearsay > Exceptions > Statements Against Interest

HN24[] **Rule Components, Statements**

A hearsay statement is nonetheless admissible if (1) the declarant is unavailable as a witness; (2) the statement is so contrary to his pecuniary, proprietary or penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true; (3) the trustworthiness and reliability of the statement is corroborated by the totality of circumstances in the case Fed. R. Evid. 804(b)(3); and (4) the declarant had personal knowledge.

Evidence > ... > Hearsay > Exceptions > Statements Against Interest

HN25[] **Exceptions, Statements Against Interest**

See Fed. R. Evid. 804(b)(3).

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN26[] **Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time**

Where a district court fails to explain its grounds for denying a Fed. R. Evid. 403 objection and its reasons for doing so are not otherwise apparent from the record, an appellate court has no way to review its discretion.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN27[] **Inchoate Crimes, Conspiracy**

For an out of court statement to be admissible pursuant to Fed. R. Evid. 801(d)(2)(E), the district court must find by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy. There is no requirement that the declarant be speaking from personal knowledge.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Statements as Evidence > Hearsay > General Overview

Evidence > ... > Hearsay > Exceptions > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

HN28[] **Exemptions, Statements by Coconspirators**

Fed. R. Evid. 801(d) sets forth statements that are admissible because they do not constitute hearsay, including statements by a coconspirator of a party during the course and in furtherance of the conspiracy.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

Evidence > ... > Hearsay > Rule Components > Statements

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

HN29[] **Exemptions, Statements by Coconspirators**

A district court can consider hearsay and other inadmissible evidence in determining the admissibility of a coconspirator statement. It must consider the content of the alleged coconspirator statement as well, although the statement requires independent corroboration.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Hearsay > Exemptions > General Overview

Evidence > ... > Exemptions > Statements by Party Opponents > General Overview

HN30[] **Exemptions, Statements by Coconspirators**

See *Fed. R. Evid. 801(d)(2)(E)*.

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN31[] **Procedural Matters, Rulings on Evidence**

The Federal Rules of Evidence are to be liberally construed in favor of admissibility.

Civil Procedure > Appeals > Standards of Review > General Overview

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

HN32[] **Appeals, Standards of Review**

The exclusion of evidence because it's probative value is substantially outweighed by the danger of unfair prejudice under *Fed. R. Evid. 403* is reviewed with substantial deference to the trial court's ruling.

Counsel: Samuel Issacharoff, Esq., New York, NY. Daniel E. Bacine, Esq., Barrack, Rodos & Bacine, Philadelphia, PA. Eugene Spector, Esq., Spector Roseman & Kodroff, Philadelphia, PA. Robert N. Kaplan, Esq. (Argued), Richard J. Kilsheimer, Esq., Kaplan Fox & Kilsheimer, New York, NY. Michael D. Hausfeld, Esq., Cohen Milstein Hausfeld & Toll, Washington, D.C. Robert Skirnick, Esq., Meredith Cohen Greenfogel & Skirnick, New York, NY, Counsel for Appellants.

Paul M. Dodyk, Esq. (Argued), Peter T. Barbur, Esq., Lawrence E. Buterman, Esq., Kelly A. Rocco, Esq., Cravath, Swaine & Moore, New York, NY. David J. Armstrong, Esq., Dickie, McCamey & Chilcote, Pittsburgh, PA, Counsel for Appellee PPG Industries, Inc.

J. Michael Murray, Esq. (Argued), Berkman, Gordon, Murray & DeVan, Cleveland, OH, Counsel for Appellee Edward Bryant.

Michael S. Sommer, Esq., McDermott, Will & Emery, New York, NY. Elliot Silverman, Esq. (Argued), McDermott, Will & Emery, Irvine, CA, Counsel for Appellee Ronald W. Skeddle. **[**2]**

Judges: Before: NYGAARD, MCKEE and CHERTOFF, Circuit Judges.

Opinion by: CHERTOFF

Opinion

[*352] OPINION OF THE COURT

CHERTOFF, *Circuit Judge*.

This case addresses the recurring question of what quantity and quality of evidence suffices to create a genuine issue of material fact as to one particular element of a claim under *Section 1 of the Sherman Act*: whether a defendant entered into an unlawful agreement. Appellants contend **[*353]** that appellee PPG Industries, Inc. ("PPG") conspired with its competitors to fix the prices of flat glass and automotive replacement glass in the early 1990s. The District Court granted PPG's motion for summary judgment on the ground that there was insufficient proof of an agreement. We will reverse in part, affirm in part, and remand for additional proceedings.

I. Background

A. The Flat Glass and Automotive Replacement Glass Industries

PPG manufactures sheets of glass through a method called the "float process." Molten glass is poured over a bath of higher-density liquid, such as molten tin. As the glass floats on top of the bath, it is polished under controlled temperatures. Finally, the glass is fed into an "annealing oven" where it gradually cools and hardens. **[**3]** See *In re Flat Glass Antitrust Litigation, 191 F.R.D. 472, 476 n.7 (W.D. Pa. 1999)*. The glass that PPG produces through the float process--in various sizes, thicknesses, and tints, see Supp. App. 14 n.16; App. 634--is called "flat glass."

PPG and a handful of other firms--Libbey-Owens-Ford Company ("LOF," a subsidiary of the British glass producer Pilkington LLC); AFG Industries, Inc. ("AFG," a subsidiary of the Japanese glass producer Asahi Glass Co.); [1] Guardian Industries ("Guardian"); and Ford Motor Co. ("Ford")--manufacture well over ninety percent of the flat glass sold in the United States. In 1995, for example, PPG accounted for approximately 28% of domestic flat glass shipments, LOF and AFG each accounted for 19%, and Guardian and Ford each accounted for 15%. Supp. App. 20. [2]

[4]** Flat glass produced through the float process may be sold "as is," in which case it is used primarily in construction. Supp. App. 16. Alternatively, many different products may be "fabricated" from flat glass by subjecting it to a variety of processes. A substantial amount of flat glass, for example, is fabricated for use in automobiles. Flat glass may be molded and combined with other parts to produce windshields, for example, or side and rear

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[1] Asahi also owns a company called Glaverbel, which was associated with AFG, and a Canadian-based company called Glaverbec.

[2] A company named Cardinal Glass Industries ("Cardinal") accounted for approximately 3 of domestic flat glass sales in 1995. Cardinal, which is not a defendant in this suit, did not produce flat glass until 1992, when it purchased a flat glass manufacturing plant that AFG built for it. Before that time, Cardinal fabricated products from flat glass it purchased from PPG and others.

windows. Supp. App. 19. Some products--called original equipment manufacturer products ("OEM" glass products)--are fabricated for sale to vehicle manufacturers for use in new vehicles. Other products--called automotive replacement glass products--are fabricated for sale and use as automotive replacement parts. Supp. App. 25. These are two separate markets. [3]

[5]** **[*354]** The automotive replacement glass market has a four-tier vertical structure. First, manufacturers--the handful of firms mentioned above--produce flat glass. Second, various companies fabricate the flat glass into different types of automotive replacement glass products. The major United States fabricators of automotive replacement glass products during the class period were PPG, LOF, Ford, Guardian, Safelite, Viracon, Premier/Hordis, and Chrysler. App. 585. Thus a number of firms, such as PPG, both manufacture flat glass and fabricate it into automotive replacement glass products. [4]

Third, the fabricators sell the parts by the "truckload" to wholesale distributors. The wholesale distributors then sell the automotive replacement glass products in less than truckload quantities to the retail installers that **[**6]** sell the products directly to car owners.

PPG operates at every level of the automotive replacement glass market; that is, PPG is "vertically integrated." In addition to manufacturing flat glass and fabricating automotive replacement glass products, PPG runs a wholesale distribution operation that sells less than truckload quantities to retail installers. Yet PPG also sells its products to its downstream competitors. It sells flat glass to automotive replacement glass fabricators, and it sells truckload quantities of automotive replacement glass products to wholesale distributors.

B. The Alleged Conspiracies

In 1993, LOF fired two of its executives--Ronald Skeddle (LOF's President and Chief Executive Officer) and Edward Bryant (LOF's Executive Vice President, the company's second-highest ranking officer)--and a grand jury indicted them for conspiracy, mail and wire fraud, and money laundering. A jury eventually acquitted them of the charges, but in the meantime Skeddle and Bryant alleged that during the early 1990s LOF had conspired with its competitors to fix the price of the glass products it sold. See *In re Flat Glass Antitrust Litigation, 288 F.3d 83, 86 (3d Cir. 2002).* **[**7]**

Skeddle and Bryant's allegations spurred plaintiffs to file several private antitrust lawsuits against LOF and its competitors (PPG, AFG, Ford, and Guardian), and the Judicial Panel on Multidistrict Litigation eventually consolidated and transferred the actions to the Western District of Pennsylvania. After the District Court certified two subclasses of plaintiffs, see *In re Flat Glass Antitrust Litigation, 191 F.R.D. 472, 475 (W.D. Pa. 1999)*, plaintiffs reached settlements with all defendants except PPG.

Plaintiffs allege that PPG and its competitors conspired to "fix, raise, and maintain" the prices of flat glass and automotive replacement glass. The two alleged conspiracies correspond with the two subclasses that the District Court certified. See *In re Flat Glass Antitrust Litigation, 191 F.R.D. at 475*. One subclass consists of individuals and entities that purchased flat glass or products fabricated from flat glass from PPG, LOF, Guardian, Ford, or AFG. The other subclass consists of individuals and entities that purchased automotive replacement glass products from any of those same firms. Id.

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[3] The parties fail to adequately explain the relationship between OEM glass parts and automotive replacement parts, which plaintiffs describe as "identical in composition." Plaintiffs' Br. 4. We gather from the record that they differ in two important respects. First, generally (but not always) only one OEM glass producer exists for any particular product. Thus PPG alone might produce a particular windshield that a car manufacturer uses in a particular model car. In contrast, multiple manufacturers typically produce any one type of automotive replacement part. So PPG, Guardian, and LOF might produce the automotive replacement part that would replace the OEM product that only PPG produced and sold to the car manufacturer. Second, OEM glass products are sold to a particular car manufacturer, whereas the corresponding identical automotive replacement glass products are sold to multiple wholesalers and retail installers.

[4] Automotive replacement glass fabricators produced approximately 10,000 different automotive replacement glass products. No one fabricator produced all 10,000. PPG produced approximately 6,000. App. 585.

Plaintiffs' allegations regarding price-fixing **[**8]** in the market for flat glass are relatively straightforward. Several times during the class period, PPG and the other **[*355]** flat glass producers raised their "list prices" for flat glass by the same amount and within very close time frames. Within a twelve-day period in the summer of 1991, for example, PPG and its competitors all raised their list prices for flat glass by the same amounts. [5] Plaintiffs simply contend that PPG and its competitors agreed to raise their prices, rather than doing so independently and with no concerted coordination.

[9]** Plaintiffs' allegations regarding price-fixing in the market for automotive replacement glass are more complicated. According to plaintiffs, PPG and other automotive replacement glass fabricators used a mechanism, called the "NAGS Calculator," to fix prices at supra-competitive levels.

NAGS, which stands for "National Auto Glass Specifications," is a business that produced a catalogue called the "NAGS Calculator." The NAGS Calculator supplied an identifying number for each type of automotive replacement glass product and provided a recommended price for an installer to charge a car owner for the part. NAGS came up with its recommended price for any particular automotive replacement glass product by taking a truckload quantity price of that product and multiplying it by a number (a "multiplier") specific to that product. Generally, NAGS would use the truckload quantity price for the OEM glass product that the automotive replacement glass was intended to replace.

According to plaintiffs, PPG and other automotive replacement glass manufacturers knew the multipliers that NAGS used to devise its recommended prices. Thus PPG could, and plaintiffs allege did, work backwards from the recommended **[**10]** price to determine the truckload price that NAGS used in its calculation. "If the truckload price used by NAGS was different from its own truckload price," plaintiffs argue, "PPG then adjusted its truckload price to match the truckload price used to create the NAGS price, as did the other [automotive replacement glass] manufacturers." Plaintiffs' Br. 33. Thus plaintiffs contend that PPG and its competitors "had an understanding and acted in concert" to use the NAGS Calculator to "align their truckload price lists and stabilize pricing, and as a benchmark for pricing of [automotive replacement glass] at less-than-truckload quantities." Plaintiffs' Br. 30.

C. <u>The Present Appeal</u>

The District Court granted PPG's motions for summary judgment on both of plaintiffs' price-fixing claims. Before doing so, the Court circumscribed the evidence it considered when deciding PPG's summary judgment motions through a series of *in limine* motions. The Court refused to order Skeddle and Bryant to testify despite their invocation of their *Fifth Amendment* privileges, for example, and it **[*356]** also excluded many of Skeddle's handwritten notes that plaintiffs argue tend to implicate PPG in a price-fixing **[**11]** conspiracy.

Plaintiffs appeal from the District Court's summary judgment and certain of its evidentiary decisions. After addressing the applicable legal standards, we first address whether summary judgment was warranted based on the evidence the District Court considered. [6] We conclude that the District Court should not have granted summary judgment on plaintiffs' flat glass price-fixing claim, and we address the District Court's evidentiary rulings so that the

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[5] The District Court catalogued these price increases as follows:

> July of 1991, all defendants raised their prices within days of each other by 7.5-9 %, with an effective date of July 29 or August 1, 1991; September of 1992, all defendants raised their prices within days of each other by 5-9 % with an effective date of October 1 or October 12; May of 1993, defendants raised their prices within days of each other by 5.5 % with an effective date of June 7 or 9; October of 1993, defendants raised their prices within days of each other by 6. 5% with an effective date of October 30 or November 1, 1993; April of 1994 all defendants raised their prices by 5-9 % with an effective date of May 1 or 2; August of 1994, all defendants raised their prices by 5-8 % with an effective date of September 19, 1994; March of 1995, all defendants raised their prices by 6 % with an effective date of April 3 or 11.

App. 16 n.4 (internal citations to District Court record omitted).

[6] ***HN1***[] We exercise plenary review over the District Court's grant of summary judgment. <u>See, e.g.</u>, *InterVest Inc. v. Bloomberg, L.P., 340 F.3d 144, 158 (3d Cir. 2003)*.

Court can further consider what evidence a jury may consider on remand. We affirm summary judgment on plaintiffs' automotive replacement glass conspiracy claim.

II. Discussion

HN2[↑] *Section 1 of the Sherman Act* provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." **[**12]** *15 U.S.C. § 1*. Despite its broad language, *Section 1* only prohibits contracts, combinations, or conspiracies that *unreasonably* restrain trade. See *InterVest Inc. v. Bloomberg, L.P., 340 F.3d 144, 158 (3d Cir. 2003)*. Certain restraints of trade are *per se* unreasonable, while others require more searching analysis under the "rule of reason." *Id. at 158-59*.

HN3[↑] Restraints of trade are *per se* unreasonable when they are "'manifestly anticompetitive' or 'would always or almost always tend to restrict competition.'" *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998)* (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988))*. Because of their "pernicious effect on competition and lack of any redeeming virtue," *Northern Pac. Ry. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*, these restraints of trade are "conclusively presumed to unreasonably restrain competition 'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Rossi, 156 F.3d at 461* (internal **[**13]** citations and quotations omitted).

Here, plaintiffs allege that PPG engaged in *HN4*[↑] horizontal price-fixing--i.e., "where competitors at the same market level agree to fix or control the prices they will charge for their respective goods or services."*United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993)*. Since at least*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*, the Supreme Court has held that *HN5*[↑] such restraints of trade are *per se* unreasonable. "Whatever economic justification particular price-fixing agreements may be thought to have," the Court explained, "the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *310 U.S. 150, 224 n.59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; see also *Brown Univ., 5 F.3d at 670*.

As a result, *HN6*[↑] plaintiffs need only prove that "the defendants conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury." *InterVest, 340 F.3d at 159*. PPG does not dispute proximate causation. Rather, it argues that it did not agree with **[**14]** its competitors to fix prices.

HN7[↑] The existence of an agreement is "the very essence of a *section 1* claim." *Alvord-Polk, Inc. v. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994)*. The *Sherman Act* **[*357]** speaks in terms of a "contract," "combination" or "conspiracy," but courts have interpreted this language to require "some form of concerted action." *Id. at 999* & n.1. In other words, there must be a "'unity of purpose or a common design and understanding or a meeting of minds'" or "'a conscious commitment to a common scheme.'" *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980))*.

HN8[↑] When faced with whether a plaintiff has offered sufficient proof of an agreement to preclude summary judgment, a court must generally apply the same summary judgment standards that apply in other contexts. See *Intervest, 340 F.3d at 159-60*. A court shall render summary judgment when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a **[**15]** matter of law." *Fed R. Civ. P. 56(c)*. In making this determination, a court must "view the facts and any reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment." *Intervest, 340 F.3d at 160*. And a court "should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if it supports an inference of concerted action." *Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)*.

Although these normal summary judgment principles apply in antitrust cases, an important distinction exists. As the Supreme Court held in *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*, *HN9*[↑] "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *§ 1* case." *Id. at 588*;see also *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763-64, 79 L. Ed. 2d 775,* 104 S. Ct. 1464 (1984). In other words, certain "inferences may not be drawn from circumstantial evidence in an antitrust case." Intervest, 340 F.3d at 160. **[**16]** [7] This higher threshold is imposed in antitrust cases to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition.

We explored "exactly what inferences are circumscribed in a section 1 case" in our decision in Petruzzi's. There, we identified "two important circumstances underlying the [Supreme] Court's decision in Matsushita": (1) "the plaintiffs' theory of conspiracy was implausible"; and (2) "permitting an inference of antitrust **[**17]** conspiracy in the circumstances 'would have the effect of deterring *significant* procompetitive conduct.'" 998 F.2d at 1232 (quoting In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 439 (9th Cir. 1990)) (emphasis in Petruzzi's). In other words, "the Court stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences." Id.; see also Matsushita, 475 U.S. at 587 ("If the factual context renders [the plaintiff's] claim implausible--if the claim is one that simply makes no economic sense--[a plaintiff] must come forward with more persuasive evidence to support [its] claim than **[*358]** would otherwise be necessary.") (citations omitted).

The plaintiffs in Matsushita alleged that the defendants conspired to engage in predatory pricing, the practice by which "a firm sets its prices temporarily below costs, with the hope that the low price will drive a competitor out of business, after which the 'predatory' firm will raise its prices so high that it will recoup its temporary **[**18]** losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down." Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, at 483. Courts and commentators alike have come to regard predatory pricing as a relatively speculative phenomenon, particularly when its success requires collusion among multiple firms. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226-27, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993). Inferences about predatory pricing are also inherently weak because the behavior of firms engaged in predatory pricing would largely mirror how firms in a competitive market act: by cutting prices. See Matsushita, 475 U.S. at 594 ("Cutting prices in order to increase business often is the very essence of competition."). Thus inferring from ambiguous evidence that firms are engaging in predatory pricing would "chill procompetitive behavior." Petruzzi's, 998 F.2d at 1232.

In Petruzzi's, by contrast, the plaintiff alleged that the defendants conspired to allocate customers. "Plaintiff's theory of conspiracy is not implausible," we explained, rather it made "perfect economic **[**19]** sense." 998 F.2d at 1232. In addition, the challenged activities could not reasonably be perceived as procompetitive. Id. ("After all, refusing to bid on accounts hardly can be labeled as the 'very essence of competition.'") (quoting Matsushita, 475 U.S. at 594). As a result of those circumstances, we concluded that "more liberal inferences from the evidence should be permitted than in Matsushita because the attendant dangers from drawing inferences recognized in Matsushita are not present." Id.; see also Intervest, 340 F.3d at 162; Alvord-Polk, Inc., 37 F.3d at 1001 ("The meaning we ascribe to circumstantial evidence will vary depending on the challenged conduct."). [8]

[7] The "strictures of Matsushita do not apply" when a plaintiff provides direct evidence of a conspiracy. Petruzzi's, 998 F.2d at 1233. That is because "no inferences are required from direct evidence to establish a fact and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence." Id. In addition, "the focus in Matsushita was on *ambiguous* evidence, and what inferences *reasonably* could be drawn from that evidence." Id. (internal citation omitted).

[8] As one prominent antitrust commentator has explained:

> Matsushita spoke in the context of a highly improbable twenty-year-long predatory pricing conspiracy and required high-quality evidence to permit such a conspiracy to be presented to a jury. . . . However, Matsushita itself said little about proof requirements in a case where underlying structural evidence indicates that the offense is quite plausible and would be profitable for the defendants.

Herbert Hovenkamp, The Rationalization of Antitrust, 116 Harv. L. Rev. 917, 925-26 (2003) (reviewing Richard A. Posner, ***Antitrust Law*** (2d ed. 2001)).

[20]** Here, like in *Petruzzi's*, plaintiffs' theory of conspiracy--an agreement among oligopolists to fix prices at a supracompetitive level--makes perfect economic sense. In addition, absent increases in marginal cost or demand, raising prices generally does not approximate--and cannot be mistaken as--competitive conduct.

Yet despite the absence of the Matsushita Court's concerns, this ***HN10***[] Court and others have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists. See *Williamson Oil Co. v. Philip Morris USA, R.J., 346 F.3d 1287, 1300-01 (11th Cir. 2003)*; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1042-43 (8th Cir. 2000)*; *Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Baby Food Antitrust Litig.), 166 F.3d 112, 121-22 (3d Cir. 1999)*; *Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 484* ***[*359]*** *(1st Cir. 1988)*; *Apex Oil Co. v. DiMaurio, 822 F.2d 246, 253-54 (2d Cir. 1987)*; see also *Petruzzi's, 998 F.3d at 1232-33*. [9] The basis for this circumspect approach is the theory of "interdependence." **[**21]** See Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 662-63 (1962).

HN11[] The theory of interdependence posits the following: In a market with many firms, the effects of any single firm's price and output decisions "would be so diffused among its numerous competitors that they would not be aware of any change." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1429, at 206 (2nd ed. 2000). In a highly concentrated market (i.e., a market dominated by few firms), however, any single firm's "price **[**22]** and output decisions will have a noticeable impact on the market and on its rivals." Id. Thus when a firm in a concentrated market (i.e., an "oligopolist") is deciding on a course of action, "any rational decision must take into account the anticipated reaction of the other [] firms." Id. at 207. [10]

The result, ***HN12***[] according to the theory of interdependence, is that firms in a concentrated market may maintain their prices at supracompetitive **[**23]** levels, or even raise them to those levels, without engaging in any overt concerted action. We quote the Areeda treatise at length:

> The first firm in a five-firm oligopoly, Alpha, may be eager to lower its price somewhat in order to expand its sales. However, it knows that the other four firms would probably respond to a price cut by reducing their prices to maintain their previous market shares. Unless Alpha believes that it can conceal its price reduction for a time or otherwise gain a substantial advantage from being the first to move, the price reduction would merely reduce Alpha's profits and the profits of the other firms as well.
>
> Such "oligopolistic rationality" cannot only forestall rivalrous price reductions, it can also provide for price increases through, for example, price leadership. If the price had for some reason been less than X [the price a monopolist would charge to maximize profits], firm Beta might announce its decision to raise its price to X effective immediately, or in several days, or next season. The other four firms may each choose to follow Beta's lead; if they do not increase their prices to Beta's level, Beta may be forced to reduce its **[**24]** price to their level. Because each of the other firms knows this, each will consider whether it is better off when all are charging the old price or price X. They will obviously choose X when they believe that it will maximize industry profits.

Id. at 207-08.

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[9] A leading antitrust scholar, who now authors the Areeda treatise, has characterized these cases at least in part as "an unfortunate misinterpretation" of Matsushita. Herbert Hovenkamp, The Rationalization of Antitrust, *116 Harv. L. Rev. at 925* ("Unfortunately, many courts have read Matsushita as requiring a certain quantum evidence of verbal agreement before summary judgment can be avoided.").

[10] "For example, in a market of one hundred sellers of equal size, an expansion in output of 20 percent by one of them will result in an average fall in output of only about .2 percent for each of the others, so a seller need not worry in making his pricing decisions about the reactions of his rivals." Richard A. Posner, ***Antitrust Law*** 56 (2nd ed. 2001). But if "there are three sellers of equal size, a 20 percent expansion in the sales of one will cause the sales of each of the others to fall by an average of 10 percent--a sales loss the victims can hardly overlook." Id.

Despite the noncompetitive nature of such conduct, which we have come to call***HN13***[] **[*360]** "conscious parallelism," we have held that the *Sherman Act* does not proscribe it. See *In re Baby Foods, 166 F.3d at 121-22*. There are two primary bases for this approach, both embodied in a line of scholarship that started with Donald Turner in 1962 and continued in large part in Phillip Areeda's influential antitrust treatise. First, there exists the notion that interdependent behavior is not an "agreement" within the term's meaning under the *Sherman Act*. See Turner, supra, at 663-65; but see Posner, ***Antitrust Law***, supra, at 94-95. Second, Turner and Areeda argued that judicial remedies are incapable of addressing the anticompetitive effects of consciously parallel pricing. Turner, supra, at 669-71, Areeda, ***Antitrust Law***, supra, PP 1432d5-1432f, at 232-36; but see Posner, **[**25]** supra, at 98. Indeed,***HN14***[] the Supreme Court has described conscious parallelism in dicta as "the process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* (emphasis added).

As a result, we have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behavior show that certain "plus factors" also exist. See *In re Baby Food, 166 F.3d at 122*; *Petruzzi's, 998 F.2d at 1243*. [11] Existence of these plus factors tends to ensure that courts punish "concerted action"--an actual agreement--instead of the "unilateral, independent conduct of competitors." *In re Baby Food, 166 F.3d at 122*. In other words, the factors serve as proxies for direct evidence of an agreement.

[26]** The question then becomes, what are "plus factors" that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists. See Id.; Areeda, supra, P 1434a, at 241-42. We have identified, however, at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) "evidence implying a traditional conspiracy." *Petruzzi's, 998 F.2d at 1244*.

In the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence. We candidly acknowledged as much in *In re Baby Food, 166 F.3d at 122*. See also Areeda, supra, P 1434c1, at 245 ("'Conspiratorial motivation' and 'acts against self-interest' often do no more than restate interdependence."); Posner, supra, at 100. ***HN16***[] Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. In other words, it is "evidence that the structure of the market **[**27]** was such as to make secret price fixing feasible." *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (7th Cir. 2002)*. Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming **[*361]** that the defendant operated in a competitive market. In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs. Put differently, in analyzing this factor a court looks to "evidence that the market behaved in a noncompetitive manner." Id.

These two plus factors are important to a court's analysis, because their existence tends to eliminate the possibility of mistaking the workings of a competitive market--where firms might increase price when, for example, demand increases--with interdependent, supracompetitive pricing. But since these factors often restate interdependence (at least in the context of an alleged price-fixing conspiracy), they may not suffice--by themselves--to defeat summary judgment on a claim of horizontal price-fixing among oligopolists. [12] ***HN17***[] The most important evidence will

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[11] ***HN15***[] Thus in order to establish illegal concerted action based on "consciously parallel behavior, a plaintiff must show (1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making process; and (3) certain 'plus' factors." *Petruzzi's, 998 F.2d at 1242*,quoted in *Intervest, 340 F.3d at 165*. It is undisputed that the first two circumstances exist here, and we therefore concentrate on the third and final.

generally **[**28]** be non-economic evidence "that there was an actual, manifest agreement not to compete." *Id. at 661*. That evidence may involve "customary indications of traditional conspiracy," or "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown." Areeda, supra, P 1434b, at 243; see also *Petruzzi's, 998 F.2d at 1244*.

[29]** We turn to whether plaintiffs here have adduced sufficient evidence of plus factors to preclude summary judgment on their two separate antitrust claims.

A. Flat Glass

We first note that plaintiffs have offered substantial evidence tending to show that PPG had a motive to enter into a price fixing conspiracy because conditions existed in the flat glass industry that were conducive to collusion. As we have described, the flat glass market is concentrated; there are a handful of sellers and there is no "fringe market" of smaller firms. Flat glass is sold primarily on the basis of price, and although it may vary in tint or thickness it is generally a standardized product. Importantly, the demand for flat glass was in decline during the start of the 1990s and PPG and its competitors had excess capacity. Normally, reduced demand and excess supply are economic conditions that favor price cuts, rather than price increases. There are also high fixed costs in the industry. See App. 635. Suffice it to say, the flat glass industry is in many respects a text book example of an industry susceptible to efforts to maintain supracompetitive prices. See generally Richard A. Posner, **[**30]** ***Antitrust Law*** 69-79 (2d ed. 2001). PPG concedes as much. See Tr. of Oral Argument 21-22.

Similarly, there is evidence in the record indicating that the price increases PPG and its competitors implemented were inconsistent with competition in the industry. In other words, there is evidence of anti-competitive behavior and that PPG **[*362]** acted "contrary to its interests." The entry of Cardinal into the market, for example, tends to indicate that flat glass producers were charging supracompetitive prices. See Posner, supra, at 89 ("The charging of a monopoly price will attract new competitors to a market who perceive opportunities for unusual profits by reason of the abnormally high price."). More important, no evidence suggests that the increase in list prices was correlated with any changes in costs or demand. Indeed, in July of 1992 a PPG executive noted that "no one . . . believes that demand will be robust enough to support a price increase without significant discipline on the part of all float producers." App. 5841. After the flat glass producers implemented a price increase in September of 1992, the same executive noted that "basic supply and demand do not support this **[**31]** [1992] increase." App. 5908.

All the above indicates that the price increases were collusive, but not whether the collusion was merely interdependent or the result of an actual agreement. We therefore consider whether sufficient "traditional" conspiracy evidence exists from which a reasonably jury could infer that an agreement existed. Plaintiffs argue that evidence that PPG's competitors entered into an agreement--at least amongst themselves--tends to show that PPG too entered the same agreement. They also argue that other circumstantial evidence shows--or at least a finder of fact could infer--that PPG agreed to raise the price of flat glass three specific times: June-July of 1991, September-October of 1992, and May-June of 1993.

As a preliminary matter, however, we address an argument that pervades PPG's briefs, both before us and before the District Court. PPG contends that regardless of the flat glass producers' list prices, the actual transactional prices--that is, the prices at which flat glass producers actually sold their product to customers--declined during the period of the alleged conspiracy. Insofar as PPG argues that plaintiffs cannot establish liability as a matter **[**32]** of

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[12] Neither factor is "strictly necessary." *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (7th Cir. 2002)*. Thus this type of economic evidence is neither necessary nor sufficient to conclude that sufficient proof of an agreement exists to preclude summary judgment, but it is relevant and courts should as a general matter consider it.

We also observe that certain types of "actions against self interest" may do more than restate economic interdependence. For example, non-price acts against self-interest, such as apparently unilateral exchanges of confidential price information, cannot simply be explained as a result of oligopolostic interdependence. See *Blomkest Fertilizer, Inc., 203 F.3d at 1046-47* (Gibson, J., dissenting).

law for that reason, it is simply wrong. [13] ***HN18***[] "An agreement to fix prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occurred at lower prices." *In re High Fructose Corn Syrup, 295 F.3d at 656*.

[33]** PPG does not--it cannot--seriously contend that the flat glass producers increased their list prices with no intention of affecting transaction prices. "Sellers would not bother to fix list prices if they **[*363]** thought there would be no effect on transaction prices." Id. Thus declining transaction prices despite an agreement to fix list prices would constitute a failed attempt to fix prices. But a horizontal agreement to fix prices need not succeed for sellers to be liable under the Sherman Act; it is the attempt that the Sherman Act proscribes. See *Socony-Vacuum Oil Co., 310 U.S. at 224 n.59*.

1. Evidence of an Agreement Among PPG's Competitors

The District Court concluded that the record "undoubtedly evidences that several of the settling defendants conspired to fix prices." App. 46. We agree. The most compelling basis for this conclusion is a document that LOF submitted to the Department of Justice's Antitrust Division in 1995.

The Antitrust Division had a "Corporate Leniency Policy" in effect at the time under which the DOJ accorded "leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions." App. **[**34]** 6459. Among the policy's requirements was that the cooperating corporation "report[] the wrongdoing with candor and completeness and provide[] full, continuing and complete cooperation that advances the Division in its investigation." App. 6460.

LOF sought leniency under the policy in 1995, but the Antitrust Division concluded that LOF had not been sufficiently forthcoming with information of its wrongdoing. "We are surprised that you consider our proffer, which described an agreed upon, across the board price increase for the entire United States," LOF responded, "to be less than a 'full and complete disclosure.'" App. 5003.

LOF's response to the Antitrust Division does not directly state that it agreed with PPG to raise prices. But a reasonable factfinder could infer such an agreement from LOF's reference to an "across the board" price increase. Black's Law Dictionary defines "across-the-board" as "applying to all classes, categories, or groups." Black's Law Dictionary 24 (7th ed. 1999). One reasonable interpretation of LOF's statement is that LOF agreed with one or more competitor to increase the price of all types of flat glass. Another is that LOF agreed with all its competitors **[**35]** to increase prices on one or more category of flat glass. And yet another is that LOF agreed with *all* its competitors to increase the price of *all* types of flat glass. [14]

PPG argues that under our decision in In re Baby Food, "the fact that some other glass producers may have attempted to fix prices in this case is irrelevant." PPG Brief 82. We disagree. Even if LOF's statement--and any other evidence--tends to show that PPG's competitors agreed among themselves to raise prices but does not

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[13] PPG argued before the District Court, for example, that "controlling case law precludes an antitrust plaintiff from avoiding summary judgment by reliance on evidence relating to list prices." App. 667. PPG misstates the law. Declining transaction prices will tend to support a conclusion that competitors did not enter into an agreement to fix prices where the other record evidence also fails to sufficiently prove an agreement. See, e.g., *Clamp-All Corp., 851 F.2d at 484* ("The fact that [the defendants] often set prices that deviated from their price lists helps support the inference that the similarity of price lists reflects *individual* decisions to copy, rather than any more formal pricing agreement."). Our decision in In re Baby Food is not to the contrary. In the specific factual setting of that case--involving "hundreds of products" and multiple complicated discounts and price promotions--we concluded that plaintiffs' and their experts' use of list price data was insufficient to show that parallel pricing had occurred. *166 F.3d at 128-29*. Significantly, the defendants made "similar pricing decisions" 15.5 of the time and priced their products differently 84.5 of the time. *Id. at 128*. The District Court therefore concluded, in a portion of its decision that we cited with approval, that the plaintiffs were "unable to show that defendants' prices moved in a parallel fashion. That is true both for list prices and transaction prices." Id.

[14] PPG does not argue that LOF's proffer is not admissible, and we therefore assume that it is for purposes of this decision. In any case, however, we would reach the same result even if we did not consider LOF's proffer.

directly implicate PPG, it is surely not irrelevant to whether PPG entered an agreement. If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, for example, it is reasonable to infer that the sixth firm acted consistent with the other five **[**36]** firms' actions because it was also a party to the agreement. That is especially so if the sister firm's behavior mirrored that of the five conceded coconspirators. In some circumstances, to be sure, such evidence might not be sufficient alone to defeat summary judgment. See *In re Citric Acid Litig., 191 F.3d 1090, 1106 (9th Cir. 1999)*. But we need not determine **[*364]** whether it can be here, because plaintiffs argue that additional evidence supports their contention that PPG entered into an agreement.

2. The June-July 1991 Increase

On June 7, 1991, AFG announced that it was raising the price of its flat glass. The price increase was to become effective on July 15, 1991. App. 3552. Neither PPG nor any of AFG's other competitors raised their prices in response. [15]

Also on June 7, 1991, top executives from Pilkington's various **[**37]** businesses (including LOF) met in the United Kingdom. Minutes from the meeting state: "There were indications that a price increase of approximately 8% would hold" in the United States. App. 3868.

A week later, on June 13, 1991, two of LOF's board members (Tomoaki Abe and Mr. Matsumora) traveled to Pennsylvania to play golf with Robert Duncan, the Vice President of PPG's Glass Group. The night before they played golf, Abe's administrative assistant sent him a fax relating a message from Glen Nightingale, the Pilkington executive based in London with responsibility for LOF. [16] The fax stated: "Mr. Nightingale requests that you call him on Friday morning [June 14] before you leave your hotel room--it will only take two minutes. He seemed rather firm. . ." App. 3890.

[38]** Two weeks later, on June 28, 1991, PPG announced a 7.5-9% price increase--an amount different than the price increase AFG announced on June 7, but notably approximately 8 %--to be effective July 29, 1991. App. 5833. PPG's competitors eventually followed suit with virtually identical price increases, to be effective either July 29 or August 1, 1991. Ford announced its price increase on July 1, app. 3472; LOF announced its price increase on July 8, app. 3474; Guardian announced on July 9, app. 3482; and AFG rescinded its June 7 increase and announced a price increase in line with PPG's on July 10, app. 3551.

A copy of PPG's June 28, 1991 announcement produced from the files of John Frazier (manager of PPG's Knoxville, Tennessee branch) contains a typewritten note on it stating: "ALL OTHER MAJOR GLASS SUPPLIERS ARE CONCURRENTLY RAISING PRICES THE SAME PERCENTAGE." App. 5833. Evidence suggests that Frazier received this document, together with the typewritten notation, sometime *before* PPG's competitors had actually matched PPG's price increase. [17]

[39]** On July 2, 1991, a Ford executive sent an email to his regional managers stating that "we must have total support of this industry pricing action and focus our attention on implementing the price increase in an intelligent manner. The actions being **[*365]** taken are important to the industry and will improve the commercial glass

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[15] AFG raised the price of its "pattern glass" by 4 %, its "thin glass products" by 5 %, its "gray and bronze thicknesses" by 9 %, and its "4mm-12mm" also by 9 %. App. 3552.

[16] LOF's proffer to the DOJ identified Nightingale as an individual "involved in the 1992 activities." App. 5003. It also stated that Nightingale had "discussions with [an AFG executive] that resulted in a price move." App. 5004. Nightingale invoked his *Fifth Amendment* privilege against self incrimination when plaintiffs sought to depose him.

[17] PPG on the other hand argues that there is evidence suggesting that someone typed the note on the June 28 announcement *after* its competitors announced their price increases. PPG is undoubtedly correct; this document's time frame is a disputed fact and a finder of fact could reasonably reach the conclusion PPG urges us to draw. But a fact finder could also reasonably conclude the opposite, and it is black letter law that we must draw all reasonable inferences in plaintiffs' favor at this point in the proceedings.

profitability." App. 3553. As of that day, however, neither LOF nor Guardian had announced a price increase. They announced increases on July 8 and July 9, respectively.

A PPG internal document dated September 6, 1991 stated that the "price increase was implemented without any problems." App. 5831. A similar document, dated September 3, 1991, stated that "the industry price increase was implemented in August by all primary manufacturers, although varying degrees of protection were offered by our competition." App. 5731. An internal LOF document from November of 1991, however, stated that the "price increase of 8/19/91 is unraveling at several key accounts due to AFG/Glaverbec/ Guardian's failure to hold the line on pricing and PPG's price protected annual contracts through the year end." App. 1712.

To summarize: AFG raised its prices, but no one followed suit. **[**40]** LOF executives expressed their opinion at a board meeting that an 8% increase in flat glass prices would "hold." Two board members met with a PPG executive one week later. Two weeks after the meeting, PPG raised its flat glass prices by essentially the same amount that LOF executives thought would "hold." An internal PPG memorandum, which might have been produced prior to any other firm announcing an increase in its flat glass prices, states that other flat glass producers were "concurrently raising prices the same percentage." The flat glass manufacturers initially felt that the price increase had gone successfully, but they later felt it was unsuccessful because at least some of them failed to "hold the line."

3. <u>The September-October 1992 Price Increase</u>

A July 1, 1992 entry in the pocket calendar for a Ford Regional Sales Manager indicated that LOF was going to announce a price increase on Sept. 22, 1992, effective Oct. 1, 1992, with increases of 9% on clear and tinted glass and 5% on "Eclipse" glass. App. 3628. A few weeks later, on July 24, 1992, Joseph Hudson--PPG's Eastern Zone Manager for Flat Glass Products, app. 5908--noted: "No one, however, believes that demand will **[**41]** be robust enough to support a price increase without significant discipline on the part of all float producers." App. 5841. [18]

In September of 1992, however, the competitors announced a 5-9% price increase: AFG announced its price increase on September 15, 1992, to **[**42]** be effective October 1, app. 3545; Guardian announced a price increase on September 21, to be effective October 9, app. 3547; LOF announced on September 22, to be effective October 1, app. 3476; and both PPG and Ford announced their prices increases on September 23, to be effective October 12, app. 3475, 3549. On September 24, AFG changed the effective date of its price increase **[*366]** from October 1 to October 12. App. 3550.

Between September 22 and September 26, 1992, soon after the price increases were announced, senior executives from the various competitors (PPG, Ford, Guardian, and Pilkington) attended a "Glass Fair" meeting in Germany. A Pilkington executive reported the following in a letter to LOF's Skeddle:

> I was pleased to learn during the Glass Fair that an attempt to raise prices by 9% in the United States had been initially supported by all suppliers in the marketplace. During the Fair, I also had the opportunity to meet with Russ Ebeid of Guardian who assured me that they were fully supportive of the price increase proposition. Clearly, this could make quite a difference to your results if the price increase can stick.

App. 3895. This excerpt was removed from **[**43]** a later version of the letter. App. 7194. [19]

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[18] A fuller excerpt from the cited portion of the record states:

> Glaverbec appears to have quieted down just a bit in terms of new aggressive pricing, seemingly for the first time to be content with current absurdly low prices. Significantly, for the first time, Glaverbec is reported to have said that their tank is sold out. All producers, including PPG, continue to react selectively to Glaverbec's pricing and attempt to protect selected customers and selected markets.
>
> Discussion and rumors surrounding a possible price increase later in the year are widespread in the market place. No one, however, believes that demand will be robust enough to support a price increase without significant discipline on the part of all float producers.

App. 5841.

Finally, during the same time period in September of 1992, PPG's Hudson reiterated his July comment that a price increase would not be consistent with market conditions. According to Hudson, "basic supply and demand do not support this [1992] increase." App. 5908. [20]

[44]** To summarize: A Ford Regional Sales Manager was aware of the precise date when LOF was going to announce a price increase almost three months ahead of time, as well as the precise amounts of the increase. A PPG executive believed that the market would not support a price increase. Nonetheless, PPG and its competitors raised their prices by the same amount, all within eight days of each other. Soon after the price increases were announced, executives from the various flat glass producers attended a trade show at which a executive from Guardian assured an executive from Pilkington that Guardian was "fully supportive of the price increase proposition."

4. <u>The May-June 1993 Price Increase</u>

In December of 1992, AFG's Roger Kennedy told LOF's Roger Teat that AFG was "considering another increase in May

or June [of 1993] of about 5 or 6%." App. 3720, 3456, 3458-59. Teat reported this to superiors at LOF with pricing authority. App. 3721-23, 3456-58. [21]

[45]** LOF's preliminary budget for fiscal year 1994, dated January 21, 1993, refers to a "May-June '93 price increase." App. 6432. Similarly, an LOF "CEO's Review Report" from March 30, 1993 stated that there would be "a U.S. domestic price increase in the May-June timeframe." App. 4031. [22] And LOF's revised budget (dated **[*367]** April 5, 1993) also referred to a "May-June price increase." App. 4669. [23]

[46]** A few months later, on April 16, 1993, AFG faxed to PPG a "prepublication" copy of its May 17, 1993 5.5% price increase announcement (to be effective in June). App. 6369. [24] It also faxed a copy to Guardian. App. 3711.

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[19] Even if this statement does not unambiguously tend to show that flat glass producers agreed ahead of time to raise prices, it at least tends to show that there was an agreement to maintain higher prices despite competitive demands (i.e. to "make it stick").

[20] The full excerpt from the record reads:

> Certainly the hot topic on the pricing front is the industry increase announced during September to be effective in October. Basic supply and demand do not support this increase, so it will require discipline on the part of each manufacturer. Glaverbec, Guardian's mirror operations and AFG's distribution arm are keys to the success of the increase.

App. 5908.

[21] Kennedy was an officer and director of AFG. Although Teat did not have pricing authority, his precise position at LOF is unclear from the record.

[22] A fuller excerpt stated:

> A price increase has been initiated in Eastern Canada by PPG to be effective March 22; 7 % increase for all clear, uncased product (2.3mm through 6.0mm) and a 9 % increase for clear cased product. It is anticipated that this increase will be a lead into a U.S. domestic price increase in the May-June timeframe. LOF is following the Canadian lead and including heavy clear and tint product with the increase.

App. 4031.

[23] In addition, Ford's business plan (dated April 29, 1993) also referred to a 5 % price increase. App. 3698. Under the heading "Possible Opportunities and Improvements," it stated: "A 5 % market price increase spurred by cyclical recovery with increased industry capacity utilization would increase profits by almost $ 3 million." App. 3697-98.

[24] PPG urges that AFG did not send the fax on April 16, 1993, arguing that the most likely explanation for the date's appearance on the fax is that the fax machine malfunctioned. PPG is free to make this argument to a jury, but surely a reasonable finder of fact could infer that the date on the fax means that it was sent on that day.

PPG announced a 5.5% price increase on May 12, 1993, almost a week before AFG was going to announce its price increase. App. 5840. The rest of PPG's competitors quickly followed suit. LOF, AFG, and Ford announced five days later, on May 17, 1993. App. 3477, 3708, 3478. Guardian announced on May 19, 1993. App. 6105.

After the price increases went into effect, John Musser (from PPG) reported that "the price increase of 5.5% announced in early May by all major **[**47]** float producers for an implementation on or about June 7 has had the effect of stabilizing prices." App. 5906. [25] In a similar vein, an LOF report (dated June 21, 1993) stated: "Price increase is in effect from all major manufacturers. We are monitoring the market to make sure that all stick to the rules and will report any and all information we hear about." App. 3732.

[48]** PPG's Central Zone Manager, Thomas Merlitti, stated on June 25, 1993 that "the price increase implemented in June remains firmly in place as all major flat glass producers are holding firm." App. 3507. And Hudson of PPG reported: "The increase which was effective June 7 has been a nearly complete success." App. 5794.

To summarize: AFG and LOF discussed a May-June 1993 price increase during the preceding December, and LOF accounted for such an increase in its forthcoming budget. In April, AFG faxed to PPG a copy of the increase it planned to announce on May 17. PPG announced an identical increase on May 12, and the rest of the flat glass producers followed with identical price increases. LOF was "monitoring the market to make sure that all stick to the rules." The flat glass producers all "held firm," and executives from the firms generally considered the price increase a "success."

[*368] 5. Analytical Summary

The above evidence is sufficient to provide a finder of fact with a basis to reasonably conclude that PPG agreed with the other flat glass producers to raise prices. Put differently, there is "evidence that would enable a reasonable jury to reject the hypothesis that the defendants **[**49]** foreswore price competition without actually agreeing to do so." *In re High Fructose Corn Syrup, 295 F.3d at 661* (citing *Matsushita, 475 U.S. at 588*).

First, there is the evidence--including LOF's assertion that there was an "across the board" agreement to increase prices--that PPG's competitors entered into an agreement. And viewed collectively and holistically, there is evidence tending to show that PPG was a party to an agreement to raise the price of flat glass on three occasions.

PPG urges us to take a different approach. It appears to propose that we consider each individual piece of evidence and disregard it if we could feasibly interpret it as consistent with the absence of an agreement to raise prices. With regard to the announcement that stated "all other major glass suppliers are concurrently raising prices by the same percentage," for example, PPG argues that the "facts *suggest* that the notation was placed on the announcement after all glass producers had issued their announcements." PPG Br. 25 (emphasis added). Similarly, PPG contends that the "most likely explanation" for the date that appears on an AFG price announcement found **[**50]** in PPG's files "is that the date stamp mechanism malfunctioned." PPG Br. 43. We echo the Seventh Circuit's admonition in In re High Fructose Corn Syrup that the "statement of facts in the defendants' brief combines a recital of the facts favorable to the defendants with an interpretation favorable to them of the remaining evidence; and that is the character of a trial brief rather than of a brief defending a grant of summary judgment." *295 F.3d at 655*. PPG's

[25] A fuller excerpt stated:

> The price increase of 5.5 % announced in early May by all major float producers for an implementation on or about June 7 has had the effect of stabilizing prices. Overall customer reaction to the increase has been favorable, particularly in the mirror and distributor/ fabricator segments. Sash accounts who are not price protected are resisting the increased [sic], to a degree. The modest amount of the increase, the perceived cost justification for the increase, and the firmness to date of all float producers, however, are all positive factors which project that the announced prices will hold. The highest degree of uncertainty resides on the West Coast, which has the lowest level of industry capacity utilization.

App. 5906.

arguments are well-suited for an argument before a jury, but they are irrelevant to our consideration in the present posture of this case.

Alternatively, PPG appears to contend that we should disregard certain categories of evidence, from various periods of time, because such evidence does not in isolation lead inexorably to the conclusion that PPG entered into an agreement. Tr. of Oral Argument 25. PPG argues, for example, that competitors' possession of each others' price increase announcements or meetings among competitors' executives cannot suffice to preclude summary judgment. To be sure, the mere presence of such evidence does not require a court to deny summary judgment. In In re Baby Food, we observed **[**51]** that "we do not believe that the mere possession of competitive memoranda is evidence of concerted action to fix prices." *166 F.3d at 126*. But the price-exchange evidence in *In re Baby Food* was far less compelling than in this case. The In re Baby Food plaintiffs relied upon testimony of competitors' price information gathered by low-level sales employees in unsystematic fashion. Plaintiffs pointed to a few competitors' memos in sales files, but there was no evidence of how the documents got there. Additional evidence documented some awareness of competitors' price increase plans. Notably, these scraps of evidence of foreknowledge were not correlated to any actual concerted price increase activity among all competitors.

We made two salient points in reviewing this evidence and rejecting the inference of agreement. First, we noted that price discussion among low level sales people has little probative weight; we distinguished the far different situation where upper level executives have secret conversations **[*369]** about price. *Id. at 125 & n.8* ("Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is **[**52]** insufficient to survive summary judgment."). Second, and more important, we emphasized that "there must be evidence that the exchanges of information had an impact on pricing decisions." *Id. at 125*. The reason for this requirement is that exchanges of price information may be compatible with competition, because they may "'increase economic efficiency and render markets more, rather than less, competitive.'" Id. (quoting *United States v. United States Gypsum Co., 438 U.S. 422, 443 n.16, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978))*. The In re Baby Food plaintiffs simply could not correlate information exchanges with specific collusive behavior. Rather, they made the more amorphous claim that the exchanges of information "impacted the market as a whole." Id.

The exchanges of information here, by contrast, are qualitatively different from those in *In re Baby Food*, particularly when considered in the context of other evidence. First, there is evidence tending to show that the exchanges occurred at a higher level of the flat glass producers' structural hierarchy. Second, and more importantly, a finder of fact could reasonably infer that the flat glass producers **[**53]** used the information to implement collusive price increases; that is, "the exchanges of information had an impact on pricing decisions." A court must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence. See *Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1364-65 (3d Cir. 1992)*, cited in *In re Baby Food, 166 F.3d at 124*. So, for example, there is evidence that AFG faxed to PPG a copy of a planned future increase that it had not announced publicly, PPG announced an identical increase before AFG, and the rest of the flat glass producers followed with identical price increases. It would take no stretch of the imagination for a fact finder to infer from this evidence--one piece of which is PPG's possession of a "competitive memoranda"--that PPG engaged in concerted action to fix prices.

In sum, here the exchanges of information are more tightly linked with concerted behavior and therefore they appear more purposive. Several of the key documents emphasize that the relevant price increases were not economically justified or supportable, but required competitors to hold the line. Others **[**54]** suggest not just foreknowledge of a single competitor's pricing plans, but of the plans of multiple competitors. Predictions of price behavior were followed by actual price changes. The inference of concerted rather than interdependent action is therefore stronger. In other words, these facts take the exchanges of pricing information outside the realm of "mere possession." *In re Baby Food, 166 F.3d at 126*.

We need not speculate as to whether something less than the evidence in this record--two rate increases, for instance, rather than three--would suffice to deny summary judgment. The evidence here, in its totality, is sufficient to go to a jury.

B. Automotive Replacement Glass

As described above, PPG and other automotive replacement glass producers supplied NAGS with their truckload list prices for various automotive replacement glass products. NAGS would select a particular truckload price--usually the truckload price of the identical OEM glass product--to devise recommended retail prices for the products. NAGS devised the recommended price by using a particular **[*370]** "multiplier" for each type of product. [26] The glass producers knew the multipliers NAGS used, **[**55]** and were able to calculate backwards to the truckload price that NAGS had utilized. The producers would then align their truckload list prices with the price that NAGS had used. As a result, the automotive replacement glass producers often increased their prices in parallel fashion. [27]

Plaintiffs argue that the evidence shows that PPG and other automotive replacement glass producers agreed to raise their prices. They provide evidence that although it was against PPG's official policy, PPG provided its truckload pricing information to NAGS. Plaintiffs also refer to the NAGS website, which at one point stated: "Manufacturers were in conflict over their **[**56]** published list prices. As a neutral party NAGS was asked to assign list prices to NAGS part numbers, establishing the NAGS List Price." App. 6444-45. [28] In addition, a chart that LOF devised depicts the process. It indicates that producers gave their truckload prices to NAGS, NAGS selected a particular truckload price, the producers issued a "new pricing schedule adjusted to NAGS," and as a result "industry pricing stabilized." App. 4939.

We understand why the NAGS Calculator would raise suspicion in plaintiffs' minds, and why plaintiffs would **[**57]** seek discovery regarding PPG's use of the calculator. Cf. Areeda, supra, P 1435g, at 264-65 (discussing the use of "pricing manuals"). But publication of pricing information can have a pro-competitive effect. As we note above, we should therefore hesitate to rest on inference of improper collusion from this ambiguous, or even pro-competitive, fact. See, e.g., *In re Baby Food, 166 F.3d at 126*;*Petruzzi's, 998 F.2d at 1232*. After conducting discovery, plaintiffs have failed to adduce sufficient evidence to create a genuine issue of material fact. First, there is no evidence that PPG or any other automotive replacement glass producer exerted influence over the truckload prices that NAGS selected to formulate recommended prices. And there is no evidence--unlike the evidence we described above regarding flat glass list prices--that the automotive replacement glass manufacturers agreed to adjust their list prices according to the NAGS recommended price. We will therefore affirm summary judgment on this claim.

C. Evidentiary Rulings

The District Court excluded several categories of evidence before it decided PPG's motions for summary judgment. **[**58]** Plaintiffs appeal from four of the District Court's evidentiary determinations. We address them in turn. [29]

[*371] 1. *Fifth Amendment*

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[26] The multiplier for domestic windshields, for example, was 4.06. App. 2980.

[27] PPG, Ford and LOF increased the price of windshields by 7 % and tempered parts by 8 %, for example, in February-March of 1992. App. 5913, 5917, 7184. Similarly, in January-February of 1992 they increased windshield prices by 9 % and tempered parts by 10 %. App. 4899, 7192, 7187.

[28] A fuller excerpt states:

> *In the 1950s*, manufacturers were in conflict over their published list prices. As a neutral party NAGS was asked to assign list prices to NAGS part numbers, establishing the NAGS List Price. These prices reflected the industry practice of discounting and were based on manufacturers' truckload prices. NAGS started publishing the part numbers with prices, establishing the 'NAGS calculator'.

App. 6444-45 (emphasis added).

[29] We do not address the District Court's other evidentiary rulings, such as its decision to exclude the transcript of Skeddle's grand jury testimony. Plaintiffs opine that the District Court erred when it excluded the testimony, but they do not appeal from that decision. Plaintiffs' Br. 18.

When plaintiffs sought to depose Skeddle and Bryant--the former LOF executives who were charged with crimes and who alleged that LOF engaged in illegal antitrust activity--they both asserted their *Fifth Amendment* privilege against self incrimination. The District Court denied plaintiffs' motion in which they urged the Court to compel Skeddle and Bryant to testify. Plaintiffs now challenge the District Court's ruling on appeal. ***HN19***[] We review the Court's determination for an abuse of discretion. See *United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1997)*.

HN20[] As a general matter, **[**59]** a court should allow a witness to invoke his *Fifth Amendment* privilege only if the hazard of incrimination is "substantial and 'real,' and not merely trifling or imaginary." *United States v. Apfelbaum, 445 U.S. 115, 128, 63 L. Ed. 2d 250, 100 S. Ct. 948 (1980)* (citation omitted). Yet "the trial judge should order the witness to answer questions only if it is perfectly clear, from a careful consideration of all the circumstances in the case that the answer cannot possibly tend to incriminate the witness." *United States v. Washington, 318 F.3d 845, 856 (8th Cir.)*, cert. denied, *540 U.S. 899, 157 L. Ed. 2d 179, 124 S. Ct. 251 (2003)* (internal quotations and citations omitted); see also *United States v. Yurasovich, 580 F.2d 1212, 1215-16 (3d Cir. 1978)* ("To support a contempt citation for a refusal to testify on *Fifth Amendment* grounds . . . it must be 'Perfectly clear from a careful consideration of all the circumstances in the case, that the witness (who invokes the privilege) is mistaken, and that the answer(s) cannot Possibly have such a tendency to incriminate.'").

Plaintiffs argue that the Court erred because (1) all relevant statutes of limitations **[**60]** have run; and (2) the relevant prosecutorial authorities have stated that they do not intend to bring criminal charges against Skeddle or Bryant. It is irrelevant, however, that prosecutorial authorities have stated that they do not intend to prosecute Skeddle or Bryant. See *Matter of Special Federal Grand Jury, 819 F.2d 56, 58 (3d Cir. 1987)* ***HN21***[] ("[A] promise by the government not to use the testimony to be compelled, even if approved by a court, does not strip the recipient of the protection of that privilege."). And Skeddle and Bryant have sufficiently refuted plaintiffs' statute of limitations argument. To be sure, ***HN22***[] "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer." *Brown v. Walker, 161 U.S. 591, 598, 40 L. Ed. 819, 16 S. Ct. 644 (1896)*. But, contrary to plaintiffs' assertion, Skeddle and Bryant have identified several state statute of limitations that have not run. In Michigan, for example, a defendant's absence from the state tolls the statute of limitation for certain of the state's antitrust laws. See *Mich. Comp. Laws. Ann. §§ 445.781*, *767.24(5)*. The District **[**61]** Court did not abuse its discretion by declining to compel Skeddle and Bryant to testify.

2. Skeddle's Notes

Over the course of the litigation, plaintiffs obtained a large collection of Ronald Skeddle's handwritten notes. The notes fall into two general categories: notes that LOF provided to plaintiffs during discovery and notes that the DOJ produced to plaintiffs pursuant to an order of the District Court. App. 10746, 11154. Skeddle originally provided the latter notes, which the parties have come to call the "Queen's File," to a grand jury empaneled in the **[*372]** spring of 1996 to investigate Skeddle's (and others) allegations of wrongdoing in the flat glass industry. [30]

PPG filed two separate *in limine* motions seeking to exclude both categories of notes, and the District Court granted its motions because **[**62]** it determined that the notes contain "multiple levels of hearsay" and did not fall within any exception to the hearsay rule. App. 47-48, 56-58. ***HN23***[] "We review the district court's decisions to admit or exclude evidence for abuse of discretion, although our review is plenary as to the interpretation or application of a legal standard underlying such a decision." *Robinson v. City of Pittsburgh, 120 F.3d 1286, 1293 (3d Cir. 1997)* (citations omitted).

a. Non-Queen's File Notes

Plaintiffs argue that many portions of Skeddle's notes tend to support their contentions that PPG agreed with its competitors to increase prices on at least two of the three occasions we discussed above. With respect to the June-July 1991 price increase, plaintiffs reference a May 31, 1991 note that states: "Glen [Nightingale] heard that

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30 There is apparently some amount of overlap between the two categories of notes: LOF had already produced a portion of the notes that plaintiffs also obtained as part of the Queen's File. App. 11154 n.3.

Glaverbec wants to move upwards in N.E. Reg's." App. 4567. Similarly, a note that plaintiffs argue Skeddle wrote no later than May of 1991 states that Jim Collins, a PPG Regional Sales Manager, "mentioned that PPG is looking at the possibility of an inc this summer." App. 3938.

With regard to the September-October 1992 price increase, plaintiffs refer to notes **[**63]** that purportedly memorialize conversations Skeddle had with Glen Nightingale, of Pilkington. First, a note dated February 6, 1992 provides: "Clearly Glen has had discussions w AFG, Guardian, & probably indirectly w PPG (crystal tower) re price increases, and is asking me now to supply him info so that he can initiate more detailed discussions with his contacts." App. 3877. And a note that plaintiffs contend pertains to a meeting Skeddle had with Glen Nightingale on April 29, 1992 states:

> Glen indicated he would make contacts w AFG and Glaverbel/Glaverbec to see if he could get them to agree to come off their silly low prices and if he could initiate a general price increase w/in the next 2 months.
> He indicated he would get back to me to indicate his findings/effect following his calls.

App. 4581. Another note also ostensibly memorializing a conversation Skeddle had with Glen Nightingale states that Nightingale met with AFG's Dee Hubbard. The note mentions an "incremental increase" and states that "AFG will lead--before Labor Day." App. 3891.

Similarly, a note from a meeting Skeddle had with LOF board member Tomoaki Abe and dated November 17, 1992 contains the **[**64]** notation: "Mtgs. w PPG, Guardian re lic'g, prices, etc." App. 10602. Finally, a note that plaintiffs contend memorializes a July 13, 1992 conversation with Nightingale states:

> Glen then related his information on North American flat glass pricing -- the info came from Hubbard of AFG, and the top guy at Glaverbel (Asahi) who control Glaverbec in Canada, [illegible] controls AFG in the states.
>
> The indication is that new "targets" have been established for AFG and Glaverbec in Canada @ [tilde] 7 % above recent experience--letters will be forthcoming to **[*373]** the general mkt place explaining new prices as follows:
> [chart omitted]
> These prices should go into effect 17th July.
> Glen then related that Hubbard & he have "talked" and have together convinced PPG to take the lead in putting up the price by [tilde] 7 % with letter to go out in Sept. 92, to take effect Oct. 1, 1992--with PPG taking the lead.

App. 3893.

Plaintiffs argue that these statements are admissible because they are statements of coconspirators under *Federal Rule of Evidence 801(d)(2)(E)* and therefore not hearsay. Alternatively, they argue that even **[**65]** if the statements are hearsay they are admissible as statements against interest under *Federal Rule of Evidence 804(b)(3)*.

We first consider whether the District Court erred in concluding that the statements were not admissible as against interest under *Rule 804(b)(3)*.***HN24***[] A hearsay statement is nonetheless admissible if (1) "the declarant is unavailable as a witness," *United States v. Boyce, 849 F.2d 833, 836 (3d Cir. 1988)*; (2) "the statement is so far contrary to his pecuniary, proprietary or penal interest that 'a reasonable person in the declarant's position would not have made the statement unless believing it to be true,'" id. (quoting *Fed. R. Evid. 804(b)(3)*); (3) "the trustworthiness and reliability of the statement [is] corroborated by the 'totality of circumstances' in the case," id.; and (4) the declarant had personal knowledge (i.e., he perceived the facts to which the statement relates), see *United States v. Ammar, 714 F.2d 238, 254 (3d Cir. 1983)*; 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 804.06[4] (2d ed. **[**66]** 2003). [31] The second and third requirements are "somewhat redundant" and often

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[31] *Federal Rule of Evidence 804(b)(3)* provides:

> ***HN25***[] (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . . .

require "'a sensitive analysis of the circumstances in which the statement was made and the precise nature of the statement.'" *Boyce, 849 F.2d at 836* (quoting *United States v. Palumbo, 639 F.2d 123, 127 (3d Cir. 1981))*; see also *United States v. Moses, 148 F.3d 277, 280 (3d Cir. 1998)* ("This determination must be made 'by viewing [the statement] in context' and 'in light of all the surrounding circumstances.'") (quoting *Williamson v. United States, 512 U.S. 594, 603-604, 129 L. Ed. 2d 476, 114 S. Ct. 2431 (1994))*.

[67]** Here, the District Court concluded that Skeddle's statements were inadmissible because they "have not been corroborated by the totality of the circumstances." App. 47. Because this was the total of the District Court's analysis, the precise basis for this conclusion is unclear. In its *in limine* motion before the District Court, PPG appears to have offered three reasons **[*374]** why the totality of the circumstances do not corroborate Skeddle's statements: (1) actual events did not occur precisely as the notes indicated they would (e.g., PPG did not "lead" the September 1992 price increase); (2) Skeddle's notes tend to implicate others besides himself; and (3) Skeddle may not have written the notes contemporaneously with the events he described in them. App. 10748-50.

The first two factors do not sufficiently impugn Skeddle's statements. To the contrary, discrepancies between Skeddle's statements and later actual events could tend to reinforce their veracity; statements that exactly mirrored what occurred would arguably be more suspect. And there is no *per se* rule that statements implicating another person in misconduct are not against the interest of the declarant. See *Moses, 148 F.3d at 280.* **[**68]** We do not agree with PPG's assertion that the statements, which relate the inculpatory statements of his superiors (such as Nightingale), do not also inculpate Skeddle. Skeddle was the President of LOF at the time of the alleged conspiracy. Discussions to increase prices and Skeddle's knowledge of those discussions blanket him with antitrust liability. Indeed, such liability likely forms the basis for Skeddle's invocation of his *Fifth Amendment* privilege against self incrimination.

We agree, however, that a finding that Skeddle's notes were not contemporaneous would support a conclusion that the statements are not reliable or corroborated by the circumstances. Skeddle left LOF under a cloud of mutual disaffection. Consequently, documenting LOF wrongdoing during a time when LOF was alleging that Skeddle himself had engaged in wrongdoing would tend to impugn Skeddle's motives and therefore also the reliability of the statements. But it is not clear that the District Court excluded Skeddle's notes because it found that they were not contemporaneous. Moreover, it is not clear that the record supports such a conclusion; on their face, many of the notes give no indication that they were **[**69]** ex post fabrications.

The District Court's summary disposition of PPG's *in limine* motion hinders our ability to determine whether it abused its discretion. Cf. *Becker v. ARCO Chemical Co., 207 F.3d 176, 181 (3d Cir. 2000)* ***HN26***[] ("Where, however, the district court fails to explain its grounds for denying a *Rule 403* objection and its reasons for doing so are not otherwise apparent from the record, there is no way to review its discretion."). Since we conclude that a jury could find an agreement existed even absent Skeddle's notes and we would remand on that basis alone, we believe the best course is to allow the District Court to consider these evidentiary matters in the first instance. We will therefore remand the District Court's determination that Skeddle's statements were not against self interest so that the Court can consider its rulings in light of our decision and more fully explain any bases for its rulings. [32]

> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed. R. Evid. 804(b)(3). We note that the *Confrontation Clause* raises some additional issues about admissibility of such testimony in a criminal case, but those concerns are irrelevant in this civil case. See *Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004)*.

[32] In this regard, the District Court should determine whether, because the statements at issue were diary entries, Skeddle believed that they would be seen by anyone. This may bear on whether they qualify as statements against interest. See ***Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1190, 1259-60 (E.D. Pa. 1981)***, issue aff'd *In re Japanese*

[70]** **[*375]** Similarly, we will also remand the District Court's determination that the statements in Skeddle's notes were not statements of co-conspirators.***HN27***[] "In order for an out-of-court statement to be admissible pursuant to *Rule 801(d)(2)(E)*, the district court must find by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy." *United States v. Ellis, 156 F.3d 493, 496 (3d Cir. 1998)*. [33]

Here, the District Court determined that plaintiffs had not satisfied the second requirement. It concluded **[**71]** that the statements in Skeddle's notes were not admissible as co-conspirator statements because "plaintiffs have failed to adduce sufficient evidence that PPG was a coconspirator in the alleged price-fixing conspiracy." App. 48. [34] In other words, although the Court concluded that there was evidence that a conspiracy existed, see app. 46, it found that there was insufficient evidence that PPG was a party to the conspiracy.

It was plaintiffs' burden to show by a preponderance **[**72]** of the evidence that the statements in Skeddle's notes were made in the course of and in furtherance of a conspiracy of which the declarant and PPG were members. See *United States v. McGlory, 968 F.2d 309, 334 (3d Cir. 1992)* (citing *Bourjaily v. United States, 483 U.S. 171, 175, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987))*; 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 801.34[6][a] (2d ed. 2003). And it was the District Court's role to determine whether plaintiffs satisfied their burden. See *Bourjaily, 483 U.S. at 175*; *Ammar, 714 F.2d at 247 n.5*. In making this factual determination, a district court is not bound by the rules of evidence. See *Bourjaily, 483 U.S. at 178-79*; *Fed. R. Evid. 104(a)*. Thus ***HN29***[] a district court can consider hearsay and other inadmissible evidence. See *McGlory, 968 F.2d at 334*. And it must consider the content of the alleged coconspirator statement as well, although the statements require independent corroboration. See *Fed. R. Evid. 801(d)(2)(E)* ***HN30***[] ("The contents **[**73]** of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . .").

The Court's summary disposition again hampers our review of its decision for an abuse of discretion, however, which is the standard of review we must apply to its *Rule 801(d)(2)(E)* determinations. See, e.g., *United States v. Local 560 (I.B.T.), 974 F.2d 315, 337 (1992)*. Insofar as the Court based its determination on a conclusion that there was insufficient evidence from which a jury could conclude that PPG entered into an agreement to fix prices, the District Court erred for the reasons we set forth above. But simply because a jury *could* find by a preponderance of the evidence that PPG entered into a conspiracy, **[*376]** it is not the case that the District Court *must* find that plaintiffs showed by a preponderance of the evidence that PPG entered into an agreement. Any particular factual determination requires making a number of more particularized factual determinations and weighing the relevant importance of those determinations. And two **[**74]** factfinders could feasibly reach different conclusion, especially under a preponderance of the evidence standard. To be sure, however, ***HN31***[] "the Federal Rules of Evidence are to be liberally construed in favor of admissibility." *United States v. Pelullo, 964 F.2d 193, 204 (3d Cir. 1992)*.

Because we will remand plaintiffs' flat glass price fixing claim for further proceedings, we again conclude that the best course is to remand the District Court's determination that the statements in Skeddle's notes were not

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Electronic Products Antitrust Litigation, 723 F.2d 238, 300 (3d Cir. 1983), rev'd on other grounds sub. nom *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. We do not categorically hold that diary entries cannot satisfy the requirements of *Rule 804(b)(3)*, see *Walker v. Lockhart, 763 F.2d 942, 951 n.18 (8th Cir. 1985)* (en banc), but we do believe that a searching inquiry is appropriate here, *In re Japanese Electronic Products, 723 F.2d at 300*.

[33] There is no requirement that the declarant be speaking from personal knowledge. See *United States v. Ammar, 714 F.2d 238, 254 (3d Cir. 1983)*; 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 801.23[2] (2d ed. 2003).

[34] The District Court characterized the admissibility of coconspirator statements as an "exception to the hearsay rule." *Rules 803* and *804* set forth exceptions to the hearsay rule; that is, they explain when statements are admissible even though they qualify as hearsay. ***HN28***[] *Rule 801(d)*, however, sets forth statements that are admissible because they do not constitute hearsay, including statements "by a coconspirator of a party during the course and in furtherance of the conspiracy." *Fed. R. Evid. 801(d)(2)(E)*.

coconspirator statements. See *In re Japanese Electronics Products Antitrust Litigation, 723 F.2d 238, 263 (3d Cir. 1983)* (remanding *Rule 801(d)(2)(E)* determination to be reconsidered),rev'd on other grounds sub. nom. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Thus the District Court can consider whether the statements in Skeddle's notes are coconspirator statements with the benefit of our discussion of the evidence tending to implicate PPG in a price-fixing conspiracy, and can further explain any bases it might have for its reasoning. [35]

[75]** Finally, we note that many of the notes contain multiple levels of hearsay. See, e.g., *Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1001-02 (3d Cir. 1988)*; *Fed. R. Evid. 805*. One note states, for example, that Nightingale "related" that he and an AFG executive "convinced PPG to take the lead in putting up the price by [tilde] 7 % with letter to go out in Sept. 92, to take effect Oct. 1, 1992--with PPG taking the lead." App. 3893. The note itself (Skeddle's statement) and Nightingale's assertion that he convinced PPG to take the lead in increasing prices are both out-of-court statements that plaintiffs seek to use to prove the truth of the matter asserted. Either or both might be admissible as statements of coconspirators as well as statements against interest. Again, we think the District Court should make these determinations in the first instance, taking into account our discussion in this opinion.

b. Queen's File Notes

The District Court concluded that the statements in the Queen's File notes, like the statements in the other Skeddle notes, were not admissible as coconspirator statements because "plaintiffs have **[**76]** failed to adduce sufficient evidence that PPG was a co-conspirator in the alleged price-fixing conspiracy." App. 57. It also concluded that the statements were hearsay and the Queen's File was not admissible under the statement against interest exception because "the statements contained therein are not contrary to Skeddle's pecuniary or penal interest" and because "the documents' trustworthiness and reliability are questionable given the totality of the circumstances." App. 57. [36]

[*377] Since this was the sum of the District Court's reasoning, we turn to PPG's arguments before the **[**77]** District Court to discern the bases for the Court's decision. Cf. *United States v. Himelwright, 42 F.3d 777, 781 (3d Cir. 1994)* (looking to whether bases for district court's decision was "apparent from the record" where the court did not explain the grounds for its decision). PPG argued that most of the notes in the Queen's File "were written after Mr. Skeddle's termination as chief executive officer of LOF on May 10, 1993, when he, Edward Bryant (then LOF's head of manufacturing operations), and Darryl Costin (then LOF's head of technical operations) were fired amidst allegations of actionable self-dealing." App. 11154. Many of the notes appear, on their face, to support PPG's contention. They are written in the third-person, for example, and they refer to events that post-date Skeddle's termination. See, e.g., Supp. App. 437. One note, for instance, refers to the "summer of 1993" in the past tense. App. 11154.

If the District Court concluded that the notes were not contemporaneous, it could have concluded that the statements contained therein were not in furtherance of a conspiracy or corroborated by the totality of the circumstances; that is, it could have **[**78]** concluded that the statements were not admissible as coconspirator statements or statements against interest. If we could conclude that the District Court excluded all the Queen's File notes on that basis, we would affirm the District Court's decision. But PPG concedes that not all the Queen's File notes appear to be non-contemporaneous. See PPG Br. 94, Tr. of Oral Argument 46. We will therefore remand the District Court's decision to exclude the Queen's File notes for the same reasons we remand its determination to

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[35] PPG argues that the District Court concluded that the statements in Skeddle's notes were not in furtherance of any conspiracy, ostensibly because--as PPG argues--Skeddle did not create the notes at the same time as the events he purports to describe in them. But nothing in the Court's decision indicates that this was a basis for its determination that the statements were inadmissible. The District Court will surely consider PPG's arguments in this regard on remand.

[36] The District Court also concluded that the Queen's File and non-Queen's File notes did not fall within the business records exception of *Rule 803(6)*. App. 47, 56-57. And the Court found that the "Queen's File does not qualify as an admission by a party opponent under *Rules 801(d)(2)(A)*, *(B)*, *(C)*, or *(D)*." App. 57-58. Plaintiffs do not argue that the District Court erred in these determinations, and we therefore do not address them.

exclude Skeddle's other notes. We think it best for the District Court to have the opportunity to make these evidentiary determinations with the benefit of our discussion here.

3. Evidence Concerning OEM Glass

As we explained above, PPG and others fabricated flat glass into products for use in automobiles. Some of those products--called "original equipment manufacturer" glass ("OEM glass")--were fabricated for use in new automobiles. Others were fabricated for use as automotive replacement parts. The latter products--called automotive replacement glass--are the same as OEM glass products, but the markets for the two are distinct.

In order to prove that PPG conspired **[**79]** to fix the price of flat glass, plaintiffs offered evidence that they argue shows that PPG conspired with LOF to fix the price of OEM glass products. Specifically, plaintiffs argue that meetings and conversations occurred between Edward Bryant--who was LOF's Executive Vice President in charge of the firm's flat glass, automotive replacement glass, and OEM businesses--and Frank Archinaco (the head of PPG's automotive replacement glass and OEM businesses). These meetings and discussions were private and occurred, according to plaintiffs, at "opportune times" for price fixing.

The District Court concluded that while the evidence constituted "other bad acts" evidence under *Federal Rule of Evidence Rule 404(b)*, it was admissible for other acceptable purposes (e.g. motive, opportunity, or intent). ***HN32***[] Yet the Court excluded the evidence because it determine that the **[*378]** evidence's probative value was substantially outweighed by the danger of unfair prejudice. App. 54-55. This is a standard *Rule 403* balance, which we review with "substantial deference." *McQueeney v. Wilmington Trust Co., 779 F.2d 916, 922 (3d Cir. 1985)*. [37]

[80]** While evidence that PPG and LOF conspired together in the OEM market would be relevant to plaintiffs' claim that PPG also conspired to fix prices in the market for flat glass, see *In re High Fructose Corn Syrup, 295 F.3d at 661* (noting that defendant conceded to having fixed prices on related products during the same time frame as the alleged conspiracy), Areeda, supra, P 1421, at 145, plaintiffs' evidence here is not particularly probative of any OEM glass conspiracy. The weakness of this evidence also mitigates any danger of unfair prejudice. But we cannot say that the District Court abused its discretion in weighing these countervailing considerations, and we will therefore affirm the Court's decision to exclude the OEM glass evidence.

III. Conclusion

We will affirm the District Court's decision granting summary judgment on plaintiffs' claim that PPG conspired to fix the prices of automotive replacement glass. We conclude, however, that there is sufficient evidence in the record--not taking into account evidence the District Court excluded--from which a reasonable jury could find that PPG conspired to fix the prices of flat glass. We will therefore reverse **[**81]** the District Court's judgment and remand for further proceedings. In addition, we will affirm the District Court's decisions declining to compel Skeddle and Bryant to testify and excluding evidence regarding OEM glass. But we will remand the Court's decision to exclude Skeddle's notes so that the Court can consider its ruling in light of our opinion here and have a further opportunity to explain the bases for its decisions.

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[37] PPG also argues that we should affirm the District Court's decision because a reasonable jury could not conclude that PPG committed the "other bad acts"--conspiring in the OEM market--that plaintiffs argue tend to show that PPG conspired to fix the prices of flat glass. See *Huddleston v. United States, 485 U.S. 681, 689, 99 L. Ed. 2d 771, 108 S. Ct. 1496 (1988)*. The District Court did not exclude the OEM glass evidence on that basis, however, and we need not address PPG's argument since we affirm on other grounds.

Davidson & Assocs. v. Internet Gateway

United States District Court for the Eastern District of Missouri, Eastern Division

September 30, 2004, Decided

No. 4:02-CV-498 CAS

Reporter
334 F. Supp. 2d 1164 *; 2004 U.S. Dist. LEXIS 20369 **; Copy. L. Rep. (CCH) P28,888

DAVIDSON & ASSOCIATES, INC., et al., Plaintiffs, v. INTERNET GATEWAY, et al., Defendants.

Subsequent History: Affirmed by *Davidson & Assocs. v. Jung, 2005 U.S. App. LEXIS 18973 (8th Cir. Mo., Sept. 1, 2005)*

Prior History: *Davidson & Assocs. v. Internet Gateway, Inc., 2003 U.S. Dist. LEXIS 25807 (E.D. Mo., Aug. 1, 2003)*

Disposition: Plaintiffs' motion for partial summary judgment granted; Defendants' motion for summary judgment denied. Other motions ruled upon.

Core Terms

bnetd, games, server, software, user, defendants', terms, parties, technological, emulator, license agreement, plaintiffs', installed, license, misuse, unconscionability, copies, summary judgment motion, players, interoperability, circumvention, circumvent, computer program, Copyright Act, rights, fair use, copyright infringement, state law, Gateway, connect

LexisNexis® Headnotes

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

A court must grant summary judgment if, based upon the pleadings, admissions, depositions, and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

HN2[] **Collective & Derivative Works, Derivative Works**

See 17 U.S.C.S. § 101.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Copyright Law > Constitutional Copyright Protections > Copyright Clause

HN3[] **Congressional Duties & Powers, Copyright & Patent Clause**

Copyright protection exists as a matter of federal law.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Copyright Law > Constitutional Copyright Protections > Copyright Clause

HN4[] **Congressional Duties & Powers, Copyright & Patent Clause**

See U.S. Const. art. I, § 8.

Business & Corporate Compliance > ... > Scope of Copyright Protection > Ownership Rights > State Regulations

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

HN5[] **Copyright, State Protection of Ownership Rights**

States may not enact copyright protection that conflicts with federal law.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > ... > Civil Infringement Actions > Presumptions > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > Scope of Protection

Governments > Legislation > Interpretation

HN6[] **Federal & State Law Interrelationships, Federal Preemption**

The Copyright Act must be construed in light of its basic purpose of promoting broad public availability of literature, music, and other arts.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Governments > Legislation > Interpretation

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

HN7[] Federal & State Law Interrelationships, Federal Preemption

The clearest indication that federal law supplants state law is a statutory preemption provision. When Congress expressly codifies its preemptive intent in statutory form, a court's analysis begins with the language of the statute.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

HN8[] Federal & State Law Interrelationships, Federal Preemption

See *17 U.S.C.S. § 301(a)*.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Common Law

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Business & Corporate Compliance > ... > Scope of Copyright Protection > Ownership Rights > State Regulations

Copyright Law > Scope of Copyright Protection > Subject Matter > Common Law Copyrights

HN9[] Federal & State Law Interrelationships, Common Law

17 U.S.C.S. § 301 preempts only those state law rights that may infringe one of the exclusive rights provided by copyright law. *Section 301* also states that nothing in its title limits any rights or remedies under the common law or statutes of any state with respect to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified under *17 U.S.C.S. § 106*. *17 U.S.C.S. § 301(b)(3)*.

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > ... > Civil Infringement Actions > Online Infringement > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Business & Corporate Compliance > ... > Scope of Copyright Protection > Ownership Rights > State Regulations

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

HN10[] **Federal & State Law Interrelationships, Federal Preemption**

A court considering federal copyright preemption must determine if a right sought under state law is equivalent to exclusive rights under federal copyright law. If an extra element is required, instead of or in addition to the acts of reproduction, performance, distribution, or display, in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption.

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

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN11[] **Federal & State Interrelationships, Erie Doctrine**

In a case where federal jurisdiction is based on diversity of citizenship, the law of the forum state is applied when deciding choice of law issues.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN12[] **Federal & State Interrelationships, Choice of Law**

Missouri courts generally recognize that parties may choose the state whose law will govern the interpretation of their contractual rights and duties. Missouri courts will honor the parties' choice of law provision if the application of the law is not contrary to a fundamental policy of Missouri.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN13[] **Federal & State Interrelationships, Choice of Law**

The law of the state chosen by parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. The law of the state chosen by the parties to govern their contractual rights and duties, will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties.

Computer & Internet Law > Internet Business > Contracts > Electronic Contracts

Copyright Law > ... > Assignments & Transfers > Licenses > Browsewrap & Clickwrap Licenses

HN14[] **Contracts, Electronic Contracts**

A "clickwrap" agreement appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement and purports to condition further access to the software or transaction on the user's consent to certain conditions there specified; the user consents to these conditions by clicking on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.

Computer & Internet Law > Internet Business > Contracts > Electronic Contracts

Governments > State & Territorial Governments > Licenses

HN15[] **Contracts, Electronic Contracts**

California courts enforce end user license agreements, which are valid under California law.

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Defenses > Unconscionability > General Overview

HN16[] **Contracts Law, Contract Conditions & Provisions**

California law allows courts to refuse to enforce an unconscionable provision in a contract. *Cal. Civ. Code § 1670.5* (2004). The purpose of *§ 1670.5* is to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. The basic test for unconscionability is whether, in light of the general background and the needs of a particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Unconscionability has both a procedural and substantive element. The procedural element focuses on oppression or surprise due to unequal bargaining power, and substantive unconscionability focuses on overly harsh or one-sided results. The prevailing view is that both procedural and substantive unconscionability must be present, although not to the same degree, before a court may exercise its discretion to refuse to enforce a contract or clause due to unconscionability. In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion the term is unenforceable, and vice versa.

Contracts Law > Defenses > Unconscionability > General Overview

HN17[] **Defenses, Unconscionability**

Procedural unconscionability concerns the manner in which a contract was negotiated and the circumstances of the parties at that time. Procedural unconscionability focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. The second component of procedural unconscionability encompasses an aspect of surprise which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce them.

Contracts Law > Defenses > Unconscionability > General Overview

HN18[] **Defenses, Unconscionability**

Substantive unconscionability focuses on the actual terms of an agreement. It traditionally involves contract terms that are so one-sided as to shock the conscience or that impose harsh or oppressive terms.

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Copyright Law > ... > Defenses > Fair Use > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

HN19[] **Defenses, Fair Use**

See *17 U.S.C.S. § 107*.

Copyright Law > ... > Defenses > Fair Use > Inapplicability of Fair Use Defense

Copyright Law > ... > Defenses > Fair Use > General Overview

HN21[] **Fair Use, Inapplicability of Fair Use Defense**

Reverse engineering as a fair use of a copyrighted work is firmly established.

Copyright Law > ... > Defenses > Fair Use > General Overview

HN22[] **Defenses, Fair Use**

Private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > ... > Age Discrimination > Defenses > General Overview

Contracts Law > Contract Conditions & Provisions > Waivers > General Overview

Labor & Employment Law > Discrimination > Age Discrimination > Waivers Under ADEA

HN23[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

Parties may waive their statutory rights under law in a contract.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Copyright & Trademark Misuse Defenses

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

HN24[] **Misuse of Rights, Copyright & Trademark Misuse Defenses**

Abuse of copyright is generally recognized as an equitable affirmative defense to a copyright infringement claim. In examining an assertion of copyright misuse, the question is not whether the copyright is being used in a manner violative of ***antitrust law*** but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright. Misuse does not invalidate the copyright, it only precludes its enforcement during the period of misuse.

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

HN25[] **Copyright Protection, Civil Infringement**

See *17 U.S.C.S. § 1201(a)(1)(A)*.

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

HN26[] Digital Millennium Copyright Act, Prohibited Conduct

To circumvent a technological measure means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner. *17 U.S.C.S. § 1201(3)(A)*. The statute defines "effectively controls access to a work" to mean if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. *§ 1201(3)(B)*.

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > General Overview

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

HN27[] Defenses, Fair Use

See *17 U.S.C.S. § 1201(f)(1)*.

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > General Overview

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

HN28[] Copyright Protection, Civil Infringement

Interoperability is defined as the ability of computer programs to exchange information, and such programs mutually to use the information which has been exchanged. *17 U.S.C.S. § 1201(f)(4)*.

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

HN29[] Copyright Protection, Civil Infringement

See 17 U.S.C.S. § 1201(a)(2).

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

HN30[] Defenses, Fair Use

See 17 U.S.C.S. § 1201(c).

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

HN31[] Defenses, Fair Use

See 17 U.S.C.S. § 1201(f)(2)-(3).

Computer & Internet Law > ... > Copyright Protection > Digital Millennium Copyright Act > Prohibited Conduct

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Computer & Internet Law > ... > Civil Infringement > Defenses > Fair Use

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > General Overview

Copyright Law > Copyright Infringement Actions > Digital Millennium Copyright Act > Prohibited Conduct

HN32[] Digital Millennium Copyright Act, Prohibited Conduct

Persons who commit copyright infringement cannot benefit from the exemptions of 17 U.S.C.S. § 1201(f). 17 U.S.C.S. § 1201(f)(2), (3) are not broad exceptions that can be employed to excuse any behavior that makes some device interoperable with some other device.

Counsel: [1]** For Davidson & Associates, Inc., Plaintiff: Carol Anne Been, SONNENSCHEIN AND NATH, Chicago, IL. Kirill Y. Abramov, SONNENSCHEIN AND NATH, LLP, St. Louis, MO. Michael Quinn Murphy, SONNENSCHEIN AND NATH, LLP, St. Louis, MO. S. Roberts Carter, III, SONNENSCHEIN AND NATH, Chicago, IL. Stephen H. Rovak, SONNENSCHEIN AND NATH, LLP, St. Louis, MO.

For Internet Gateway, Inc., Defendant: Cindy A. Cohn, ELECTRONIC FRONTIER FOUNDATION, San Francisco, CA. Mark Sableman, THOMPSON COBURN, St. Louis, MO. Matthew A. Braunel, THOMPSON COBURN, St. Louis, MO. Paul S. Grewal, DAY AND CASEBEER, Cupertino, CA.

Judges: CHARLES A. SHAW, UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES A. SHAW

Opinion

[*1166] **MEMORANDUM AND ORDER**

This matter is before the Court on defendants' motion for summary judgment **[*1167]** and plaintiffs' motion for partial summary judgment. The Court will grant plaintiffs' motion to consider supplemental authority and defendants' motion to consider supplemental authority. The Court entered a consent decree on March 18, 2004 which resolved most of the claims raised in the summary judgment motions. On the remaining claims, the Court will (1) grant plaintiffs' motion for summary judgment as to Count **[**2]** VII of their second amended complaint for breach of contract and deny defendants' motion for declaratory judgment as to the contract claim; (2) grant plaintiffs' motion for summary judgment as to the anti-circumvention claim in Count II and will deny defendants' motion for declaratory judgment as to the anti-circumvention claim; and (3) grant plaintiffs' motion for summary judgment as to the trafficking in anti-circumvention technology claim in Count II and deny defendants' motion for declaratory judgment regarding the trafficking in anti-circumvention technology claim.

I. Procedural Background

Plaintiffs Davidson & Associates, Inc. d/b/a Blizzard Entertainment ("Blizzard") and Vivendi Universal Games, Inc. sued defendants Internet Gateway, Inc., Jim Jung, Ross Combs, Rob Crittenden, Yi Wang, and John Does 1-50. The Court dismissed Yi Wang and John Does 1-50. (See Order of July 8, 2003). Plaintiffs' second amended complaint alleges that defendants committed copyright infringement in violation of *17 U.S.C. § 501*; circumvention of copyright protection systems and trafficking in circumvention technology under *17 U.S.C. § 1201(a)* **[**3]** ; federal trademark infringement under the Lanham Act, *15 U.S.C. § 1114(1)*; federal false designation of origin under the Lanham Act, *15 U.S.C. § 1125(c)*; common law trademark infringement and unfair competition; and breach of End User License Agreements ("EULA") and Battle.net Terms of Use ("TOU"). The defendants filed counterclaims requesting declaratory relief as to non-infringement under *17 U.S.C. § 501*, non-circumvention of copyright under *17 U.S.C. § 1201(a)*, the unconstitutionality of *17 U.S.C. § 1201(a)*, and unenforceability of contract.

On March 18, 2004, the Court entered a consent decree and permanent injunction which constituted the full and complete relief on plaintiffs' claims of copyright infringement, federal trademark infringement, federal false designation, and common-law trademark and infringement. The consent decree also provided complete relief on defendants' claim for declaratory judgment for non-infringement and unconstitutionality of *17 U.S.C. § 1201(a)*. The consent decree resolves plaintiffs' claims in Counts I, III, **[**4]** IV, V, and VI of the second amended complaint. The consent decree also constitutes the full monetary relief, costs, and fees related to this action. The parties agreed that the remaining claims for injunctive relief (plaintiffs' claims of circumvention of copyright protection systems and trafficking in circumvention technology under *17 U.S.C. § 1201(a)*, breach of the EULAs and TOU, and defendants' claims for declaratory relief for non-circumvention and unenforceability of contract) should be resolved by the Court based on the parties' existing summary judgment motions. The parties only seek injunctive relief on plaintiffs' remaining claims under Counts II and VII and defendants' claims for declaratory relief under Counts II and IV of their second amended counterclaim.

II. Legal Standard

HN1[] This Court must grant summary judgment if, based upon the pleadings, admissions, depositions and affidavits, there exists no genuine issue of material fact and **[*1168]** the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*; *Board of Education, Island Trees v. Pico, 457 U.S. 853, 863, 73 L. Ed. 2d 435, 102 S. Ct. 2799 (1982).* **[**5]** "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Cearley v. General Am. Transp. Corp., 186 F.3d 887, 889 (8th Cir. 1999)* (citing *Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405-06 (8th Cir. 1990))*. In this case, only legal issues exist for determination, as the parties submitted a joint stipulation of undisputed facts after entry of the consent decree.

III. Undisputed Facts

Blizzard is a California corporation. Vivendi is the parent corporation of Blizzard. The plaintiffs will be collectively referred to as Blizzard. Blizzard creates and sells computer games that are played on personal computers. The particular Blizzard games at issue in this case are entitled "StarCraft," "StarCraft: Brood War," "WarCraft II: Battle.net Edition," "Diablo," and "Diablo II: Lord of Destruction." Blizzard games have sold millions of copies and generated revenue in excess of $ 480 million since 1998.

The individual defendants are two computer programmers, Ross Combs and Rob Crittenden, and a systems administrator, Jim Jung. The corporate defendant Internet Gateway is an Internet service **[**6]** provider based in St. Peters, Missouri. [1] Jung is the president, co-owner, and day-to-day operator of Internet Gateway.

A. Battle.net Online Gaming Service

In January 1997, Blizzard officially launched Battle.net, a 24-hour online gaming service available to purchasers of its computer games. The Battle.net service currently has nearly 12 million active users who spend more that 2.1 million hours online per day. At any given time, Battle.net servers average about 200,000 concurrent users, with a peak volume of 400,000 concurrent users.

Blizzard has valid copyright registrations covering Battle.net and each of its computer games at issue in this litigation. The only copyright registrations Blizzard has identified in this case concern its Battle.net server program and its individual computer game software. The Battle.net service **[**7]** is a free service that allows owners of certain Blizzard games to play those games, through their personal computers, against each other by linking together over the Internet. Battle.net mode allows users to create and join multi-player games that can be accessed across the Internet, to chat with other potential players, to record wins and losses and save advancements in a password protected individual game account, and to participate with others in tournament play featuring elimination rounds. Players can set up private chat "channels" and private games on the Battle.net service to allow players to determine whom they wish to interact with on the Battle.net service. These Battle.net mode features are accessed from within the games themselves.

In addition to multi-player play over the Internet via Battle.net mode, the games at issue have the capacity for and permit non-Internet multi-player gaming for a limited number of players who connect to each other via a local area computer network ("LAN") such as a home network, via modems connected to telephone lines, or by directly connecting two computers together with cables. The features and functions of Battle.net mode, however, cannot **[**8]** be accessed when players are connected **[*1169]** through those means. The parties stipulate that players also have the option of engaging in single player play against the computer.

Like most computer software, Blizzard games can be easily copied and distributed over the Internet. The Battle.net service is designed to prohibit access and use of Battle.net mode by such unauthorized or pirated copies of Blizzard games. Each time a customer logs onto the Battle.net service, a Battle.net server examines the customer's game to

[1] The parties have included Internet Gateway in the term "defendants," but have not discussed its liability separate from the individual defendants. The Court will do the same.

check whether the game is using the latest version of the game software. If a Blizzard game does not have the latest software upgrades and fixes, the Battle.net service updates the customer's game before allowing the game to play in Battle.net mode.

B. Technology of the Battle.net Service

Blizzard's games are shipped to customers on CD-ROM disks. Except for the game "Diablo," each authorized version of a Blizzard game comes with a "CD Key," a unique sequence of alphanumeric characters that is printed on a sticker attached to the case in which the CD-ROM was packaged. The user of the game must input the CD Key into his or her computer when installing the game, and it **[**9]** is subsequently stored on the computer for use in logging on to the Battle.net service. The Battle.net service prohibits use of unauthorized or pirated copies of Blizzard games with the Battle.net service.

To log on to the Battle.net service and access Battle.net mode, the game initiates a authentication sequence or "secret handshake" between the game and Battle.net server. First, the game and Battle.net server exchange random numbers (one provided by the game and one provided by the server). The game then takes the random numbers, as well as information from the CD Key, and calculates an encrypted alphanumeric sequence which is sent to the Battle.net server. The game performs this encryption to prevent individuals from stealing the game's CD Key when it is transmitted over the Internet to a Battle.net server. The Battle.net server receives the alphanumeric sequence sent by the game, along with other information sent by the game, and uses this data to determine whether the CD Key information sent by the game is valid. If the CD Key information is valid, the Battle.net server will determine whether the same CD Key is already being used by another game that is currently logged on to **[**10]** that Battle.net server gateway. [2] If the CD Key is both valid and not currently being used by other players on the same Battle.net gateway, the Battle.net server sends a signal to the game that allows the game to enter the Battle.net mode and use the Battle.net gaming services. The Blizzard game waits for this signal before entering Battle.net mode. Battle.net uses an encryption algorithm for this process based on a common encryption algorithm. The standard version of this algorithm was released by the United States government.

C. End User License Agreements ("EULA") and Battle.net Terms of Use ("TOU")

In order to play the Blizzard game contained on a CD-ROM, a user must first install the game onto a computer from the CD-ROM. First, the user inserts the CD-ROM into his or her computer. A menu pops up automatically, and **[**11]** the user chooses to install the game from that menu. Second, the user is presented with the terms of an End User License Agreement **[*1170]** ("EULA"). At the end of the EULA, Blizzard includes a button with the text, "I Agree" in it, which the user must click in order to proceed with the installation. The game will not work if the "I Agree" button is not selected. Third, the user is asked to enter a name and the CD Key. Fourth, the user is asked to choose where on his or her computer the program's files should be installed. The files are then installed at the chosen location. Finally, the user is offered the opportunity to register his or her copy of the game with Blizzard via an on-line registration process. After the user has finished registering his copy, or if he or she chooses not to register, the installation process is complete.

Blizzard's Battle.net service has a Terms of Use ("TOU"), which Blizzard presents to users when they first log onto the Battle.net service. First-time users of the Battle.net service are shown the terms of the Battle.net service TOU after a user has installed a Blizzard game and logs onto the Battle.net service for the first time to play with a purchased Blizzard **[**12]** game product. At the end of the TOU, Blizzard includes a button with the text, "Agree" in it, which the user must click before the Battle.net service can be used. The product will not work with the Battle.net service if the "Agree" button is not selected.

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[2] The parties stipulate that a gateway is a cluster of servers located in a particular geographic region and that the four current gateways are U.S. West, U.S. East, Europe, and Asia.

For every game at issue in this litigation except for Diablo, the outside packaging of the game states that use of the game is subject to a EULA, and that use of Blizzard's Battle.net service is subject to the Battle.net TOU. The terms of the EULAs and TOU themselves do not appear on the outside packaging. If the user does not agree to the terms of Blizzard's EULAs or Battle.net TOU, he or she may return the game for a full refund of the purchase price within thirty (30) days of the original purchase. The EULA contains the following language:

> YOU SHOULD CAREFULLY READ THE FOLLOWING END USER LICENSE AGREEMENT BEFORE INSTALLING THIS SOFTWARE PROGRAM. BY INSTALLING, COPYING, OR OTHERWISE USING THE SOFTWARE PROGRAM YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, PROMPTLY RETURN THE UNUSED SOFTWARE PROGRAM TO THE PLACE OF PURCHASE OR CONTACT BLIZZARD ENTERTAINMENT CUSTOMER **[**13]** SERVICE . . . FOR A FULL REFUND OF THE PURCHASE PRICE WITHIN THIRTY DAYS OF THE ORIGINAL PURCHASE.

(Pls.' Ex. 8). The EULA further states "subject to the grant of license hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, reverse engineer [3], derive source code [4] **[**14]** , modify, disassemble, decompile, create derivative works [5] based on the Program, or **[*1171]** remove any proprietary notices or labels on the program without the prior consent, in writing, of Blizzard." Id. The EULA also states that it "shall have been deemed to have been made and executed in the State of California and any dispute arising hereunder shall be resolved in accordance with the law of California." Id.

The Battle.net TOU states: "Blizzard hereby grants, and by using Battle.net you thereby accept, a limited personal non-exclusive license and right to use Battle.net using either a home, work, or portable computer." Pls.' Ex. 9.

> You are entitled to use Battle.net for your own personal use, but you shall not be entitled to (i) sell or grant a security interest in or transfer reproductions of Battle.net to other parties in any way, nor to rent, lease, or license Battle.net to others without the prior written consent of Blizzard; (ii) copy, photocopy, reproduce, translate, reverse engineer, modify, disassemble, or de-compile in whole or in part any Battle.net software; (iii) create **[**15]** derivative works based on Battle.net; (iv) host or provide matchmarking services for any Blizzard software programs or emulate or redirect the communication protocols used by Blizzard as part of Battle.net, through protocol emulation, runneling, modifying, or adding components to the Program, use of a utility program, or any other technique now known or hereafter developed for any purpose, including, but not limited to, network play over the Internet, network play utilizing commercial or non-commercial gaming networks, or as part of content aggregation networks without the prior written consent of Blizzard or exploit Battle.net or any of its parts for any commercial purpose, including but not limited to, use at a location such as a cyber cafe, arcade, or other location where users are charged a fee, whether hourly or otherwise to use Battle.net; (v) use any third-party software to modify Battle.net to change game play, including, but not limited to cheats and/or hacks; (vi) use Blizzard's intellectual property rights contained in Battle.net to create or provide any other means through which Blizzard entertainment software products including, but not limited to, StarCraft, StarCraft: **[**16]** Brood War, Diablo, Diablo II, Warcraft: Orcs & Humans, Warcraft II: Tides of Darkness, Warcraft II: Beyond the Dark Portal, Warcraft II: Battle.net Edition, and Warcraft II may be played by others, including, not limited to, server emulators . . . this agreement shall be governed by and construed with the laws of the State of California, without giving effect to any principles of conflicts of laws.

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[3] "Reverse engineering is the process of discovering how an invention works by inspecting and studying it, especially by taking it apart in order to learn how it works and how to copy it and improve it." BLACK'S LAW DICTIONARY 1345 (8th ed. 2004).

[4] "The term "source code" means the [non-machine] language used by a computer programmer to create a program." BLACK'S LAW DICTIONARY 1429 (8th ed. 2004).

[5] ***HN2***[] "A 'derivative work' is a work based upon one or more preexisting works, such as a translation . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a 'derivative work." *17 U.S.C. § 101*.

Pls.' Ex. 9 P13. Defendant Combs installed one Blizzard game, StarCraft, and clicked on the "I Agree" button after the EULA was displayed. Defendant Crittenden installed Blizzard games and clicked on the "I Agree" button after the EULAs were displayed. Defendant Jung installed three Blizzard games, Diablo, Diablo II, and Diablo II: Lord of Destruction, and clicked on the "I Agree" button after the EULAs were displayed. Crittenden and Jung logged onto the Battle.net service and clicked on the "Agree" button after the TOUs were displayed.

D. The bnetd project

The users of the Battle.net service have occasionally experienced difficulties with the service. Blizzard has also received complaints about user profanity and users who cheated to win games by modifying Blizzard's software **[**17]** ("client hacks"). Although Blizzard has taken actions to correct these difficulties with its Battle.net service, including adding additional server capacity, banning cheaters, and providing **[*1172]** for private channels and games, defendants were frustrated by the difficulties.

To address their frustrations with Battle.net, the defendants joined a group of non-profit volunteer game hobbyists, programmers, and other individuals called the "bnetd project." Combs, Crittenden, and Jung were lead developers for the bnetd project. Combs led all the developers. The bnetd project was a collaboration focusing on development of the bnetd server, which is a program that attempts to emulate Blizzard's Battle.net service. The bnetd server was created for "hack value" [6] and to address the difficulties that users sometimes experienced with the Battle.net service. In addition, some or all of the defendants developed bnetd, in part, because they believed that Blizzard game players should not be forced to view advertisements displayed via the Battle.net service and that it was morally wrong for Blizzard to require people who want to play Blizzard's games over the Internet to agree to the Battle.net TOU or **[**18]** other restrictions imposed by Blizzard. The bnetd project is a volunteer effort and the project has always offered the bnetd program for free to anyone who wants a copy of it.

The bnetd project was organized and managed over the Internet through a website, available at www.bnetd.org, that was available to the public through equipment provided by defendant Internet Gateway. The bnetd emulator provides a server that would allow gamers unable or not wishing to connect to Battle.net to experience the multi-player features of Blizzard's games, and was designed to allow access to Blizzard games in a multi-player environment without using Battle.net. The bnetd emulator provides matchmaking services for users of Blizzard games who want to play those games in a multi-player environment without using Battle.net. The bnetd project attempted to include all of the user-visible features of the Battle.net service. The bnetd.org website provided online discussion forums and information **[**19]** about the bnetd program, and also provided access to the program's computer code for others to copy and modify.

The bnetd program was intended as a functional alternative to the Battle.net service. To serve this function, bnetd had to be compatible with Blizzard's software. In particular, compatibility required that bnetd speak the same protocol [7] that the Battle.net service speaks. This was necessary for compatibility because the Blizzard games expect servers to speak this protocol, and will therefore be unable to work with any server that does not speak the protocol. By speaking the same protocol, the bnetd program was able to interoperate with Blizzard games. Once game play starts there is no difference between Battle.net and the bnetd emulator from the standpoint of a user who is actually playing the game.

Reverse engineering was **[**20]** necessary in order for the defendants to learn Blizzard's protocol language and to ensure that bnetd worked with Blizzard games. It would not have been possible to create a workable bnetd server without reverse engineering Blizzard's software and protocols. Combs used reverse engineering in the process of developing the bnetd server, including a program called "tcpdump" to log communications between Blizzard games and the Battle.net server. Crittenden used reverse engineering in the process of developing the bnetd server,

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[6] The parties do not define "hack value."

[7] Protocol is a set of rules for the format and sequencing of communication between two or more parties. Plaintiffs' and defendants' joint stipulation of undisputed facts P91.

including using a program called "Nextray." **[*1173]** Crittenden also used a program called "ripper" to take Blizzard client files which were compiled together in one file and break them into their component parts. Crittenden used the ripper program in order to figure out how Blizzard games displayed ad banners so that people running the bnetd emulator could display ad banners to users in the format that Blizzard uses on the Battle.net service. Combs tried to disassemble a Blizzard game to figure out how to implement a feature that allowed bnetd to protect the password that a user enters when creating an account in Battle.net mode. Crittenden made an unauthorized copy of a **[**21]** Blizzard game in order to test the interoperability of the bnetd server with multiple games.

Blizzard games are designed to connect only to Battle.net servers. To cause a Blizzard game to connect to a bnetd server instead of a Battle.net server, the computer file that contains the Internet address of the Battle.net servers must be modified. Combs participated in the development of a utility program called "BNS" to allow Blizzard games to connect to bnetd servers. The BNS utility is part of the bnetd project. Connecting to a bnetd server without the BNS utility program is more difficult to do and somewhat involved compared to using the BNS utility program. Once the computer files that contains the Internet address of the Battle.net servers has been modified so that the Blizzard game will connect to a bnetd server, the game sends the bnetd server information about its CD Key. It is technically possible for an individual who is using one of the Blizzard games at issue to play his or her game over the Internet via bnetd rather than Battle.net. Blizzard believes that the EULAs and TOUs prohibit this activity.

When the bnetd server receives the CD Key information, unlike Battle.net, it **[**22]** does not determine whether the CD Key is valid or currently in use by another player. The bnetd server computer code always sends the game an "okay" reply regardless of whether the CD Key is valid or currently in use by another player, as the game will otherwise not allow access to Battle.net mode. The bnetd emulator always allows the Blizzard games to access Battle.net mode features even if the user does not have a valid or unique CD Key, because the bnetd emulator does not determine whether the CD Key is valid or currently in use by another player. Blizzard does not disclose the methods it uses to generate CD Keys or to confirm the validity of CD Keys. Therefore, there is no way that defendants could have implemented a check for CD Key validity in the bnetd program. Defendants never advised people to play pirated copies of Blizzard games using the bnetd server.

The bnetd server program is highly configurable, which means that much of the operation of the server is under the control of the administrator running the server. Running a bnetd server allows users to become server administrators and not just players on someone else's server, giving them the ability to allow or deny access **[**23]** to various features of the bnetd server or to modify the computer code of the bnetd server. This allows the administrator of the bnetd server to create a gaming environment with different options than those presented to the user on the Battle.net service. In contrast, the Battle.net service is operated solely by Blizzard.

Combs, Crittenden, and Jung have used a Blizzard game to log into a bnetd server. Crittenden was aware that unauthorized versions of Blizzard games were played on bnetd servers. Jung knew that the bnetd emulator did not require that Blizzard games provide valid CD Keys. Combs suspected that the bnetd server would not know the difference between a real game and a pirated game.

[*1174] E. Distribution of the bnetd Server Program

Combs and Crittenden sent portions of the bnetd software to Jung to place on the www.bnetd.org website for download, or they put the software on the website themselves. Combs made the bnetd software available on his website located at *www.cs.nmsu.edu*/ rcombs/sc/. Defendants distributed the BNS utility program, which allowed Blizzard games to connect to bnetd servers. Also, defendants made the source code available as an "open source" application, **[**24]** meaning that others were free to copy the source code and distribute it with or without modifications. Because the bnetd source code was freely available, others developed additional Battle.net emulators based on the bnetd source code. Defendants also distributed binary versions of the bnetd program make it more convenient for users to set up and access the emulator program. Internet Gateway has donated space on its computers for use by the bnetd project. Internet Gateway also hosted a bnetd server that anyone on the Internet could access and use to play Blizzard games in Battle.net mode.

IV. Discussion

HN3[] Copyright protection exists as a matter of federal law. The Copyright Act is constitutionally based in Article I, § 8 which states: HN4[] "The Congress shall have power . . . to promote the progress of science and other useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." HN5[] States may not enact copyright protection that conflicts with federal law. HN6[] "The Copyright Act must be construed in light of its basic purpose of 'promoting broad public availability of literature, music, and other arts.'" Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 45 L. Ed. 2d 84, 95 S. Ct. 2040 (1975). **[**25]**

A. Preemption under the Copyright Act

Plaintiffs assert that the individual defendants [8] breached the EULAs and TOU when they used reverse engineering to learn Blizzard's protocol and distributed the bnetd software on the Internet. Defendants contend that the EULAs and TOU in this case concern areas protected by the Copyright Act. Defendants assert that the Copyright Act preempts the state law of contracts and therefore plaintiffs' state law contract claim is preempted by the Copyright Act.

HN7[] "The clearest indication that federal law supplants state law is a statutory preemption provision. When Congress expressly codifies its preemptive intent in statutory form, our analysis 'begins with the language of the statute.'" Jones v. Vilsack, 272 F.3d 1030, 1034 (8th Cir. 2001) (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 150 L. Ed. 2d 532, 121 S. Ct. 2404, 2415 (2000)). There is a statutory preemption provision in the Copyright Act, **[**26]** HN8[] 17 U.S.C. § 301(a)(2004), which provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." Id. HN9[] Section 301 preempts only those state law rights that "may infringe one of the exclusive rights provided by copyright law." National Car Rental Sys. Inc. v. Computer Assocs. Int'l Inc., 991 F.2d 426, 431 (8th Cir. 1991). Section 301 also states that nothing in its title limits any rights or remedies under the common law or statutes of any state with respect to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright **[*1175]** as specified under section 106. 17 U.S.C. § 301(b)(3).

First, the Court must determine if the computer software program is within the subject matter of copyright. National, 991 F.2d at 431. The answer is yes. 17 U.S.C. § 102. Then, HN10[] the Court must determine if the right sought under state law is equivalent to exclusive rights under federal copyright law. National, 991 F.2d at 431. **[**27]** If an extra element is required, instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action, then the right does not lie 'within the general scope of copyright' and there is no preemption. Id.

In this contract claim, the plaintiffs are alleging that the contract creates a right not existing under copyright law, a right based upon defendants' agreement to the EULA and TOU with Blizzard. The Court agrees that the contractual restriction does create a right not existing under copyright law. The right created is the right to restrict the use of the software through the EULAs and TOU. "Absent the parties' agreement, this restriction would not exist. The contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively different from one for copyright." Id. at 433. Therefore, the Court finds that the EULA and TOU are not statutorily preempted by the Copyright Act.

B. Choice of Law Provisions in Contract

First, the parties dispute whether the contract should be governed by Missouri law or California law. HN11[] In a case where **[**28]** federal jurisdiction is based on diversity of citizenship, the law of the forum state is applied when

[8] Defendant Internet Gateway is not a party to the EULAs and TOU.

deciding choice of law issues. *Inacom Corp. v. Sears, Roebuck and Co., 254 F.3d 683, 687 (8th Cir. 2001)*. ***HN12***[] Missouri courts generally recognize that parties may choose the state whose law will govern the interpretation of their contractual rights and duties. *Peoples Bank v. Carter, 132 S.W.3d 302, 304 (Mo. Ct. App. 2004)*. Missouri courts will honor the parties' choice of law provision if the application of the law is not contrary to a fundamental policy of Missouri. *Id.* (citing *Consolidated Fin. Invs. v. Manion, 948 S.W.2d 222, 224 (Mo. Ct. App. 1997))*.

In this case, the choice of law provision on the EULAs states, "This license Agreement shall be deemed to have been made and executed in the State of California and any dispute arising hereunder shall be resolved in accordance with the law of California." The TOU choice of law provision states, "This agreement shall be governed by and construed in accordance with the laws of the State of California, ..."

When a contract contains a choice of law provision, the validity of that provision **[**29]** is governed by *§ 187 of the Restatement (Second) of Conflict of Laws* (1971), which provides:

> ***HN13***[] (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
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> (2) The law of the state chosen by the parties to govern their contractual rights and duties, will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
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>> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
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>> **[*1176]** (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

See *In the Estate of Brown, 955 S.W.2d 940, 944-45 (Mo. Ct. App. 1997)* **[**30]** (court finds that Missouri law follows the Restatement (Second) Conflict of Laws in contract actions and *§ 187* addresses choice of law where contract contains a choice of law provision).

The relevant inquiry is whether the issue involved here is one in which the parties could have resolved by mutual agreement. If so, the Court should honor the parties' choice of law. See *Baxter Int'l Inc. v. Morris, 976 F.2d 1189, 1195-96 (8th Cir. 1992)*. The Court finds that the parties made an explicit agreement to the choice of law provision. Under Missouri law and the Restatement *§ 187(1)*, this Court will give effect to the reasonable expectations of the parties to the Agreement and apply the law of the state chosen by the parties, California. See *Hospital Products, Inc. v. Sterile Design, Inc., 734 F. Supp. 896, 899 n.2 (E.D. Mo. 1990)* (court applies Missouri law where parties agreed that Missouri law would govern interpretation of the agreement).

C. Existence of Contract

The parties disagree as to whether an enforceable contract exists. Blizzard asserts that the EULAs and TOU are enforceable contracts. Defendants assert that the EULAs and TOU are not **[**31]** contracts because under Missouri law there was no agreement between the parties. [9] Defendants argue that the only agreement between the parties is the offer to sell the software and the defendants' acceptance by purchase of the software. Also,

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[9] The Court notes that the defendants only addressed the applicability of Missouri law and did not address whether the EULAs and TOU were enforceable contracts under California law.

defendants contend that the terms of the EULAs and TOU were not presented at the time of purchase. The defendants assert that if a contract exists, it is unenforceable because it is unconscionable.

The end user licenses at issue in this case are commonly referred to as "clickwrap" agreements.

> ***HN14***[] A "clickwrap" agreement appears when a user first installs computer software obtained from an online source or attempts to conduct an Internet transaction involving the agreement and purports to condition further access to the software or transaction on the user's consent to certain conditions **[**32]** there specified; the user consents to these conditions by clicking on a dialog box on the screen, which then proceeds with the remainder of the software installation or Internet transaction.

Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions,* 106 A.L.R. 5th 309 n.1 (2003). [10]

[*1177] The Court finds that the license agreements are enforceable contracts under both California and Missouri law. **[**33]** ***HN15***[] California courts have enforced end user license agreements, which are valid under California law. See *Adobe Sys. Inc. v. One Stop Micro, Inc., 84 F. Supp.2d 1086, 1089-93 (N.D. Cal. 2000)* (end user license agreement valid under California law); *Hotmail Corp. v. Van$ Money Pie, Inc., 1998 U.S. Dist. LEXIS 10729, No. C-98-20064, 1998 WL 388389, at *6 (N.D. Cal. 1998)* (applying California law, plaintiff likely to prevail on breach of contract claim regarding clickwrap agreement). Cf. *SoftMan Prods. Co. v. Adobe Sys., 171 F. Supp. 2d 1075, 1087-88 (C.D. Cal. 2001)* (software reseller was not bound by EULA because it had never assented to the terms and court did not rule on validity of shrinkwrap agreements in general).

Even if Missouri law applied, the license agreement would be enforceable. Missouri has implemented the Uniform Commercial Code. The UCC provides that "a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." [11] *MO. REV. STAT. § 400.2-204(1)* (2000). "An agreement sufficient to constitute a contract for sale may be found even though **[**34]** the moment of its making is undetermined." *MO. REV. STAT. § 400.2-204(2)* (2000). The defendants assert that the licenses are not enforceable because they add additional terms under *Mo. Rev. Stat. § 400.2-207*, which are to be construed as proposals for additions to the contract. Defendants state that the EULAs and TOU are additional terms which they rejected. Defendants contend that is unfair for them to pay $ 49.99 for the games and then be unable to install them or access Battle.net without assenting to the EULA and TOU.

[35]** The Court finds the EULAs and TOU are enforceable under the UCC. First, the defendants did not purchase the Blizzard software, rather they purchased a license for the software. A sale consists in the passing of title from the seller to the buyer. *Mo. Rev. Stat. § 400.2-106(1)* (2000). When defendants purchased the games, they bought a license to use the software, but did not buy the software. Defendants' argument parallels the "first sale doctrine," although defendants do not use this term.

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[10] Clickwrap licenses are similar to shrinkwrap licenses which "consist of written conditions on a card or paper sheet which appears when the user opens the packaged hardware or software" and "purports to condition use of the hardware or software on the user's implicit agreement to abide by the conditions specified thereon." Kevin W. Grierson, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions,* 106 A.L.R. 5th 309 n.2.

[11] The Court assumes, as have several other courts, that the games in question constitute goods under the UCC. See *Specht v. Netscape Communications Corp., 306 F.3d 17, 29 n.13 (2nd Cir. 2002)* (discusses problems with applying the UCC to licensing of software downloadable from the Internet under California law); *I.Lan Systems, Inc. v. Netscout Serv. Level Corp., 183 F. Supp.2d 328, 332 (D. Mass. 2002)* (court notes UCC does not technically apply to software licenses, but assumes that it does under Massachusetts law). In 1999, the National Conference of Commissioners on Uniform State Laws approved the Uniform Computer Information Transactions Act (UCITA), which would establish the enforceability of the EULA and TOU in this case. See UNIF. COMPUTER TRANSACTIONS ACT *§ 112* (2002). To date, the UCITA has only been adopted in *Maryland* and *Virginia*. It applies specifically to computer software license agreements. Adoption of the UCITA recognizes the difference between the copyrighted information contained in the physical object and the physical object itself.

Under the first sale doctrine, "a sale of a lawfully made copy terminates a copyright holder's authority to interfere with subsequent sales or distribution of that particular copy." *Adobe Sys. Inc., 84 F. Supp.2d at 1089* (citations omitted). "The first sale doctrine is only triggered by an actual sale. Accordingly, a copyright owner does not forfeit his right of distribution by entering into a licensing agreement." Id. *Section 117 of the Copyright Act* provides that copies of computer programs may be "leased, sold, or otherwise transferred . . . **[*1178]** only with the authorization of the copyright owner." *17 U.S.C. § 117(b)*.

> To apply the first sale doctrine **[**36]** and the exceptions of *§ 117*, there must be an authorized transfer of ownership. Either a licensee can never be the owner of a copy for purposes of *§ 117* or ownership of the licensed copy depends on the terms of the license agreement. First, it must be determined what are the express terms of the contract? When license terms provide that ownership of the copy remains in the copyright owner, they preclude the transfer of title to the copy of the license.

Raymond T. Nimmer, LAW OF COMPUTER TECHNOLOGY: RIGHTS LICENSES LIABILITIES § 7:69 (3d ed. 2003). The EULAs and TOU in this case explicitly state that title and ownership of the games and Battle.net remain with Blizzard. Defendants do not produce sufficient evidence demonstrating that title and ownership of the games passed to them. Therefore, the Court finds that the first sale doctrine is inapplicable here.

Defendants rely upon *Klocek v. Gateway, Inc., 104 F. Supp.2d 1332 (D. Kan. 2000)*, to support their argument that Missouri law would not recognize their assent to the EULAs and TOU as binding contracts. In Klocek, the court found that the shrinkwrap agreement was not enforceable under Missouri law. **[**37]** The Court believes that this case is readily distinguishable from *Klocek*. In Klocek, the parties disputed whether plaintiff's complaint about repair of his Gateway computer should be submitted to arbitration. The contract was contained in a standard terms and conditions agreement and placed in the box with the Gateway computer. The contract provided that if the customer kept the Gateway computer beyond five (5) days after delivery, the customer accepted the terms and conditions. The court in Klocek held that a contract did not exist because "the act of keeping the computer past five days was not sufficient to demonstrate that Kloeck expressly agreed to the standard terms." *Id. at 1341*. Additionally, the mere fact that Gateway shipped the goods with the terms attached did not communicate to Klocek any willingness to proceed without Klocek's agreement to the standard terms.

In this case, the defendants do not dispute that (1) the software at issue in this litigation with the exception of Diablo has outside packaging stating it is subject to a EULA and Battle.net is subject to a TOU; (2) the defendants installed the games and assented to the EULA; (3) the **[**38]** defendants went to the Battle.net website and assented to the TOU; and (4) the EULA and TOU state it is a license and ownership of software remains with Blizzard. This case is readily distinguishable from Klocek, because here the defendants had sufficient notice of the EULAs and TOU. It is true that the terms of the EULAs and TOU were not on the box, but the terms were disclosed before installation of the games and access to Battle.net was granted. The defendants also expressly consented to the terms of the EULA and TOU by clicking "I Agree" and "Agree." See *SoftMan, 171 F. Supp.2d at 1087* ("Reading a notice on a box is not equivalent to the degree of assent that occurs when the software is loaded onto the computer and the consumer is asked to agree to the terms of the license."). Unlike the plaintiff in Klocek, the defendants in this case are not being penalized for inaction, but instead are being held to contract terms to which they assented. Accordingly, the Court finds that the EULA and TOU are enforceable contracts under both Missouri or California law.

D. Unconscionability

Next, the defendants argue that even if a contract was formed, it was a **[**39]** **[*1179]** contract of adhesion and is therefore unenforceable. Defendants argue that the contract is adhesive because it fails to square with the reasonable expectations of the parties, as no average member of the public would expect to pay $ 49.99 for a game and then be unable to use it when he or she gets home. Defendants also argue that no reasonable person would expect to be barred from installing the game he just bought unless he or she is forced to comply with an EULA. [12]

HN16[] California law allows courts to refuse to enforce an unconscionable provision in a contract. Cal. Code *§ 1670.5* (2004). The purpose of *§ 1670.5* is to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. Cal. Code *§ 1670.5* (2004) Legis. Comm. Cmt. (1). The basic test for unconscionability is "whether, in light of the general **[**40]** background and the needs of a particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." Id. Unconscionability has both a procedural and substantive element. *Freeman v. Wal-mart Stores, Inc., 111 Cal. App. 4th 660, 3 Cal. Rptr. 3d 860, 866 (Cal. Ct. App. 2003)* (citations omitted). The procedural element focuses on oppression or surprise due to unequal bargaining power, and substantive unconscionability focuses on overly harsh or one-sided results. *Id.* The prevailing view is that both procedural and substantive unconscionability must be present, although not to the same degree, before a court may exercise its discretion to refuse to enforce a contract or clause due to unconscionability. *Pardee Construction Co. v. Superior Court of San Diego County, 100 Cal. App. 4th 1081, 123 Cal. Rptr. 2d 288, 293 (Cal. Ct. App. 2002)*. "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion the term is unenforceable, and vice versa." *Freeman, 3 Cal. Rptr. 3d at 866-67*.

> ***HN17***[] Procedural unconscionability **[**41]** concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. Procedural unconscionability focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party. The second component of procedural unconscionability encompasses an aspect of surprise which the party supposedly agreed being hidden in a prolix printed form drafted by the party seeking to enforce them.

Pardee at 294.

The parties in this case did have unequal bargaining power because Blizzard is the sole seller of its software licenses; however, the defendants had the choice to select a different video game, to agree to the terms and gain the software and access to Battle.net, or to disagree and return the software for a full return of their money. See *De John v. TV Corp. Int'l, 245 F. Supp.2d 913, 919 (C.D. Ill. 2003)*. Also, the defendants are not unwitting members of the general public as they claim. They are computer programmers and administrators familiar with the language used **[**42]** in the contract, and have the expertise to reverse engineer and understand source code. Next, there was no surprise about the contract terms. The defendants had notice that the games were subject to the EULAs and that access to Battle.net was subject to a TOU. The defendants also had **[*1180]** access for up to thirty days to read over the EULA and decide if they wanted to adhere to its terms or return the games. Defendants had the same option in obtaining access to Battle.net. Therefore, the Court finds that the licensing agreements were not procedurally unconscionable.

Even if the contract was procedurally unconscionable, it is not substantively unconscionable. ***HN18***[] "Substantive unconscionability focuses on the actual terms of the agreement." *Pardee, 123 Cal. Rptr. 2d at 295*. It traditionally involves contract terms that are so one-sided as to "shock the conscience" or that impose harsh or oppressive terms. Id. The terms of the EULA and TOU in this case do not impose harsh or oppressive terms. Therefore, the Court hold that the EULAs and TOU in this case are enforceable contracts.

E. Fair Use Defense

The defendants claim that even if the EULA and TOU are enforceable **[**43]** under state law, they are unenforceable because they prohibit the fair use of the Blizzard software. ***HN19***[] *Section 107 of the Copyright*

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[12] The defendants make their arguments under Missouri law, but the Court will consider the clickwrap license in accordance with applicable California law.

Act states that "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. This section provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.; See United Tel. Co. of Mo. v. Johnson Publ'g Co., 855 F.2d 604, 609-10 (8th Cir. 1988). Defendants argue that the EULAs and TOU are anti-competitive because they prohibit Blizzard's customers from hosting or providing matchmaking services **[**44]** for the game. Also, the defendants state that the prohibition on reverse engineering violates their right under the fair use doctrine. Plaintiffs contend private contractual agreements waiving the right to reverse engineer are valid and defendants waived their rights in this case.

HN21[] Reverse engineering as a fair use is firmly established. See Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1325 (Fed. Cir. 2003) (reverse engineering is a fair use under 17 U.S.C. § 107); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000) (reverse engineering was fair use for the purpose of gaining access to the unprotected elements of software). The parties' dispute concerns the interpretation of two circuit court cases about the prohibition of reverse engineering under state law and licensing contracts.

In Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988), a software license agreement was declared invalid because the Louisiana License Act, with which the contract complied, was preempted by the federal Copyright Act. The Fifth Circuit noted the conflicts between the Louisiana Act and **[**45]** the Copyright Act: First, the Louisiana Act "authorized a total prohibition on copying, [while] the Copyright Act allows archival copies and copies made as an essential step in the utilization of a computer program . . . ." Id. at 269. Second, the Louisiana Act "authorized a perpetual bar against copying [and] the Copyright Act grants protection only for the life of the author plus fifty years . . . ." Third, the Louisiana Act "placed no restrictions on programs which may be protected, but the Copyright **[*1181]** Act only protects original works of authorship." Id. The court held that the provision of the Louisiana Act which "permits a software producer to prohibit the adaptation of a licensed computer program by decompilation or disassembly, conflicts with the rights of computer program owners under § 117 and clearly touches upon an area of federal copyright law." Id. at 270. The Fifth Circuit therefore concluded the restriction in Vault's license agreement against decompiliation or disassembly was unenforceable. Id.

Defendants rely on Vault and assert that Blizzard's licensing restrictions on fair use by reverse engineering are identical **[**46]** to those in Vault. Defendants state that Blizzard is attempting to use state enforcement of private contracts in an area that touches upon federal copyright law. Plaintiffs rely on Bowers and assert that the Vault holding is limited because it holds only that a state law prohibiting all copying is preempted by the Copyright Act. Therefore, plaintiffs contend that Vault does not apply to private license agreements at issue in this case.

In Bowers, the court held that ***HN22***[] "private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act." Bowers, 320 F.3d at 1325-26 (applying First Circuit law). The Bowers court acknowledged the Vault holding, but distinguished it by stating there was no evidence that "the First Circuit would extend the concept to include private contractual agreements supported by mutual assent and consideration." Bowers, 320 F.3d at 1325. The Federal Circuit in Bowers stated that the First Circuit recognized the contractual waiver of affirmative defenses and statutory rights, therefore, the defendants could contractually **[**47]** waive their fair use right to reverse engineer. Id.

The Court finds the reasoning in Bowers persuasive. The defendants in this case waived their "fair use" right to reverse engineer by agreeing to the licensing agreement. ***HN23***[] Parties may waive their statutory rights under law in a contract. See, e.g, The Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (2004) (statute outlines minimum requirements for waiver of statutory right to sue under the ADEA). In this case, defendants gave up their fair use rights and must be bound by that waiver.

F. Copyright Misuse Defense

Finally, defendants assert that the EULA and TOU terms constitute a misuse of Blizzard's copyright in the software. Defendants assert that by requiring restrictions on reverse engineering, matchmaking, and commercialization, Blizzard is guilty of copyright misuse. Further, defendants state that the EULA and TOU are facially anti-competitive. Blizzard responds that the copyright misuse defense is unavailable as a defense to a contract claim. Further, Blizzard asserts that even if the defense were available, Blizzard's software licenses contain routine restrictions repeatedly **[**48]** upheld by the courts and that defendants' unclean hands prevent them from relying upon the doctrine.

HN24[] "Abuse of copyright is generally recognized as an equitable affirmative defense to a copyright infringement claim." *Schoolhouse, Inc. v. Anderson, 2000 U.S. Dist. LEXIS 22524, No. 99-1214, 2001 WL 1640081 at *7 (D. Minn. 2001)* (citing *Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 973 (4th Cir. 1990))*, aff'd *275 F.3d 726 (8th Cir. 2002)*. In examining an assertion of copyright misuse, "the question is not whether the copyright is being used in a manner violative of ***antitrust law*** . . . but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright." *Lasercomb, 911 F.2d at 978*. Misuse does not invalidate the copyright, it only precludes its enforcement **[*1182]** during the period of misuse. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 204 (3rd Cir. 2003)*.

The leading cases affirming the availability of the copyright misuse defense have found that the language used in licensing agreements may constitute a misuse or abuse of copyright law. See *Lasercomb, 911 F.2d 970* **[**49]** (licensing agreement was copyright misuse because its broad language suppressed any attempt to independently implement the idea expressed, forbade licensee and its employees from developing or assisting in the development of any kind of computer-assisted diemaking software; agreement term was for ninety-nine years, and all licensees and employees forewent utilization of creative abilities); *Practice Mgmt. Info. Corp. v. American Medical Assoc., 121 F.3d 516, 520-21 (9th Cir. 1997)* (licensing agreement constituted copyright misuse because the limitation imposed by the AMA prevented licensee from using other forms, giving the AMA a substantial and unfair advantage over its competitors thus violating the public policy embodied in the grant of copyright); *Video Pipeline, 342 F.3d at 204-05* ("Anti-competitive licensing agreements may conflict with the purpose behind a copyright's protection by depriving the public of a would-be competitor's creativity," but copyright misuse not found).

In the *Lasercomb*, *Practice Management*, and *Video Pipeline* cases, the defendants raised copyright misuse as a defense to copyright infringement claims. In contrast, **[**50]** in this case defendants are asserting the copyright misuse doctrine as a defense to a contract claim, as plaintiffs' copyright infringement claim was settled by the parties and dismissed in the Consent Decree. As a result, the copyright misuse defense may be inapplicable. See, e.g., *Pollstar v. Gigmania Ltd., 170 F. Supp.2d 974, 982 (E.D. Cal. 2000)* (court declined to decide whether the license agreement terms constituted copyright misuse because the plaintiff did not allege copyright infringement).

In this case, the EULA's language permits the licensee to install one copy of the program on either a home or portable computer. The program has a multi-player capability [13] that allows up to eight players per registered version. These "spawned" versions may be installed on an unlimited number of computers, but must be played in conjunction with the registered version of the program from which they are spawned. The license agreement is effective until terminated and may be terminated at any time by either party. The licensee may also permanently transfer all of its rights under the license agreement if the recipient of the transfer agrees to the license agreement's terms **[**51]** and the licensee agrees to remove the program and any new materials from his or her computer. These requirements are in addition to the requirements previously mentioned which prohibit reverse engineering, creating derivative works, and transferring reproductions of the program among other restrictions.

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[13] The EULA for StarCraft: Brood of War does not state it has a multi-player format. There is no EULA provided to the Court for the Diablo game.

Considering these factors, the Court finds that the EULAs and TOU terms do not constitute copyright misuse. The language used does not prevent defendants from competing with Blizzard by prohibiting them or their employees from developing video game software as in Lasercomb, or require defendants to use or buy only Blizzard games similar to the AMA's prohibition on use of a competitor's coding system in Practice Management. The parties can terminate the licenses at any time. Finally, the Court is reluctant to apply the copyright misuse defense as a **[*1183]** defense to **[**52]** a contract claim, because the defense is normally used in copyright infringement actions and the copyright claim has been dismissed in this case. Therefore, the copyright misuse defense fails. As a result, the Court will grant plaintiffs' motion for summary judgment on Count VII of the second amended complaint and deny defendants' motion for summary judgment on this claim.

G. Digital Millennium Copyright Act

The Digital Millennium Copyright Act of 1998 ("DMCA") implemented the Copyright Treaty and the Performances and Phonograms Treaty, "two international treaties signed before the World Intellectual Property Organization ("WIPO") in December 1996 by the United States and 125 other countries." *17 U.S.C. § 1201 (1998)*. "The two treaties supplement the Berne Convention for the Protection of Literary and Artistic Works, to account for the development of 'digital works and the growth of the Internet and other digital communication networks." Raymond T. Nimmer, LAW OF COMPUTER TECHNOLOGY: RIGHTS LICENSES LIABILITIES § 1:44 (3d ed. 2003). "Along with implementing the WIPO treaties, the [DMCA] addresses a variety of copyright issues, including the circumvention **[**53]** of copyright protection systems, the integrity of copyright management information, and civil remedies and criminal offenses and penalties with respect to copyright protection and management systems." Amy P. Bunk, Annotation, *Validity Construction, and Application of Digital Millennium Copyright Act,* 179 A.L.R. Fed. 319 (1998).

1. Circumvention of Copyright Protection Systems

Plaintiffs allege that defendants violated the anti-circumvention provision of the DMCA. The DMCA provides, ***HN25***[] "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." *17 U.S.C. § 1201(a)(1)(A)*. ***HN26***[] To circumvent a technological measure "means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." *17 U.S.C. § 1201(a)(3)(A)*. The statute defines "effectively controls access to a work" to mean if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright **[**54]** owner, to gain access to the work. *17 U.S.C. § 1201(a)(3)(B)*.

Plaintiffs contend that the defendants' development of the bnetd emulator violates *§ 1201(a)(1)(A)*, because the defendants circumvented Blizzard's technological measures to gain access to Battle.net mode on their "unauthorized emulator." Plaintiffs assert that all of the available defenses are inapplicable to defendants' conduct.

Defendants respond that even if they circumvented or provided tools for circumvention, *§ 1201(f)* provides a complete defense to Blizzard's claims. First, defendants assert that *§ 1201(f)* provides a specific exception to the prohibition on circumvention outlined in *§ 1201(a)* when the circumvention is done for the sole purpose of creating and distributing interoperable computer programs such as the bnetd matchmaking server. Second, defendants state the legislative history shows that the DMCA only protects initial access to copyrighted works, not subsequent access. [14] See S. REP. NO. 105-190 at 28 **[*1184]** (1998); H.R. REP. NO. 105-551, pt. 1, at 18 (1998). Third, the

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[14] The Senate Report states: "Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological measure put in place by the copyright owner . . . . This paragraph does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under title 17, even if such actions involve circumvention of other types of technological measures. S. REP. NO. 105-190 at 28. The House Report states: "Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized

defendants assert they had authority to access the Battle.net mode because they lawfully purchased the software. **[**55]**

[56]** Plaintiffs respond that the defendants did not circumvent technological measures for the sole purpose of identifying and analyzing elements of the program that are necessary to interoperate with computer programs. Rather, plaintiffs allege that defendants' sole purpose was to copy and distribute Blizzard computer files. Plaintiffs contend that the defendants not only copied code that would achieve interoperability, but also copied elements that would preserve player account information, display of icons, and presentation of ad banners. Plaintiffs contend that the reverse engineering exemptions of *§ 1201(f)* are inapplicable because defendants consented to a EULA and TOU that expressly gave up the right to reverse engineer and engage in matchmaking. Next, plaintiffs state that the legislative history cited by defendants did not make it into the text of the statute and the plain language of the statute should prevail. Finally, plaintiffs asset that the defendants did not have authority to access Battle.net mode via a fake Battle.net server. Plaintiffs state that even if the defendants' theory were correct, the scope of the initial access was limited to connections with authentic Battle. **[**57]** net servers. Plaintiffs assert that defendants' argument relies on the false assumption that granting permission to access Battle.net mode via a Battle.net server creates implied authority to access Battle.net mode via a fake Battle.net server.

Section 1201(f)(1) provides a possible defense to plaintiffs' anti-circumvention claims. *Section 1201(f)(1)* provides:

> ***HN27***[] Notwithstanding the provisions of subsection (a)(1)(a), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

The DMCA defines ***HN28***[] interoperability as the "ability of computer programs to exchange information, and such programs mutually to use the information which has been exchanged." **[**58]** *17 U.S.C. § 1201(f)(4)*.

The Court finds that the defendants' actions constitute a circumvention of copyright under the DMCA. It is undisputed that defendants circumvented Blizzard's technological measure, the "secret handshake" **[*1185]** between Blizzard games and Battle.net, that effectively controlled access to Battle.net mode. It is true the defendants lawfully obtained the right to use a copy of the computer programs when they agreed to the EULAs and TOU. The statute, however, only exempts those who obtained permission to circumvent the technological measure, not everyone who obtained permission to use the games and Battle.net. See *Universal City Studios, Inc. v. Corley, 273 F.3d 429, 444 (2nd Cir. 2001)* (court rejects argument that because DVD buyer has authority to view DVD, buyer has authority of copyright owner to view DVD in a competing platform; court finds that argument misreads *§ 1201(a)(3)* because the provision exempts from liability those who would "decrypt"--not "use"--an encrypted DVD with the authority of copyright owner). The defendants did not have the right to access Battle.net mode using the bnetd emulator. Therefore, defendants' **[**59]** access was without the authority of the copyright owner.

The primary question is whether the defenses under *§ 1201(f)* are available to the defendants. It must be determined whether the defendants' sole purpose was to identify and analyze elements of the program to achieve interoperability of an independently created computer program with other programs, to the extent the identification and analysis did not constitute infringement under the Copyright Act. Plaintiffs contend that the defendants did not try to create another program, but rather their purpose was to copy Battle.net and place and distribute copies of it on the bnetd server to imitate Battle.net without the restrictions. The defendants admit that the bnetd project was to

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access to a copy of a work protected, under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation, where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully. H.R. REP. NO. 105-551, pt. 1 at 18.

provide matchmaking services for users of Blizzard games who want to play in a multi-player environment without using Battle.net.

The Court finds that the defendants' actions constituted more than enabling interoperability. The bnetd emulator developed by the defendants always allows the Blizzard game to access Battle.net mode features even if the user does not have a valid or unique CD Key, because the bnetd emulator does not determine whether the CD **[**60]** Key is valid or currently in use by another player. Unauthorized copies of the Blizzard games were played on bnetd servers. Then, defendants distributed the bnetd program for free. Because the bnetd source code was freely available, others developed additional Battle.net emulators based on the bnetd source code. In addition, the defendants distributed binary versions of the bnetd program to make it more convenient for users to set up and access the emulator program. Finally, the defendants did not create an independently created computer program. The bnetd program was intended as a functional alternative to the Battle.net service. Once game play starts there are no differences between Battle.net and the bnetd emulator from the standpoint of a user who is actually playing the game. Based on these facts, defendants' actions extended into the realm of copyright infringement and they cannot assert the defenses under *§ 1201(f)(1)*. See *17 U.S.C. § 1201(f)(1)*. Therefore, the Court will grant summary judgment to Blizzard on Count II of its second amended complaint as to the anti-circumvention claim and deny defendants' motion for summary judgment on this claim.

[**61] 2. Trafficking in Circumvention Technology

Finally, plaintiffs allege that defendants trafficked in circumvention devices in violation of *17 U.S.C. § 1201(a)(2)*. *Section 1201(a)(2)* provides:

> ***HN29***[] No person shall manufacture, import, offer to the public, provide, or otherwise **[*1186]** traffic in any technology, product, service, device, component, or part thereof, that, -- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to work protected under this title; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

The statute also states that ***HN30***[] "nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." *17 U.S.C. § 1201(c)* **[**62]** .

Plaintiffs allege that the defendants' development and distribution of the bnetd emulator satisfies one, if not all, of the tests for liability. First, the plaintiffs assert that the "secret handshake" that takes places between the Battle.net server and the Blizzard game is a technological measure that effectively controls access to Battle.net mode. Second, plaintiffs claim that the only purpose of the bnetd emulator is to allow access to Battle.net mode. Third, plaintiffs' claim that the defendants distributed the bnetd emulator knowing that it could be used to circumvent Blizzard's technological controls.

Defendants do not dispute these facts. Again, defendants rely on the exceptions of *§ 1201(f)*. Therefore, the question is whether the defendants' conduct meets the exceptions of *§ 1201(f)*. The provisions applicable to *§ 1201(a)(2)* in *§ 1201(f)(2)-(3)* provide:

> ***HN31***[] Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose **[**63]** of enabling interoperability or an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.
>
> The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case

> may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

17 U.S.C. § 1201(f)(2)-(3). The defendants assert that their purpose was to enable interoperability with the Blizzard software and that distribution to others for that same purpose is protected under § 1201(f).

Based on the facts presented to the Court, defendants violated the trafficking provision of § 1201(a)(2). The defendants' purpose in developing the bnetd server was to avoid the anti-circumvention restrictions **[**64]** of the game and to avoid the restricted access to Battle.net. Thus, the sole purpose of the bnetd emulator was not to enable interoperability. The bnetd emulator had limited commercial purpose because it was free and available to anyone who wanted to copy and use the program. See *RealNetworks, Inc. v. Streambox, Inc., 2000 U.S. Dist. LEXIS 1889, No. 99-CV02070, 2000 WL 127311 at *8 (W.D. Wash. 2000)* ("portion of VCR that circumvents the Secret Handshake so as to avoid the Copy Switch has no significant **[*1187]** commercial purpose other than to enable users to access and record protected content."). Finally, the development and distribution to others constituted copyright infringement and ***HN32***[] persons who commit copyright infringement cannot benefit from the exemptions of § 1201(f). See 17 U.S.C. § 1201(f)(2)-(3). "Sections 1201(f)(2) and (3) of the DMCA are not broad exceptions that can be employed to excuse any behavior that makes some device 'interoperable' with some other device." *Lexmark Int'l Inc. v. Static Control Components, Inc., 253 F. Supp.2d 943, 970 (E.D. Ky. 2003)*. Therefore, the Court will grant plaintiffs' motion for summary judgment as to Count **[**65]** II regarding the trafficking in anti-circumvention technology provisions and deny defendants' motion for summary judgment on this claim.

V. Conclusion

For the foregoing reasons, the Court finds that the individual defendants Jung, Crittenden, and Combs breached the license agreements in this case. As a result, plaintiffs' motion for summary judgment should be granted on the breach of contract claim in Count VII and defendants' motion for summary judgment on this claim and Count IV of their counterclaim should be denied. Plaintiffs' motion for summary judgment on the anti-circumvention and trafficking in anti-circumvention technology claims in Count II should be granted and defendants' motion for summary judgment on Count II of the second amended complaint and Count IV of their counterclaim should be denied.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is **DENIED.** [Doc. 109]

IT IS FURTHER ORDERED that defendants' supplemental opposition to plaintiffs' motion for partial summary judgment is **DENIED.** [Doc. 142].

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment is **GRANTED. [**66]** [Doc. 111]

IT IS FURTHER ORDERED that plaintiffs' motion to consider supplemental authority is **GRANTED.** [Doc. 152]

IT IS FURTHER ORDERED that defendants' motion to consider supplemental authority is **GRANTED.** [Doc. 160]

An appropriate judgment will accompany this memorandum and order.

CHARLES A. SHAW

UNITED STATES DISTRICT JUDGE

Dated this 30th day of September, 2004.

JUDGMENT

In accordance with the Memorandum and Order of this date and incorporated herein and the Consent Decree entered on March 18, 2004, and the Order of March 24, 2004,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiffs and against defendants on Count II of plaintiffs' second amended complaint.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiffs and against defendants on Count VII of plaintiffs' second amended complaint.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of plaintiffs and against defendants on Count II of defendants' counterclaim.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment is entered **[**67]** in favor of plaintiffs and against defendants on Count IV of defendants' counterclaim.

IT IS FURTHER ORDERED that defendants, their officers, employees, agents, subsidiaries, representatives, distributors, dealers, members, affiliates, and all other persons in active concert or participation with any of them are permanently enjoined from: (1) violating the prohibitions on circumvention of copyright protection systems and trafficking in circumvention technology with respect to the Blizzard games: "StarCraft," "StarCraft: Brood War," "WarCraft II: Battle.net Edition," "Diablo," and "Diablo II: Lord of Destruction." and Battle.net and (2) violating Blizzard's End User License Agreements or providing matchmaking services, or emulating communication protocols to enable provision of Internet gaming services for Blizzard games.

CHARLES A. SHAW

UNITED STATES DISTRICT JUDGE

Dated this 30th day of September, 2004.

Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.

United States Court of Appeals for the Fourth Circuit

September 24, 2003, Argued ; October 8, 2004, Decided

No. 03-1108

Reporter

386 F.3d 581 *; 2004 U.S. App. LEXIS 21023 **

VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC., a Delaware corporation; VOLVO TRADEMARK HOLDING AKTIEBOLAGET, a Swedish corporation; CHAMPION ROAD MACHINERY LIMITED, a Canadian corporation, Plaintiffs-Appellees, v. CLM EQUIPMENT COMPANY, INC., a Louisiana corporation; FUTURE EQUIPMENT COMPANY, INC., a Texas corporation, CLARK MACHINERY COMPANY, an Arkansas corporation, Defendants-Appellants, and AIS CONSTRUCTION EQUIPMENT CORPORATION, a Michigan corporation; NUECES FARM CENTER, INC., d/b/a Nueces Power Equipment, a Delaware corporation, Defendants.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by, Motion to strike granted by *Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip. Corp., 2006 U.S. Dist. LEXIS 10020 (W.D.N.C., Feb. 16, 2006)*

Prior History: [1]** Appeal from the United States District Court for the Western District of North Carolina, at Asheville. (CA-00-238-1; CA-01-232-1). Lacy H. Thornburg, District Judge.

Volvo Trademark Holding Aktiebolaget v. CLM Equip. Co., 236 F. Supp. 2d 536, 2002 U.S. Dist. LEXIS 25837 (W.D.N.C., 2002)

Disposition: Affirmed in part, vacated in part, and remanded.

Core Terms

Dealer, Champion, termination, fundamental policy, district court, parties, without cause, Choice-of-Law, public policy, local law, Louisiana Act, Arkansas Act, Graders, modification, state statute, anti-waiver, good cause, provisions, consumer, terms, declaratory judgment, franchise, manufacturer, possessed, circumstances, pleadings, embodies, notice, contractual, assessing

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[ ] **Appeals, Standards of Review**

When reviewing an award of judgment on the pleadings, an appellate court's factual recitation is presented in the light most favorable to the nonmoving party.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN2[] **Appellate Jurisdiction, Final Judgment Rule**

An award of partial judgment on the pleadings does not generally constitute an appealable order. An appeal is not interlocutory, however, where the prevailing party has voluntarily dismissed its remaining claims.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Appellate Review

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

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

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Federal Declaratory Judgments, Appellate Review**

An appellate court reviews de novo the issue of whether a district court possessed jurisdiction in a declaratory judgment proceeding. If a plaintiff has asserted sufficient facts to create declaratory judgment jurisdiction, the appellate court reviews for abuse of discretion a district court's decision to exercise its jurisdiction. District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN4[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's award of judgment on the pleadings. *Fed. R. Civ. P. 12(c)*. The same standard is applied to motions under *Rule 12(c)* and *Rule 12(b)(6)*. In reviewing an award of judgment on the pleadings, the appellate court assumes the facts alleged in the relevant pleadings to be true and draws all reasonable inferences therefrom.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN5[] **Distributorships & Franchises, Franchise Relationships**

The issue of whether an entity is protected under a state dealer protection statute is a question of law, which is reviewed de novo.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Immediacy

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN6[] **Federal Declaratory Judgments, Discretionary Jurisdiction**

A federal court may properly exercise jurisdiction in a declaratory judgment proceeding when three essentials are met: (1) the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment; (2) the court possesses an independent basis for jurisdiction over the parties (that is, federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction. *28 U.S.C.S. § 2201*.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN7[] **Declaratory Judgments, Federal Declaratory Judgments**

See *28 U.S.C.S. § 2201*.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Case or Controversy > Advisory Opinions

Trademark Law > Subject Matter of Trademarks > Terms Requiring Secondary Meaning > Grades & Styles

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

HN8[] **Declaratory Judgments, Federal Declaratory Judgments**

A case meets the actual controversy requirement only if it presents a controversy that qualifies as an actual controversy under U.S. Const. art. III. Pursuant to the limitation of *28 U.S.C.S. § 2201* to cases involving actual controversy, the Declaratory Judgment Act is operative only with respect to constitutional controversy.

Civil Procedure > ... > Diversity Jurisdiction > Citizenship > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

HN9[] **Diversity Jurisdiction, Citizenship**

For a controversy to exist for declaratory judgment purposes, the situation need not present a federal cause of action; if the parties are diverse, a federal court may possess subject matter jurisdiction over a state-law contract dispute.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Actual Controversy

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN10[] **Case & Controversy Requirements, Actual Controversy**

An actual controversy exists under the Declaratory Judgment Act when a plaintiff seeks declaratory relief in order to avoid the accrual of potential damages for past actions. The purpose of the Declaratory Judgment Act is to avoid accrual of avoidable damages to a party uncertain of its rights.

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

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > Discretionary Jurisdiction

HN11[] **Standards of Review, Abuse of Discretion**

If a district court possesses declaratory judgment jurisdiction, it may nonetheless, in the exercise of its discretion, decline to entertain the action. The exercise of such discretion, however, is not without bounds. A district court must have good reason for declining to exercise its declaratory judgment jurisdiction. A district court is obliged to rule on the merits of a declaratory judgment action when declaratory relief will serve a useful purpose in clarifying and settling the legal relations in issue, and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. District courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions.

Civil Procedure > ... > Declaratory Judgments > Federal Declaratory Judgments > General Overview

Governments > Courts > Authority to Adjudicate

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Governments > Courts > Judicial Comity

HN12[] **Declaratory Judgments, Federal Declaratory Judgments**

The federal trial courts should weigh the legitimate concerns of efficiency and comity when deciding whether to award declaratory relief. However, the first suit should have priority, absent the showing of balance of convenience in favor of the second action.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN13[] **Franchise Relationships, Franchise Agreements**

In South Carolina and Ontario, the parol evidence rule precludes the use of extrinsic evidence of prior or contemporaneous negotiations to alter, contradict, or explain the terms of agreements, provided the agreements are complete, unambiguous and unconditional. Unless the agreements are ambiguous or incomplete, oral promises or representations made prior to execution of the agreements have no effect on those agreements.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Discharge & Termination

Contracts Law > Contract Interpretation > General Overview

HN14[] **Standards of Performance, Discharge & Termination**

The fact that both "with cause" and "without cause" termination provisions are contained in the same section of a contract only shows that the parties differentiated between termination for cause and termination without cause. And when a contract contains both "for cause" and "without cause" provisions, a party may terminate a contract, even in the absence of breach or fault by the other party, pursuant to the without cause provision.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Integration Clauses

Evidence > Admissibility > Statements as Evidence > Parol Evidence

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

HN15[] **Contract Conditions & Provisions, Integration Clauses**

A court applying South Carolina or Ontario law is obliged to consider a writing as complete if the writing on its face appears to express the whole agreement. In addition, the court is entitled to consider an integration clause in weighing whether contracting parties intended a written contract to constitute the entirety of an agreement.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Adequate Consideration

Contracts Law > Contract Formation > Consideration > General Overview

Contracts Law > Contract Modifications > General Overview

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

HN16[] **Consideration, Adequate Consideration**

Pursuant to South Carolina and Ontario law, an oral modification of a written contract must be supported by separate and adequate consideration. A written contract may be changed by a subsequent parol agreement supported by valuable consideration.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Preexisting Duties

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Business & Corporate Compliance > ... > Contract Formation > Consideration > Sufficient Consideration

Contracts Law > Contract Modifications > General Overview

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

HN17[] Consideration, Preexisting Duties

Pursuant to South Carolina law, an agreement to do what one is already legally bound to do is not sufficient consideration to support a new agreement. Moreover, under Ontario law, an agreement to perform a preexisting duty does not constitute new consideration.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

Evidence > Admissibility > Statements as Evidence > Parol Evidence

HN18[] Franchise Relationships, Franchise Agreements

Although courts commonly look to evidence of the course of dealing and to industry custom and usage in assessing ambiguous contract terms, under South Carolina and Ontario law, extrinsic evidence of a usage or custom is not admissible where the contract expresses the intent of the parties in clear and unambiguous language. Extrinsic evidence is not admissible to vary the terms of a clear and unambiguous contract.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Breach > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN19[] Types of Contracts, Covenants

In South Carolina and Ontario, there can be no breach of an implied covenant of good faith and fair dealing where a party to a contract does what provisions of the contract expressly give him the right to do. The covenant of good faith and fair dealing is circumscribed by the terms of the contract.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

HN20[] Consideration, Promissory Estoppel

Promissory estoppel is not a cause of action recognized in Ontario. And in South Carolina, equitable relief is precluded under a theory of promissory estoppel if the estoppel claim is in direct conflict with a specific contract term.

Civil Procedure > ... > Venue > Federal Venue Transfers > Convenience Transfers

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

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

HN21[] **Federal Venue Transfers, Convenience Transfers**

A federal court exercising diversity jurisdiction is obliged to apply the substantive law of the state in which it sits, including the state's choice-of-law rules. The forum state's choice-of-law rules are substantive.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN22[] **Contract Conditions & Provisions, Forum Selection Clauses**

The presumptive rule of lex loci contractus is that the interpretation of a contract is governed by the law of the place where it was made. Under North Carolina law, however, such a presumption may be overcome by the presence of a choice-of-law provision in a contract.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Choice of Law

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Contracts Law > Contract Conditions & Provisions > General Overview

HN23[] **Contract Conditions & Provisions, Forum Selection Clauses**

Despite North Carolina's adherence to the presumptive rule of lex loci contractus, contracting parties in North Carolina are entitled to agree that a particular jurisdiction's substantive law will govern their contract, and such a provision will generally be given effect. In certain circumstances, however, North Carolina will decline to honor a choice-of-law provision. North Carolina relies on the Second Restatement of Conflict of Laws to determine whether such circumstances are present. Thus, a choice-of-law provision will not be enforced if either of the following two conditions is satisfied: (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Exceptions to Failure to Object

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN24[] **Standards of Review, Plain Error**

Absent exceptional circumstances, an appellate court does not consider issues raised for the first time on appeal. Indeed, courts consider such issues on appeal only when the failure to do so would result in a miscarriage of justice.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN25[] **Reviewability of Lower Court Decisions, Preservation for Review**

In assessing whether an issue was properly raised in the district court, a reviewing court is obliged on appeal to consider any theory plainly encompassed by the submissions in the underlying litigation.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN26[] **Reviewability of Lower Court Decisions, Preservation for Review**

An issue may be considered on appeal if it was argued below or specifically decided by the district court.

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN27[] **Distributorships & Franchises, Termination**

The Texas Farm, Industrial and Outdoor Power Equipment Dealer Act, *Tex. Bus. & Com. Code Ann. § 19.01 et seq.*, provides that a manufacturer may not terminate a dealer agreement except for cause. *Tex. Bus. & Com. Code Ann. § 19.41*.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN28[] **Distributorships & Franchises, Franchise Relationships**

See *Tex. Bus. & Com. Code Ann. § 19.01(5)* (1991).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Commercial Law (UCC) > ... > Subject Matter > Definitions > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN29[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The Texas Deceptive Trade Practices and Consumer Protection Act (DTPA), *Tex. Bus. & Com. Code Ann. § 17.41 et seq.*, provides protection only to consumers. Under the DTPA, a consumer is one who seeks or acquires, by purchase or lease, any goods or services.

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

HN30[] **Federal & State Interrelationships, Erie Doctrine**

A state intermediate appellate court's judgment on a rule of law is a datum for ascertaining state law and should not be disregarded by a federal court unless it is convinced by persuasive data that the highest court of the state would decide otherwise.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Contracts Law > Types of Commercial Transactions > Secured Transactions > General Overview

HN31[] **Consumer Protection, Deceptive & Unfair Trade Practices**

A business possessing an intangible right such as the contract right to be a dealer of a manufacturer's goods in a certain geographic area may be a consumer under the Texas Deceptive Trade Practices and Consumer Protection Act, *Tex. Bus. & Com. Code Ann. § 17.41 et seq.*, if (1) the business purchased the intangible right, and (2) the business's decision to purchase the right was motivated, in part, by its desire to obtain collateral services under the dealer agreement.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN32[] **Federal & State Interrelationships, Choice of Law**

Not every statutory provision constitutes a fundamental policy of a state. The law of a state and its public policy are not necessarily synonymous. Not every law enacted by the legislature embodies the public policy of the state.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN33[] **Distributorships & Franchises, Franchise Relationships**

In assessing whether a dealer protection statute expresses a state's fundamental policy, a court is guided by the language of the statute, relevant court decisions, and pertinent legislative history.

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Computer & Internet Law > Civil Actions > Jurisdiction > Conflict of Law

HN34[] **Distributorships & Franchises, Franchise Relationships**

The presence of a statutory anti-waiver provision does not necessarily mean that a statute embodies a state's fundamental policy. There is no established rule for determining whether a state policy is fundamental. Although the presence of an anti-waiver provision does not necessarily mean that a dealer protection statute embodies a fundamental policy, such a provision suggests the importance the legislature attached to the statute. The strength of anti-waiver provisions in dealer protection statutes, however, varies among the states.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN35[] **Federal & State Interrelationships, Choice of Law**

In Arkansas, a determination of public policy lies almost exclusively with the legislature, and courts should not interfere with that determination absent palpable error.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN36[] **Contract Conditions & Provisions, Forum Selection Clauses**

In the absence of an anti-waiver provision in the statute, and there being no legislative finding that the Louisiana Dealer Act, *La. Rev. Stat. Ann. § 51:481 et seq.*, constitutes an important, much less a fundamental, state policy, the act cannot override a choice-of-law contract provision precluding its application.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Choice of Law

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN37[] **Causes of Action, Choice of Law**

See *Ark. Code Ann. § 4-72-206(1)*.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN38[] **Federal & State Interrelationships, Choice of Law**

A legislature simplifies the task of determining whether a state statute embodies fundamental policy when it expressly states that the statute constitutes such policy.

Governments > Legislation > Interpretation

HN39[] **Legislation, Interpretation**

In interpreting an Arkansas statute, courts may look to an emergency clause to determine legislative intent.

Counsel: Scott E. Korzenowski, DADY & GARNER, P. A., Minneapolis, Minnesota, for Appellants.

Michael J. Lockerby, HUNTON & WILLIAMS, Richmond, Virginia, for Appellees.

ON BRIEF: J. Michael Dady, Ronald K. Gardner, DADY & GARNER, P.A., Minneapolis, Minnesota; Robert B. Delano, Jr., SANDS, ANDERSON, MARKS & MILLER, Richmond, Virginia; Edward L. Bleynat, Jr., FERIKES & BLEYNAT, P.L.L.C., Asheville, North Carolina, for Appellants.

Kimberley A. Isbell, HUNTON & WILLIAMS, Richmond, Virginia; Nash E. Long, III, HUNTON & WILLIAMS, Charlotte, North Carolina, for Appellees.

Judges: Before WIDENER, TRAXLER, and KING, Circuit Judges. Judge King wrote the opinion, in which Judge Traxler joined. Judge Widener wrote an opinion concurring in part and dissenting in part.

Opinion by: KING

Opinion

[*587] KING, Circuit Judge:

Three retail dealers of large earth-moving motor graders (the "Dealers") [1] appeal the district court's decision in favor of the graders' manufacturers (collectively, "Volvo") [2] in this contract dispute. *Volvo Trademark Holding Aktiebolaget v. CLM Equip. Co., Inc., 236 F. Supp. 2d 536 (W.D.N.C. 2002)* **[**2]** (the "Opinion"). The Dealers maintain that the court lacked jurisdiction in the declaratory judgment proceeding initiated by Volvo because no actual controversy existed. The Dealers also assert that, even if the court possessed jurisdiction, it abused its discretion by exercising jurisdiction in that proceeding. Finally, the Dealers contend that the court erroneously ruled in favor of Volvo on the merits of this dispute, in that Volvo's refusal to supply them with equipment constituted a breach of its contractual obligations and contravened several state statutes. For the reasons explained below, we affirm in part, vacate in part, and remand.

[3]** I.

A.

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[1] The Dealers are CLM Equipment Company, Inc., a Louisiana corporation, Clark Machinery Company, an Arkansas corporation, and Future Equipment Company, Inc., a Texas corporation.

[2] The three appellees, referred to as Volvo, are Volvo Construction Equipment North America, Inc., a Delaware corporation, Volvo Trademark Holding Aktiebolaget, a Swedish corporation, and Champion Road Machinery Limited, a Canadian corporation.

Prior to being purchased by Volvo in 1997, Champion Road Machinery Limited ("Champion") was a Canadian corporation specializing in the manufacture of large earth-moving motor graders (the "Champion Motor Graders"). [3] The contract dispute **[*588]** underlying this litigation emanates from Volvo's 1997 purchase of Champion and Volvo's subsequent decision to cease supplying Champion Motor Graders to the Dealers - CLM Equipment Company, Inc. ("CLM"), Clark Machinery Company ("Clark"), and Future Equipment Company, Inc. ("FEC") - for resale. That decision resulted in what the Dealers contend was Volvo's unlawful termination of their dealer agreements with Champion (the "Dealer Agreements"). [4] According to the Dealers, Champion promised them, during a 1970s effort to increase its dealerships in this country, that it would "continue a business relationship with a dealer unless the dealer was having financial difficulties or was performing poorly." The Dealers allege that Champion promised to terminate a Champion dealer "only after first giving the dealer notice of its deficiencies and an opportunity to correct those deficiencies." The Dealers maintain that Champion representatives also **[**4]** made contemporaneous oral representations that the Dealers could continue as Champion dealers so long as they adequately performed. This contract dispute relates primarily to the interpretation and application of a specific subsection of the Termination section of the Dealer Agreements. That subsection, the "Without Cause Provision," authorizes termination of a dealership without cause, providing as follows:

> Champion may terminate this agreement at any time without cause by written notice of termination delivered to [Dealer or Distributor], such termination to be effective not less than sixty (60) days after receipt or deemed receipt by Dealer of such notice.

CLM, Clark, and FEC Dealer Agreements § 24.4. Although the Without Cause Provision is important in this appeal, several other provisions of the Dealer Agreements are also significant. They include:

- a merger and integration clause (the "Integration Clause"), providing that a Dealer Agreement contains the entire agreement respecting a Dealer's purchase and distribution of Champion products and parts; CLM and Clark Dealer Agreements § 32.1, FEC Dealer Agreement § 33.1;

- a clause prohibiting oral **[**5]** modification (the "Modification Clause"), providing that any modification of a Dealer Agreement must be in writing and signed by a duly authorized officer of Champion; CLM and Clark Dealer Agreements § 32.2, FEC Dealer Agreement § 33.2;
- a market withdrawal provision (the "Market Withdrawal Provision"), pursuant to which Champion reserves the right to discontinue its product lines without notice to the Dealers; CLM, Clark, and FEC Dealer Agreements § 27;
- a best efforts provision (the "Best Efforts Provision"), under which the Dealers agree to use their best efforts to sell Champion products; CLM and Clark Dealer Agreements § 6, FEC Dealer Agreement § 7;

- a choice-of-law provision (the "Choice-of-Law Provision"), providing that, pursuant to CLM's and Clark's Dealer Agreements, the obligations of the parties are to be determined under South Carolina law; CLM and Clark Dealer **[*589]** Agreements § 29; and that, pursuant to FEC's Dealer Agreement, the obligations of the parties are to be governed by the law of Ontario; FEC Dealer Agreement § 29; and

- a conformity with local laws provision (the "Local Law Provision"), under which the rights and obligations of the **[**6]** parties are subject to all applicable laws of government entities having jurisdiction over them, and providing that, if local law substantially alters relationships under a Dealer Agreement, a party may request modification of the Agreement; CLM, Clark, and FEC Dealer Agreements § 30.

After consummating its purchase of Champion, Volvo decided that it could compete more effectively with such manufacturers as Case, Caterpillar, **[**7]** John Deere, and Komatsu if it marketed motor graders under a single

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[3] ***HN1***[] Because we are reviewing an award of judgment on the pleadings, our factual recitation is presented in the light most favorable to the nonmoving party (i.e., the Dealers). *George C. Frey Ready-Mixed Concrete, Inc. v. Pall Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977)*; 5ACharles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1368 (2d ed. 1990).

[4] The three Dealer Agreements at issue are entitled "Distributor Sales Agreements" (CLM and Clark) and "Grader Dealer Agreement" (FEC). We refer to each as a Dealer Agreement.

brand name (i. e., Volvo) and through a single dealer network (i. e., that of Volvo). [5] As a result, Volvo implemented a plan to "Volvoize" its products and "rationalize" its dealer network. Volvo characterized the "Volvoization" program as a process of reengineering and rebranding Champion Motor Graders for sale under the VOLVO trademark. Volvo characterized its "Dealer Rationalization" plan as the integration of the Volvo and Champion dealer networks.

In 2000, the Dealers responded to Volvo's plan by demanding that Volvo continue to provide them with motor graders manufactured by Volvo at the former Champion factory. Despite these demands, the Dealers were not selected by Volvo as authorized dealers of such motor graders, and Volvo notified the Dealers that it would no longer **[**8]** supply them with Champion Motor Graders. On January 19, 2000, FEC received notice that its Dealer Agreement would be terminated on March 19, 2000. On October 10, 2000, Volvo notified Clark and CLM that their Dealer Agreements would be terminated on January 9, 2001. Upon receipt of these termination notices, the Dealers advised Volvo that they would litigate all efforts to terminate the Dealer Agreements. In January 2001, after receipt of such advice from the Dealers, Volvo ceased manufacturing Champion brand motor graders.

B.

On October 10, 2000, Volvo filed its declaratory judgment complaint in the Western District of North Carolina (the "North Carolina Litigation"), naming as defendants CLM, FEC, AIS Construction Equipment Corporation ("AIS"), and certain other Champion dealers, including Nueces Farm Center, Inc. ("NFC"). By this civil action, Volvo sought a declaration that, pursuant to the Dealer Agreements, it was not obliged to continue supplying Champion Motor Graders to Champion dealers. On November 27, 2000, the defendants sought dismissal of the North Carolina Litigation for lack of subject-matter jurisdiction. In response, Volvo amended its declaratory judgment complaint **[**9]** and, *inter alia*, named Clark as an additional defendant. On March 19, 2001, before the district court addressed the jurisdictional issue, Volvo sought leave to amend its complaint for a second time, dropping defendant NFC from the North Carolina Litigation and asserting diversity jurisdiction in the North Carolina court. [6]

[*590] On March 20, 2001, the Dealers filed a separate civil action against Volvo in the Eastern District of Arkansas (the "Arkansas Litigation"). The Dealers then moved the North Carolina court to dismiss, abstain from, or stay the North Carolina Litigation, in deference to the Arkansas Litigation (the "Dealers' Motion"). On April 9, 2001, a magistrate judge in North Carolina recommended to the **[**10]** district court that the Dealers' Motion be denied and that Volvo be authorized to file its Second Amended Complaint. *Volvo Trademark Holding Aktiebolaget v. AIS Const. Equip. Corp., No. 1:00CV238, 2001 U.S. Dist. LEXIS 13198 (W.D.N.C. April 9, 2002)*.

On April 20, 2001, Volvo moved the Arkansas court to dismiss, abstain from, or stay the Arkansas Litigation, in deference to the North Carolina Litigation. On June 21, 2001, the Arkansas court granted that motion, entering a stay of the Arkansas Litigation pending resolution of the Dealers' Motion in North Carolina. On August 27, 2001, the North Carolina court, relying on the magistrate judge's recommendation, denied the Dealers' Motion, granted Volvo leave to voluntarily dismiss NFC as a defendant, and authorized Volvo to file its Second Amended Complaint (the "Complaint"). *Volvo Trademark, 162 F. Supp. 2d 465, 2001 U.S. Dist. LEXIS 13493, No. 1:00CV238 (W.D.N.C. Aug. 27, 2001)*. [7]

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[5] According to Volvo, its competing manufacturers typically market a full line of construction equipment, and their dealers offer "one-stop shopping" for such products.

[6] Both Volvo and NFC are Delaware corporations. NFC, as a defendant, would have destroyed diversity in the North Carolina Litigation. *See* *28 U.S.C. § 1332*. With NFC no longer a defendant in the North Carolina Litigation, no diversity issue is raised, and none is apparent.

[7] Volvo's Second Amended Complaint in the North Carolina Litigation sought the following: (1) a declaration pursuant to the Lanham Act (*15 U.S.C. § 1051, et seq.*) of trademark infringement, unfair competition, and dilution; (2) a declaration that the Lanham Act preempted any state law claims that were inconsistent therewith; (3) a declaration that there had been no breach of contract by Volvo; (4) a declaration that there are no ancillary tort law claims against Volvo; and (5) a declaration that Volvo had not violated any state statutes. Volvo's Second Amended Complaint is the operative complaint in this appeal.

[11]** Upon being advised of the North Carolina court's ruling on the Dealers' Motion, the Arkansas court, on August 30, 2001, transferred the Arkansas Litigation to the Western District of North Carolina. Thereafter, on September 14, 2001, the Dealers filed their Joint Answer and Counterclaim in the North Carolina Litigation. Their Counterclaim mirrored the claims asserted in their complaint against Volvo in the Arkansas Litigation. [8] On January 9, 2002, the parties consented to consolidation of the Arkansas Litigation with the North Carolina Litigation in the North Carolina court. *Volvo Trademark*, No. 1:00CV238, No. 1: 01CV122 (W.D.N.C. Jan. 9, 2002).

[12]** On December 13, 2002, the district court filed the Opinion from which this appeal arises. The Opinion granted Volvo partial judgment on the pleadings, dismissed the Dealers' counterclaims in the **[*591]** North Carolina Litigation, and dismissed the Dealers' affirmative claims in the Arkansas Litigation. *Opinion at 558*. In its Opinion, the court determined, *inter alia*, that Volvo's refusal to supply the Dealers with Champion Motor Graders did not breach the Dealer Agreements because each agreement contained the Without Cause Provision. *Id. at 546*. In addition, the court concluded that the Dealers were not protected by the state dealer protection statutes of Arkansas, Louisiana, or Texas, because the Choice-of-Law Provision precludes the Dealers from seeking protection under those statutes. *Id. at 551-54*. The Dealers thereafter filed a timely notice of appeal, and we possess jurisdiction pursuant to *28 U.S.C. § 1291*. [9]

[13]** II.

HN3[] We review de novo the issue of whether a district court possessed jurisdiction in a declaratory judgment proceeding. *Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765 (4th Cir. 1991)*. If a plaintiff has asserted sufficient facts to create declaratory judgment jurisdiction, we review for abuse of discretion a district court's decision to exercise its jurisdiction. *See Wilton v. Seven Falls Co., 515 U.S. 277, 282, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995)* ("District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites."). ***HN4***[] We review de novo a district court's award of judgment on the pleadings. *Fed. R. Civ. P. 12(c)*; *see Burbach Broad. Co. v. Elkins Radio Corp., 278 F.3d 401, 405-06 (4th Cir. 2002)* (noting that same standard is applied to motions under *Rule 12(c)* and *Rule 12(b)(6)*). In reviewing an award of judgment on the pleadings, we assume the facts alleged in the relevant pleadings to be true, and we draw all reasonable inferences therefrom. **[**14]** *Elkins Radio, 278 F.3d at 406*; *see also Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)*. Finally, ***HN5***[] the issue of whether an entity is protected under a state dealer protection statute is a question of law, which we review de novo. *See generally United States v. Hill, 322 F.3d 301, 304 (4th Cir. 2003)*; *Hand v. Dean Witter Reynolds Inc., 889 S.W.2d 483, 496 (Tex. App. 1994)*.

III.

The Dealers raise multiple issues on appeal. They first maintain that the district court erred in exercising jurisdiction in the North Carolina Litigation. Specifically, they contend that Volvo failed to allege an actual controversy between

[8] The Dealers asserted twelve claims against Volvo in the Arkansas Litigation and in the North Carolina Litigation. Those claims were for (1) violations of the Arkansas Franchise Practices Act, *Ark. Code § 4-72-201, et seq.*; (2) violations of the Texas Farm, Industrial and Outdoor Power Equipment Dealer Act, *Tex. Bus. & Com. Code § 19.01, et seq.*; (3) violations of the Texas Deceptive Trade Practices and Consumer Protection Act, *Tex. Bus. & Com. Code § 17.41, et seq.*; (4) violations of the Michigan Motor Vehicle Act, *Mich. Comp. Laws Ann., Ch. 445.1561, et seq.*; (5) violations of the Louisiana Dealer Act, *La. Rev. Stat. § 51:481, et seq.* ; (6) violations of Ontario's Arthur Wishart Act; (7) violations of the South Carolina Fair Practices of Farm, Construction, Industrial and Outdoor Power Equipment Manufacturers, Distributors, Wholesalers and Dealers Act, *S.C. Code Ann. § 39-6-10, et seq.*; (8) breach of contract and the covenant of good faith and fair dealing; (9) tortious interference with contractual relations and prospective economic advantage; (10) unjust enrichment; (11) estoppel; and (12) recoupment.

[9] We recognize that ***HN2***[] an award of partial judgment on the pleadings does not generally constitute an appealable order. *See Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505, 511 (4th Cir. 2003)*. This appeal is not interlocutory, however, because Volvo has voluntarily dismissed its remaining claims. *Volvo Trademark*, No. 1: 00CV238, No. 1: 01CV232, No. 1: 01CV122 (W.D.N.C. Jan. 2, 2003).

it and the Dealers. Moreover, the Dealers maintain that, even if the court possessed jurisdiction, its exercise thereof constituted an abuse of discretion.

The Dealers next contend that the district court erred when it ruled that Volvo's termination of the Dealer Agreements was not a breach of its contractual obligations. They maintain that the contract terms "may" and "without cause," as used in the Without Cause Provision, are ambiguous, that the Dealer Agreements are not completely integrated, **[**15]** and that the parties orally modified the Without Cause Provision. The Dealers contend that, notwithstanding the Without Cause Provision, Volvo's actions breached its implied duty **[*592]** of good faith and fair dealing. The Dealers also maintain that, even if the Dealer Agreements are completely integrated contracts unmodified by oral promises, Volvo is estopped from breaching its oral representations.

Finally, the Dealers contend that the Without Cause Provision is trumped by Arkansas, Louisiana, and Texas statutes that preclude manufacturers from terminating dealer agreements without cause (collectively, the "State Statutes"). The Dealers assert that, under the Local Law Provision, the Dealer Agreements are governed by the State Statutes. In the alternative, the Dealers maintain that the Choice-of-Law Provision should not be given effect because the laws selected thereunder are not rationally related to the Dealer Agreements and are contrary to the fundamental policies of their home states. Volvo maintains that the Dealers never raised this alternative contention in the district court and that it should not be considered on appeal.

We assess each of these contentions in turn.

A.

We first **[**16]** consider whether the district court erred in its exercise of jurisdiction in Volvo's declaratory judgment action. In this regard, it is elementary that ***HN6***[] a federal court may properly exercise jurisdiction in a declaratory judgment proceeding when three essentials are met: (1) the complaint alleges an "actual controversy" between the parties "of sufficient immediacy and reality to warrant issuance of a declaratory judgment;" (2) the court possesses an independent basis for jurisdiction over the parties (e.g., federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction. *28 U.S.C. § 2201*; *Cont'l Cas. Co. v. Fuscardo, 35 F.3d 963, 965 (4th Cir. 1994)*; *N. Jefferson Square Assocs. v. Virginia Hous. Dev. Auth., 94 F. Supp. 2d 709, 714 (E.D. Va. 2000)*.

Two of these three jurisdictional prerequisites, the first and the third, are contested by the Dealers on appeal. The second jurisdictional prong, that the court must possess an independent basis for jurisdiction over the parties, was satisfied when Volvo filed its Complaint and dropped defendant NFC, the only party defeating **[**17]** diversity. The district court thus properly concluded that Volvo had established diversity jurisdiction in its Complaint. *Volvo Trademark, 162 F. Supp. 2d 465, No. 1:00CV238 (W.D.N.C. Aug. 27, 2001)*.

The Dealers maintain, however, that the first and third jurisdictional prongs are not met, and that the district court erred in its exercise of jurisdiction. They assert that the first prong (the "Constitutional Inquiry") is not satisfied because Volvo's actions did not create an actual controversy under the Declaratory Judgment Act. They contend that the third prong (the "Prudential Inquiry") is not met because, even if the court had jurisdiction, it abused its discretion in considering the merits of this dispute. We address these inquiries below.

1.

In assessing the Constitutional Inquiry, we look to the Declaratory Judgment Act, which provides that ***HN7***[] "in a case of *actual controversy within its jurisdiction* …any court of the United States …may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201* (emphasis added). ***HN8***[] A case meets the actual controversy requirement **[**18]** only if it presents a controversy that qualifies as an actual controversy under Article III of the Constitution. *See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 81 L. Ed. 617, 57 S. Ct. 461* ***[*593]*** *(1937)* (deciding that, pursuant to statute's limitation to cases involving actual controversy, Act is operative only with respect to constitutional controversy). The Dealers contend that, although Volvo's termination notices created disputes regarding their rights to distribute Champion Motor Graders, "the termination did not create the type of trademark 'case or controversy' subject to declaratory-judgment review." As explained below, this contention is immaterial.

The Dealers first maintain that the district court lacked federal question jurisdiction because they did not take any action or make any assertion that placed Volvo in objective apprehension of the improper use of its trademark or its ability to control its trademark. ***HN9***[] For a controversy to exist for declaratory judgment purposes, however, the situation need not present a federal cause of action; if the parties are diverse, a federal court may possess subject matter jurisdiction over a state-law contract dispute. The Dealers **[**19]** have admitted in their pleadings that the court had diversity jurisdiction over the North Carolina Litigation, and the existence of a contract dispute is plainly evident in the pleadings. [10] Indeed, when the court addressed the Dealers' Motion, Volvo had already been sued in Maine and Texas by Champion dealers, [11] **[**20]** and Volvo had already received written and oral litigation threats from the Dealers. [12]

The Dealers acknowledge that ***HN10***[] an actual controversy exists under the Declaratory Judgment Act when a plaintiff seeks declaratory relief in order to avoid the accrual of potential damages for past actions. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, 28 F.3d 572, 577 (7th Cir. 1994)* (stating that purpose of Declaratory Judgment Act is to avoid accrual of avoidable **[**21]** damages to party uncertain of its rights). When Volvo initiated its declaratory judgment action in North Carolina, it had terminated the Dealer Agreements, it had received the Dealers' litigation threats, and separate suits had been filed against it in Maine and Texas. In these circumstances, Volvo possessed a reasonable apprehension of a multiplicity of litigation and of liability for ongoing **[*594]** damages. An actual controversy therefore existed between Volvo and the Dealers when Volvo initiated the North Carolina Litigation. The first prong of the declaratory judgment test is thus satisfied.

2.

The Dealers next maintain that Volvo fails to satisfy the third prong of the declaratory judgment test, the Prudential Inquiry. They contend that, even if an actual controversy existed and the district court possessed an independent basis of jurisdiction, the court nevertheless abused its discretion when it exercised jurisdiction in the North Carolina Litigation.

HN11[] If a district court possesses declaratory judgment jurisdiction, it may nonetheless, in the exercise of its discretion, decline to entertain the action. *See* *Cont'l Cas. Co., 35 F.3d at 965* (acknowledging that court **[**22]** possessed jurisdiction in declaratory judgment action and noting that critical question was whether court should have exercised its jurisdiction). The exercise of such discretion, however, is not without bounds. We have held that a district court must have "good reason" for declining to exercise its declaratory judgment jurisdiction. *Id*. As Judge Parker aptly opined years ago, a district court is obliged to rule on the merits of a declaratory judgment action when

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[10] In its Complaint, Volvo sought a "declaratory judgment with respect to [its] rights and obligations under certain contracts ...." Complaint P 3. And, in assessing whether an actual controversy existed between Volvo and the Dealers under the Complaint, the magistrate judge observed that Volvo "runs the risk of incurring multiple liabilities if [it does] not seek judicial interpretation and clarification of [its] rights in respect to the contracts ....Without a doubt, there is an active and immediate controversy among these plaintiffs and defendants ...." *Volvo Trademark*, No. 1: 00CV238 (W.D.N.C. April 9, 2001).

[11] On February 2, 2000, Champion dealer N.A. Burkitt, Inc. initiated litigation against Volvo in the District of Maine alleging, *inter alia*, that Volvo's termination of its dealer agreement contravened the Maine Motor Vehicle Dealers Act. On August 28, 2000, a defendant in Volvo's original complaint in North Carolina (i. e., NFC) commenced litigation against Volvo in Texas, contending, *inter alia*, that Volvo could not terminate its dealer agreement without cause.

[12] The initiation of litigation against Volvo and the threats of future litigation distinguish this dispute from *North Jefferson*, a decision on which the Dealers rely. There, the district court determined that a controversy was not present under the Declaratory Judgment Act because the defendant had not taken any action, even of a preliminary nature, against the plaintiff, and the defendant had not indicated that it intended to take any future legal action against the plaintiff. *N. Jefferson, 94 F. Supp. 2d at 718*. *See generally* *GTE Directories Pub. Corp. v. Trimen Am., Inc., 67 F.3d 1563 (11th Cir. 1995)* (holding that threat of future litigation gives rise to actual controversy).

declaratory relief "will serve a useful purpose in clarifying and settling the legal relations in issue," and "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937)*. And we have often observed that "'district courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions.'" *United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 493 (4th Cir. 1998)* (quoting *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co., 139 F.3d 419, 422 (4th Cir. 1998)*). In these circumstances, the district court did not abuse its discretion. **[**23]** Its Opinion served several useful purposes: it clarified and settled Volvo's legal obligations under the Dealer Agreements, it eliminated uncertainty regarding those agreements, and it clarified the contractual rights of the parties. [13]

[24]** The Dealers, relying on the Supreme Court's decision in *Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)*, maintain that principles of efficiency and comity compelled the district court either to dismiss or abstain from Volvo's declaratory judgment action, in the interests of conserving judicial resources and comprehensively disposing of the litigation. We recognize that ***HN12***[] the federal trial courts should weigh the legitimate concerns of efficiency and comity when deciding whether to award declaratory relief. *Id*. As the Dealers acknowledge, however, "the first suit should have priority, **[*595]** absent the showing of balance of convenience in favor of the second action." *Ellicott Mach. Corp. v. Modern Welding Co., Inc., 502 F.2d 178, 180 n. 2 (4th Cir. 1974)* (internal quotation marks and citation omitted). In this situation, as there has been no such showing, the court did not abuse its discretion in declining to defer to the Arkansas proceeding.

B.

The Dealers next maintain that Volvo breached its contractual obligations when it terminated the Dealer Agreements under its programs of Volvoization and **[**25]** Dealer Rationalization. More specifically, the Dealers contend that Volvo breached the Dealer Agreements when it began placing Volvo labels on Champion Motor Graders and when it refused to provide the Dealers with an inventory of Champion Motor Graders. As explained below, we disagree.

First and foremost, Volvo's termination of the Dealer Agreements did not constitute a breach of contract because the Without Cause Provision authorized Volvo to act as it did. When Volvo acquired Champion in 1997, Volvo assumed Champion's rights and obligations under the Dealer Agreements. Volvo was, therefore, entitled to terminate the Dealer Agreements under the Without Cause Provision. [14]

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[13] The factual predicate underlying this appeal is analogous to the factual underpinnings of *Kapiloff*. There, we concluded that a "declaratory judgment action is designed to allay exactly the sort of uncertainty that flows from the threat that ambiguous contractual rights may be asserted," and we observed that a "declaratory judgment action allows the uncertain party to gain relief from the insecurity caused by a potential suit waiting in the wings." *Kapiloff, 155 F.3d at 494*.

The Dealers acknowledge that a federal court may exercise its declaratory judgment jurisdiction when a plaintiff is seeking a declaration to avoid the accrual of potential damages for past actions. *See Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987)* (observing that declaratory judgment is available where party desires declaration of legal effect of proposed or past course of action). In this dispute, Volvo was seeking such a declaration.

[14] Volvo also contends that, in the absence of the Without Cause Provision, its terminations of the Dealer Agreements would not constitute breaches of contract because "the Market Withdrawal Provision contemplates the possibility that Champion could completely disappear from the marketplace without liability following a discontinuation of the CHAMPION line of motor graders." The Market Withdrawal Provision provides:

> Champion reserves the right at any time to change models, classification of models and specifications, or add to or discontinue any products or product lines without notice to [Dealer or Distributor] and without incurring any obligation to incorporate such changes in any other products.

CLM, Clark, and FEC Dealer Agreements § 27. According to Volvo, any interpretation of the Market Withdrawal Provision that would not permit Champion to withdraw from the marketplace would render meaningless the phrase "discontinue any product or product lines." The Dealers contend, however, that in order to "withdraw from the market," Volvo would have to cease producing

[26]** The Dealers do not contend that the express terms of the Dealer Agreements preclude Volvo from terminating their dealer contracts without cause. Instead, they contend that the Without Cause Provision is ambiguous and that the district court was obligated to look beyond the Dealer Agreements in determining Volvo's contractual obligations. Under South Carolina and Ontario law, which apply to CLM's and Clark's contract claims, the court did not err because (1) the Without Cause Provision is clear and unambiguous; (2) the Dealer Agreements were integrated instruments; and (3) oral promises, course of dealing, and industry custom can not alter the plain and unambiguous terms of the integrated Dealer Agreements. *See* *U.S. Leasing Corp. v. Janicare, Inc., 294 S.C. 312, 364 S.E. 2d 202, 205 (S.C. Ct. App. 1988)* (providing that, under South Carolina law, if contract contains language that imports complete legal obligation, parol or extrinsic evidence is not admissible to add to contract); *Gutierrez v. Tropic Int'l Ltd.*, 63 O.R. 3d 63, 73 (Ont. C.A. 2002) (providing that, under Ontario law, evidence of collateral **[*596]** agreement is not admissible to contradict **[**27]** terms of integrated contract).

1.

Because the terms of the Dealer Agreements favor the legal position advanced by Volvo, the Dealers emphasize a series of oral promises allegedly made by Champion representatives before the Dealer Agreements were made. ***HN13***[] In South Carolina and Ontario, however, the parol evidence rule precludes the use of extrinsic evidence of prior or contemporaneous negotiations to alter, contradict, or explain the terms of the Dealer Agreements, provided the agreements are complete, unambiguous and unconditional. *See* *Gilliland v. Elmwood Prop., 301 S.C. 295, 391 S.E. 2d 577, 581 (S.C. 1990)* (applying South Carolina law); *Gutierrez*, 63 O.R. 3d at 71 (applying Ontario law). Unless the Dealer Agreements are ambiguous or incomplete, oral promises or representations made to the Dealers by Champion representatives prior to execution of the Dealer Agreements have no effect on those agreements. In their appeal, the Dealers maintain that the Dealer Agreements are both ambiguous and incomplete and that the district court erred by not incorporating Volvo's oral promises into them. As explained below, we disagree.

a.

The Dealers first maintain **[**28]** that the Without Cause Provision is ambiguous and that the district court should have looked beyond the four corners of the Dealer Agreements in determining Volvo's contractual obligations. The Without Cause Provision provides that "Champion *may* terminate [the] agreement at any time *without cause* by written notice of termination …." CLM, Clark, and FEC Dealer Agreements § 24.4 (emphasis added). The Dealers contend that this terminology is ambiguous because it fails to define the terms "may" and "without cause" as they are used therein. To the contrary, however, there is nothing ambiguous about the term "may," and there is no ambiguity in any of the other operative terms in the Without Cause Provision. Those terms are easily and commonly understood in the English language - contract terms are rarely more plainly stated. See *Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 2003 WL 22519825, at *13 (7th Cir. 2003)* (declaring contract language permitting dealer agreement to be terminated at any time without cause to be unambiguous). [15]

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motor graders at the Champion factory - the simple act of relabeling does not constitute a withdrawal from the marketplace. As the district court observed, however:

> Volvo did not terminate the dealership contracts by virtue of discontinuing Champion Road motor graders or withdrawing that product from the market; the contracts were terminated pursuant to the provision … for termination without cause.

Opinion at 543-44.

[15] The Seventh Circuit's decision in *Cromeens* was filed on November 7, 2003, a month after this appeal was argued. One of the issues in *Cromeens* was whether, under their programs of Volvoization and Dealer Rationalization, AB Volvo, Volvo Excavators AB, and Volvo Construction Equipment NV could terminate the dealers of Samsung construction equipment without cause. The dealer agreements in *Cromeens* contained a termination clause analogous to the Without Cause Provision. *Cromeens, 349 F.3d 376, 2003 WL 22519825, at *11*. On appeal, the Samsung dealers maintained that the "without cause" provision in the Samsung dealer agreements was ambiguous. The Seventh Circuit rejected this contention, ruling that the language of the "without cause" provision "could not be more plain." *349 F.3d 376, [WL] at *13*. The Seventh Circuit then concluded that the dealer agreements unambiguously permitted termination of the Samsung dealers without cause. *Id*.

[29]** The Dealers contend, however, that the ambiguity of the Without Cause Provision is apparent when examined in the context of Section 24 of the Dealer Agreements. More specifically, the Dealers maintain that the "may terminate" language of the Without Cause Provision contrasts sharply with the "shall terminate automatically" language found in Subsection 24.5. As the district court noted in its Opinion, however, this distinction relates **[*597]** to the fact that termination under the Without Cause Provision is discretionary and occurs only after sixty days notice. Opinion at 545. A termination under Subsection 24.5, by contrast, is non-discretionary, and it occurs automatically upon the occurrence of a certain event, such as when a dealer files for bankruptcy.

The Dealers also maintain that the ambiguity of the term "without cause" is apparent when examined in the context of Section 24. The Dealers contend that, because Section 24 otherwise provides when Champion can terminate the Dealer Agreements for cause, the term "cause" in the Without Cause Provision should be interpreted to mean a cause not otherwise provided for in Section 24. As the Eleventh Circuit has observed, however, ***HN14***[] the fact **[**30]** that both "with cause" and "without cause" termination provisions are contained in the same section of a contract only shows that the parties differentiated between termination for cause and termination without cause. And when a contract contains both "for cause" and "without cause" provisions, a party may terminate a contract, even in the absence of breach or fault by the other party, pursuant to the without cause provision. *Harris Corp. v Giesting & Assocs., Inc., 297 F.3d 1270, 1273 (11th Cir. 2002)*. We agree with the district court; the Without Cause Provision is "clear, specific and unambiguous." Opinion at 546.

b.

The Dealers next maintain that, because the Dealer Agreements are incomplete, evidence of promises made by Champion representatives prior to execution of the Dealer Agreements are not barred by the parol evidence rule. In this regard, ***HN15***[] a court applying South Carolina or Ontario law is obliged to consider a writing as complete if "the writing on its face appears to express the whole agreement." *U.S. Leasing Corp., 364 S.E. 2d at 205*; G.H.L. Fridman, *Law of Contract in Canada* 22 (4th ed. 1999). In addition, we are entitled to **[**31]** consider an integration clause in weighing whether contracting parties intended a written contract to constitute the entirety of an agreement. *Gilliland, 391 S.E. 2d at 581*; *Gutierrez*, 63 O.R. 3d at 73. In this situation, the Dealer Agreements are detailed and explicit, and each contains the Integration Clause providing that the writing is "the entire and only agreement between the parties respecting the …purchase and distribution" by the Dealers of Champion products and parts. [16] Furthermore, the Dealer Agreements emphasize that "terms or conditions in connection therewith not incorporated herein shall not be binding upon either party." Finally, the agreements provide that they cancel, terminate, and supersede all previous agreements entered into between the parties. CLM and Clark Dealer Agreements § 32.1; FEC Dealer Agreement § 33.1.

[32]** In these circumstances, the Dealer Agreements are both unambiguous and integrated. As such, we agree with the district court on the parol evidence issue. **[*598]** The parol evidence rule bars the Dealers from utilizing oral representations made prior to contract execution to modify or contradict the terms of the Dealer Agreements. Opinion at 546.

2.

The Dealers next maintain that subsequent oral promises, made by Champion and Volvo representatives *after* the Dealer Agreements were executed, altered the terms thereof. Volvo acknowledges that the parol evidence rule does not bar the use of such promises; it maintains, however, that the Modification Clause precludes their use here.

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[16] The Integration Clause specifically provides:

> This agreement and [any] accompanying Exhibits contain the entire and only agreement between the parties respecting the sale to and purchase and distribution by [Dealer or Distributor] of Products and Parts, and any representations, terms or conditions in connection therewith not incorporated herein shall not be binding upon either party. This agreement wholly cancels, terminates and supersedes any agreement heretofore entered into between the parties, or their successors or assigns, pertaining to Products and Parts.

CLM and Clark Dealer Agreements § 32.1; FEC Dealer Agreement § 33.1.

Pursuant to the Modification Clause, any modification of a Dealer Agreement is invalid unless it is in writing and signed by an authorized Champion officer. [17] In response to Volvo's reliance on the Modification Clause, the Dealers assert that a "no oral modification clause" may itself be orally modified, validating subsequent unwritten modifications. This position must also fail, however, because, **HN16**[] pursuant to South Carolina and Ontario law, an oral modification of a written contract must be supported by separate **[**33]** and adequate consideration. *See* Evatt v. Campbell, 234 S.C. 1, 106 S.E. 2d 447, 449-50 (S.C. 1959) (observing that written contract may be changed by subsequent parol agreement supported by valuable consideration); *Francis v. Canadian Imperial Bank of Commerce*, 21 O.R. 3d 75, 83 (Ont. C.A. 1994) (recognizing principle of contract law that additional consideration is required to support modification of existing agreement).

The Dealers' sole basis for contending that they provided separate and adequate consideration in support of modification of the Modification Clause is that they continued to market Champion Motor Graders after Champion was purchased **[**34]** by Volvo. Although the Dealers may have made good faith efforts to market Champion Motor Graders after Champion's purchase by Volvo, such efforts could not constitute consideration in support of an oral modification because, under the Best Efforts Provision, the Dealers had a preexisting contractual obligation to make such efforts. Rabon v. State Fin. Corp., 203 S.C. 183, 26 S.E. 2d 501, 502 (S.C. 1943) (observing that, **HN17**[] pursuant to South Carolina law, agreement to do what one is already legally bound to do is not sufficient consideration to support new agreement); *Francis*, 21 O.R. 3d at 82 (observing that, under Ontario law, agreement to perform preexisting duty does not constitute new consideration). In such circumstances, the Dealers' contention of subsequent oral modification of the Dealer Agreements must fail.

3.

In their final effort to convince us to read additional terms into the Dealer Agreements, the Dealers contend that, in defining the parties' obligations under the Dealer Agreements, we should look to the course of dealing between the parties and to industry custom regarding heavy equipment dealer franchises. **HN18**[] Although courts commonly **[**35]** look to evidence of the course of dealing and to industry custom and usage in assessing ambiguous contract terms, under South Carolina and Ontario law, "extrinsic evidence of a usage or custom is not admissible where the contract expresses the intent of the parties in clear and unambiguous **[*599]** language." U.S. Leasing Corp., 364 S.E. 2d at 206; *see Gutierrez*, 63 O.R. 3d at 71 (concluding that extrinsic evidence is not admissible to vary terms of clear and unambiguous contract). The terms of the Dealer Agreements are clear and unambiguous, and we must decline to modify them on the basis of either course of dealing or industry custom.

4.

Finally, the Dealers contend that Volvo breached its implied duty of good faith and fair dealing when it refused to supply them with Champion Motor Graders. **HN19**[] In South Carolina and Ontario, however, there can be no breach of an implied covenant of good faith and fair dealing where "a party to a contract [does] what provisions of the contract expressly [give] him the right to do." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 465 S.E. 2d 84, 85 (S.C. 1995); *see Peel Condo. Corp. No. 505 v. Cam-Valley Homes, Ltd.*, 53 O.R. 3d 1, 16 (Ont. C.A. 2001) **[**36]** (holding that covenant of good faith and fair dealing is circumscribed by terms of contract). In this regard, the Dealer Agreements gave Champion, and therefore Volvo, the right to terminate the Dealer Agreements without cause. In terminating the Dealer Agreements, then, Volvo could not have breached its duty of good faith and fair dealing.

C.

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[17] The Modification Clause provides:

> This agreement, and any modification, renewal, waiver, extension or termination hereof, shall not be valid unless in writing and signed by a duly authorized officer of Champion.

FEC Dealer Agreement § 33.2; CLM and Clark Dealer Agreements § 32.2 (omitting "waiver").

The Dealers maintain that, even if the Dealer Agreements are completely integrated contracts unmodified by the promises of Champion and Volvo representatives, Volvo is estopped from breaching its oral promises. The Dealers' estoppel theory is without merit. ***HN20***[] Promissory estoppel is simply not a cause of action recognized in Ontario. *See Gilbert Steel, Ltd. v. Univ. Constr., Ltd.*, 12 O.R. 2d 19, 23 (Ont. C.A. 1976) ("Estoppel can never be used as a sword but only as a shield. A plaintiff cannot found his claim in estoppel."). And in South Carolina, equitable relief is precluded under a theory of promissory estoppel if the estoppel claim is in direct conflict with a specific contract term. *See Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E. 2d 362, 364-65 (S.C. Ct. App. 2001)* (holding **[**37]** that party who acknowledges being bound by contract cannot recover in equity under theory of promissory estoppel if estoppel claim is in direct conflict with contract term). CLM's and Clark's estoppel claims are barred under South Carolina law, therefore, because they conflict with the Without Cause Provision.

D.

We next turn to the Dealers' contentions regarding the State Statutes. The Dealers maintain that, notwithstanding the Without Cause Provision, Volvo was prohibited by the State Statutes from terminating the Dealer Agreements without good cause. More specifically, Clark contends that the Arkansas Franchise Act (the "Arkansas Act") prohibited Volvo from terminating its Dealer Agreement (*Ark. Code § 4-72-201, et seq.)*; CLM maintains that Volvo's termination of its Dealer Agreement was prohibited by the Louisiana Dealer Act (the "Louisiana Act"; *La. Rev. Stat. § 51: 481, et seq.*); and FEC alleges that both the Texas Farm, Industrial and Outdoor Power Equipment Dealer Act (the "Equipment Act"; *Tex. Bus. & Com. Code § 19.01, et seq.*) and the Texas Deceptive Trade Practices and Consumer Protection **[**38]** Act (the "DTPA"; *Tex. Bus. & Com. Code § 17.41, et seq.*) precluded Volvo's termination of its Dealer Agreement.

HN21[] A federal court exercising diversity jurisdiction is obliged to apply the **[*600]** substantive law of the state in which it sits, including the state's choice-of-law rules. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*; *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)* (observing that forum state's choice-of-law rules are substantive). And when a lawsuit is transferred from one federal court to another pursuant to *28 U.S.C. § 1404(a)*, the transferee court is obliged to apply the choice-of-law rules that the transferor court would have applied. *Van Dusen v. Barrack, 376 U.S. 612, 632-37, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964)*. This transfer, however, was not a typical *§ 1404(a)* convenience-of-the-witnesses transfer. Instead, the Arkansas Litigation was transferred to North Carolina because the North Carolina court declined to defer to the Dealers' later filed Arkansas case. The North Carolina Litigation was first filed, venue was **[**39]** proper in the Western District of North Carolina, and that court possessed jurisdiction over all the parties. The North Carolina court's decision that it need not defer to the Arkansas court, therefore, was entirely proper. Under these circumstances, and in light of the principles animating the Supreme Court's decision in *Van Dusen*, we are not at all sure that the *Van Dusen* precedent should be blindly and mechanically applied, as the Dealers would have us do. *See Van Dusen, 376 U.S. at 635-36* ("The legislative history of *§ 1404(a)* certainly does not justify the rather startling conclusion that one might get a change of law as a bonus for a change of venue. Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of *§ 1404(a)*. If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument.").

Moreover, the claims asserted by the Dealers in the Arkansas Litigation are mirror images of their counterclaims in the North Carolina Litigation. Thus, applying Arkansas law to the Arkansas claims and North Carolina law to the North Carolina counterclaims could (in theory, **[**40]** at least) lead to different results on identical claims. It therefore seems clear that the choice-of-law rules of only one state should be applied to this action. For example, in *Boardman Petroleum, Inc. v. Federated Mutual Insurance Co., 135 F.3d 750 (11th Cir. 1998)*, an insurer and its insured filed separate actions in the federal courts of different states, both raising the question of whether coverage existed under an insurance policy. The insurer's action was transferred from South Carolina to Georgia, where the insured's action was pending, and the proceedings were consolidated. The Eleventh Circuit applied *Van Dusen* but nonetheless concluded that "of necessity, only one state's law may be applied" to the consolidated case. *Id. at 753*; *see also Bott v. Am. Hydrocarbon Corp., 441 F.2d 896, 899-900 (5th Cir. 1971)* ("When the California action was transferred to Texas the California law went with it. But this is only the first step, because the Texas District Court found pending before it two separate but identical actions between the same parties, which it consolidated. …The Texas court could not try the consolidated **[**41]** cases under two sets of laws if to do so would produce differing results. If there was a conflict, it was required to make a choice of law.").

In any event, we need not definitively decide how this thorny issue should be resolved, because the choice-of-law principles of North Carolina and Arkansas are sufficiently similar that the outcome of this dispute would be the same under either set of rules. Both North Carolina and Arkansas typically give effect to contractual **[*601]** choice-of-law provisions. *See* *Torres v. McClain, 140 N.C. App. 238, 535 S.E. 2d 623, 625 (N.C. App. 2000)* (holding that parties' choice of law is generally binding); *In re Jones, 231 B.R. 66, 68 (Bankr. E.D. Ark. 1999)* (observing that Arkansas courts will generally uphold contract's choice of law). In addition, as discussed in more detail later, both Arkansas and North Carolina rely on the Restatement (Second) of Conflict of Laws (1971) (the "Second Restatement") to determine the circumstances under which a contractual choice-of-law provision will be given effect. *See* *Cable Tel Servs., Inc. v. Overland Contracting, Inc., 154 N.C. App. 639, 574 S.E. 2d 31, 33-34 (N.C. Ct. App. 2002)*; **[**42]** *S. Farm Bureau Cas. Ins. Co. v. Craven, 79 Ark. App. 423, 89 S.W. 3d 369, 372 (Ark. Ct. App. 2002)*. Accordingly, in the interest of simplicity, and because it will not affect the outcome of this proceeding, we will approach this dispute through the prism of North Carolina's choice-of-law rules.

In support of their contentions regarding the State Statutes, the Dealers rely on ***HN22***[] the presumptive rule of *lex loci contractus*, that is, the interpretation of a contract is governed by the law of the place where it was made. *See* *Tanglewood Land Co., Inc. v. Byrd, 299 N.C. 260, 261 S.E. 2d 655, 656 (N.C. 1980)* (observing presumption that interpretation of contract is governed by law of place where contract was made). Under North Carolina law, however, such a presumption may be overcome by the presence of a choice-of-law provision in a contract. *See* *Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E. 2d 205, 209 (N.C. App. 1999)* (noting that, when contract contains choice-of-law provision, parties intended exception to presumptive rule that law of place where contract made governs). In this situation, the Dealer Agreements each contain **[**43]** a Choice-of-Law Provision. [18]

Recognizing the difficultly presented by that provision, the Dealers attack Volvo's position that the Dealer Agreements are governed solely by South Carolina and Ontario law. First, the Dealers contend that the Local Law Provision is also a choice-of-law clause and that, pursuant thereto, the Dealer Agreements are governed by the State Statutes. Second, the Dealers maintain that, if **[**44]** the Dealer Agreements are not governed by the State Statutes under the Local Law Provision, the Choice-of-Law Provision is invalid because the law selected thereunder contravenes the fundamental policies of their home states. We address these contentions below.

1.

The Dealers first contend that there are, in effect, two choice-of-law clauses in each Dealer Agreement - the Choice-of-Law Provision (§ 29) and the Local Law Provision (§ 30). The Dealers maintain that these two clauses are reconcilable because the drafters of the Dealer Agreements could have intended the Choice-of-Law Provision to be applicable only in the absence of local law governing the agreements. The Dealers contend that, because these two provisions are reconcilable, it would be error to give effect to **[*602]** one clause but not the other. As explained below, these contentions are without merit.

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[18] The Choice-of-Law Provision in the Clark and CLM Dealer Agreements provides:

> This Agreement has been formalized in South Carolina, and the rights, duties and obligations of the parties as set forth herein shall be determined according to the laws of the State of South Carolina.

CLM and Clark Dealer Agreements § 29. The Choice-of-Law Provision in the FEC agreement provides:

> This Agreement and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of the Province of Ontario.

FEC Dealer Agreement § 29.

Under the Local Law Provision, the rights and obligations created by the Dealer Agreements are subject to all applicable laws, orders, and regulations of governments and government agencies having jurisdiction over the parties. If a contracting party believes that a local law substantially alters the relationships established **[**45]** by its Dealer Agreement, that party may request the other party to modify the agreement. [19] According to Volvo, the State Statutes, if applied, would effectively nullify the Without Cause Provision, substantially altering the relationship between Champion and the Dealers. We agree.

[46]** The Local Law Provision provides a ready mechanism for the Dealers to request that the Dealer Agreements be modified. If the Dealers had viewed the State Statutes as substantially altering the relationships between the parties under the Dealer Agreements, they were entitled to request Champion (or Volvo) to modify the agreements; the Local Law Provision expressly provided them with this right. The Dealers did not, however, seek to modify the Dealer Agreements so that they could be terminated only "for good cause," and they cannot now maintain that, under the Local Law Provision, they are protected by the State Statutes. [20]

[47]** 2.

In their second assault on the Choice-of-Law Provision, the Dealers maintain that application of South Carolina law (under the Clark and CLM Dealer Agreements) and Ontario law (under the FEC Dealer Agreement) is unreasonable and contravenes the fundamental policies of Arkansas, Louisiana, and Texas. ***HN23***[] Despite North Carolina's adherence to the presumptive rule of *lex loci contractus*, contracting parties in North Carolina are entitled to agree that a particular jurisdiction's substantive law will govern their contract, and such a provision will generally be given effect. *See* Torres, 535 S.E. 2d at 625 (holding that parties' choice of law is generally binding). [21] In certain circumstances, **[*603]** however, North Carolina will decline to honor a choice-of-law provision. North Carolina relies on the Second Restatement to determine whether such circumstances are present. *See* Cable Tel Servs., 574 S.E. 2d at 33-34. Pursuant to § 187 of the Second Restatement, a choice-of-law provision will not be enforced if either of the following two conditions is satisfied:

> (a) the chosen state *has no substantial relationship* to the parties or the transaction **[**48]** and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be *contrary to a fundamental policy* of a state which has a materially greater interest than the chosen state in the determination of the particular issue ….

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[19] The Local Law Provision provides:

> The rights and obligations of the parties hereto shall be subject to all applicable laws, orders, regulations, directions, restrictions and limitations of governments and government agencies having jurisdiction over the parties hereto. In the event that [a local] law, order, regulation, direction, restriction or limitation, appropriation, …or interpretation thereof shall, in the judgment of either party hereto substantially alter the relationship between the parties under this Agreement or the advantages derived from such relationship, *either party may request the other hereto to modify this Agreement*.

CLM, Clark, and FEC Dealer Agreements § 30 (emphasis added).

[20] In support of their contention that the Local Law Provision mandates that the State Statutes govern the Dealer Agreements, the Dealers rely on two decisions, Sutter Home Winery, Inc. v. Vintage Selections, Ltd., 971 F.2d 401 (9th Cir. 1992), and Lake Charles Diesel, Inc. v. General Motors Corp., 328 F.3d 192 (5th Cir. 2003). Their reliance on these decisions, however, is misplaced. The agreement at issue in *Sutter Home* expressly provided that, "*except as otherwise required by applicable law*, this Agreement shall be governed by the law of the State of California." Sutter Home, 971 F.2d at 406 (emphasis added). This language is absent from the Dealer Agreements. The agreement at issue in *Lake Charles* provided that "any provision which contravenes the laws of any state or jurisdiction where this Agreement is to be performed will be deemed not a part of this Agreement in such state or jurisdiction." Lake Charles, 328 F.3d at 197 n. 10. No such provision exists in the Dealer Agreements.

[21] We recognize that the "Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity." Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996).

Second Restatement *§ 187* (emphasis added). The Dealers maintain that the Choice-of-Law Provision does not apply here because it contravenes both prongs of the *§ 187* test. They contend, first, that there is no substantial relationship between South Carolina and the Clark and CLM Dealer Agreements (the "Substantial Relationship" issue), and, second, that application of South Carolina or Ontario law to those agreements would contravene the fundamental policies of Arkansas, Louisiana, and Texas (the "Fundamental Policy" issue).

[49]** Before addressing this aspect of the Dealers' assault on the Choice-of-Law Provision, we must assess whether Volvo is correct in its contention that the Substantial Relationship and Fundamental Policy issues were not properly raised in the district court. If those issues are properly before us, we must determine whether the Dealers are protected by the State Statutes.

a.

Volvo contends that the Substantial Relationship and Fundamental Policy issues were not raised in the district court. ***HN24***[] Absent exceptional circumstances, of course, we do not consider issues raised for the first time on appeal. *Williams v. Prof'l Transp. Inc., 294 F.3d 607, 614 (4th Cir. 2002)* (citing *Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993)*). Indeed, we consider such issues on appeal only when the failure to do so would result in a miscarriage of justice. *Muth, 1 F.3d at 250*.

In support of its contention, Volvo relies on an observation in the Opinion that the Dealers and the Dealer Agreements may not bear a reasonable relationship to South Carolina or Ontario. The court declined to decide whether such a reasonable relationship existed, however, concluding **[**50]** that the Dealers had not raised the Substantial Relationship issue. Opinion at 542 n. 5. The Dealers maintain that Volvo has mischaracterized the record on this point, and they contend that the Substantial Relationship and Fundamental Policy issues were raised in the district court. In support of their position that these issues were properly raised, the Dealers point to memoranda filed on October 23, 2002 (the "October Response"), in which they maintained:

> all the Dealers are protected by dealer protection statutes enacted by their own state legislatures to protect them from the precise action that Volvo is seeking to undertake. …all but one of the applicable statutes contain 'non-waiver' provisions - meaning that the contract simply cannot be seen as circumventing the statute.

In the October Response, the Dealers asserted that, because some of the State Statutes contain anti-waiver provisions, the Dealers are protected by them, despite the presence of the Choice-of-Law **[*604]** Provision in the Dealer Agreements. ***HN25***[] In assessing whether an issue was properly raised in the district court, we are obliged on appeal to consider any theory plainly encompassed by the submissions **[**51]** in the underlying litigation. *See* *Maynard v. Gen. Elec. Co., 486 F.2d 538, 539 (4th Cir. 1973)*. In this circumstance, the October Response plainly encompasses the contention that certain of the State Statutes contain anti-waiver provisions (namely the Arkansas Act, the Texas Equipment Act, and the Texas DTPA), and that protection of the Dealers under these statutes cannot be circumvented by the Choice-of-Law Provision. We will therefore consider this contention on appeal. The Dealers acknowledged in the October Response, however, that one of the State Statutes (i.e., the Louisiana Act) does not contain an anti-waiver clause. Rather than raising the issue of whether the Louisiana Act sets forth a fundamental policy of Louisiana, and therefore trumps the Choice-of-Law Provision, the Dealers asserted that the Act governs CLM's Dealer Agreement because of the Local Law Provision. Although the Dealers failed to assert in the district court that the Louisiana Act expresses a fundamental policy of Louisiana, the court addressed this point in determining whether the Louisiana Act precluded Volvo's termination of the CLM Dealer Agreement without cause. Opinion at 554. Because **[**52]** the question of whether the Louisiana Act expresses fundamental state policy was decided by the district court, that issue is properly before us on appeal. *Home Health Servs., Inc. v. Currie, 706 F.2d 497, 498 (4th Cir. 1983)* (observing that ***HN26***[] issue may be considered on appeal if it was argued below or specifically decided by district court).

We next consider whether the Substantial Relationship issue was properly raised below. On this point, the pleadings fail to plainly encompass the contention that there is no substantial relationship between the law selected under the Choice-of-Law Provision, on the one hand, and the parties or the Dealer Agreements, on the other. We therefore agree with the district court - the Dealers did not properly raise the Substantial Relationship issue below.

Opinion at 542 n. 5. Moreover, the Dealers have presented us with no reason to believe that declining to address this issue on appeal will result in a miscarriage of justice.

b.

Next, before assessing whether the State Statutes constitute fundamental policies of Arkansas, Louisiana, or Texas and thus govern the Dealer Agreements, we must decide whether the Dealers are protected **[**53]** parties under those statutes. If a Dealer is protected by one of the State Statutes, we must then determine whether the statute also applies to Champion Motor Graders.

(1)

We first consider whether FEC can assert a claim under ***HN27***[] the Texas Equipment Act, which provides that a manufacturer may not terminate a dealer agreement except for cause. *Tex. Bus. & Com. Code § 19.41*. As the district court ruled, however, FEC cannot state a claim under the Texas Equipment Act because FEC is not a party protected by it. When FEC acquired its Champion dealership in 1996, the Texas Equipment Act excluded from its protection those ***HN28***[] "persons whose principal business is the sale of off-road construction equipment." *Id*. *§ 19.01(5)* (originally enacted as Act of May 19, 1991, 72nd Leg., ch. 119, § 1), *amended by* Act of Sept. 1, 1999, 76th Leg., ch. 725, § 2. The court concluded that FEC could not state a claim under the Texas Equipment Act **[*605]** because Champion Motor Graders constituted offroad construction equipment. [22] Opinion at 553. We agree. Because FEC is unable to state a claim under the Texas Equipment Act, we need not address the question of whether its provisions **[**54]** constitute a fundamental policy of Texas.

(2)

We next turn to the issue of whether FEC can state a claim under ***HN29***[] the Texas DTPA, which provides protection only to "consumers." *See* *Kennedy v. Sale, 689 S.W.2d 890, 892-93, 28 Tex. Sup. Ct. J. 377 (Tex. 1985)* (noting that DTPA is designed to protect only "consumers," as that term is defined therein). Under the DTPA, "a consumer is one who seeks or acquires, by purchase or lease, any goods **[**55]** or services." *Rayford v. Maselli, 73 S.W. 3d 410, 411 (Tex. App. 2002)* (citing *Tex. Bus. & Com. Code Ann. § 17.45(4)*). On appeal, FEC maintains that it is a consumer under the DTPA, and that the district court erred in ruling that it could not state a claim under that statute. In assessing whether the court erred in so ruling, we must ascertain and follow the substantive law of Texas. *See* *Erie, 304 U.S. at 78-79*.

In its Opinion, the court relied heavily on the Texas decision in *Fisher Controls International, Inc. v. Gibbons, 911 S.W.2d 135 (Tex. App. 1995)*, and it ruled that FEC was not a consumer under the DTPA. [23] In *Fisher*, the owner ("Gibbons") of a company engaged in the resale of valves and instruments ("ACI") sued the company's supplier ("Fisher"), alleging a violation of the DTPA. ACI was an independent sales representative for Fisher. In his DTPA claim, Gibbons alleged that Fisher had falsely promised to extend ACI's agreement beyond the three years expressly provided in its contract, and that Fisher failed to inform ACI of Fisher's long-term business plan to

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[22] In 1999, the Texas Legislature amended the Texas Equipment Act so that a "dealer" under the Act included dealers engaged in the retail sale of off-road construction equipment. The Legislature provided, however, that "an agreement entered into before the effective date of this Act [Sept. 1, 1999] *is governed by the law in effect on the date the agreement was entered into* …." 1999 Tex. Gen. Laws § 4, 76th Leg., Ch. 725 (emphasis added). FEC acquired its Champion dealership in 1996; thus the 1999 amendments to the Texas Equipment Act have no application to its Dealer Agreement.

[23] The Supreme Court of Texas, the court possessing the final authority in all Texas civil cases, has not addressed the issue of whether, pursuant to a dealer agreement analogous to FEC's, a vendee is a consumer under the DTPA. Because there is no reason to believe the Supreme Court of Texas would disagree with the Texas Court of Appeals (an intermediate appellate court of Texas) on this issue, we must rely on that court in discerning Texas law. *See* *West v. Am. Tel. & Tel. Co., 311 U.S. 223, 237, 85 L. Ed. 139, 61 S. Ct. 179 (1940)* (holding that ***HN30***[] state intermediate appellate court's judgment on rule of law is datum for ascertaining state law and should not be disregarded by federal court unless it is convinced by persuasive data that highest court of state would decide otherwise).

terminate its independent representatives **[**56]** (such as ACI). *Id. at 139* n. 1. Although the jury found for Gibbons, the trial court granted judgment notwithstanding the verdict, concluding that ACI was not a consumer under the DTPA.

The Texas Court of Appeals **[**57]** began its analysis of whether ACI was a consumer by noting that ACI was authorized, under the agreement, to "buy Fisher products at a discount and resell them on its own behalf." *Id. at 139*. The court ruled, however, that despite being authorized to buy Fisher products, ACI was not a consumer under the DTPA. The court observed that ACI's DTPA complaint was premised on ACI's "intangible property right …to act as Fisher's sales representative under the ' **[*606]** Representative Agreement,'" rather than the quality of Fisher's products. *Id. at 138-39*. In ruling for Volvo, the district court concluded that the *Fisher* decision was controlling because there is no material distinction between the arrangement in *Fisher* and the arrangement between FEC and Volvo. [24] We agree. FEC's complaint is based on its asserted intangible right to be a Champion dealer, not the quality of Champion Motor Graders. Opinion at 552.

[58]** FEC maintains that, under the Texas decision in *Texas Cookie Co. v. Hendricks & Peralta, 747 S.W.2d 873 (Tex. App. 1988)*, it is nonetheless a consumer protected by the Texas DTPA. Under *Texas Cookie*, ***HN31***[] a business possessing an intangible right analogous to that in *Fisher* (i. e., the contract right to be a dealer of a manufacturer's goods in a certain geographic area) may be a consumer under the DTPA if (1) the business purchased the intangible right, and (2) the business's decision to purchase the right was motivated, in part, by its desire to obtain collateral services under the dealer agreement. *Fisher, 911 S.W.2d at 139* (citing *Tex. Cookie, 747 S.W.2d at 876-77*).

FEC is not a consumer under the DTPA, however, because FEC did not *purchase* an intangible right to be a Champion dealer, and the collateral services provided under the Dealer Agreement were merely incidental to the agreement. *See id*. (concluding that, because collateral services provided ACI under contact were incidental to transaction rather than its objective, ACI was not consumer under DTPA). As the district court observed, FEC does not allege that **[**59]** it paid for an intangible right to continue to be a Champion dealer, and no payment is reflected in the Dealer Agreement. Opinion at 552. In addition, receipt of collateral services provided to FEC by Champion was not an objective of the Dealer Agreement. The collateral services Champion provided to the Dealers included sales advice, catalogues, manuals, instruction booklets, and advertising signs, and the Dealer Agreement provided that all demonstration equipment furnished by Champion "remains the property of Champion." FEC Dealer Agreement § 14. These collateral services were, therefore, merely incidental to FEC's objective of being an authorized Champion dealer, and the court properly determined that FEC was not a consumer under the DTPA. Opinion at 552. As such, FEC is unable to assert a claim under the DTPA, and we need not reach the issue of whether the DTPA constitutes a fundamental policy of Texas.

(3)

Next, we assess whether Clark or CLM can state a claim under the Arkansas Act or the Louisiana Act, respectively. In the district court, Volvo maintained that Clark was not protected by the Arkansas Act and that CLM was not protected by the Louisiana Act because, pursuant **[**60]** to the Choice-of-Law Provision, Clark's and CLM's Dealer Agreements are governed by South Carolina law. Volvo did not, however, assert that the statutes in question, by their terms, fail to apply to Clark's or CLM's Dealer Agreements. Absent the Choice-of-Law Provision, Clark could state a claim under the Arkansas Act, and CLM could state a claim under the Louisiana Act. We must therefore decide whether either statute embodies a fundamental state policy.

[*607] c.

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[24] Under both the dealer agreement in *Fisher* and FEC's Dealer Agreement, the relationship between the manufacturer and dealer was that of vendor and vendee. FEC Dealer Agreement § 21. And like the valves and instruments provided to ACI by Fisher, Champion Motor Graders were sold to FEC at dealer net prices for resale. *Id*. §§ 9.1, 12.4.

Under the Second Restatement, North Carolina will not honor a choice-of-law provision if the law of the chosen state is contrary to the fundamental policy of a state possessing a greater interest in the issue than the chosen state (the "Fundamental Policy" test). *See* Cable Tel Servs., 574 S.E. 2d at 33-34 (quoting § 187 and noting that it has been incorporated into North Carolina common law). Pursuant thereto, unless the Choice-of-Law Provision in either Clark's or CLM's Dealer Agreement satisfies the Fundamental Policy test, it does not deprive Clark or CLM of protection under the Arkansas Act or the Louisiana Act, respectively.

In this regard, Clark and CLM maintain that Volvo's termination of their Dealer **[**61]** Agreements without cause contravenes fundamental state policies. More specifically, they contend that the law selected under the Choice-of-Law Provision is contrary to the Arkansas Act and the Louisiana Act, that these statutes constitute fundamental state policy, and that the Choice-of-Law Provision therefore fails the Fundamental Policy test.

In order to determine whether the law selected under the Choice-of-Law Provision fails the Fundamental Policy test, we must first determine whether either the Arkansas Act or the Louisiana Act expresses a fundamental state policy. In addressing this issue, we begin with the proposition that ***HN32***[] not every statutory provision constitutes a fundamental policy of a state. *Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994)* ("The law of a state and its public policy are not necessarily synonymous. Not every law enacted by the legislature embodies the 'public policy' of the state."). [25]

[62]** (1)

HN33[] In assessing whether a dealer protection statute expresses a state's fundamental policy, we are guided by the language of the statute, relevant court decisions, and pertinent legislative history. [26] In particular here, we are aided by several recent decisions of our sister circuits regarding similar controversies. *See* *Cromeens, 349 F.3d 376, 2003 WL 22519825* (determining that Maine franchise statute evidenced strong public policy against contracts violating franchise law, and that protection under such statute may not be waived); *Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990)* (determining that Indiana franchise law expressed fundamental policy, and that protection under Indiana franchise law may not be waived); *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734 (8th Cir. 1989)* (en banc) (holding that protection under Minnesota franchise law may be waived because law does not embody fundamental policy); *Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd., 814 F.2d 1120 (6th Cir. 1987)* (holding that protection under Ohio business statute **[*608]** may be waived because statute does not embody **[**63]** fundamental policy).

The Sixth, Seventh, and Eighth Circuits have, in their analyses of similar issues, focused on whether state dealer protection statutes contain anti-waiver provisions. The Arkansas Act contains such a provision, and Clark maintains that its inclusion reflects that the Arkansas Act constitutes a fundamental policy of Arkansas. [27] In espousing this proposition, Clark relies primarily on the Seventh Circuit's decision in *Wright-Moore*. There, the court held that an Indiana franchise statute containing an anti-waiver provision constituted a fundamental policy of Indiana and barred contracting **[**64]** parties from opting out of its protection "whether directly through waiver provisions or indirectly through choice of law." *Wright-Moore, 908 F.2d at 132*. As the Sixth and Eight Circuits have observed, however, ***HN34***[] the presence of a statutory anti-waiver provision does not *necessarily* mean that a statute embodies a state's fundamental policy. *See* *Tele-Save, 814 F.2d 1120*; *Modern Computer, 871 F.2d 734*.

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[25] If every statutory provision expressed a state's fundamental policy, contracting parties would be entitled to apply the law of another state under the Second Restatement only when the law of the chosen state was the same as that of the state where the contract was made. *Cherokee Pump & Equip. Inc., 38 F.3d at 252* (characterizing such proposition as "ridiculous").

[26] We note that, in assessing whether the Arkansas Act or the Louisiana Act embodies a fundamental state policy, we would be bound by any relevant precedent of the Arkansas or Louisiana courts. Because there is none, and because our Court has not heretofore addressed such an issue, we are constrained to examine the decisions of our sister circuits addressing these and similar dealer protection statutes.

[27] Unlike the Arkansas Act, the Louisiana Act does not contain an antiwaiver provision.

There is no established rule for determining whether a state policy is fundamental. Although the presence of an anti-waiver provision does not necessarily mean that a dealer protection statute embodies a fundamental policy, such a provision suggests the importance the legislature attached to the statute. The strength of anti-waiver provisions in dealer protection statutes, however, varies among the states. *Wright-Moore, 908 F.2d at 134*. Following the lead **[**65]** of our sister circuits, we will determine whether the Arkansas Act expresses fundamental policy by first assessing the strength of its anti-waiver provision. *See Wright-Moore, 908 F.2d at 134*; *Modern Computer, 871 F.2d at 738*; *Tele-Save, 814 F.2d at 1122-23*; *see also Jeffries v. State, 212 Ark. 213, 205 S.W.2d 194, 196 (Ark. 1947)* (observing that, in Arkansas, public policy is determined by examining constitution, statutes, and court decisions). We will also focus on any legislative history indicating whether the Arkansas Act was intended to embody a fundamental policy of Arkansas. *See Cromeens, 376 F.3d 376, 2003 WL 22519825, at *9-10*; *see also Jordan v. Atl. Cas. Ins. Co., 344 Ark. 81, 40 S.W. 3d 254, 257 (Ark. 2001)* (observing that, ***HN35***[] in Arkansas, determination of public policy lies almost exclusively with legislature, and courts should not interfere with that determination absent palpable error). Because the Louisiana Act does not have an anti-waiver provision, we must, in seeking to determine whether the Act was intended to embody a fundamental policy of Louisiana, focus on its **[**66]** provisions and on any relevant court decisions.

(2)

In assessing whether the Louisiana Act constitutes a fundamental policy of Louisiana, we look to pertinent Louisiana judicial and legislative authorities. Because the Louisiana courts have not addressed this issue, our analysis is limited to the text of the statute. *Cherokee Pump, 38 F.3d at 253* (observing that court decisions fail to show that Louisiana Act reflects public policy of Louisiana). Unlike the dealer protection statutes of certain other states, the Louisiana Act does not contain an anti-waiver provision. More importantly, nothing in the Act indicates that it was enacted to foster or protect a fundamental policy of Louisiana. *See Cherokee Pump, 38 F.3d at 253* (observing that Louisiana Act fails to indicate that "strongly held belief" or "public policy" of Louisiana was being fostered or protected by its enactment). In this regard, the Louisiana legislature **[*609]** clearly understood the significance of a statutory provision indicating that a statute represents important state policy. For example, in the Louisiana Oilfield Indemnity Act, the legislature indicated its intent "to declare *null* **[**67]** *and void and against public policy of the state of Louisiana any provision in any agreement* which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault …on the part of the indemnitee …." *La. Rev. Stat. § 9:2780* (emphasis added). No such provision is found in the Louisiana Act.

HN36[] In the absence of an anti-waiver provision in the statute, and there being no legislative finding that the Louisiana Act constitutes an important, much less a fundamental, state policy, we agree with the Fifth Circuit that the Act cannot override a choice-of-law contract provision precluding its application. *Cherokee Pump, 38 F.3d at 252*. Because the body of law selected in CLM's Choice-of-Law Provision does not fail the Fundamental Policy test, that law, rather than the Louisiana Act, governs the obligations of the parties.

(3)

Finally, we turn to the issue of whether the Arkansas Act embodies a fundamental policy of Arkansas. The Arkansas courts have not addressed this issue. We begin our analysis, therefore, by examining the text of the Arkansas Act. That Act, unlike the Louisiana Act, contains an **[**68]** anti-waiver provision, which provides that a franchisor may not ***HN37***[] "require a franchisee at the time of entering into a franchise agreement to assent to a …waiver …which would relieve any person from liability imposed by [the Arkansas Act]." *Ark. Code § 4-72-206(1)*. Although the inclusion of an anti-waiver provision in the Arkansas Act is indicative of the importance the Arkansas legislature attached to the statute, we see nothing in the provision itself to indicate that the legislature intended the Act to embody the state's fundamental policy.

The Seventh Circuit recently addressed a similar situation in *Cromeens*, in which it analyzed the anti-waiver provision of the Maine Franchise Law for Power Equipment, Machinery and Appliances (*10 M.R.S.A. § 1361, et* seq.; the "Maine Law"). [28] Like the anti-waiver provision of the Arkansas Act, there was nothing in the anti-waiver provision of the Maine Law to indicate that the legislature intended the statute to embody fundamental policy. As the court observed in *Cromeens*, however, ***HN38***[] a legislature simplifies the task of determining whether a state statute embodies fundamental **[**69]** policy when it expressly states that the statute constitutes such policy. *Cromeens, 349 F.3d 376, 2003 WL 22519825, at *9*. In *Cromeens*, the Seventh Circuit discovered that the Maine legislature had rendered the court's task "exceedingly easy" by including in the Maine Law a section entitled "Public Policy." *Id*. The "Public Policy" section of the Maine Law provides that "[a] contract …or activity undertaken pursuant to a contract in violation of this chapter is deemed against public policy and is void and unenforceable." *10 M.R.S.A. § 1368*. Relying on this section, the court held that the Maine Law "evidences a strong public policy against contracts that violate the franchise law generally," and that, because Maine has expressed a strong public policy against allowing choice-of-law provisions **[*610]** to prevail over the statute, franchisees could not waive protection under the Maine Law. *Cromeens, 349 F.3d 376, 2003 WL 22519825, at *10*.

[70]** In determining whether the Arkansas Act embodies a fundamental policy of Arkansas, we will conduct an analysis like that utilized by the *Cromeens* court. As the Supreme Court of Arkansas has observed, the "public policy [of Arkansas] is declared by the General Assembly." *Western World Ins. Co. v. Branch, 332 Ark. 427, 965 S.W.2d 760, 762 (Ark. 1998)*. And the Arkansas legislature, in the Arkansas Act's emergency clause (the "Emergency Clause"), included a provision analogous to the "Public Policy" section of the Maine Law. [29] In the Emergency Clause, the legislature expressly declared that cancellation of franchise agreements in Arkansas, absent good cause, was "vitally affecting the …public welfare." 1977 Ark. Acts 355, § 13. More specifically, the Emergency Clause asserted that franchisors, "without good cause and to the great prejudice and harm of the citizens of the State of Arkansas, [were] cancelling existing franchise agreements." And it declared that the legislature had enacted the Arkansas Act to prevent the cancellation of such franchise agreements without good cause, in order to preserve the "public peace, health, and safety" of its citizens. **[**71]** Importantly, the Supreme Court of Arkansas has recognized that the Emergency Clause shows that the legislature "designed the [Arkansas Act] for the protection of the public," and it has acknowledged that the purpose of the Arkansas Act is revealed in its Emergency Clause. *Dr. Pepper Bottling Co. of Paragould v. Frantz, 311 Ark. 136, 842 S.W.2d 37, 41 (Ark. 1992)*. In sum, like the "Public Policy" provision of the Maine Law, the Emergency Clause of the Arkansas Act constitutes a compelling statement of Arkansas policy.

[72]** In these circumstances, the anti-waiver provision of the Arkansas Act, considered in conjunction with the declarations made in the Emergency Clause, renders the termination of a dealer agreement, absent good cause, a violation of the fundamental policy of Arkansas. And Arkansas has a materially greater interest than South Carolina in determining whether a dealer agreement between an Arkansas dealer and an out-of-state manufacturer can be terminated without cause. Thus, under the Fundamental Policy test, Clark's Dealer Agreement is governed by the Arkansas Act. We must therefore assess whether Volvo's termination of Clark's Dealer Agreement was permissible under the Arkansas Act.

d.

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[28] Pursuant to the anti-waiver provision of the Maine Law, it is unlawful for a manufacturer, without good cause, "to cancel …a franchise relationship with a distributor or dealer, notwithstanding …the terms or provisions of a waiver …." 10 M.R.S.A. *§ 1363(3)(B)*.

[29] The requirements for enacting an emergency clause in Arkansas are explained in Amendment 7 to the Arkansas Constitution:

> If it shall be necessary for the preservation of the public peace, health and safety that a measure shall become effective without delay, such necessity shall be stated in one section, and if upon a yea and nay vote two-thirds of all members elected to each house …shall vote upon separate roll call in favor of the measure going into immediate operation, such emergency measure shall become effective without delay.

Ark. Const. amend. 7. ***HN39***[] In interpreting an Arkansas statute, courts may look to the emergency clause to determine legislative intent. *Quinney v. Pittman, 320 Ark. 177, 895 S.W.2d 538, 542 (Ark. 1995)*.

Volvo maintains that, even if Clark's Dealer Agreement is governed by the Arkansas Act, it did not violate the Act because the Dealer Agreement was terminated for good cause. More specifically, Volvo contends that its legitimate business objective of consolidating its network of motor-grader dealers satisfies the good cause standard of the Arkansas Act. Indeed, in the *Cromeens* controversy, AB Volvo, Volvo Excavators AB, and Volvo **[*611]** Construction Equipment NV (collectively, "AB Volvo") made a similar **[**73]** argument to the Seventh Circuit. And AB Volvo, like Volvo here, maintained that it possessed good cause to terminate its dealers because it had withdrawn from the market the heavy equipment sold by those dealers. *Cromeens, 349 F.3d 376, 2003 WL 22519825, at *10*.

In this appeal, Volvo maintains that it possessed good cause to terminate Clark's Dealer Agreement because it withdrew the Champion Motor Graders from the market. Volvo acknowledges that, although the Maine Law assessed in *Cromeens* provided that "there is good cause [for termination of a franchise] when the manufacturer discontinues production or distribution of the franchise goods," 10 M.R.S.A. *§ 1363(3)(C)(4)*, the Arkansas Act contains no such provision. Volvo maintains, however, that circumstances other than those enumerated in the Arkansas Act may constitute good cause, and it contends that a market withdrawal is such a circumstance.

Clark, on the other hand, asserts that, even if the list of what may constitute good cause under the Arkansas Act is not exhaustive, and even if a market withdrawal may constitute good cause for a franchise termination, Volvo did not in fact withdraw the **[**74]** Champion Motor Graders from the market. Clark contends that, because the motor graders currently manufactured by Volvo have not been significantly reengineered, Volvo has not withdrawn Champion Motor Graders from the market. More specifically, Clark maintains that Volvo has simply rebranded the Champion Motor Graders and that it is selling them as Volvo graders. And, according to Clark, such rebranding does not constitute a market withdrawal. Clark contends, therefore, that even if a market withdrawal may constitute good cause under the Arkansas Act, Volvo did not possess good cause for terminating its Dealer Agreement.

In these circumstances, a genuine factual dispute exists as to whether Volvo possessed good cause, under the Arkansas Act, to terminate Clark's Dealer Agreement. We therefore remand Clark's statutory claim (in the Arkansas Litigation) and its statutory counterclaim (in the North Carolina Litigation) for the district court's assessment of whether, pursuant to the Arkansas Act, Volvo terminated Clark's Dealer Agreement without good cause.

IV.

Pursuant to the foregoing, we affirm the district court except as to Clark's statutory claim in the Arkansas Litigation and **[**75]** its statutory counterclaim in the North Carolina Litigation. We vacate the judgment on those two claims only, and we remand for such further proceedings as may be appropriate.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Concur by: WIDENER, (In Part)

Dissent by: WIDENER, (In Part)

Dissent

WIDENER, Circuit Judge, concurring and dissenting:

I concur in part and respectfully dissent in part.

I agree with the result reached by the majority except the treatment of CLM's claim under the Louisiana Act and the claim of Future Equipment Company under the Texas Deceptive Trade Practices and Consumer Act. In my opinion, the decision of the district court as to those claims should be vacated, and as to them should be remanded to the district court for further consideration.

I.

The key provision in CLM's dealer agreement with Volvo is the Local Law Provision, or section 30 of the dealer **[*612]** agreement. The Local Law Provision provides as follows:

> The rights and obligations of the parties hereto shall be subject to all applicable laws, orders, regulations, directions, restrictions and limitations of governments and governmental agencies having jurisdiction over the parties hereto. In the event **[**76]** that any law, order, regulation, direction, restriction or limitation, appropriation …or interpretation thereof shall, in the judgment of either party hereto, substantially alter the relationship between the parties under this Agreement or the advantages derived from such relationship, either party may request the other party hereto to modify this Agreement. If, within fifteen (15) days subsequent to making such request, the parties hereto are unable to agree upon a mutually satisfactory modification hereof, then the adversely affected party may terminate this Agreement on fifteen (15) days' notice to the other party.

The Louisiana Act, *La. Rev. Stat. Ann. §§ 51: 481-82 (West 2003)*, applies to the CLM-Volvo dealer agreement. In *Lake Charles Diesel, Inc. v. General Motors Corp., 328 F.3d 192 (5th Cir. 2003)*, the court explained the prerequisites necessary for the Louisiana Act to apply. For the Louisiana Act to apply in this case, each of the following must be present:

> 1. A contract or agreement, written or oral;
> 2. The contract must be between (1) a dealer, [1] and (2) an agent. [2]
>
> 3. The dealer must be in the business **[**77]** of selling, distributing, or retailing.
> 4. The agent must be in the business of wholesaling, manufacturing, or distributing.
> 5. The tangible movable (personal) property that the dealer agrees to sell, distribute, or retail and that the agent agrees to wholesale, manufacture, or distribute must pertain to one or more of five industries only: (1) farming; (2) construction; (3) heavy industrial material handling; (4) utility; or (5) lawn and garden.
> 6. The tangible movables that are the objects of the dealership contract must be one or more of the following types: (1) equipment; (2) engines; (3) implements; (4) machinery; or (5) attachments.
>
> 7. In addition to the type or types of equipment that are the objects of the dealership contract, the dealer must also agree to sell, distribute or retail, and the agent must also agree to wholesale, manufacture, or distribute repair parts for such equipment.
>
> 8. In the dealership contract, the dealer must agree to maintain an inventory of one or more of the following: (1) repair parts for the subject tangible movables; or (2) the tangible movables themselves; or (3) attachments.

Lake Charles Diesel, 328 F.3d at 200. **[**78]** The CLM-Volvo dealer agreement fulfills all of these prerequisites. Because the dealer agreement fulfills all of the prerequisites **[*613]** outlined by the court in *Lake Charles Diesel*, the substantive sections of Title 51 apply to the dealer agreement. In particular, *§ 482* is applicable. *Section 482(A)(1)* provides that:

> no agent, directly through an officer or an employee, may terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealership agreement or contract without good cause.

La. Rev. Stat. Ann. § 51: 482 (West 2003). Accordingly, *§ 482* is an applicable law under the Local Law Provision of the dealer agreement.

[79]** Under the majority's interpretation of the *Local Law Provision, § 482* is not applicable in this case because CLM failed to request a modification of its dealer agreement. Maj. Op. at 25-26. But the plain language of the Local Law Provision does not require CLM to request a modification of the dealer agreement in order to gain the

[1] A dealer is defined by statute to mean "any farm dealer, heavy industrial equipment dealer, construction equipment dealer, material handling equipment dealer, utility equipment dealer, engines equipment dealer, lawn and garden equipment dealer or retail equipment distributor dealer." *La. Rev. Stat. Ann. § 51:481(B)(3)* (West 2003).

[2] An agent is defined by statute to mean "any manufacturer, wholesaler or wholesale distributor." *La. Rev. Stat. Ann. § 51: 481(B)(4) (West 2003).*

protection of § 482. Under the Local Law Provision, either party, *either Volvo or CLM*, could have requested a modification if it believed, "in [its] judgment" that a local law would substantially alter the contractual relationship between the parties. Neither CLM nor Volvo requested a modification. As the majority duly notes in its opinion, Volvo recognized that § 482 would alter the relationship between the two parties:

> According to Volvo, the State Statutes, if applied, would effectively nullify the Without Cause Provision, substantially altering the relationship between Champion and the Dealers.

Maj. Op. at 25-26. Despite this realization, Volvo never sought a modification of the contract.

The Louisiana state legislature added § 482 to Title 51 in 1991. See La. Rev. Stat. Ann. § 51:482 (West 2003). Until **[**80]** the time of this addition, neither CLM nor Volvo was subject to § 482(A)(i), and immediately upon enactment, and until 2000, either CLM or Volvo could have asked for a modification of the dealer agreement. The reason that CLM did not seek such a modification is at once apparent; under the dealer agreement, if there had been no applicable local law, the agreement could have been terminated under the Without Cause Provision of CLM Dealer Agreement § 24. At the time the dealer agreement was signed in 1984, neither party had any cause to seek a modification. The passage of § 482 in 1991 modified the dealer agreement. CLM had no cause for concern, however, because it derived a benefit from § 482. Volvo, as it admits and as the majority notes in its opinion, did have its rights and advantages altered by the passage of § 482. Maj. Op. at 26. Since Volvo now recognizes the impact of § 482, as shown without objection, it could have recognized § 482's significance at any time since 1991, and did not.

Furthermore, the Local Law Provision provided a method for Volvo to alter the dealer agreement to regain any advantages, in its judgment it lost by the passage of § 482. The majority opinion **[**81]** holds that only CLM bears the burden of requesting a modification of the dealer agreement, but as I have noted, the plain language of the Local Law Provision does not limit to CLM alone the ability to request a modification. The majority interprets the Local Law Provision so that, while § 482 alters the relationship of the parties, CLM loses on its claims because it did not request a modification. Using the same logic, the majority should, with equal facility, reach the opposite conclusion; that because § 482 alters the relationship between the parties, Volvo loses because it did not request a modification.

The majority offers no reason or justification for declaring Volvo the winner with **[*614]** respect to the construction of this provision of the contract, which, by its literal terms, applies to "either party." Indeed, a more logical and reasonable construction of the contract is that in the absence of a "request [of] the other party," the literal terms of the contract should stand as written and unaltered.

Under the majority's reasoning, CLM, as the party benefitting from § 482, must call Volvo's attention to the existence of a provision that benefits CLM for the purpose of altering **[**82]** the relationship to the point where CLM loses the benefit of § 482. Such a departure from human nature is not a reasonable contract construction, I suggest.

II.

The Local Law Provision, section 30 of the dealer agreement, is reconcilable with the Choice of Law Provision in section 29. For example, prior to 1991, the Louisiana legislature had not enacted § 482. As a result, no local law triggered the application of the Local Law Provision. Had there been a contract dispute prior to 1991, it would have been governed by South Carolina law. After the passage of § 482, the contract is still governed by South Carolina law, except that § 482, as an applicable local law, applies as well.

Yet, under the majority's interpretation of the contract, the Local Law Provision would be surplusage, violating the "universal law of contract law that, in construing language in a contract, 'an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless.'" Island Creek Coal Co. v. Lake Shore, Inc., 832 F.2d 274, 277 (4th Cir. 1987) (quoting United States v. Johnson Controls, Inc., 713 F.2d 1541, 1555 (Fed. Cir. 1983); **[**83]** see also Union Inv. Co. v. Fidelity & Deposit Co. of Ind., 549 F.2d

1107, 1110 (6th Cir. 1977)). The majority decision renders meaningless the contractual language in the Local Law Provision that "the rights and obligations of the parties …shall be subject to all applicable local laws."

In *Liverpool & London Steamship Protection & Indemnity Association, Ltd. v. Queen of Leman MV, 296 F.3d 350 (5th Cir. 2002)*, the court faced a contract construction question similar to the one facing this court regarding the Local Law Provision and Choice of Law Provision in the dealer agreement. Liverpool & London Steamship Protection & Indemnity Association, Ltd., (L & L) provided protection and indemnity insurance to the owners and operators of the QUEEN OF LEMAN. *296 F.3d at 351*. The insurance contract between the parties contained four provisions that affected the choice of law that would govern the contract. First, Rule 40 of the contract stated that L & L "is entitled to 'a lien on the ships of a member' for any unpaid premiums." Second, Rule 47 stated that "disputes are to be resolved either by arbitration or 'by the English High Court **[**84]** of Justice.'" Third, Rule 47C stated that:

> nothing herein shall affect or prejudice the right of the Association to take action and/or commence proceedings in any jurisdiction to enforce its right of lien on ships or to otherwise obtain security by seizure, attachment or arrest of assets for any amounts owed to the Association.

Finally, Rule 48 provided that

> these rules and any special terms of entry form a contract of insurance between the Association and a member, and subject to the right of the Association under Rule 47C to enforce its right of lien in any jurisdiction in accordance with local law in such a jurisdiction, shall **[*615]** be construed in accordance with English law.

See *L & L, 296 F.3d at 353*.

L & L filed a complaint in the Eastern District of Louisiana to seize the QUEEN OF LEMAN for unpaid insurance premiums. *296 F.3d at 351*. The district court granted the request, and the vessel was arrested and later sold for $ 512,000.00. *296 F.3d at 351*. The funds from the sale of the vessel were placed in the registry of the district court. Two parties, one who insured the vessel's cargo and one who owned the **[**85]** vessel's cargo, intervened seeking to recover the proceeds from the sale. The intervenors argued that the insurance contract called for the application of English law, under which L & L could not obtain a maritime lien. *296 F.3d at 351*. The district judge agreed, granted summary judgment in favor of the intervenors, and L & L appealed to the Fifth Circuit. *296 F.3d at 351-52*.

On appeal, the parties agreed "that English law generally governs the contract." *296 F.3d at 352*. They also agreed that the procedure for enforcing a lien was governed by the law of the jurisdiction in which the lien was being enforced, in this case the United States. The parties disagreed over whether English law, as the law that governs the contract generally, also determines whether a maritime lien exists. As the court noted, this disagreement is "significant because even L & L admits it would have no maritime lien under English law." *296 F.3d at 352*. In contrast, the federal Maritime Commercial Instruments and Liens Act, *46 U.S.C. §§ 31341-31343*, makes a maritime lien available for a party who provides necessaries, which includes **[**86]** marine insurance in the Fifth Circuit, to a vessel. *296 F.3d at 353* (citing *Equilease Corp. v. M/V Sampson, 793 F.2d 598, 603 (5th Cir. 1986)* (en banc)). The intervenors sought to persuade the court that the "reference to local law in Rules 47C and 48 is limited to the procedural aspects of enforcing liens." The argument went that the substantive issue of any lien to which L & L may be entitled is governed by English law, but L & L may enforce the lien by relying on local procedural law. *296 F.3d at 353*.

The court disagreed. If the choice of law provision controlled the maritime lien, then the provision in Rule 40 authorizing L & L to secure a maritime lien would have been rendered meaningless because English law did not recognize a maritime lien. *296 F.3d at 353*. The court explained that

> if English law controls and there is no maritime lien for unpaid insurance premiums, then L & L would have little need for enforcement provisions, as no right would exist to be enforced. …We therefore agree with L & L that in order to give meaning to the entire contract, the determination of whether a maritime lien exists in the first **[**87]** place should be determined by United States law.

296 F.3d at 353-54. The court thus reversed the district court's decision granting the intervenors' motion for summary judgment. 296 F.3d at 355.

The Local Law Provision in the dealer agreement is similar to Rule 47C. By construing the contract to allow the Choice of Law Provision to trump another provision in the contract, the majority follows a path that the *L & L* court rejected because it would not give meaning to the entire contract. See L & L, 296 F.3d at 353-54. Because the Local Law Provision can be reconciled with the Choice of Law Provision, this court should allow CLM to pursue its rights under § 482, an applicable local law.

The dealer agreement should be construed to give effect to all of its provisions. See Osteen v. T.E. Cuttino Constr. Co., 315 S.C. 422, 434 S.E. 2d 281, 284 **[*616]** (S.C. 1993). The majority's interpretation gives no effect to the Local Law Provision. In my opinion, CLM is entitled to the protection of the Louisiana Act, and CLM's claims and counterclaims under the Louisiana Act should be remanded to the district court.

III.

On remand, **[**88]** the district court should have South Carolina law and the Louisiana Act as the governing law for interpreting the CLM Volvo dealer agreement. The district court should enforce the Louisiana Act unless there is a rule in North Carolina that prevents the district court from enforcing the Louisiana Act, and no such rule has been brought to our attention. Accordingly, the Louisiana Act should be enforced by the district court on the basis of the Local Law Provision.

The majority concluded that the CLM dealer agreement is to be construed according to South Carolina law. Maj. Op. at 24. The majority reached this decision by applying North Carolina's choice of law rules, which enforce choice of law provisions in contracts. Maj. Op. at 24; see also Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E. 2d 205, 209 (N.C. App. 1999). South Carolina law, while retaining the rule of lex loci contractus, [3] also recognizes the right of parties to choose another jurisdiction's law to govern the contract. Associated Spring Corp. v. Wilson, 410 F. Supp. 967, 975 (D.S.C. 1976). The *Associated Spring Corp*. court relied on the following language from the South **[**89]** Carolina Supreme Court's opinion in Livingston v. Atlantic Coast Line R. Co., 176 S.C. 385, 180 S.E. 343 (S.C. 1935):

> It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs. If the contract be silent thereabout, the presumption is that the law governing the enforcement is the law of the place where the contract is made.
>
> "The act of the parties in entering into a contract at a particular place, in the absence of anything shown to the contrary, sufficiently indicates their intention to contract with reference to the laws of that place; hence the rule as it usually stated is that a contract as to its validity and interpretation is governed by the law of the place where it is made, the lex loci contractu; or more accurately, that contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." 13 C. J., 248.

180 S.E. at 345.

[90]** In *Livingston*, the South Carolina Supreme Court explained that South Carolina law allows parties to choose the law that they want to use to enforce their contract. See Associated Spring Corp., 410 F. Supp. at 975 (noting that this view is "widely-held and is generally in conformity with that of the Restatement (Second) of Conflict of Laws § 187 (1971)"). Under the Restatement (Second) of Conflict of Laws § 187(2), South Carolina law will govern the contract unless the

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[3] The rule of lex loci contractus means "the law of the place where the contract is made governs the contract." Joye v. Heuer, 813 F. Supp. 1171, 1173 (D.S.C. 1993) (citing Livingston v. Atlantic Coast Line R. Co., 176 S.C. 385, 180 S.E. 343, 345 (S.C. 1935)).

> application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of *§ 188*, **[*617]** would be the state of the applicable law in the absence of an effective choice of law by the parties.

The majority refuses to remand CLM's claims and counterclaims under the Louisiana Act to the district court on the ground that the Louisiana Act does not constitute a fundamental policy of Louisiana. Maj. Op. at 34-35. In my opinion, this reasoning is not only overly **[**91]** and hyper-technical, it is fundamentally wrong. A statute enacted by a state legislature establishes the public policy of that State. See *Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524, 3 L. Ed. 2d 1003, 79 S. Ct. 962 (1959)* ("Policy decisions are for the state legislature, absent federal entry into the field."); *Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1031 (4th Cir. 1983)* ("It seems apparent that where the law chosen by the parties would make enforceable a contract flatly unenforceable in the state whose law would otherwise apply, to honor the choice-of-law provision would trench upon that state's 'fundamental policy.'").

Every state court in the Fourth Circuit has also recognized the state legislature as the definitive voice on pronouncements of public policy. See *Schmeizl v. Schmeizl, 186 Md. 371, 46 A.2d 619, 621 (Md. 1946)* ("The court cannot adopt a public policy contrary to the plain provisions of the statute."); *Pitt & Greene Electric Membership Corp. v. Carolina Power & Light Co., 255 N.C. 258, 120 S.E. 2d 749, 754 (N.C. 1961)* ("Public policy is for legislative determination."); *Brown v. Drake, 275 S.C. 299, 270 S.E. 2d 130, 132 (S.C. 1980)* **[**92]** ("Public policy is basically for the legislature"); *Wood v. Board of Supervisors of Halifax City, 236 Va. 104, 115, 372 S.E.2d 611, 5 Va. Law Rep. 541 (1988)* ("It is the responsibility of the legislature, not the judiciary, to formulate public policy."); *State v. Varney, 142 W. Va. 105, 96 S.E. 2d 72, 76 (W. Va. 1956)* (". ..the public policy of a state is a law of the state, and is a legislative and not a judicial function, and it is not the function of the judiciary to declare what is the public policy of the state respecting matters on which the legislature has spoken …").

The Supreme Court of Louisiana especially has expressed its opinion as to whether statutes express the public policy of Louisiana in a case involving a state ***antitrust law***. *State v. American Sugar Refining Co., 138 La. 1005, 71 So. 137, 142-143 (La. 1916)*. …

> the public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts. But, when the Legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statutes passed by it enacts public policy to be. The only authentic **[**93]** and admissible evidence of public policy of a state on any given subject are its Constitutions, laws, and judicial decisions. The public policy of a state, of which courts take notice and which they give effect, must be decided from those sources. Where the state has spoken through its legislators, there is no room for speculation as to what the policy of the state is.

So, in my opinion, it is beyond argument that the fundamental policy of Louisiana is expressed in *§ 51:482*.

Section 51:482, barring cancellation of the contract without cause, was enacted by the Louisiana state legislature. In this circuit, nothing else appearing, we must accept that statute as the fundamental public policy of Louisiana. See *Hall v. McKenzie, 537 F.2d 1232, 1234 (4th Cir. 1976)*("The determination of legislative policy for the State of West Virginia is for that state and not us."); *St. Paul Fire & Marine Ins. Co. v. Jacobson, 48 F.3d 778 (4th Cir. 1995)* ("We will not attempt to **[*618]** decide the public policy of the State of Virginia absent a clear and dominant articulation of that policy by the Commonwealth herself."). By concluding that the Louisiana Act does not constitute **[**94]** a fundamental policy of Louisiana, the majority is making its own determination that the Louisiana Act, as a statute, does not express the fundamental public policy of Louisiana. Our court cannot determine the public policy of Louisiana, even if the Fifth Circuit is willing to do so. See *St. Paul Fire & Marine, 48 F.3d at 783*. C. f. *Cherokee Pump & Equipment, Inc. v. Aurora Pump, 38 F.3d 246, 252-53 (5th Cir. 1994)*. Instead, the Louisiana state statute must be viewed as the fundamental public policy of that State.

Whatever the Fifth Circuit may have decided, *Cherokee Pump* is a flawed authority on which to rest our decision. *Cherokee Pump* recites, *38 F.3d at 253*, that "There is no case law evidencing that the Repurchase Statute amendment espouses public policy in Louisiana." Along the same line, the majority in this case recites that "The Louisiana courts have not addressed this issue," referring to whether the Louisiana statute is a fundamental policy of Louisiana. Although *State v. American Sugar Refining Co., 138 La. 1005, 71 So. 137 (La. 1916)* has been in full force and virtue in that State for some 88 years **[**95]** and has not been modified or overruled, both the Fifth Circuit and the majority here persist in their reasoning that the subject has not been addressed by the Louisiana courts. To repeat, *American Sugar* stated:

> But, when the Legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statutes passed by it enacts public policy to be.

71 So. at 142. That certainly should end the discussion, but just as *Cherokee Pump* did not mention *American Sugar*, so the majority here does not. Such omission, both by the Fifth Circuit and this court, is flawed reasoning, I suggest.

If that were not enough, and of even more importance, the case of *Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023 (4th Cir. 1983)*, is on facts which are indistinguishable from those at hand, and, on the same question, determines that where the law chosen by the parties would make enforceable a contract flatly unenforceable in the State whose law would otherwise apply, "the choice of law provision would trench upon that State's 'fundamental policy.'" *716 F.2d at 1031*. *Barnes Group* was **[**96]** a case in which Barnes, the plaintiff, alleged that C & C, the defendant, had interfered with Barnes' contracts with six of Barnes' sales agents. Barnes was an Ohio company, and its contracts with its agents provided that they should be construed in accordance with the laws of the State of Ohio. Three of the salesmen, however, were from Alabama, and their territories were exclusively in Alabama. The contract of employment, which included a covenant not to compete, was void as against public policy under Alabama law and could not be enforced. The holding of this court was:

> To honor the contractual choice of law would make enforceable a contract flatly unenforceable in Alabama, surely impinging upon "fundamental policy" of Alabama. It was error, therefore, for the district court to apply Ohio law to determine the enforceability of the Alabama salesmen's covenants not to compete.

716 F.2d at 1032. Applying the facts of this case to the holdings of *Barnes Group*, the law chosen by the parties, South Carolina, would permit a contractual provision for cancellation to be without notice, and would make enforceable in Louisiana a **[*619]** contract "flatly unenforceable" **[**97]** in Louisiana under *§ 51: 482*, the law of that State. The holding of *Barnes Group* is that such a choice-of-law provision would "trench upon [Louisiana's] 'fundamental policy.'" *716 F.2d at 1031*. And the impinging of the fundamental policy of Louisiana, error here as there, means that the statute of Louisiana, *§ 51: 482*, must be applied. Louisiana is the State in which the dealership is located, and which even the majority in this case agrees had a greater interest than the chosen State of South Carolina.

Applying the rule of *§ 187(b) Restatement (Second) Conflict of Laws* to this case indicates that the Louisiana Act should apply, for if the "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue" the law of South Carolina should not apply. I have just demonstrated that the fundamental policy of Louisiana is expressed in the statute requiring that such contracts not be cancelled by the manufacturer without cause. It is also beyond doubt that Louisiana has a materially greater **[**98]** interest than South Carolina in determining whether a dealer agreement between a Louisiana dealer and an out-of-state manufacturer can be terminated without cause. The majority holds just that with relation to the Arkansas dealer, [4] and no reason is apparent why the Louisiana dealer should be treated differently on what are essentially the same facts. The only difference in the two statutes is that Arkansas has some kind of anti-waiver provision mentioned by the majority, but even Arkansas does not have an opinion of its Supreme Court taking nearly so strong a stand as the position of the Louisiana court in *American*

[4] "And Arkansas has a materially greater interest than South Carolina in determining whether a dealer agreement between an Arkansas dealer and an out of state manufacturer can be terminated without cause." Maj. Op. at 39.

Sugar that statutes reflect the fundamental policy of Louisiana. In my opinion, the clearly implicit holding of the majority, that a statute without an anti-waiver provision is not the fundamental policy of a State, is clearly wrong.

[99]** IV.

I am further of opinion that the claim of Future Equipment Company, Inc. under the *Texas Deceptive Trade Practices and Consumer Protection Act, Vernon's Texas Statutes and Codes Ann., Title II, § 17.41,* et seq., should be re-examined on the merits.

This case is a result of a "judgment on the pleadings," A. 486, and not based on depositions, affidavits, etc., a factual development, as is the more usual case.

> For the purposes of the court's consideration of the motion [for judgment on the pleadings], all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true, and all contravening assertions in the movant's pleadings are taken to be false.

5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 520 (2d. ed. 1990) relying on *National Metropolitan Bank of U. S., 323 U.S. 454, 457, 89 L. Ed. 383, 65 S. Ct. 354 (1945)* and various cases from the federal courts of appeals and district courts. In Count III of the Arkansas complaint found in this appendix at A. 298, the following allegation is made by Future Equipment Company:

> 53. At all times material to this action, FEC was a 'business consumer' **[**100]** as that term is defined in the Texas Deceptive Trade Practices and Consumer Protection Act (' DTPA'), *Tex. Bus. & Com. Code, § 17.41, et seq.*, **[*620]** in that FEC is a corporation or business that sought and/or acquired goods or services by purchase or lease, and the goods or services formed the basis of their claims.

Section 17.45 (10) provides that:

> 'Business Consumer' means an individual, partnership or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

So, for the purposes of judgment on the pleadings under *Rule 12*, as here, we must consider that FEC is a "business consumer, a corporation who seeks or acquires by purchase or lease …goods or services for commercial or business use." That is sufficient to qualify Future Equipment to have its claim examined under the Texas Deceptive Trade Practices and Consumer Protection Act under Texas law as found in *Fisher Controls Intern., Int'l v. Gibbons,, 911 S.W. 2d. 135 (Tx. App. 1995)* and *Texas Cookie Co. v. Hendricks & Peralta, 747 S.W. 2d. 873 (Tx. App. 1988).* **[**101]** Briefly, *Texas Cookie* held that the fact that the transfer agreement "involved the transfer of 'goods or services' for purpose of the DTPA," *Texas Cookie, 747 S.W. at 877*, qualified Hendricks for relief under the Texas Deceptive Trade Practices and Consumer Act, the same statute involved here.

This is not to say that a future factual development may not add to the facts favorable to Future Equipment or to the facts favorable to Volvo. But it is clear that judgment in favor of Volvo should not have been entered *on the pleadings which admit the necessary facts*, and that the case on remand should require examination and development of that aspect or Future Equipment's claim.

In all events, if the majority holding is correct, that Future Equipment loses because "FEC does not allege that it paid for an intangible right to continue to be a champion dealer and no payment is reflected in the dealer agreement," there would have been no dealership contract to cancel, and this case is nothing more than an exercise for the lawyers.

End of Document

[N. Jackson Pharm., Inc. v. Express Scripts, Inc.](#)

United States District Court for the Northern District of Alabama, Northeastern Division

October 13, 2004, Decided ; October 13, 2004, Filed

CIVIL ACTION NO. CV-03-HS-2696-NE consolidated with: CV-03-HS-2697-NE; CIVIL ACTION NO. CV-03-HS-2697-NE consolidated with: CV-03-HS-2696-NE

Reporter
345 F. Supp. 2d 1279 *; 2004 U.S. Dist. LEXIS 23413 **

NORTH JACKSON PHARMACY, Inc., C & C, Inc., d/b/a BIG C DISCOUNT DRUGS, Inc., individually and on behalf of all others similarly situated, Plaintiffs v. EXPRESS SCRIPTS, Inc., Defendant; NORTH JACKSON PHARMACY, Inc., C & C, Inc., d/b/a BIG C DISCOUNT DRUGS, Inc., individually and on behalf of all others similarly situated, Plaintiffs v. MEDCO HEALTH SOLUTIONS, INC.; MERCK & CO., Inc.; and PAID PRESCRIPTIONS, L.L.C.; Defendants

Subsequent History: Related proceeding at *N. Jackson Pharm., Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740, 2005 U.S. Dist. LEXIS 17020 (N.D. Ill., 2005)*

Class certification granted by *N. Jackson Pharm., Inc. v. Express Scripts, Inc., 2006 U.S. Dist. LEXIS 98774 (N.D. Ala., Mar. 3, 2006)*

Disposition: Defendants' motion to dismiss was denied.

Core Terms

pharmacies, antitrust, prices, Defendants', allegations, sponsors, conspiracy, price-fixing, horizontal, anticompetitive, pharmacists, conspired, cases, price fixing, Plaintiffs', motion to dismiss, consumers, practices, drugs, conclusory, purchasers, formulary, negotiate, quotation, sellers, courts, costs, marks, alleged conspiracy, prescription drug

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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

HN1[] **Regulated Practices, Private Actions**

A complaint is not to be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Inquiry under *Fed. R. Civ. P. 12(b)(6)* is limited to whether the complaint gives the defendant fair notice of what the claim is and the grounds upon which it rests. This liberal "notice pleading" standard applies in antitrust cases.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Though *15 U.S.C.S. § 1* does not explicitly so state, its scope is limited to "unreasonable" trade restraints.

Antitrust & Trade Law > Sherman Act > Claims

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Sherman Act, Claims

The party alleging a *15 U.S.C.S. § 1* violation must prove that two or more persons entered into an agreement to restrain trade. The antitrust plaintiff must also prove that the restraint is unreasonable.

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

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5[] Per Se Rule Tests, Manifestly Anticompetitive Effects

For purposes of *15 U.S.C.S. § 1*, unreasonableness can be shown by demonstrating that the conduct in question is historically of the type that regularly poses anticompetitive consequences, and thus qualifies as a "per se" violation. In lieu of this, the plaintiff can establish a per se violation by means of a preliminary examination of market conditions which discloses an "anticompetitive effect," with no "procompetitive justification." Failing either of these alternatives, the antitrust plaintiff must cope with the "rule of reason," which requires proof that the defendant's conduct had an anticompetitive effect in the relevant market and that no procompetitive rationale would justify the conduct. This approach requires more extensive evidence of an anticompetitive effect than is necessary in connection with a preliminary examination. The preliminary examination of market conditions is not as detailed as the one required by the rule of reason, and has been referred to as a "quick look" at market conditions.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Admissibility > Circumstantial & Direct Evidence

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Recognizing the unlikelihood that direct evidence of a price-fixing agreement will be available, courts permit the existence of such an agreement to be inferred from indirect evidence.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

In a price-fixing case, indirect evidence often involves proof that the antitrust defendants demand similar contractual terms in dealing with the plaintiffs. This "parallel" behavior is not enough by itself, however, as it is just as plausible that the behavior simply reflects a rational, independent calculus by each of the defendants, rather than a conspiracy to fix prices. The courts have accordingly fashioned a test under which price fixing plaintiffs must demonstrate the existence of "plus factors" that remove their evidence from the realm of equipoise and render that evidence more probative of conspiracy rather than of conscious parallelism. One prominent "plus factor" is a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN9[] **Summary Judgment, Entitlement as Matter of Law**

Under the Federal Rules of Civil Procedure's simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN10[] **Complaints, Requirements for Complaint**

A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules of Civil Procedure, and not by judicial interpretation. Furthermore, *Fed. R. Civ. P. 8(a)*, which calls for a short and plain statement of the claim showing that the pleader is entitled to relief, establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

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

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN11[] **Motions to Dismiss, Failure to State Claim**

For purposes of *Fed. R. Civ. P. 12(b)(6)*, so-called "conclusory" allegations are not inherently objectionable. Cases which say that "conclusory allegations" of conspiracy are not enough to withstand a motion to dismiss cannot be squared with Swierkiewicz. Factual allegations in a complaint--even if "conclusory"--are sufficient if they allow the defendant to understand the gist of the plaintiff's claim, thereby making it possible to formulate a meaningful response. All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer. All that is required to state a claim in a complaint filed in a federal court is a short statement, in plain (that is, ordinary, nonlegalistic) English, of the legal claim. The courts keep reminding plaintiffs that they do not have to file long complaints, do not have to plead facts, do not have to plead legal theories.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Securities Law > Initial Offerings of Securities > General Overview

HN12[] **Pleadings, Rule Application & Interpretation**

The function of the complaint is simply to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Evidence > Inferences & Presumptions > Inferences

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

HN13[] Regulated Practices, Price Fixing & Restraints of Trade

"Plus factor" allegations serve to substantiate a plaintiff's conspiracy allegation; their purpose is not to clarify an otherwise incomprehensible claim. Just as an employment-discrimination plaintiff need not allege circumstances that support an inference of discrimination, there is no need for an antitrust plaintiff to allege a plus factor which generates an inference of illegal price fixing. The prima facie case applicable to a claim of employment discrimination is an evidentiary standard, not a pleading requirement. The prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. This United States Supreme Court has never indicated that the requirements for establishing a prima facie case also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN14[] Pleadings, Rule Application & Interpretation

Under the so-called notice rules of pleading, a complaint must include sufficient detail so that the defendant can obtain a fair idea of what the plaintiff is complaining.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN15[] Pleadings, Heightened Pleading Requirements

The United States Supreme Court has rejected the proposition that conspiracy allegations are subject to a heightened pleading standard, holding that courts have no authority to create exceptions to the "simplified pleading standard" generally applicable under the Federal Rules of Civil Procedure.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN16[] Regulated Practices, Private Actions

Notice pleading is all that is required for a valid antitrust complaint. Notice pleading means that the complaint need only give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN17[] Regulated Practices, Private Actions

Because of the liberal pleading requirements of the Federal Rules of Civil Procedure, rarely will a motion to dismiss for failure to state a claim be granted. Indeed, such a motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This is particularly true in an antitrust suit where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-conspirators. This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint must comprehend a so-called prima facie case, and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. Conclusory allegations that the defendant violated the antitrust laws and the plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. However, the alleged facts need not be spelled out with exactitude.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN18[] **Pleadings, Rule Application & Interpretation**

Factual allegations as to "when and how" price-fixing agreements were made, the terms of such alleged agreements, and how those alleged agreements were supposedly implemented are precisely the kinds of "details" which would likely be known only by the alleged co-conspirators, and hence should not be required in the complaint. In antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN19[] **Regulated Practices, Private Actions**

Given the highly fact-sensitive nature of antitrust litigation, case-to-case consistency and predictability require clearly stated overarching principles to which both the courts and the parties can refer in determining what must be pled.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN20[] **US Department of Justice Actions, Criminal Actions**

The United States District Court for the Northern District of Alabama, Northeastern Division, declines to infer from Aquatherm and Lombard's that antitrust complaints are subject to a more exacting standard than, for example, a complaint in an employment discrimination lawsuit. Since the United States Court of Appeals for the Eleventh Circuit has not explicitly ruled otherwise, the court assumes that in the antitrust context, the ordinary rules for assessing the sufficiency of a complaint apply.

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN22[] **Actual Monopolization, Anticompetitive & Predatory Practices**

"Predatory pricing" is a term that has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices below some appropriate measure of cost as a means of forcing competitors out of the market, or perhaps to deter potential entrants from coming in.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN23[] **Regulated Industries, Higher Education & Professional Associations**

The distinction between "legitimate" buying arrangements and those that run afoul of the Sherman Act turns largely on the concept of "antitrust injury." An antitrust injury is one which results from interference with the freedom to compete. More specifically, it is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN24[] **Private Actions, Standing**

Even where the conduct complained of is illegal per se, a plaintiff must show that it is adversely affected by an anticompetitive aspect of the defendant's conduct. In the absence of an antitrust injury, a plaintiff does not have standing to prosecute an action under *15 U.S.C.S. § 1* of the Sherman Act.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN25[] **Private Actions, Remedies**

An antitrust plaintiff may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN26[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The United States Court of Appeals for the Eleventh Circuit has implicitly accepted the proposition that prices fixed by a purchaser can be predatory.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN27[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN28[] **Regulated Practices, Price Fixing & Restraints of Trade**

While antitrust plaintiffs are required to present economic evidence that would show that the hypothesis of collusive action is more plausible than that of individual action, they do not have to exclude all possibility that price discrimination was unilateral rather than collusive.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN29[] **Pleadings, Rule Application & Interpretation**

A complaint must contain either direct allegations on every material point, or the pleading must contain allegations from which an inference fairly may be drawn by the district court that evidence on the these material points will be available and introduced at trial.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN30[] **Complaints, Requirements for Complaint**

For purposes of notice pleading, lack of permissible purpose is implicit in an allegation that defendants did have an impermissible purpose.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN31[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An "oligopoly" is the control or domination of a market by a few large sellers. By definition, it results in "high prices."

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN32[] **US Department of Justice Actions, Criminal Actions**

Antitrust complaints are to be measured against the Federal Rules of Civil Procedure's "simplified pleading standard."

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN33[] **Conspiracy, Elements**

Where the "spokes" of a conspiracy have no knowledge of or connection with any other, dealing independently with the hub conspirator, there is not a single conspiracy, and the importance has been noted in a wheel type conspiracy of such knowledge by individual spokes of the existence of other spokes.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN34[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A restraint is horizontal because it is the product of a horizontal agreement. A facilely vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal cartel" agreement among his distributors is in reality a horizontal restraint.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN35[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The "per se" designation is reserved for those types of restraints which are "deemed unlawful" precisely because they have predictable and pernicious anticompetitive effect, and limited potential for procompetitive benefit. Thus a plaintiff's allegation of a per se violation logically implies a violation of the rule of reason. Per se treatment is appropriate once experience with a particular kind of restraint enables a court to predict with confidence that the rule of reason will condemn it.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN36[] Regulated Practices, Price Fixing & Restraints of Trade

Illicit price-fixing does not require a finding that the prices set are "uniform and inflexible."

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Sherman Act > General Overview

HN37[] Regulated Practices, Price Fixing & Restraints of Trade

An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. Price fixing includes more than the mere establishment of uniform prices. Prices are fixed if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. Price-fixing in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN38[] Regulated Practices, Price Fixing & Restraints of Trade

An allegation that the defendants have conspired to keep prices paid to the plaintiffs at below market-rate levels suffices for purposes of the Sherman Act.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Under Seal

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

HN39[] Types of Contracts, Contracts Under Seal

A document central to a complaint that the defense appends to its motion to dismiss is properly considered, provided that its contents are not in dispute.

Counsel: [1]** For NORTH JACKSON PHARMACY, INC., C & C INC, dba, Big C Discount Drugs Inc, C&C INC, dba, Big C Discount Drugs Inc, Individually and on behalf of all others similarly situated, plaintiff: Joe R Whatley, Jr, Andrew C Allen, Othni J Lathram, WHATLEY DRAKE LLC, Birmingham, AL; Archie C Lamb, Jr, A David Fawal, Chris W Cantrell, LAW OFFICES OF ARCHIE LAMB LLC, Birmingham, AL

For EXPRESS SCRIPTS INC, defendant: Gregory C Cook, A Kelly Brennan, BALCH & BINGHAM LLP, Birmingham, AL; Kenneth R Logan, Jayma M Meyer, Peter E Kazanoff, SIMPSON THACHER & BARTLETT LLP, New York, NY

For MEDCO HEALTH SOLUTIONS INC, MERCK & CO INC, PAID PRESCRIPTIONS LLC, defendant: Sam C Pointer, Jr, Harlan I Prater, IV, James F Hughey, III, Sarah Warburton, LIGHTFOOT FRANKLIN & WHITE LLC, Birmingham, AL; Kenneth M Kramer, James P Tallon, Marc D Ashley, SHEARMAN & STERLING LLP, New York, NY

Judges: VIRGINIA EMPERSON HOPKINS, UNITED STATES DISTRICT JUDGE

Opinion by: VIRGINIA EMPERSON HOPKINS

Opinion

[*1282] OPINION REGARDING MOTION TO DISMISS SECOND AMENDED COMPLAINT

This matter is before the court on a motion by the Defendants in these consolidated actions to dismiss the Plaintiffs' Second Amended Complaint ("SAC"). Doc. **[**2]** 27. The Plaintiffs allege a violation of *§ 1 of the Sherman Act*. The issue is whether the SAC "state[s] a claim upon which relief can be granted." *F.R.Civ.P. 12(b)(6)*. The court holds that it does.

I. BACKGROUND

The Plaintiffs are independent pharmacies. One of the four Defendants, Merck & Co., Inc., is a pharmaceuticals manufacturer. The Plaintiffs allege that during the relevant time period, Merck "controlled and dominated" another Defendant, Medco Health Solutions, Inc., "to the extent that Medco was the mere 'alter ego' and/or agent of Merck." SAC Doc. 90 (case no. CV-03-HS-2695NE [1]) at P 21. Medco, like the other two Defendants, is a pharmacy benefits manager, or "PBM." The PBMs administer drug-benefit plans on behalf of the plan sponsors.

II. DISCUSSION

A. Standard of Review

HN1[] A complaint is not to be dismissed "unless it appears beyond **[**3]** doubt that the plaintiff can prove no set of facts **[*1283]** in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*. Inquiry under *Rule 12(b)(6)* is limited to whether the complaint "give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id. at 47*. This liberal "notice pleading" standard applies in antitrust cases. See *Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738,746-47, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*; cf. *Swierkiewicz v. Sorema N.A., 534 U.S. 506,512-13, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)*; *Leatherman v. Tarrant County Narcotics Intelligence &.Coordination.Unit, 507 U.S. 163, 168-69, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)*.

B. Analysis

[1] This is the original lead case. It was transferred to the Northern District of Illinois on August 3, 2004. Doc. 100 (case no. CV-03-HS-2695-NE).

Section 1 of the Sherman Act states that **HN2**[] "every contract, combination. . . , or conspiracy, in restraint of trade or commerce among the several States . . . is . . . illegal." 15 U.S.C. § 1. **HN3**[] Though the statute does not explicitly so state, its scope is limited to "unreasonable" trade restraints. See, e.g., Maris Distr. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207, 1215 (11th Cir. 2002).

HN4[] The party alleging a § I violation must prove **[**4]** that two or more persons entered into an agreement to restrain trade. Aquatherm Indus. v. Florida Power & Light Co., 145 F.3d 1258,1262 (11th Cir 1998). The antitrust plaintiff must also prove that the restraint is unreasonable. Retina Assocs. v. Southern Baptist Hospital of Fla., 105 F.3d 1376, 1380 (11th Cir. 1997) (*per curiam*).

HN5[] Unreasonableness can be shown by demonstrating that the conduct in question is "historically . . . of the type that regularly poses anticompetitive consequences," and thus qualifies as a *"per se"* violation. Id. at 1381. In lieu of this, the plaintiff can establish a *per se* violation by means of "a preliminary examination of market conditions" which discloses an "anticompetitive effect," with no "procompetitive justification." Id.

Failing either of these alternatives, the antitrust plaintiff must cope with the "rule of reason," which requires proof that the defendant's "conduct had an anticompetitive effect in the relevant market; and . . . that no procompetitive rationale would justify the conduct." Id. at 1383. This approach requires more extensive evidence of an anti-competitive **[**5]** effect than is necessary in connection with a preliminary examination. See id. (The "preliminary examination of market conditions . . . is not as detailed as the one required by the rule of reason, and has been referred to as a 'quick look' at market conditions." (citation omitted)).

The SAC alleges that the Defendants have agreed amongst themselves, with other PBMs, and/or with plan sponsors to fix prices that would be paid to Plaintiffs for their services. SAC at PP 66-68, 74-77. The Plaintiffs characterize this as a "horizontal" scheme. Id. at P 59. See generally, e.g., Southern Card & Novelty v. Lawson Mardon Label. Inc., 138 F.3d 869, 875 n.9 (11th Cir.1998) **HN6**[] ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." (citation omitted)). They also assert that the price-fixing constitutes a *per se* violation of § 1. See SAC at PP 67, 76; see generally, United States v. Giordano, 261 F.3d 1134, 1142 (11th Cir. 2001) (referring to the "long-established rule that a horizontal **[**6]** price-fixing agreement . . . is *per se* illegal").

In their motion to dismiss, the Defendants implicitly concede that a price-fixing conspiracy among PBMs would constitute a *per se* violation of § 1. The Defendants **[*1284]** do, however, claim that a conspiracy involving plan sponsors would create a "vertical" restraint, rather than a "horizontal" one, and therefore is not a *per se* violation. They assert that the allegations of price-fixing are deficient in a number of other respects as well. These assertions are considered in the sub-sections which follow.

Conspiracy

(1) Plus Factors

To establish their claim, the Plaintiffs will have to prove that the Defendants reached an agreement among themselves or with others on the price to be paid for Plaintiffs' services. **HN7**[] Recognizing the unlikelihood that direct evidence of a price-fixing agreement will be available, courts permit the existence of such an agreement to be inferred from indirect evidence. See, e.g., Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287,1299-1300 (11th Cir. 2003).

HN8[] Indirect evidence often involves proof that the antitrust defendants demand similar contractual terms in dealing **[**7]** with the plaintiffs. This "parallel" behavior is not enough by itself, however, as it is just as plausible that the behavior simply reflects "a rational, independent calculus by each" of the defendants, rather than a conspiracy to fix prices. Id. at 1299. The courts have accordingly "fashioned a test under which price fixing plaintiffs must demonstrate the existence of 'plus factors' that remove their evidence from the realm of equipoise and render that evidence more probative of conspiracy rather than of conscious parallelism." *Id. at 1301*. "One prominent 'plus factor' . . . is a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices . . . " *City of Tuscaloosa v. Harcros Chemicals, 158 F.3d 548, 572 (11th Cir. 1998)*.

The Plaintiffs accuse the Defendants of "parallel behavior." SAC at P 53. They describe this behavior as follows:

> [The Defendants all] have substantially similar contracts in which all material provisions are the same; all are engaged in the formation of third-party utilization services, including Hub RX [*sic* - **[**8]** RxHub]; all used the AWP [average wholesale price] and MAC [maximum allowable cost] to set their reimbursement prices to pharmacies; all require member pharmacies to use and purchase similar software designed to process claims and to maintain their detrimental pricing scheme; all impose unreasonable and unnecessary additional costs on member pharmacies; all continue to "push" drugs, by placing them on their formulary, that are not the least expensive or even the most therapeutic or effective of a given class of drugs; all contractually require pharmacies to turn over confidential customer data and then use that data to divert customers to their mail-order pharmacies; all refuse to disclose to pharmacies what price they have negotiated for formulary drugs with the drug manufacturer, including any rebates, discounts, or incentives they received; all refuse to share any of the savings they receive via these rebates and discounts with either the pharmacies or the health plan members; and all impose the same or similar unconscionable and punitively low reimbursement rates on member pharmacies.

Id. [2]

[9]** The Defendants argue that "each of the parallel practices alleged . . . is . . . in the **[*1285]** economic interest of individual PBMs acting independently and therefore cannot support an inference of conspiracy." Defendants' Brief (doc. 28) at 17. Because the SAC "proffers no plus factors reflecting unlawful parallel conduct," the Defendants assert, the complaint must be dismissed. Id.

The premise underlying this argument is that a complaint which fails to allege a valid plus factor is subject to dismissal pursuant to *Rule 12(b)(6)*. The Defendants imply that such is the case, citing 3 cases for the proposition that "'plus factors' must be alleged." Id. at 16. Those cases are not on point, however, as they addressed the sufficiency of the plaintiffs evidence, rather than the adequacy of the complaint. See *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-65, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *Williamson Oil, 346 F.3d at 1300-01*; *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 (11th Cir. 1991)*.

A case which the court believes *is* on point is the decision of the United States Supreme Court in *Swierkiewicz, supra.* There the plaintiff alleged **[**10]** that his employer discriminated against him on the basis of age and national origin. The Second Circuit affirmed dismissal of the complaint because the plaintiff did not allege "circumstances that support an inference of discrimination." *Swierkiewicz, 534 U.S. at 510*.

The Court reversed, stressing that ***HN9***[] under "the Federal Rules' simplified standard for pleading, [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Id. at 514* (citation omitted). This "simplified notice pleading standard," the Court explained, "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id. at 512*.

The defendant in Swierkiewicz argued "that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits." *Id. at 514*. The Court was unswayed:

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[2] The Plaintiffs describe AWPs and MACs as "prices for drugs that are established by known and unknown sources" which are "published in industry trade magazines and databases." SAC at P 31. RxHub is described by the Defendants as "an electronic link that permits healthcare providers, pharmacies and PBMs to share medical information and specific identification of prescription. drugs for individual patients." Defendants' Brief (doc. 28) at 3.

> Whatever the practical merits of this argument, the Federal Rules do not contain a heightened **[**11]** pleading standard for employment discrimination suits. ***HN10***[] A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules,. and not by judicial interpretation. . . . Furthermore . . . . [*F.R.Civ.P.] 8(a)*[, which calls for "a short and plain statement of the claim showing that the pleader is entitled to relief,"] establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Id. at 514-15 (quotation marks & citations omitted).

The Court made clear in Swierkiewicz that ***HN11***[] for purposes of *Rule 12(b)(6)*, so-called "conclusory" allegations are not inherently objectionable. See, e.g., *Walker v. Thompson, 288 F.3d 1005, 1008 (7th Cir. 2002)* ("Cases. . . which say that 'conclusory allegations' of conspiracy . . . are not enough to withstand a motion to dismiss cannot be squared with . . . *Swierkiewicz* . . . ."). Factual allegations in a complaint -- even if "conclusory" -- are sufficient if they allow the defendant to understand **[**12]** **[*1286]** the gist of the plaintiff's claim, thereby making it possible to formulate a meaningful response:

> All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer. . . . All that's, required to state a claim in a complaint filed in a federal court is a short statement, in plain (that is, ordinary, nonlegalistic) English, of the legal claim . . . . The cqurts keep reminding plaintiffs that they don't have to file long complaints, don't have to plead facts, don't have to plead legal theories. . . . Had Higgs merely alleged that the defendants had retaliated against him for filing a suit, without identifying the suit or the act or acts claimed to have constituted retaliation, the complaint would be insufficient . . . because the defendant would not have known how to respond. But Higgs specified both the suit and the act of retaliation. . . , and this specification was enough to enable the defendants to file an answer.

Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (citation & quotation marks omitted). See also *Swierkiewicz, 534 U.S. at 512* ***HN12***[] (The function of the **[**13]** complaint is "simply [to] 'give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests.'" (quoting *Conley, 355 U.S. at 47*)); *In re Initial Public Offering Securities Litigation, 241 F. Supp.2d 281, 324 n.42* & accompanying text (S.D. N.Y. 2003).

As discussed, ***HN13***[] "plus factor" allegations serve to substantiate a plaintiffs conspiracy allegation; their purpose is not to clarify an otherwise incomprehensible claim. Just as an employment-discrimination plaintiff need not allege "circumstances that support an inference of discrimination," *Swierkiewicz, 534 U.S. at 510*, there is no need for an antitrust plaintiff to allege a "plus factor [which] generates an inference of illegal price fixing." *Williamson Oil, 346 F.3d at 1301*. Cf. *Swierkiewicz, 534 U.S. at 510-11* ("The prima facie case [applicable to a claim of employment discrimination] . . . is an evidentiary standard, not a pleading requirement. . . . This Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. . . . This **[**14]** Court has never indicated that the requirements for establishing a prima facie case . . . also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."). But see *Twombly v. Bell Atlantic Corp., 313 F. Supp.2d 174, 180-82 (S.D. N.Y. 2003)* (declining to adhere to Swierkiewicz in the antitrust context, for reasons this court regards as unpersuasive). The Defendants' assertion that the SAC does not allege valid "plus factors" is therefore irrelevant under *Rule 12(b)(6)*.

(2) Specificity

The Plaintiffs allege that the Defendants have "conspired . . . to fix reimbursement disbursement rates" paid to independent pharmacies. SAC at P 46. The Defendants complain that more specific allegations are required, such as "when and how" price-fixing agreements were made, the "terms of such alleged agreements, and how those alleged agreements were supposedly implemented." Defendants' Brief at 12.

In support of their position, the Defendants cite 3 decisions of the Eleventh Circuit Court of Appeals -- *Aquatherm, supra*, *Lombard's v. Prince Mfg., 753 F.2d 974 (11th Cir. 1985)*, and *Fullman v. Graddick, 739 F.2d 553 (11th Cir. 1984).* **[**15]** See Defendants' Brief at 11.

The last-cited of these cases stated that ***HN14***[] "under the so-called notice rules of pleading," a complaint must include "sufficient **[*1287]** detail . . . so that the defendant . . . can obtain a fair idea of what the plaintiff is complaining." *Fullman, 739 F.2d at 556* (citation omitted). The Plaintiffs' contention that the Defendants have conspired to fix the price to be paid for the services of independent pharmacies gives the Defendants a "fair idea" as to the nature of the Plaintiffs' grievance.

Fullman goes on to declare that "in civil rights and conspiracy actions, . . . more than mere conclusory notice pleading is required." Id. "It is not enough," the court added, "to simply aver in the complaint that a conspiracy existed." *Id. at 557*. Thus a "complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy." Id.

Given these comments, *Fullman* appears to stand for the proposition that conspiracy allegations are subject to a heightened pleading standard. See *Ross v. State of Alabama, 15 F. Supp.2d 1173, 1191 (M.D. Ala. 1998)* (DeMent, **[**16]** J.) (citing Fullman in asserting that "a more stringent pleading standard is required to state a claim under *§ 1983*); *Malone v. Chambers County Board of Commrs., 875 F. Supp. 773, 790 (M.D. Ala. 1994)* (Albritton, J.) (likewise stating that Fullman imposes a "'heightened pleading' standard" with respect to *§ 1983* complaints). ***HN15***[] The United States Supreme Court has since rejected that proposition, holding that courts have no authority to create exceptions to the "simplified pleading standard" generally applicable under the Federal Rules of Civil Procedure. *Swierkiewicz, 534 U.S. at 513*.

In identifying the appropriate pleading standard under *Rule 12(b)(6)*, Aquatherm referred to Lombard's, which in turn referred to *Quality Foods de Centro America v. Latin American Agribusiness Dev. Corp., 711 F.2d 989 (11th Cir. 1983)*. See *Aquatherm, 145 F.3d at 1261*; *Lombard's, 735 F.2d at 975*. Quality Foods stated in pertinent part:

> ***HN16***[] Notice pleading is all that is required for a valid antitrust complaint. . . . By notice pleading, we mean that the complaint need only give the defendant fair **[**17]** notice of what the plaintiff's claim is and the grounds upon which it rests. . . .
>
> ***HN17***[] Because of the liberal pleading requirements of the Federal Rules, rarely will a motion to dismiss for failure to state a claim be granted. Indeed, such a motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . This is particularly true in an antitrust suit where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-conspirators . . . .
>
> This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint must comprehend a so-called prima facie case, . . . and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. . . . Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude . **[**18]** . . .

Ouality Foods, 711 F.2d at 995 (quotation marks & citations omitted).

As mentioned, the Defendants argue that the Plaintiffs must include ***HN18***[] factual allegations as to "when and how" the price-fixing agreements were made, the "terms of such alleged agreements, and how those alleged agreements were supposedly implemented." Defendants' Brief at 12. **[*1288]** The court believes that these are precisely the kinds of "details" which Quality Foods indicated would likely be known only by the "alleged co-conspirators,". and hence should *not* be required in the complaint. *Ouality Foods, 711 F.2d at 995*. See also *Hospital Bldg. Co., 425 U.S. at 746* (" . . . in antitrust cases, where the proof is largely in the hands of the alleged conspirators, ... dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (citation & quotation marks omitted)).

An argument could be made that while nominally adhering to a liberal pleading standard, Aciuatherm and Lombard's actually applied a more rigorous standard in holding that the complaints under consideration failed to state an antitrust **[**19]** claim. See *Aquatherm, 145 F.3d at 1261*; *Lombard's, 753 F.2d at 975*. These cases could accordingly be construed as standing for the proposition that antitrust complaints are subject to a kind of *de facto* heightened pleading standard.

However, that rather cynical construction would put the Eleventh Circuit on a collision course with the United States Supreme Court. See *Walker, 288 F.3d at 1008* (quoted supra p. 7).

It would also greatly complicate the task of lower courts in this circuit. It is difficult, after all, to apply a heightened pleading standard which the Eleventh Circuit Court of Appeals has not explicitly recognized, much less attempted to articulate in any coherent fashion. And ***HN19***[] given the highly fact-sensitive nature of antitrust litigation, case-to-case consistency and predictability require clearly stated overarching principles to which both the courts and the parties can refer in determining what must be pled.

For these reasons, ***HN20***[] the court declines to infer from Aquatherm and Lombard's that antitrust complaints are subject to a more exacting standard than, for example, "a complaint in an employment discrimination **[**20]** lawsuit." *Swierkiewicz, 534 U.S. at 508*. Since the Eleventh Circuit Court of Appeals has not explicitly ruled otherwise, the court assumes that in the antitrust context, "the ordinary rules for assessing the sufficiency of a complaint apply." *Id. at 511*. The conspiracy allegation in the SAC passes muster under these very lenient rules, as it makes reasonably clear what the Defendants are accused of having done, thereby permitting the Defendants to formulate an appropriate response. See generally *Higgs, 286 F.3d at 439* (quoted supra p. 8).

The Cooperative-Buying Defense and Antitrust Injury

The Defendants argue "that when Plan Sponsors use an individual PBM to administer their prescription drug benefit plans, the economic effect of that action is similar to that of a cooperative purchasing group." Defendants' Supplemental Submission (Doc. 91, case no. CV-03-HS-2695-NE), at 5. This is significant, the Defendants explain, because "mere buying coops" receive "favorable treatment under the *Sherman Act*." *Id.*

According to the Defendants, the "seminal" case on this point is *Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (15th Cir. 1984).* **[**21]** Id. at 6. The plaintiffs in Kartell were physicians who alleged that Blue Shield violated the *Sherman Act* by limiting the amount that they could charge for services provided to Blue Shield subscribers. The court held that ***antitrust law*** did not forbid Blue Shield from fixing prices to be charged to others (*i.e.,* the subscribers). *Kartell, 749 F.2d at 927*.

To reach this result, the First Circuit implicitly acknowledged the need to distinguish *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68* ***[*1289]*** *S. Ct. 996 (1948)*. See *Kartell, 749 F.2d at 925*. In that case, northern California beet growers filed an action under the *Sherman Act* against a sugar refiner, claiming that it had conspired with two other refiners to fix the prices paid by the refiners for beets. *Mandeville, 334 U.S. at 221-22*. These "refiners controlled . . . the only practical market for beets grown in northern California." *Id. at 223*.

The Ninth Circuit affirmed the district court's dismissal of the complaint for failure to state a cause of action. *Id. at 221*. The Court reversed, making the following pertinent **[**22]** observations:

> It is clear that the agreement [among the refiners] is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers. . . .
>
> ***HN21***[] The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these . . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Id. at 235-36 (footnotes omitted). See also *id. at 235 n. 16* (favorably citing cases which "involved outlawed practices by persons who were both purchasers and sellers, and forbidden effects upon sellers as well as purchasers and consumers").

Kartell included Mandeville among 3 cases cited to illustrate the assertion that in situations "where courts have forbidden an 'organization' to buy a good or service[,] . . . the buyer was typically a 'sham' organization seeking only to combine otherwise independent buyers in order to suppress **[**23]** their otherwise competitive instinct to bid up [the] price." *Kartell, 749 F.2d at 925*. The Defendants likewise argue that Mandeville is distinguishable because the price-fixing scheme was implemented by way of a "sham organization." Defendants' Reply (Doc. 31) at 7.

There is, however, no indication in Mandeville that the 3 refiners formed *any kind* of "entity," let alone one which was a "sham." Nor does*Mandeville* otherwise suggest that its analysis is limited in the fashion posited by Kartell or the Defendants.

The idea behind the "sham" distinction, the Defendants suggest, is that price-fixing is permissible if it serves "a legitimate business purpose in seeking to reduce costs and improve efficiencies." Defendants' Supplemental Submission at 7. But this simply begs the question as to when price-fixing is "legitimate." Nor does Kartell offer a coherent and satisfactory answer to that question.

The Defendants also rely on *Austin v. Blue Cross & Blue Shield of Alabama, 903 F.2d 1385 (11th Cir. 1990)*. See Defendants' Supplemental Submission at 7. There the court stated that agreements between Blue Cross and various hospitals **[**24]** setting the price to be paid for health care rendered to Blue Cross subscribers was not an unreasonable restraint of trade. *Austin, 903 F.2d at 1391*.

However, Austin's benign view of the agreements was based on the absence of allegations that "Blue Cross conspired with the hospitals to engage in predatory pricing," or that the agreed-upon charges were below the hospitals' "average variable cost" or "total cost." Id. See generally *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 n.8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* ***HN22***[] ("Predatory pricing" is a term that "has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices" below "some appropriate **[*1290]** measure of cost" as a means of forcing "competitors out of the market, or perhaps to deter potential entrants from coming in."). Allegations to that effect are made by the Plaintiffs in this case. See SAC at PP 46, 60, 63, 67, 68, 71, 76, 77, & 80.

While Austin is not on point, it does offers some guidance in suggesting that ***HN23***[] the distinction between "legitimate" buying arrangements and those that run afoul of the *Sherman Act* turns largely on the concept **[**25]** of "antitrust injury." See *Austin, 903 F.2d at 1389-91*. An antitrust injury is one which "result[s] from interference with the freedom to compete." *Johnson v. University Health Servs., 161 F.3d 1334, 1338 (11th Cir. 1998)*. More specifically, it is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186, 1198 (1993)*, amended, *997 F.2d 1340 (11th Cir. 1993)* (citation & quotation marks omitted).

HN24[] "Even where the conduct complained of is illegal per se, a plaintiff must show that it is adversely affected by an *anti-competitive* aspect of the defendant's conduct." Id. (citation & quotation marks omitted; emphasis in original). In the absence of an antitrust injury, a plaintiff does not have standing to prosecute an action under *§ 1 of the Sherman Act*. *Eichorn v. AT &T Corp., 248 F.3d 131, 140 (3d Cir. 2001)*.

The SAC makes the following allegations regarding the nature of the harm caused by the Defendants:

> PBMs engage in numerous anti-competitive **[**26]** practices that have a detrimental effect on the competition for the dispensing and sale of prescription drugs reimbursed by insurance and generally result in increased prescription drug costs to both consumers and pharmacies and lower reimbursement rates. to the pharmacies. These practices . . . include . . . :
>
> a. Fixing and artificially depressing the prices to be paid to pharmacies for prescription drugs.

> b. Accepting "kickbacks" such as rebates, discounts, and other undisclosed incentives from drug manufacturers in return for placing the manufacturer's drugs on the PBMs' formulary and "pushing" these drugs on physicians and pharmacists regardless of whether the drug is the least expensive and most therapeutically effective drug available and using these undisclosed kickbacks to set anticompetitive prices for drugs filled through their in-house mail order pharmacies.
>
> c. Conspiring to and using their oligopolistic market power to force unconscionable reimbursement rates on "member pharmacies" with the specific intent to manipulate prices. These reimbursement rates are far below the rates that would apply in a true competitive market and are generally below any measure of **[**27]** Independent Pharmacist's actual costs including their variable, marginal, and/or actual costs. Additionally, the Defendants . . . unilaterally change reimbursement rates without negotiating with the member pharmacies and force these new rates upon them.
>
> d. Acting as a conduit for the [plan sponsors] . . . to engage in horizontal restraint of trade by removing the need and existence for any market whereby they must compete in order to secure the services of pharmacist[s] to service their insured. The removal of this market and conferring of the aggregate power to negotiate these services upon Defendants and other **[*1291]** PBMs amounts to horizontal price fixing as it allows for the stabilization and repression of the fees pharmacists would be able to charge in a free and open market.
>
> e. Diverting health plan members to mail order pharmacies, which are owned by Defendants and other PBMs, by prohibiting retail pharmacies from providing more than a 30-day supply of drugs, while allowing their own mail order pharmacies to provide 90-day supplies, through direct prohibitions on certain network pharmacies[,] preventing them from dispensing refill and follow-up prescriptions, and by undercutting **[**28]** the co-pay the network pharmacy is required to charge for each 30-day refill.
> f. Removing the physician and pharmacist from their vital role in the health care equation. PBMs "push" their formulary drugs on health plan members, bypassing the physician and the pharmacist, regardless of whether the formulary drug is the cheapest or most therapeutic drug in that class.
> g. Requiring pharmacists to contact the prescribing physician and patient, if a non-formulary drug was prescribed, and encourage a change to a formulary drug; and to provide the prescribing physician with a list of alternative formulary drugs,
> h. Requiring member pharmacies to use and pay for common software systems to process claims that are designed to maintain the detrimental pricing schemes.
> i. Imposing unreasonable and unnecessary additional costs on member pharmacies, including charging them a fee for each claim processed and a fee when the pharmacy seeks information from a PBM.
> j. Attempting to extend their oligopoly power in many directions[,] including the diversion of more profitable refill prescription business to their in-house mail order pharmacies and wholesale markets.

SAC at P 5. See **[**29]** also, e.g., id. at P 4 ("PBMs now maximize their revenue through . . . methods resulting in egregious injuries to Plaintiff Independent Pharmacies and end consumers."); id. at P 62 ("The Defendants' practices harm competition in the marketplace and create antitrust injury.").

The Defendants characterize these allegations as "concluaory," and argue that the SAC is "defective as a matter of law" because the Plaintiffs "have not pled a single fact to explain how consumers or the 'marketplace' are injured as a result of [their] . . . allegedly anticompetitive conduct." Defendants' Brief at 6. Restating this argument in terms relevant to *Rule 12(b)(6)*, the Defendants apparently take the position that the complaint does not reasonably support the inference that antitrust injury has occurred.

The Court disagrees. A premise underlying the Defendants' argument is that there can be no antitrust injury if consumers are not adversely affected by their alleged price-fixing. See id. That premise may not be unanimously accepted. See *Telecor Comms. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1134 (10th Cir. 2002)* (Mandeville "strongly suggests that suppliers . **[**30]** . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users. . . . Tenth Circuit case law also appears to reject the notion that a monopsony plaintiff must prove end-user impact."); see generally Black's Law Dictionary (8th ed.) (The term "monopsony" is used to describe a "situation in which one buyer controls the market.").

The issue is moot here, however, as the SAC suggests at least one scenario which would satisfy the consumer-injury requirement, **[*1292]** and which is not implausible: By conspiring to hold down prices paid to independent pharmacies (among other alleged actions), PBMs will bankrupt those pharmacies, thereby capturing a larger segment of the insurance-paid prescription market for the PBMs' own prescription-dispensing business, and allowing the PBMs to charge higher prices for that service. See SAC at P 76 (Each of the Defendants' "practices harms consumers . . . by eliminating independent pharmacists nationwide."); id. at P 33 (". . . Defendants' anticompetitive conduct is done with the purpose and specific intent to expand . . . their stranglehold on the market of insurance reimbursed prescription drug sales."); *id.* ***[**31]*** *at P 63* (The Defendants' "practices will ultimately drive independent pharmacists out of business," which will "harm competition in the marketplace and create antitrust injury."); see generally *Levine v. Central Florida Medical Affiliates, 72 F.3d 1538, 1551(11th Cir. 1996)* ***HN25***[] (". . . the plaintiff may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition." (quotation marks omitted)).

The Defendants ridicule this theory on several grounds. They argue that the facts in this case don't fit the mold of a "true" claim of "predatory pricing" because there is no contention that the Defendants are selling a product or service at below cost. Defendants' Brief at 9. This case is atypical, the Defendants explain, because the allegation is that they have conspired to create an opportunity to charge supra-competitive prices by *paying* for a service at below the Plaintiffs' cost. Id.

One problem with the Defendants' position on this point is that it runs counter to a case upon which they themselves rely: As indicated earlier, Austin ***HN26***[] implicitly accepts **[**32]** the proposition that prices fixed by the purchaser *can* be predatory. See *Austin, 903 F.2d at 1391* ("There is no claim that Blue Cross conspired with the hospitals to engage in predatory pricing.").

The more fundamental problem is that the Defendants do not explain why their purchaser/seller distinction matters. The potential effect of the Defendants' alleged scheme on retaillevel competition is in essence the same as is hypothesized in cases involving predatorily established pricing by sellers. Thus the antitrust injury is likewise the same. See *Mandeville, 334 U.S. at 235-242*; *Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001)* ***HN27***[] (". . . a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers."). And the Defendants' alleged scheme is actually more plausible, as it does not entail the risk associated with predatory pricing. Compare *Matsushita, 475 U.S. at 589* ("Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, 'the predator must make a substantial investment with no assurance that it will pay **[**33]** off.'" (citation omitted; emphasis in original)).

Alluding to this lack of risk, the Defendants point out that they are not alleged to be "acting against their short-run economic interests" by negotiating for lower prices. Defendants' Brief at 9-10. A credible allegation to this effect would tend to support a finding of conspiracy. See *City of Tuscaloosa, 158 F.3d at 572* (quoted supra p. 5). But it is not a prerequisite to such a finding. Cf. *In re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781, 787 (7th Cir. 1999)* ***HN28***[] (While the plaintiffs were required "to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual **[*1293]** action[,] . . . they did not . . . have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive."). Nor is this allegation relevant to the question of antitrust injury.

The Defendants also observe that "the SAC makes no allegation regarding" their "ability" to raise prices after independent pharmacies are "driven. . . out of the market." Defendants' Brief at 10. This allegation, however, is implicit **[**34]** in the Plaintiffs' contention that the Defendants' "practices harm consumers . . . by eliminating independent pharmacists nationwide," SAC at P 76, and are designed to "expand . . . their stranglehold on the market of insurance reimbursed prescription drug sales." Id. at P 33. See also id. at P 5 (alleging that the

Defendants are "attempting to extend their oligopoly power" to the "refill prescription business" [3]). That is sufficient under *Rule 12(b)(6)*. See generally 5 Wright & Miller Federal Practice and Procedure: Civil 3d § 1216 ***HN29***[] (". . . the complaint must contain either direct allegations on every material point . . . , or the pleading must contain allegations from which an inference fairly may be drawn by the district court that evidence on the these material points will be available and introduced at trial."); compare *Phillips v. Grendahl, 312 F.3d 357, 365 (8th Cir. 2002)* ("Although the complaint does not literally plead that defendants lacked a permissible purpose . . . , ***HN30***[] for purposes of notice pleading, lack of permissible purpose is implicit in the allegation that they did have an impermissible purpose."); *Quality Foods, 711 F.2d at 996-97* **[**35]** (inferring that various key allegations were made in an antitrust complaint on the basis of other allegations therein).

The Defendants cite *Spanish Broadcasting Sys. of Florida v. Clear Channel Comms., 376 F.3d 1065 (11th Cir. 2004)*, in which the court affirmed dismissal under *Rule 12(b)(6)* of an antitrust complaint that "offered only conclusory allegations of harm to competition." *Id. at 1079*. See Defendants' Reply at 2.

Spanish Broadcasting presents this court with the same dilemma as the decisions in Aquatherm and Lombard's, discussed supra p.10 -- namely, a holding which is difficult to reconcile with the lenient pleading standard that the court purports to apply. See *Spanish Broadcasting, 376 F.3d at 1070-79*. Nevertheless, for the reasons stated earlier, the court adheres **[**36]** to the position that ***HN32***[] antitrust complaints are to be measured against the Federal Rules' "simplified pleading standard." *Swierkiewicz, 534 U.S. at 513*. By this measurement, the SAC adequately alleges antitrust injury.

Common Agent

The Plaintiffs allege that the sponsors of the drug-benefit plans use the Defendants as their "common agents" in a scheme to fix prices to be paid for the Plaintiffs' services. SAC at PP 5, 56-57. The Defendants argue that this allegation is deficient because no claim is made that the sponsors agreed among themselves to implement such a scheme. Defendants' Brief at 14.

To support their contention that an allegation to this effect is necessary, the Defendants cite *United States v. Chandler, 376 F.3d 1303 (11th Cir. 2004)*, a criminal-conspiracy case. Stated in terms applicable to this case, however, Chandler simply stands for the proposition that a plan sponsor must be aware that by using a PBM, it and the PBM's other plan sponsors would be able to compel independent pharmacies to accept lower prices than the pharmacies **[*1294]** could command through separate negotiations with each of the sponsors. See *id. at 1317* **[**37]** (construing a decision of the United States Supreme Court as holding that ***HN33***[] "where the 'spokes' of a conspiracy *have no knowledge of* or connection with any other, dealing independently with the hub conspirator, there is not a single conspiracy," and adding that "we too have noted 'the importance in a wheel type conspiracy of such *knowledge by individual spokes of the existence of other spokes"* (citation omitted; emphasis added)).

The SAC implies that plan sponsors share, and are aware that they share, a common strategy -- *i.e.,* the utilization of a PBM to combine purchasing power and drive down pharmacy costs. In paragraph 5 of the SAC, for example, the Plaintiffs allege:

> PBMs. . . act[] as a conduit for [plan sponsors] . . . to engage in horizontal restraint of trade by removing the need and existence for any market whereby they must compete in order to secure the services of pharmacist[s] to service their insured. The removal of this market and conferring of the aggregate power to negotiate these services upon Defendants and other PBMs amounts to horizontal price fixing as it allows for the stabilization and repression of the fees pharmacists would be able **[**38]** to charge in a free and open market.

The SAC goes on to allege:

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[3] ***HN31***[] An "oligopoly" is the "control or domination of a market by a few large sellers." Black's Law Dictionary (8th ed.). By definition, it results in "high prices." Id.

> . . . by collectively conferring their pharmacy purchase decisions upon Defendants and other PBMs, [plan sponsors] . . . effectively accomplished the same anti-competitive behavior which would have existed if they had themselves directly engaged in horizontal price fixing. By using Defendants as common agents, the . . . [plan sponsors] are able to present retail pharmacies with worse coordinated offers and bargaining positions . . . .

SAC at P 56. See also id. at P 57 ("Defendants and [plan sponsors]. . . engage in price fixing. . . .").

Based on these allegations, the court rejects the Defendants' argument that the common-agent theory is legally insufficient.See *Bellevue Drug Co. v. Advance PCS, 2004 U.S. Dist. LEXIS 3627, No. 03-4731, 2004 WL 724490, at *5 (E.D. Pa. Mar. 2, 2004)* (Robreno, J.) (The "complaint alleges . . . that each plan sponsor is fully aware that Advance PCS negotiates with . . . pharmacies on behalf of many other plan sponsors." If true, the plaintiffs' allegations "may give rise to the inference that Advance PCS acted with the acquiescence and understanding of the plan sponsors **[**39]** it represented and that each plan sponsor 'had an awareness of the general scope and purpose of the undertaking.'" (quoting *United States v. Masonite Corp., 316 U.S. 265, 275, 86 L. Ed. 1461, 62 S. Ct. 1070, 1942 Dec. Comm'r Pat. 777 (1942))*; see also *Brady Enters. v. Medco Health Solutions, 2004 U.S. Dist. LEXIS 15155, No. 03-4730,2004 WL 1737651, at *1 (E.D. Pa. Aug. 3, 2004)* (Fullam, J.) (concurring with the decision in Bellevue).

The Defendants also argue that if a common-agent theory is "cognizable," it establishes a vertical restraint, and is therefore subject to the "rule of reason." Defendants' Brief at 15. See *State Oil Co. v. Khan, 522 U.S. 3, 18, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)* ("There is insufficient economic justification for per se invalidation of vertical maximum price fixing."). The Plaintiffs' invocation of the theory fails, the argument continues, because nothing in the SAC "suggests . . . a rule of reason violation." Defendant's Brief at 15.

HN34[] "[A] restraint is horizontal. . . because it is the product of a horizontal agreement." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731 n.4, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. Thus if plan sponsors have conspired to fix prices, a horizontal restraint **[*1295]** is created even **[**40]** if PBMs are used to carry out the scheme. Cf. id. ("[A] facilely vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal cartel' agreement among his distributors is in reality a horizontal restraint.").

The Defendants' argument fails for another reason. ***HN35***[] The *"per se"* designation is reserved for those "types of restraints" which are "deemed unlawful" precisely because they "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit." *State Oil, 522 U.S. at 10*. Thus the Plaintiffs' allegation of a *per se* violation, see SAC at PP 67 & 76, logically implies a violation of the rule of reason. See *State Oil, 522 U.S. at 10* ("*Per se* treatment is appropriate 'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (citation omitted)). For purposes of *Rule 12(b)(6)*, then, the common-agent theory would be viable even if the Defendants were correct in asserting that it does not establish a *per se* violation.

Pricing

The Plaintiffs allege that the **[**41]** fees paid to them by the various Defendants "are roughly the same and/or remarkably similar." SAC at P 32. The Defendants argue that "these nebulous allegations of similar rates or prices do not support the inference that there was any conspiracy to fix such rates or prices." Defendants' Brief at 18.

HN36[] Illicit price-fixing does not require a finding that the prices set are "uniform and inflexible." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. As the Supreme Court explained,

> ***HN37***[] An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the *Sherman Act*. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. . . . Price fixing includes more than the mere establishment of uniform prices . . . . Prices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are

> related to the market prices. . . . [Price-fixing] in its various manifestations is implicitly an artificial stimulus applied to (or **[**42]** at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone.

Id. at 222-23.

The SAC ***HN38***[] alleges that the Defendants have conspired to keep the prices paid to the Plaintiffs at below market-rate levels. See, e.g., SAC at PP 56, 67, & 76. Socony-Vacuum instructs that this allegation suffices for purposes of the *Sherman Act*.

The Defendants' alternative argument fails for the same reason. Citing the relevant contracts, copies of which have been submitted under seal, the Defendants claim that the fees actually paid by them to the Plaintiffs are "widely divergent." Defendants' Brief at 18. See generally *Harris v. Ivax Corp., 182 F.3d 799, 802 n.2 (11th Cir. 1999)* ***HN39***[] (". . . a document central to the complaint that the defense appends to its motion to dismiss is . . . properly considered, provided that its contents are not in dispute."). This alleged discrepancy does not rule out the possibility that even the highest contract prices are artificially low -- *i.e.,* less than what the Defendants would be obliged to pay in the absence of a **[*1296]** price-fixing **[**43]** conspiracy. See *Socony-Vacuum, 310 U.S. at 223*. Thus even if the contracts can properly be taken into account, the prices set forth therein do not establish grounds for dismissal under *Rule 12(b)(6)*.

III. CONCLUSION

The SAC provides the Defendants with fair notice as to the nature and basis of the claims made against them. Moreover, the SAC affords no sound basis for ruling out the possibility that the Plaintiffs will be able to establish facts which establish a right of recovery for violation of the *Sherman Act*. The Defendants' motion to dismiss will therefore be denied.

A separate order will be entered.

October 13, 2004.

VIRGINIA EMPERSON HOPKINS

UNITED STATES DISTRICT JUDGE

ORDER DENYING MOTION TO DISMISS SECOND AMENDED COMPLAINT

The Defendants have filed a motion to dismiss the second amended complaint. Doc. 27. For the reasons stated in the court's written opinion, it is **ordered** that the motion is denied. The hearing presently scheduled on this motion is cancelled.

It is further **ordered** that any pending motions to dismiss the original or first amended complaint are denied **[**44]** as moot.

Done and ordered this 13 day of October, 2004.

[Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.](#)

United States Court of Appeals for the Second Circuit

December 4, 2003, Argued ; October 18, 2004, Decided

Docket Nos. 02-9222, 02-9346

Reporter

386 F.3d 485 *; 2004 U.S. App. LEXIS 21586 **; 2004-2 Trade Cas. (CCH) P74,583

GENEVA PHARMACEUTICALS TECHNOLOGY CORP., as successor in interest to Invamed, Inc., Plaintiff-Appellant, APOTHECON, INC., Consolidated-Plaintiff-Appellant, v. BARR LABORATORIES INC., BRANTFORD CHEMICALS INC., BERNARD C. SHERMAN, APOTEX HOLDINGS, INC., APOTEX, INC., SHERMAN DELAWARE, INC., Defendants-Appellees.

Subsequent History: On remand at, Motion granted by *Geneva Pharm. Tech. Corp. v. Barr Labs., 2005 U.S. Dist. LEXIS 19069 (S.D.N.Y., Sept. 6, 2005)*

Prior History: [1]** Plaintiffs manufacturers appeal an order of the United States District Court for the Southern District of New York (Sweet, J.) entered October 7, 2002 granting partial summary judgment dismissing plaintiffs' claims that a competing manufacturer and its supplier conspired to restrain trade and monopolize the supply and retail markets of generic warfarin sodium in violation of 1 and 2 of the Sherman Antitrust Act and § 7 of the Clayton Act.

Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 2002 U.S. Dist. LEXIS 8411 (S.D.N.Y., 2002)

Disposition: The court reversed the grant of summary judgment pursuant to the Sherman Act, affirmed the dismissal of the Clayton Act claim; and reversed the ruling that plaintiff Apothecon lacks standing to sue. The case was remanded to the district court for further proceedings.

Core Terms

clathrate, generic, warfarin, sodium, manufacturer, prices, supplier, district court, joint venture, monopoly power, plaintiffs', monopoly, percent, competitors, acquisition, monopolize, pharmaceutical, customers, drugs, antitrust, products, market share, brand, relevant market, conspiracy, effects, summary judgment, parties, losses, chain

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1[] **Appellate Review, Appealability**

Ordinarily, a district court's grant of partial summary judgment is not immediately appealable because it is not a final judgment. *28 U.S.C.S. § 1291*.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN2[] **Entry of Judgments, Multiple Claims & Parties**

Fed. R. Civ. P. 54(b) allows for the entry of a partial final judgment and thereby permits immediate appeal to avoid injustice.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

HN3[] **Entry of Judgments, Multiple Claims & Parties**

See *Fed. R. Civ. P. 54(b)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

HN4[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is useful to isolate and dispose of factually unsupported claims, particularly in antitrust cases. This remedy is an essential tool in the area of ***antitrust law*** because it helps avoid wasteful and lengthy litigation that may have a chilling effect on pro-competitive market forces.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN5[] **Standards of Review, De Novo Review**

An appellate court reviews a grant of summary judgment de novo to ensure the district court applied substantive ***antitrust law*** correctly. A grant of such relief is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Upon reviewing the record, the court draws all inferences and resolve all ambiguities in favor of the non-moving party. In an antitrust case, however, those inferences must be weighed in light of competing inferences of permissible competition, and the inference of conspiracy must be found the more reasonable in order for plaintiffs to escape summary judgment.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

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

HN6[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Antitrust Act makes it an offense for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN7[] **Sherman Act, Claims**

To establish a violation of § 2 (15 U.S.C.S. § 2) of the Sherman Antitrust Act, plaintiffs must prove that defendants possessed monopoly power, and willfully acquired or maintained that power in the relevant market. The willful acquisition or maintenance of monopoly power is to be distinguished from growth or development that is the result of superior product, business acumen or historical accident.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN8[] **Regulated Practices, Market Definition**

In the context of an antitrust claim, a market definition provides the context against which to measure the competitive effects of an agreement.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN9[] **Market Definition, Relevant Market**

In the context of an antitrust claim, the goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output. The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. Reasonable interchangeability sketches the boundaries of a market, but there may also be cognizable submarkets which themselves constitute the appropriate market for antitrust analysis. Defining a submarket requires a fact-intensive inquiry that includes consideration of such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. The term "submarket" is somewhat of a misnomer, since the "submarket" analysis simply clarifies whether two products are in fact "reasonable" substitutes and are therefore part of the same market. The emphasis always is on the actual dynamics of the market rather than rote application of any formula.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is the power to control prices or exclude competition. It can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Where direct evidence is unavailable or inconclusive, monopoly power may be inferred from high market share. Although market share is not functionally equivalent to monopoly power, it is nevertheless highly relevant to the determination of monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN12[] **Monopolies & Monopolization, Actual Monopolization**

Courts will only draw the inference that a high market share leads to a fair inference of monopoly power only after considering market share in conjunction with other characteristics of the market, such as the strength of competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Every first mover into a new market has a monopoly during its initial period of exclusivity. The antitrust laws have not been applied to condemn the transient advantage inherent in being a first mover because to do so would stifle innovation.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Sherman Act, Claims

Section 1 of the Sherman Antitrust Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. 15 U.S.C.S. § 1. As the language states, § 1 targets concerted action between two or more entities. Independent conduct falls outside the purview of this provision. To prove a § 1 violation, a plaintiff must demonstrate (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice. If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement -- both pro and con -- to determine if the effects of the challenged restraint tend to promote or destroy competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN16[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In the context of § 1 (15 U.S.C.S. § 1) of the Sherman Antitrust Act, to withstand a summary judgment motion, plaintiffs must present evidence of an actual illegal combination, and such evidence must satisfactorily cast doubt on inferences of independent action or proper conduct by defendants. The evidence must prove defendants had an intent to adhere to an agreement that was designed to achieve an unlawful objective; specific intent to restrain trade is not required.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN17[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive dealing arrangements implicate *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act because they have the potential unreasonably to exclude competitors or new entrants from a needed supply, or to allow one supplier to deprive other suppliers of a market for their goods. Such agreements may also, however, have pro-competitive purposes and effects, such as assuring steady supply, affording protection against price fluctuations, reducing selling expenses, and promoting stable, long-term business relationships. In order not to condemn the positive aspects of exclusive dealing agreements, courts must take care to consider the competitive characteristics of the relevant market. Exclusive dealing is an unreasonable restraint of trade and a *§ 1* violation only when the agreement freezes out a significant fraction of buyers or sellers from the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Evidence > Burdens of Proof > General Overview

HN18[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Plaintiffs bear the initial burden to demonstrate an actual adverse effect on competition. Courts have not required proof of market power in *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Antitrust Act cases. If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output, there is no need to show market power in addition.

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN19[] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act prohibits mergers or acquisitions if the effect may be substantially to lessen competition, or to tend to create a monopoly. *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

Antitrust & Trade Law > Clayton Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

Although § 7 (*15 U.S.C.S. § 18*) of the Clayton Act targets restraint of trade and monopolization, it is not co-extensive with the Sherman Antitrust Act.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN21[] Clayton Act, Claims

The Clayton Act is concerned with whether an acquisition or merger itself may cause antitrust injury.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

HN22[] Tying Arrangements, Clayton Act

The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition" which deprives rivals of a fair opportunity to compete.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Dissolution & Winding Up

Business & Corporate Law > Joint Ventures > General Overview

Business & Corporate Law > Joint Ventures > Formation

HN23[] Types of Contracts, Joint Contracts

A joint venture is a special combination of two or more persons, whether corporate, individual or otherwise, formed for some specific venture in which a profit is jointly sought without the parties designating themselves as an actual partnership or corporation. Under New Jersey law, the elements of a joint venture are essentially the same as of a partnership. These elements include agreement, sharing profits and losses, ownership and control of the partnership's property and business, community of power, rights upon dissolution and the conduct of the parties towards third persons, among others. Joint venture status is created by contract, express or implied, and depends on the mutual intent of the parties.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Law > Joint Ventures > General Overview

HN24[] **Types of Contracts, Joint Contracts**

A classic element of a joint venture is that there is a limited objective and scope of the venture.

Counsel: WAYNE A. CROSS, White & Case, New York, New York (Michael J. Gallagher, Brendan G. Woodard, White & Case LLP, New York, New York; Frederick R. Dettmer, Law Office of Frederick R. Dettmer, New York, New York; David S. Preminger, Rosen, Preminger & Bloom, New York, New York, of counsel), for Plaintiff-Appellant Geneva Pharmaceuticals Technology Corp.

LOUIS M. SOLOMON, New York, New York (Harry Frischer, Colin A. Underwood, Jennifer R. Scullion, Daniel J. Rothstein, Proskauer Rose LLP, New York, New York, of counsel), for Plaintiff-Appellant Apothecon, Inc.

MICHAEL J. GAERTNER, Chicago, Illinois (David G. Greene, Lord, Bissell & Brook, Chicago, Illinois, of counsel), for Defendants-Appellees **[**2]** Brantford Chemicals Inc., Bernard C. Sherman, Apotex Holdings Inc., Apotex Inc., Sherman Delaware, Inc.

KURT L. SCHULTZ, New York, New York (Alan B. Howard, Winston & Strawn, New York, New York, of counsel), for Defendant-Appellee Barr Laboratories, Inc.

Judges: Before: CARDAMONE, SACK, and GIBSON [*], Circuit Judges.

Opinion by: CARDAMONE

Opinion

[*489] CARDAMONE, *Circuit Judge*:

This civil antitrust action was instituted by plaintiffs-appellants Apothecon, Inc. and Geneva Pharmaceuticals Technology Corp., which manufacture and distribute a generic form of warfarin sodium, an anti-coagulant medication (a blood thinner). The suit was brought under §§ 1 and *2* of the Sherman Antitrust Act, *15 U.S.C. § 1* and *§ 2 (2000)*. Those sections make it unlawful to enter into a contract, combination, or conspiracy in restraint of trade (*§ 1*), and/or to engage in a conspiracy to monopolize (*§ 2*). Plaintiffs' antitrust claims are based on the alleged anti-competitive conduct of defendants-appellees Barr Laboratories, Inc., a competing manufacturer of generic warfarin **[**3]** sodium, and Brantford Chemicals, Inc., a supplier of clathrate, which is the primary chemical ingredient used to make warfarin sodium.

This litigation is about protecting the operation of our competitive markets. Competition, which fosters innovation and tends to lower prices for consumers, directly pits one producer against another. When individual firms go head-to-head, one might wish that the rules of the Marquis of Queensberry, which ensure fair play, [1] would be uppermost in the competitors' minds. The antitrust laws, however, safeguard consumers by protecting the competitive process. Those laws, unlike the Marquis of Queensberry rules, are not designed to protect competitors from one another's conduct.

[4]** Plaintiffs appeal from an order of the United States District Court for the Southern District of New York (Sweet, J.), entered October 7, 2002, which granted partial summary judgment to defendants dismissing plaintiffs'

[*] Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] The code of rules that most directly influenced modern boxing was first published in 1867 under the sponsoring of John Sholto Douglas, Marquis of Queensberry (1844-1900), from whom they take their name. There are 12 rules in all, including "no wrestling or hugging allowed," to ensure a fair fight between contestants. *See* 7 *EncyclopC&dia Britannica* 870 (15th ed. 2002).

antitrust causes of action and dismissing Apothecon's state law claims for lack of standing. *See Geneva Pharms. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236 (S.D.N.Y. 2002)*.

BACKGROUND

A. *The Parties*

Plaintiff Apothecon, Inc. (Apothecon) is a wholly-owned subsidiary of pharmaceutical giant Bristol-Myers Squibb, and plaintiff Geneva Pharmaceuticals Technology Corp. (Geneva), the successor-in-interest to Invamed, Inc., is a wholly-owned subsidiary of Novartis. In June 1996 Apothecon and Geneva entered into a five-year Development and Supply Agreement to develop, manufacture, and market generic pharmaceutical drugs, including generic warfarin sodium. The parties dispute the precise nature of the relationship between Apothecon and Geneva, which as we explain later affects whether Apothecon has standing to sue.

[*490] Defendant Barr Laboratories, Inc. (Barr) is a competing manufacturer of generic warfarin sodium. Defendant Brantford Chemicals, **[**5]** Inc. is a Canadian corporation that, prior to July 1996, was known as ACIC (Canada) Inc. (hereafter ACIC/Brantford). ACIC/Brantford is a supplier of various chemicals used in manufacturing pharmaceutical drugs, including clathrate. An exclusive dealing contract between Barr and ACIC/Brantford is a key issue in this litigation.

The other defendants are Dr. Bernard C. Sherman, a Canadian citizen who is the beneficial owner of all the stock of defendant Apotex, Inc., a Canadian company with its principal place of business in Weston, Ontario. Dr. Sherman is also a substantial shareholder of Barr and was a member of its board of directors. In addition, Dr. Sherman, through Apotex, now controls 100 percent of the shares of ACIC/Brantford, so he is clearly an important figure in the events we discuss.

B. *Drug Industry*

1. *Generic Pharmaceutical Drugs*

We believe it helpful to describe at the outset the place of generics in the drug industry. Generic drugs are chemically identical versions of branded drugs and cannot be put on the market until the patent on the branded drug has expired. Generic drugs are typically sold at a substantial discount from the name brand drug. To market **[**6]** and distribute such a drug in the United States, manufacturers must receive approval from the United States Food and Drug Administration (FDA). A generic manufacturer files an Abbreviated New Drug Application with the FDA to establish that its drug is therapeutically equivalent to the innovator drug.

As part of the approval process, pharmaceutical companies must identify the supplier of the active pharmaceutical ingredient they intend to use in manufacturing the product. Ingredient suppliers, such as ACIC/Brantford, submit a Drug Master File (Master File) to the FDA which summarizes the equipment, manufacturing process, and control measures used to prepare the particular ingredient. The supplier submits a reference letter to the FDA on behalf of a particular manufacturer, stating that it will follow the methods in its Master File for that manufacturer.

The parties dispute the effect of a Master File reference letter. Plaintiffs maintain it is industry practice for such a reference letter effectively to bind a supplier actually to provide the chemical to the manufacturer. They also state that manufacturers and suppliers generally do business in reliance on oral agreements. Defendants **[**7]** respond that the filing of a reference letter is nothing more than a preliminary action that creates no obligation on the part of the supplier.

The FDA rates a generic product as AB equivalent if it is a bioequivalent to the branded product. The generic warfarin sodium products currently on the market all have been rated as AB equivalent to the branded drug Coumadin. Despite this rating, generic drugs may have some minor differences from the branded drug, such as the water content, crystalline structure, and particle size of the active ingredient.

2. *Warfarin Sodium*

Warfarin sodium, the drug at the root of this litigation, is an oral anti-coagulant medication prescribed by a physician and taken in tablet form. This drug thins the blood and helps prevent blood clots that can cause strokes and heart attacks. Warfarin sodium is viewed as a narrow therapeutic index drug because the dosage has a narrow range of therapeutic value: the **[*491]** range between too low a dose, which is ineffective, and too high a dose, which may cause harmful side effects, is narrow. Its active ingredient is known as "bulk" warfarin sodium or warfarin sodium clathrate. The parties dispute whether the process **[**8]** to make clathrate is simple or complex; plaintiffs assert it can take years to develop a process to produce clathrate.

For nearly 50 years warfarin sodium has been manufactured by DuPont under the well-known brand name Coumadin. Although DuPont's patent for Coumadin expired in 1962, it remained the only manufacturer of warfarin sodium for the next 35 years. Its annual sales eventually exceeded $ 500 million. Several companies received FDA approval to market warfarin-related products in the 1980's, but these products were unsuccessful.

In 1990 the New England Journal of Medicine published the results of two studies that created renewed interest in the efficacy of warfarin sodium. A few companies thereafter began the process of gaining approval to enter the warfarin sodium market. Currently, four companies sell warfarin sodium in the United States: DuPont, with Coumadin since 1956; Barr, with generic warfarin sodium since July 1997; Geneva, with generic warfarin sodium since October 1998; and Taro Pharmaceutical Industries Ltd. (Taro), which has marketed generic warfarin sodium since September 1999. Key for a manufacturer to the production of warfarin sodium is obtaining a source **[**9]** of clathrate.

C. *Obtaining a Source of Clathrate*

1. *Defendant Barr's Relationship with Defendant ACIC/Brantford*

In the early 1990's Barr identified warfarin sodium as a product with high barriers to entry because of the difficulty in procuring commercial quantities of clathrate. Barr began to research potential suppliers, and in 1991 it discussed purchasing clathrate from ACIC/Brantford. ACIC/Brantford confirmed that it would be able to produce commercial quantities of clathrate. In February 1991 Barr placed a small order for it. On March 15, 1995 ACIC/Brantford filed a Master File for clathrate, and on April 3, 1995, it provided a reference letter to the FDA in support of Barr's warfarin sodium Abbreviated New Drug Application. On May 10, 1995 Barr filed its application, listing ACIC/Brantford as its supplier of clathrate.

(a) *Exclusive Arrangement Between Barr and ACIC/Brantford*

In September 1995 the defendants entered into an exclusive supply agreement pursuant to which ACIC/Brantford would supply Barr with clathrate. The agreement obligated Barr to purchase $ 1.8 million worth of clathrate. It also provided that ACIC/Brantford would supply Barr exclusively **[**10]** with commercial quantities of clathrate until another manufacturer began selling generic warfarin sodium. Barr agreed to purchase 100 percent of its supply from ACIC/Brantford during the exclusivity period. One week after they entered into the supply agreement, the defendants executed a confidentiality agreement that for five years prohibited either party from disclosing "valuable, proprietary, technical, commercial and other confidential information."

This agreement only covered commercial quantities of clathrate. Hence, it did not prohibit ACIC/Brantford from selling small samples or developmental quantities, or from acting as a broker between manufacturers and other suppliers. The agreement also permitted Barr to purchase small quantities of clathrate from other sources in order to qualify that supplier as an alternate source.

[*492] (b) *ACIC/Brantford Becomes Barr's Only Source*

From September 1995 through September 1996, Barr ordered larger shipments of clathrate from ACIC/Brantford, the last of which was shipped in February 1997. On March 26, 1997, the FDA approved Barr's application and authorized it to begin marketing, which it did starting in July 1997. The FDA determined **[**11]** that Barr's warfarin sodium tablets were "bioequivalent, and therefore therapeutically equivalent" to the name brand drug Coumadin.

Barr continued to place orders for large quantities of clathrate from ACIC/Brantford. In a September 1997 document Barr referred to ACIC/Brantford as "the only source [of clathrate] available to the generic industry." The district court found that Barr had attempted to secure a back-up producer, but as of March 1998 had not succeeded.

2. *Plaintiff Geneva's Search for a Source of Clathrate*

(a) *Plaintiff's Dealings Before 1996 with Defendant ACIC/Brantford*

Geneva's attempt to obtain a source of clathrate encountered nearly insurmountable obstacles. Between 1993 and 1996 it sought to obtain a clathrate supply from numerous chemical companies, including Hoechst Celanese, Chemoswede, Banyan Chemicals, and others. A critical issue in the present dispute is whether any of these potential suppliers was in fact a viable commercial source of clathrate because nearly all of plaintiff's accusations depend on its theory that ACIC/Brantford's monopoly on clathrate created a bottleneck for others attempting entry into the generic warfarin market. **[**12]** At the relevant time, Geneva concluded that ACIC/Brantford was its only viable supplier. But, the district court found several other sources were available to plaintiffs.

Geneva had purchased a variety of products from ACIC/Brantford during the 1980's and 90's. Dr. Panjak Dave, Geneva's regulatory manager, had represented Geneva in most of the prior dealings with ACIC/Brantford. Sergio Getrajdman was ACIC/Brantford's sales representative responsible for sales to Geneva. On September 20, 1994 when Dr. Dave contacted Getrajdman to discuss the availability of clathrate, Getrajdman told him that ACIC/Brantford had no exclusive arrangement with respect to clathrate and that it could supply clathrate to Geneva. The next day, Dr. Dave telephoned ACIC/Brantford for a price quote on a small purchase and was quoted approximately $ 2,500 per kg. From late 1994 through early 1995, ACIC/Brantford sent Geneva several samples and R&D quantities of clathrate. At one point, Geneva purchased 15 kg. In March 1995 ACIC/Brantford sent three additional samples along with technical information that Geneva had requested. In April 1995 ACIC/Brantford sent the FDA a Master File reference letter on behalf **[**13]** of Geneva (then known as Invamed). The letter provided:

> Dear Sir,
>
> Re: WARFARIN SODIUM DMF # 11387
>
> Authorization is hereby given to the Food and Drug Administration to refer to our Master File for WARFARIN SODIUM on behalf of:
>
> INVAMED, INC.
> 2400 Route 130 North
> Dayton, NJ 08810 -- U.S.A.
>
> In support of any new drug application they may file on pharmaceutical preparation containing the drug manufactured by us.
>
> **[*493]** ACIC (CANADA) INC. herewith commits itself to manufacture all of their pharmaceutical products in accordance with the current good manufacturing practices and by the methods described in this specific Drug Master File, and to issue a new DMF reference letter after each amendment on the above Drug Master File.

In July 1995 Geneva ordered 5 more kg of clathrate at $ 2,500 per kg and requested ACIC/Brantford's safety and handling procedures. ACIC/Brantford shipped the product along with information about its procedures.

(b) *Plaintiff's Dealings with ACIC/Brantford in 1996-97*

From this point forward, communications between ACIC/Brantford and Geneva are in considerable dispute. In the background of these communications is the Barr/ACIC/Brantford **[**14]** exclusive dealing arrangement signed in late September 1995, and the confidentiality agreement signed one week later. The district court found that on August 23, 1995 ACIC/Brantford's Getrajdman attempted to dissuade Geneva from pursuing its FDA application on the pretext that others were ahead of it, and that its market share would thus be proportionally smaller. In January 1996 Geneva's Dave placed an order for 12 to 14 kg of clathrate from ACIC/Brantford to perform tests on a particular machine. Getrajdman advised Dave that he did not know when availability would permit ACIC/Brantford to accept this order.

Before and during 1996, Geneva avers it informed Getrajdman that it would be working with ACIC/Brantford's clathrate and intended to use its clathrate to file its Abbreviated New Drug Application. Geneva insists it also specifically advised ACIC/Brantford that it would be obligated to supply Geneva with commercial clathrate once Geneva's application was approved, and asserts that it received repeated assurances from ACIC/Brantford. Geneva says that ACIC/Brantford never mentioned its exclusive contract with Barr and never said it was unwilling or unable to supply Geneva with **[**15]** clathrate.

In the spring of 1997 Dr. Dave asked Getrajdman for 100-150 kg of clathrate. Getrajdman responded that ACIC/Brantford would be able to deliver the order as soon as the FDA approved two generic manufacturers' applications for generic warfarin sodium. Getrajdman gave no explanation for this condition, but it is essentially consistent with the terms of the Barr/ACIC/Brantford supply agreement.

In September 1997 Geneva received FDA approval for its generic warfarin sodium application. The next day it sent ACIC/Brantford an order to purchase 750 kg of clathrate for $ 1.8 million. By October 1997 Geneva still had not received an acceptance of its order, and it threatened legal action. On October 20, 1997 ACIC/Brantford formally rejected Geneva's order, and thereafter refused to accept further Geneva orders. It was then that Geneva first learned of the exclusive deal between ACIC/Brantford and Barr, and that as a result, ACIC/Brantford would not be able to supply it with clathrate.

Finding itself suddenly without a supplier, Geneva turned to Banyan Chemicals (Private) Ltd. (Banyan), an Indian manufacturer. Geneva and Banyan had previously worked together on several products, **[**16]** and in 1995 had signed a Memorandum of Understanding that included a provision that Banyan would begin to develop the capability to manufacture clathrate. Banyan had never manufactured clathrate before, and at the time Geneva expected **[*494]** Banyan's development process to take years.

After ACIC/Brantford rejected Geneva's order, Geneva decided that the fastest way it could enter the market was by assisting Banyan to develop a process for manufacturing clathrate. Geneva and Apothecon eventually entered the generic warfarin sodium market using Banyan clathrate in October 1998, after a one-year delay from the date of Geneva's unfilled order to ACIC/Brantford.

D. *Plaintiffs' Claims Against Defendants*

Plaintiffs sued ACIC/Brantford and Barr alleging that their secret exclusive dealing arrangement unfairly gave Barr exclusive access to the only available source of clathrate. They further assert that ACIC/Brantford repeatedly assured them that it would provide them with clathrate, and that because of those assurances they delayed taking steps to develop an alternative supply. These circumstances, plaintiffs insist, effectively delayed their entry into the generic warfarin sodium market **[**17]** for one year, and gave Barr a monopoly in this drug during that period. Plaintiffs declare that consumer prices were inflated during the exclusivity period and that Barr's lengthy monopoly gave it an unfair advantage as an entrenched first-mover, even after competitors eventually entered the market.

Plaintiffs further declare that the exclusive supply contract, coupled with the confidentiality agreement, amounted to a contract, combination or conspiracy in restraint of trade that violated *§ 1 of the Sherman Act and* was, in effect, a conspiracy to monopolize in violation of *§ 2*. They allege in addition an actual monopoly by Barr in the generic warfarin sodium market that violated *§ 2*, and declare that ACIC/Brantford misused its monopoly in the clathrate market that likewise violated *§ 2*. Finally, plaintiffs aver that the acquisition of ACIC/Brantford by Apotex -- and via Apotex by Dr. Sherman -- violated *§ 7 of the Clayton Act* because the acquisition lessened competition or tended to create a monopoly in the generic warfarin sodium market.

E. *District Court Proceedings*

On defendants' motion for summary judgment, the district court ruled against plaintiffs on most of the **[**18]** crucial issues and, granting defendants' motion, dismissed plaintiffs' federal antitrust claims. The court ruled the relevant warfarin sodium market was the entire market, including Coumadin. Since Barr had little market share in this overall market, the court found no monopolization of warfarin sodium. It also identified other available suppliers of clathrate and ruled that ACIC/Brantford was not therefore monopolizing the clathrate industry.

Finding the supply agreement between Barr and ACIC/Brantford was the product of reasonable business decisions and had pro-competitive benefits, the trial court dismissed all the Sherman Act causes of action. Further, finding no evidence that Apotex's purchase of ACIC/Brantford caused economic harm to plaintiffs, it also dismissed the Clayton Act claim. In addition, the district court ruled Apothecon was not engaged in a joint venture with Geneva and therefore lacked standing to sue. From these rulings and the order entered thereon, plaintiffs appeal. Geneva's state law tort and breach of contract causes of action against the same defendants remain before the district court during the pendency of this appeal.

DISCUSSION

I Partial Summary **[**19]** Judgment

HN1[] Ordinarily, a district court's grant of partial summary judgment is not **[*495]** immediately appealable because it is not a final judgment. *See* *28 U.S.C. § 1291*; *Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978)* (federal appellate jurisdiction generally requires a conclusive decision by the district court that ends the litigation on the merits). The district court entered final judgment on October 7, 2002 on the claims it dismissed pursuant to *Fed. R. Civ. P. 54(b)*. [2]***HN2***[] *Rule 54(b)* allows for the entry of a partial final judgment and thereby permits immediate appeal to avoid injustice. Thus, we have appellate jurisdiction. *See* *O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29, 40-41 (2d Cir. 2003)*.

[20]** ***HN4***[] Summary judgment is useful "to isolate and dispose of factually unsupported claims," *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*, particularly in antitrust cases. *See* *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 95 (2d Cir. 1998)*. This remedy is an essential tool in the area of ***antitrust law*** because it helps avoid wasteful and lengthy litigation that may have a chilling effect on pro-competitive market forces. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593-94, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

HN5[] We review a grant of summary judgment *de novo* to ensure the district court applied substantive ***antitrust law*** correctly. *Tops Mkts., 142 F.3d at 95*. A grant of such relief is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)* (2000). Upon reviewing the record, we draw all inferences and resolve all ambiguities in favor of the non-moving party, here plaintiffs. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* **[**21]** In an antitrust case, however, those inferences must be weighed in light of competing inferences of permissible competition, and the inference of conspiracy must be found the more reasonable in order for plaintiffs to escape summary judgment. *Matsushita, 475 U.S. at 588*. With these standards in mind we turn to the substantive claims.

II *Section 2* Claims

HN6[] *Section 2 of the Sherman Act* makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. Plaintiffs accuse defendants of monopolizing the generic warfarin market by controlling and misusing ACIC/Brantford's monopoly on clathrate.

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[2] *Rule 54(b)* provides in pertinent part:

> ***HN3***[] When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

HN7[] To establish a violation of *§ 2*, plaintiffs must prove that defendants possessed monopoly power, and willfully acquired or maintained that power in the relevant market. *See* *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The willful acquisition or maintenance of monopoly power is to be distinguished from growth or development that is the result of **[**22]** superior product, business acumen or historical accident. *See* *id. at 571*.

A. *Defining the Relevant Market for Warfarin Sodium*

Before proceeding further we think it helpful to define the relevant market for **[*496]** warfarin sodium. Evaluating market power begins with defining the relevant market. This inquiry will also prove useful for analyzing the *§ 1* allegations because *HN8*[] a market definition provides the context against which to measure the competitive effects of an agreement. *See*, *e.g.*, *Copperweld v. Independence Tube Corp., 467 U.S. 752, 768, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)* (rule of reason requires "an inquiry into market power and market structure designed to assess the combination's actual effect").

HN9[] The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output. The relevant market is defined as all products "reasonably interchangeable by consumers for the same purposes," because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).* **[**23]** Reasonable interchangeability sketches the boundaries of a market, but there may also be cognizable submarkets which themselves constitute the appropriate market for antitrust analysis. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. Defining a submarket requires a fact-intensive inquiry that includes consideration of "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. The term "submarket" is somewhat of a misnomer, since the "submarket" analysis simply clarifies whether two products are in fact "reasonable" substitutes and are therefore part of the same market. The emphasis always is on the actual dynamics of the market rather than rote application of any formula.

The district court ruled that the entire warfarin sodium market, including Coumadin, was the appropriate market. It had noted the chemical equivalence between Coumadin and generics, found that customers and vendors viewed the products as competing, **[**24]** and concluded that generics took market share from Coumadin. We have performed our own analysis of the *Brown Shoe* factors and we conclude to the contrary that in this case generics alone constitute the relevant market.

1. *Generics - A Separate Market*

It may seem paradoxical to believe that Coumadin and generic warfarin -- which have been certified by the FDA as therapeutically equivalent -- are nevertheless in separate markets for antitrust analysis. Functional interchangeability is certainly a *prima facie* indication that consumers of one product might be willing to switch to the other in the face of a non-trivial price increase. Yet, in examining the competitive pressures that affect the ability of a lone generic manufacturer to raise prices or reduce output, we are persuaded that competition among generics creates those restraints. We note that there is not just one relevant customer group, and are mindful to consider the impact that patients, doctors, third-party payers, wholesalers, and chain pharmacies can have on the price and output of warfarin.

(a) *Price Differential*. First, the price differential between Coumadin and generics is plain, as are the **[**25]** variant pricing trends. Barr's generic was introduced at about 70 percent of Coumadin's price, and has since declined to 50 percent while Coumadin's price has stayed steady, creating a marked gap in price between the products. Coumadin's substantially higher **[*497]** prices is evidence of a distinct customer group with brand allegiance and/or high risk sensitivity that was unwilling to switch from the known brand name even in the face of a discounted alternative. That this group has remained loyal despite Coumadin's conspicuously higher prices strongly suggests inelastic demand. More significantly, this division of customers indicates there is little likelihood that price-sensitive generic customers would switch to the higher-priced Coumadin when faced with an increase in generic prices.

When other generic competitors entered the market, Barr's prices dropped substantially, but Coumadin's remained virtually unchanged and even rose slightly. Not only did Barr's invoice prices drop a small, but statistically significant amount, but more importantly Barr admitted that Geneva's presence forced it to offer substantial off-invoice discounts and rebates. Barr's senior vice president of sales and **[**26]** marketing confirmed that Geneva's entry had a substantial effect on Barr's pricing, especially with large chain pharmacies and wholesalers. Regarding wholesalers, he testified Barr offered 15-20 percent rebates after Geneva entered, and with chain pharmacies, he confirmed that Geneva's entry cost Barr "many millions of dollars." As one example, he noted that Geneva's entry forced Barr to give rebates to the CVS and Walgreens chain pharmacies each in excess of a million dollars a year.

(b) Brown Shoe *Distinguished*. Defendants urge us not to evaluate the market based on pricing differentials since they believe the Supreme Court rejected such analysis in *Brown Shoe, 370 U.S. at 326*. In *Brown Shoe*, the Court did indeed reject Brown's claim that its medium priced shoes did not compete with its lower priced shoes. Applying *Brown Shoe* to the instant case, the district court agreed with defendants' position and held that "a division of the product lines based on 'price/quality' was 'unrealistic.'" *201 F. Supp. 2d at 269* (quoting *Brown Shoe, 370 U.S. at 326*). We cannot adopt this reasoning.

In *Brown Shoe*, customers and vendors **[**27]** viewed the differently priced shoes as competing, and the Court simply clarified that a price differential alone should not override observed market conditions. Further, in *Brown Shoe* there was a continuous spectrum of pricing, leading the court to conclude "it would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $ 8.99 are in a different product market from those selling above $ 9.00." *Brown Shoe, 370 U.S. at 326*. Here we find a substantial gap in pricing indicative of separate markets. Nor do we treat pricing as dispositive, but rather use pricing trends as one indicator of the impact each market participant has on overall price and output.

(c) *Inelastic Demand*. We also conclude that Coumadin's customers are displaying strongly inelastic demand. Overall generic penetration has not been as significant in the warfarin market as in other drug markets of comparable size: Barr's CEO testified that generic penetration after one year can be as high as 60 percent, but Barr projected only 35 percent penetration after a year and in fact captured just 8 percent of the warfarin market. Three-and-a-half years after generic warfarin **[**28]** was introduced, the generic substitution rate was just over 30 percent despite prices that were 40 percent lower than Coumadin. Such results indicate a substantial customer base that has not responded to lower prices.

Customers that have remained with Coumadin clearly do not perceive generics to be a reasonable substitute for it. Conversely, price-sensitive customers have flocked to the cheaper generic and are **[*498]** likely to view another inexpensive generic as a reasonable substitute. Plaintiffs' evidence suggests that upon generic entry, the consumer base split such that Coumadin and generics each faced smaller, distinct consumer groups.

Plaintiffs have offered evidence supporting plausible justifications for this trend. The narrow therapeutic index status of the drug may be having some effect on the risk-sensitivity of patients. Since proper dosing is tricky, patients must go through a lengthy introductory period of closely monitored dosage by their attending physician. Patients concerned about the potential for dosage problems may be especially unlikely to switch from a known entity even though they have to pay a higher price. Also, since Coumadin was the sole manufacturer of warfarin **[**29]** sodium for 35 years, there has been a lengthy opportunity to develop strong brand association and loyalty among patients and doctors.

(d) *Different Distribution Chains*. In addition, the distribution chain for generics is different in important ways from that of Coumadin. Wholesalers and chain pharmacies frequently stock Coumadin plus one generic version. Thus, for a substantial customer base, generic warfarin manufacturers compete among themselves for one slot rather than with Coumadin. Plaintiffs also offered evidence that Coumadin has been marketed primarily to physicians, while generics target wholesalers and chain pharmacies. Not surprisingly, Geneva's entry affected Barr's pricing primarily with respect to wholesalers and chain pharmacies.

(e) *Industry Recognition*. Industry recognition is also notable. Although the industry undoubtedly acknowledges that Coumadin competes to some extent with generics, generic manufacturers treat each other as the entities which most directly affect their pricing and output decisions. With respect to generic drugs generally, Dr. Sherman, defendant ACIC/Brantford's principal owner, stated:

> Given that generic drug products are universally **[**30]** cheaper than original brand products, the first generic drug company, upon entry of a particular drug market, will automatically capture a sizeable portion of the sales of the drug, thereby creating the generic drug market.
> When subsequent generic drug companies enter the market in respect of the particular drug, these generic companies compete with the first and prior generic drug companies as to the share of the generic drug market.
> . . . As a result, from the standpoint of the patentee drug company it matters not whether there is one, two, ten or twenty generic drug companies since each successive generic entrant only gains market share from the previous generic competitors and not from the patentee.

Several Apothecon employees also testified that they make pricing decisions as to generic warfarin sodium based on generic competition, not competition from Coumadin. Apothecon's former product manager stated "We compete against other generics, we do not compete against Coumadin. . . . We do not set our prices based on what the brand is doing." Plaintiff's expert pointed out that Barr's website stated, "Barr focuses its generic research and development activities on generic **[**31]** products that have significant barriers to entry," and such barriers would apply only to generic competitors. [3]

[*499] Barr's own price predictions for generic warfarin sodium led it to conclude that it could charge 70 percent of Coumadin's price in the first year, 50 percent in the second year and 40 percent in the third year. These predictions assumed one generic competitor entering in the second year and another entering in the third year. This effect is consistent **[**32]** with the literature on generic drug competition describing how generic pricing is a function of the number of generic competitors. *See generally* Congressional Budget Office, *How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry*, at 32 (1998); Roy Levy, *The Pharmaceutical Industry: A Discussion of Competitive and Antitrust Issues in an Environment of Change* (Federal Trade Commission Bureau of Economics Staff Report, Mar. 1999); David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics* (Federal Trade Commission, Working Paper No. 248, Feb. 2002), *at* *http://www.ftc.gov/be/workpapers/industrydynamicsreiffenwp.pdf* (last visited June 4, 2004).

(f) *No Supply Substitution*. Moreover, the evidence shows there was very limited potential for supply substitution in the generic market. A manufacturer's ability to raise prices or reduce output is not only constrained by current substitutes but also by actual or potential competitors capable of providing new competition quickly with little sunk costs.

We can readily dismiss potential substitution from all entities other than DuPont. We find **[**33]** evidence of particularly high barriers to entry resulting both from limited supply of clathrate and from the regulatory requirements to sell generics. We find no evidence that other generic pharmaceutical manufacturers could quickly and easily have entered the warfarin market if generic warfarin prices were raised substantially above marginal cost. Barr's own process of reaching the warfarin market, which began in 1991 and ended in 1997, belies its claim of easy entry, as does its mission statement which acknowledges seeking drugs with high barriers to entry.

2. *DuPont Unlikely to Enter Generic Market*

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[3] We note that Barr appears to have changed the wording on its website, although consistent with that language the site now also states that "[Barr's] generic product development activities focus on the selection of pharmaceutical products where these selection criteria may limit the potential number of *generic competitors*." *See* *http://www.barrlabs.com/pages/corphist.html* (last visited June 7, 2004) (emphasis added). Since the district court did not have the benefit of this statement before it, we do not rely on it in reaching our decision.

Competition from DuPont is not so straightforward. DuPont already sold warfarin sodium, had access to a clathrate supply, and had contacts in the distribution chain. However, DuPont would have had strong incentives not to introduce its own generic, even if it felt that Barr was charging supra-competitive prices. No doubt it observed that within a few years, there would be increased competition among generics, and its own entry would simply accelerate the decline of generic prices and thereby accelerate the segmentation of the market. Since at best it would be substituting sales **[**34]** of a generic at a lower price for sales of Coumadin at a higher price, all with the same cost of production, DuPont's entry into the generic market could only hurt its bottom line. DuPont likely could only have had success selling generic warfarin if it had been able to seize the substantial advantage that a first mover has in the generic market, and even then, it obviously found any advantage would be outweighed by the erosion of sales of Coumadin. DuPont had substantial success maintaining its customer allegiance at the higher price, and we believe it posed no **[*500]** threat of generic entry and therefore no check on generic prices.

In sum, the totality of the evidence convinces us that once Barr entered the market, the market became segmented so that Coumadin and Barr each had smaller, distinct customer groups. After the initial segmentation, Barr's price was impacted much more by Geneva's entry than by Coumadin. For example, plaintiffs have pointed to data indicating that Geneva's entry affected Barr's pricing of its dosage strengths also sold by Geneva, but not of its other dosage strengths. This evidence strongly suggests to us that competition among generics is the competitive force **[**35]** that restrains a single generic competitor from raising prices or restricting output.

We therefore hold that the relevant market for our purposes is the market for generic warfarin sodium tablets.

B. *Monopoly Power*

We turn now to discuss proof of monopoly power in the generic warfarin sodium market. ***HN10***[] Monopoly power is "the power to control prices or exclude competition." *E.I. du Pont, 351 U.S. at 391*. It can be proven directly through evidence of control over prices or the exclusion of competition, or it may be inferred from a firm's large percentage share of the relevant market. *Tops Mkts., 142 F.3d at 98*. Plaintiffs seek to demonstrate monopoly power through both methods.

1. *Direct Evidence of Monopoly Power*

With respect to direct evidence, plaintiffs primarily rely on the report of their expert, Dr. Robert Larner. The expert's market analysis led him to conclude that in the absence of generic competition Barr had charged a monopoly price that lasted until plaintiffs finally entered the market. Plaintiffs offered evidence to show that after their entry Barr lowered its price and offered substantial price discounts and rebates. Plaintiffs **[**36]** contend this is direct proof that Barr controlled prices during its period of exclusivity. Further, they assert that Barr's first-mover advantage led to substantial entrenchment, such that it continued to control 80 percent of generic sales several years after it faced competition. This, they think, constituted exclusion of competition, which likewise is direct proof of monopoly power.

This direct proof is at best ambiguous. We recognize plaintiffs' pricing proof may of course be indicative of monopoly power. However, absent from plaintiffs' proffer is any analysis of Barr's costs. Hence, we do not know whether the allegedly elevated prices led to an abnormally high price-cost margin. *See* 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 501 (1995). Nor do plaintiffs present direct evidence that defendants restricted output, asking us to infer the basis for the higher prices. Moreover, plaintiffs' assertion with regard to Barr's continuing high percentage market share is not direct evidence, but rather requires that we engage in the sort of inference more appropriate for market share analysis.

HN11[] Where direct evidence is unavailable or inconclusive, as here, monopoly **[**37]** power may be inferred from high market share. Although market share is not functionally equivalent to monopoly power, it is nevertheless highly relevant to the determination of monopoly power. *Tops Mkts., 142 F.3d at 98*.

2. *Monopoly Power Through Market Share*

Having defined the relevant market, we consider whether Barr's high market share leads to a fair inference of monopoly power. ***HN12***[] Courts will only draw that **[*501]** inference after considering market share in conjunction with other characteristics of the market, such as "the strength of competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand." *Int'l Distribution Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 792 (2d Cir. 1987)*.

Defendants do not dispute that Barr was the sole manufacturer of generic warfarin sodium during the period from July 1997 through October 1998. This alone creates a strong inference of monopoly power. The nature of defendant's pricing activities also supports an inference of monopoly power. However, we think there is a question of fact as to whether this is the type of **[**38]** competitive advantage about which the antitrust laws should be concerned. ***HN13***[] Every first mover into a new market has a monopoly during its initial period of exclusivity. The antitrust laws have not been applied to condemn the transient advantage inherent in being a first mover because to do so would stifle innovation. *See AD/SAT, a Division of Skylight, Inc. v. Associated Press, 181 F.3d 216, 229 (2d Cir. 1999)* (*per curiam*) (quoting 2A Areeda & Hovenkamp, *supra*, P 506d, at 103 ("Transitory power may safely be ignored by ***antitrust law***" because market forces would end that power fairly quickly)); *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 530 (5th Cir. 1982)* ("Transitory control over prices, ever present in a competitive economy . . . is not the subject of the completed monopolization offense.").

Barr's period of exclusivity lasted about 15 months, although plaintiffs allege that the effects of this exclusivity period lasted much longer. This may or may not be of sufficient duration to have significant anti-competitive effects. In any event, whether Barr's advantage should be viewed as a transitory advantage inherent **[**39]** in being a first entrant or a substantial impediment to competition involves a genuine question of material fact. Plaintiffs have satisfied their burden of producing evidence that the effects of Barr's advantage were substantial and that competition overall was impaired. Such an issue of material fact should not be resolved at the summary judgment stage because to do so requires weighing the evidence, which is a matter left for a jury.

The final element of the monopolization charge is that defendants must have willfully acquired or maintained their advantage as opposed to succeeding through a superior product, business acumen or historical accident. On this point, plaintiffs have alleged a conspiracy between Barr and ACIC/Brantford, embodied in their exclusivity agreement and in their actions towards plaintiffs. Plaintiffs believe Barr and ACIC/Brantford sought to leverage ACIC/Brantford's monopoly in the clathrate market in a manner that attempted both to assure Barr's monopoly in the downstream generic warfarin sodium market and simultaneously helped reinforce ACIC/Brantford's monopoly in the clathrate market. Because of the close connection of these allegations to the dynamics **[**40]** of the clathrate market, we discuss the evidence of intent as part of our analysis of the clathrate market, where we conclude that plaintiffs presented satisfactory evidence that Barr willfully acquired or maintained its monopoly, *see Grinnell Corp., 384 U.S. at 570-71*, and that both defendants conspired to do so.

III Clathrate Market

A. *Section 2 Claims Stated*

Plaintiffs also allege that ACIC/Brantford monopolized the clathrate supply market and that both defendants, ACIC/Brantford and Barr, conspired to do **[*502]** so. Defendants respond that plaintiffs' arguments regarding ACIC/Brantford's asserted clathrate monopoly relate to the purported effort to monopolize the generic warfarin sodium market. They maintain that plaintiffs have not contended that ACIC/Brantford's actions had the effect of keeping other clathrate suppliers out of the clathrate market and that therefore plaintiffs' *§ 2* claim in the clathrate market must fail.

Defendants are correct that *§ 2* is often concerned with the exclusion of competitors. However, plaintiffs contend that ACIC/Brantford and Barr conspired to mislead and deceive them in order to delay Geneva from pursuing and developing **[**41]** an alternate supply of clathrate. They have thus successfully alleged that, by so preventing the plaintiffs from developing a rival to ACIC/Brantford, the defendants "willful[ly] . . . maint[ained]" ACIC/Brantford's monopoly. *Id*. Although the plaintiffs were not themselves excluded from the clathrate market, they have sufficiently stated *§ 2* claims regarding that market and have standing to bring them, *see Blue Shield of Va. v. McCready, 457 U.S. 465, 479-81, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. Thus, it is a question for the jury whether

ACIC/Brantford had monopoly power in the clathrate market, and if so, whether defendants abused ACIC/Brantford's market power.

B. *No Other Viable Suppliers of Clathrate Available*

In determining if ACIC/Brantford had monopoly power in the clathrate supply market, it is crucial to determine whether other suppliers besides ACIC/Brantford were available as potential generic warfarin sodium manufacturers. The district court found other suppliers of clathrate were available to plaintiffs in 1995-98, and ruled that ACIC/Brantford did not have a sizeable market share. Specifically, it identified Hoechst Celanese and Chemoswede as **[**42]** companies prepared to sell clathrate. It also mentioned several other manufacturers that could have developed the capability of processing clathrate, if plaintiffs had pursued the matter. However, viewing the facts as we must in the light most favorable to plaintiffs, the issue of whether ACIC/Brantford effectively was the only source available to generic manufacturers in 1995-98 is in sufficient dispute so that it should not have been resolved on a motion for summary judgment. We enumerate ten other possible suppliers of clathrate. They are: Hoechst, Chemoswede, Lachema, Taro, Arenol, Vinchem, Diosynth, Banyan, Chemagis, and Shanghai. Plaintiffs' proof suggests that for one reason or another none of them could actually be considered a viable supplier of clathrate during the relevant time period.

Hoechst. Geneva received R&D samples from Hoechst and considered entering into a supply agreement with Hoechst. Plaintiffs raise serious questions about Hoechst's willingness and ability to provide clathrate. Hoechst had not filed a Drug Master File with the FDA and indicated it would not be able to for some time. According to plaintiffs, Hoechst was experiencing difficulties with the **[**43]** stability of its clathrate production, reporting environmental problems due to clathrate's toxicity that were hampering its development. Hoechst had little interest in solving this problem. A Hoechst interoffice memo describes Geneva's frustration with Hoechst's clathrate development problems, and describes Dr. Patel's suggestion that if they could not provide better service they should not be in the business. The memo's author states "I resisted the urge to tell him that we are likely to accept his advice." Hoechst eventually sold the only facility it had working to develop clathrate. **[*503]** Barr's purchasing manager Mary Casatelli confirmed that Barr considered Hoechst's viability as a clathrate supplier to be a "moot point" because it had decided to close its manufacturing facility and put it up for sale.

Chemoswede. Chemoswede was DuPont's supplier of clathrate for Coumadin. As of mid-1995 Chemoswede was under contract to supply clathrate exclusively to DuPont, and DuPont purchased Chemoswede outright in 1997. Barr's Paul Bisaro testified in his deposition that Chemoswede would not sell clathrate to Barr because of its obligations to DuPont. Barr's chairman Bruce Downey also testified **[**44]** that the result of DuPont's purchase of Chemoswede was that Chemoswede would no longer supply to the generic industry. Despite this testimony, the district court decided that Chemoswede should be considered an available source. Although acknowledging that "most or all of its clathrate was dedicated to DuPont," the court believed that "internal or captive sources of a product are still included in the relevant market." 201 F. Supp. 2d at 272. In light of our market definition of generic warfarin sodium, this conclusion no longer is apt. The question here is availability of clathrate to generic manufacturers, which affects the supply of generic warfarin sodium. Chemoswede's clathrate affects neither, and therefore has no impact on a putative monopolist's ability to control supply of generic warfarin.

Lachema. Plaintiffs ordered a 15 kg sample of clathrate from Lachema in February 1998. When Lachema failed to fill this order after a 6-9 month delay, Geneva abandoned the order realizing that Lachema could not supply them. Barr's Mary Casatelli testified that when she left Barr in November 1997, she had concluded "there was no way" Lachema could have been an approved **[**45]** supplier.

Taro. Sergio Gertrajdman, an employee of ACIC/Brantford, testified that before he left he attempted to secure clathrate from Taro, but Taro refused to sell. Plaintiffs presented evidence that Taro did not have a Master File on file with the FDA and did not enter the market until September 1999, two full years after Geneva sought a clathrate source.

Arenol. Arenol evidently worked on a clathrate process in 1997 and 1998, although it too did not file a Master File for clathrate. Arenol's plant was eventually destroyed by fire in August 1998, but even at that late date, plaintiffs maintain that Arenol had not even begun to prepare to supply clathrate.

Vinchem. Vinchem was a broker, not a manufacturer of clathrate. Plaintiffs at one point received some clathrate from Vinchem, but they were unable to determine that the source had filed the requisite Master File. Geneva ultimately concluded that Vinchem was unable to deliver any clathrate.

Diosynth. Diosynth potentially could have provided clathrate, but had no viable process for synthesizing or manufacturing clathrate in 1996-97. According to plaintiffs, Diosynth was unable to develop a process until September **[**46]** 1999, two years after Geneva's Abbreviated New Drug Application was approved.

Banyan. In 1995, Geneva and Banyan amended their existing development agreement to include development of clathrate. At the time, Banyan had no facilities capable of producing clathrate nor did it have a process for manufacturing clathrate. Because Banyan was not expected to have clathrate production capabilities for a substantial period of time, plaintiffs did not consider Banyan a viable source. After ACIC/Brantford rejected plaintiffs' purchase order in 1997, plaintiffs made an **[*504]** effort to accelerate Banyan's capabilities, and were able to enter the market using Banyan clathrate in October 1998.

Chemagis. Geneva met with Chemagis to discuss the purchase of clathrate. Chemagis never filed a Master File for clathrate. Chemagis refused to develop a process to manufacture clathrate unless plaintiffs paid the upfront costs of establishing a new facility. According to plaintiffs, Chemagis' development time frame was too long, the startup costs were prohibitive, and its production capability was at best speculative.

Shanghai. Geneva received samples of clathrate from Shanghai in early 1997. However, **[**47]** Shanghai had not filed a Master File for clathrate, and Geneva understood that its facilities to produce clathrate had not been built. Believing Shanghai was in the very early stages of development, plaintiffs concluded it was even further behind than Banyan.

It is significant that plaintiffs' description of the state of the clathrate industry in 1995-98 is consistent with Barr's own records and reports. A Barr memorandum to investors commented that warfarin sodium featured "unique raw material sourcing issues," and that it had secured "an exclusive source of active ingredient that to date is the only source available to the generic industry." Barr's CEO Bruce Downey also testified that Barr had been actively looking for a backup material supplier in the period before its launch, and he stated "it was our judgment that there were no others, other than the one that we had worked with."

The factual dispute over the availability of clathrate precludes any definitive assessment of ACIC/Brantford's power in the clathrate industry, making the grant of summary judgment on this issue inappropriate.

C. *Willful Acquisition or Maintenance of Monopoly Power*

We have found material questions **[**48]** of fact regarding Barr's monopoly power in the generic warfarin sodium market and ACIC/Brantford's monopoly power in the clathrate industry. Plaintiffs have presented sufficient evidence on both of these issues to satisfy their burden at the summary judgment stage. To succeed on their claims however plaintiffs must also demonstrate that defendants willfully acquired or maintained their monopoly power as opposed to having achieved their advantage through superior business practice or historical accident.

Several Barr statements can be interpreted as suggesting an intent to seize the sole supply of clathrate in order to monopolize the generic warfarin market. A memorandum dated April 14, 1997 from Mary Casatelli, Barr's purchasing manager, to Paul Bisaro, Barr's vice president and general counsel, identifies just two manufacturers capable of making clathrate, DuPont Chemoswede and ACIC/Brantford. The memo closes with the statement, "We should give thought to the strategy we should pursue in order to deny a viable source to Invamed." Mary Petit, Barr's director of pharmacology and senior vice president of operations, added a handwritten note to the memorandum: "Paul - What is this worth **[**49]** to us - Will purchasing the Coventry facility's supply (even tho we can't use it) be less $$ than our losses if Invamed enters the market? Would ACIC/Brantford or Barr purchase the

Coventry R/M and sell to ACIC/Brantford's overseas customers to keep them out of supplying Invamed?" Defendants attempt to portray these notes as isolated thoughts of non-decision-making employees, but we think a jury should decide what weight should be given these statements.

[*505] Later in 1997 a "Product Development Strategy" prepared for a Barr board of directors' meeting in September 10-11, 1997, states that Barr focuses on lower sales volume drugs with high barriers to entry that limit competition. The memorandum describes Barr's efforts to secure a source of raw materials for generic warfarin sodium and notes that its "investment of time and capital resulted in an exclusive source of active ingredient that to date is the only source available to the generic industry."

Further, an internal Barr memorandum titled "Branded Pharmaceutical Company Generic Defense Strategies" contains a section entitled "Preserving Market Share: Warfarin Case Study" that includes the headline "Block Generic Competition by **[**50]** Controlling Raw Materials." Ms. Casatelli believed that denying Geneva a source of clathrate was "simply good business practice." Barr's chairman, Bruce Downey, confirmed that Barr was not successful in finding backup clathrate suppliers, and he believed generic competition would be limited due in part to the small number of FDA-approved raw material suppliers.

Plaintiffs also provided evidence relating to why they believed they had an oral contract with ACIC/Brantford. Sergio Getrajdman, ACIC/Brantford's sales representative who dealt with Geneva, recalled telling Geneva's Dr. Dave that ACIC/Brantford could provide clathrate to Geneva. Getrajdman stated that he had not been aware that ACIC/Brantford had even considered an exclusive agreement on clathrate: "I never - I would have never approached [Dr. Dave] with the product had there been discussion of an exclusive." Getrajdman testified that he thought ACIC/Brantford was obligated to provide clathrate to Geneva and that he repeatedly advised people at ACIC/Brantford of that obligation. Antoniette Walkom, who was the author of ACIC/Brantford's Master File reference letter in support of Geneva, testified similarly that the letter **[**51]** reflected a commitment by ACIC/Brantford to provide clathrate to Geneva.

In September 1996 after ACIC/Brantford acquired ACIC, ACIC/Brantford wrote to Dr. Dave and stated, "According to our records, letters of access to the following U.S. files have been provided to your firm. Please kindly review the list below and notify us of any omissions . . ." Warfarin sodium was on the list. Geneva's Dr. Mahendra Patel testified that on several occasions, ACIC/Brantford actively encouraged Geneva to develop warfarin sodium using ACIC/Brantford clathrate, and repeatedly solicited Geneva's business.

After the exclusive agreement was signed, ACIC/Brantford was elusive in its responses to Geneva's requests for more clathrate. Getrajdman wrote in a memo dated August 23, 1995, "I contacted [Geneva's Mahendesh] Patel with the strategy we discussed Friday in Toronto, namely, to discourage him from proceeding w/development on the pretext that others were ahead of him and his market share would thus be proportionately smaller. I was unsuccessful . . ." ACIC/Brantford's Telemagic printout contains entries of Getrajdman's response to Dr. Dave's January 12, 1996 request for clathrate: he stalled until **[**52]** February 5, "but we must decide whatever I am to tell Invamed by then: we had the chance to tell them face to face in Germany, but [ACIC/Brantford President Luciano Calenti] felt the time was not right."

ACIC/Brantford evidently developed several strategies for how to tell Geneva that they would no longer provide clathrate. One strategy was to give the false story that for capacity reasons, they would be moving their production facility to Mexico. Getrajdman noted at the bottom of a **[*506]** memo, "Time to bite the bullet. If I go with the switching site story, I need dates as soon as possible." He also placed an entry in the Telemagic machine dated January 16, 1996: "The fact that they're putting things in writing makes me nervous." As late as mid-1997, two full years after the exclusive supply agreement was signed, it is clear that ACIC/Brantford still had not told Geneva it could not supply clathrate.

Additionally, plaintiffs provided some evidence that Barr was involved with ACIC/Brantford in the decision to reject Geneva's purchase order in September 1997. Barr Chairman Bruce Downey stated that Barr was contacted by ACIC/Brantford and informed that ACIC/Brantford had received a purchase **[**53]** order from Geneva for commercial quantities of clathrate, "which sale was prohibited by our contract. And we were asked whether we were going to stand on our rights as embodied in that contract and we said yes." Defendants dispute their involvement in the decision, but given the totality of the circumstances suggesting intent to monopolize, we are inclined to allow a jury to make that factual determination.

The evidence as a whole could lead a reasonable jury to conclude that Barr and ACIC/Brantford intended to take advantage of ACIC/Brantford's clathrate monopoly, intended to create a monopoly for Barr in the generic warfarin sodium industry, and intended to keep their agreement secret so that Geneva would not take steps to develop an alternate source. We discuss the specific evidence of agreement in the following section. While there may be some pro-competitive benefits of exclusive supply agreements, it is difficult to conceive of the pro-competitive benefits that would be derived from this level of deception, and, also, it is difficult to believe that defendants' advantage came about through better business practices or historical accident. The district court's grant of summary **[**54]** judgment on plaintiffs' *§ 2* claims must therefore be reversed.

IV *Section 1*

HN14[] *Section 1 of the Sherman Act* prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. As the language states, *§ 1* targets concerted action between two or more entities. Independent conduct falls outside the purview of this provision. *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*. To prove a *§ 1* violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. *See* *Tops Mkts., 142 F.3d at 95*; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. The parties agree that the conduct at issue here does not fall within the narrow range of behavior that is considered so plainly anti-competitive and so lacking in redeeming pro-competitive value that it is "presumed illegal without further examination," that is, it is illegal **[**55]** *per se*. *Broad. Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Accordingly, the case before us is evaluated under the rule of reason, and defendants' conduct will be deemed illegal only if it unreasonably restrained competition. *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*.

HN15[] Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior "had an *actual* adverse effect on competition **[*507]** as a whole in the relevant market." *Capital Imaging, 996 F.2d at 543*. Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice. *Atl. Richfield, 495 U.S. at 343-44*. If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. *Capital Imaging, 996 F.2d at 543*; *Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991)*. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove **[**56]** that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. *Capital Imaging, 996 F.2d at 543*. Ultimately, the factfinder must engage in a careful weighing of the competitive effects of the agreement -- both pro and con -- to determine if the effects of the challenged restraint tend to promote or destroy competition. *Id*.

A. *Contract, Combination or Conspiracy*

To satisfy the concerted action requirement, plaintiffs allege a conspiracy between Barr and ACIC/Brantford to restrain trade in the clathrate and generic warfarin sodium markets. In addition, they insist the exclusive supply and confidentiality agreements themselves violate *§ 1*. Although the district court only addressed the conspiracy argument, we think the complaint fairly read encompasses both allegations.

HN16[] To withstand a summary judgment motion, plaintiffs must present evidence of an actual illegal combination, and such evidence must satisfactorily cast doubt on inferences of independent action or proper conduct by defendants. *Matsushita, 475 U.S. at 588*. The evidence must prove defendants had an intent to adhere to **[**57]** an agreement that was designed to achieve an unlawful objective; specific intent to restrain trade is not required. *Capital Imaging, 996 F.2d at 545*.

The district court ruled that there was a material question of fact regarding Barr's knowledge of the interactions between Geneva and ACIC/Brantford. The court held that plaintiffs' evidence was sufficient to support an inference that Barr was aware that ACIC/Brantford had supplied Geneva with enough clathrate to file its Abbreviated New Drug Application, and that it was industry practice that such supply created an implied contract.

However, the district court then ruled the conspiracy theory must fail because there was no evidence that the exclusive agreement was anything but a legitimate business tactic by ACIC/Brantford. It held that lack of intent by one party, here ACIC/Brantford, precludes a conspiracy to monopolize. While we agree with the district court's statement of the law, we believe it inappropriately resolved factual disputes in reaching its conclusion that there was no conspiracy.

The testimony as a whole as well as the various memos and internal documents support an inference of conscious, concerted **[**58]** action intended to take advantage of ACIC/Brantford's monopoly on clathrate. Plaintiffs presented circumstantial evidence that Barr and ACIC/Brantford conspired to control the only source of clathrate available and to deceive plaintiffs so that plaintiffs would not take steps to develop an alternate supply. There was evidence that Barr demanded the confidentiality agreement in order to delay Geneva's entry and thwart the development of alternative supplies. Testimony further showed that both Barr and ACIC/Brantford understood the confidentiality agreement to require silence by ACIC/Brantford in its dealings with Geneva, **[*508]** suggesting that ACIC/Brantford's deceptions were in furtherance of the agreement.

Also, the Casatelli/Petit memorandum urging Barr to purchase excess clathrate in order to block Geneva's entrance is particularly damning. The district court dismissed this memorandum because the court found "no evidence that this document represents any employee's view but that of Casatelli and Petit, nor that their views were ever acted upon." *201 F. Supp. 2d at 277*. We doubt the soundness of this conclusion since at least one was a senior executive. But, in any event, **[**59]** it represents an improper weighing of the evidence by the court, which should have instead looked at the evidence in the light most favorable to the non-moving party. *See*, *e.g.*, *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 547 (2d Cir. 1998)*.

We also believe the exclusive dealing arrangement itself satisfies the *§ 1* requirement of coordinated action. Since Barr was aware that clathrate was in short supply -- and in fact believed ACIC/Brantford was the only available supplier -- the decision to use an exclusive supply contract as opposed for example to a requirements contract, as well as its demand for a confidentiality clause, suggest intent to control the supply of clathrate. The evidence as a whole from telephone records, deposition testimony, and internal documents, indicates "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto, 465 U.S. at 768*. [4] Thus, plaintiffs satisfied the concerted action requirement at this stage of the litigation.

[60]** B. *Unreasonable Restraint of Trade*

HN17[] Exclusive dealing arrangements implicate *§ 1* because they have the potential unreasonably to exclude competitors or new entrants from a needed supply, or to allow one supplier to deprive other suppliers of a market for their goods. *See* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* (O'Connor, J., concurring). Such agreements may also, however, have pro-competitive purposes and effects, such as assuring steady supply, affording protection against price fluctuations, reducing selling expenses,

[4] Theorists note it usually does not further harm competition for a monopolist in one market to leverage its advantage into a monopoly in a downstream market. This is so because the firm already has a monopoly and can extract monopoly returns. *See*, *e.g.*, Robert H. Bork, The Antitrust Paradox, 228-29, 372-75 (1978). Still, the window of monopoly opportunity is unique in this case. ACIC/Brantford recognized its period of exclusivity would be brief, and that the best way to take advantage of its exclusivity was to work with Barr to gain a monopoly in the generic warfarin sodium market. If Barr too could gain an entrenched advantage, ACIC/Brantford's clathrate advantage could last even after other clathrate suppliers entered that market. Therefore, despite allegedly possessing monopoly power, ACIC/Brantford would still have had an incentive to use that power to gain advantage downstream.

and promoting stable, long-term business relationships. *See* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*. In order not to condemn the positive aspects of exclusive dealing agreements, courts must take care to consider the competitive characteristics of the relevant market. Exclusive dealing is an unreasonable restraint of trade and a *§ 1* violation only when the agreement freezes out a significant fraction of buyers or sellers from the market. *Jefferson Parish, 466 U.S. at 45*; *cf*. *Standard Oil Co. v. United States, 337 U.S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949).* **[**61]**

[*509] The exclusive dealing agreement in the present case is of particular concern because of the alleged bottleneck in the clathrate supply chain. Plaintiffs have created a material dispute of fact as to whether ACIC/Brantford effectively controlled the entire supply of clathrate available to generic warfarin sodium manufacturers during the period at issue. There is also evidence of high barriers to entry, meaning that potential suppliers could not easily enter the market. To the extent plaintiffs' theory is accurate, the exclusive dealing agreement had the potential to freeze competitors out of the generic warfarin sodium market.

HN18[] Plaintiffs bear the initial burden to demonstrate an actual adverse effect on competition. We have not required proof of market power in *§ 1* cases. If plaintiff can demonstrate an actual adverse effect on competition, such as reduced output, *see* *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, there is no need to show market power in addition. *See* *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 128-29 (2d Cir. 1995)*.

In addition to the somewhat inconclusive evidence **[**62]** of Barr's warfarin sodium pricing, plaintiffs presented evidence that the exclusive dealing arrangement reduced the supply of clathrate available to generic manufacturers. They offered evidence that ACIC/Brantford's own production plans called for the production of a greater amount of clathrate than Barr intended to purchase. This output was effectively lost to the generic warfarin sodium industry because of the exclusive terms of the contract. In addition, for the reasons previously discussed, plaintiffs have created a genuine issue of material fact regarding ACIC/Brantford's market power in the clathrate market and Barr's market power in the generic warfarin sodium market. Their proffer is sufficient to satisfy their initial burden under the rule of reason.

The burden then shifts to defendants to offer pro-competitive justifications for the arrangement. Even if we credit defendants' evidence, the essential facts are in dispute. The period of 1995-98 was a period of uncertainty in an emerging market. Supplies were difficult to procure, and the number of actual or potential generic warfarin sodium manufacturers was unknown, in part due to delays relating to FDA approval. This was **[**63]** a time when it might make particular sense for a supplier to secure a ready buyer and for a buyer to secure a steady supply of materials. Were there other clathrate competitors available, a point which is in dispute, this exclusive arrangement could have significant pro-competitive benefits both to the signatories and to competition overall.

The calculus of course changes if ACIC/Brantford was indeed the sole available supplier, and the evidence suggests Barr and ACIC/Brantford at least suspected that was the case. If so, then an exclusive dealing agreement that dedicated all that supply to one buyer could freeze out competition to an extent that greatly outweighed any pro-competitive effects. At the least, such a situation would heighten the need to consider if less restrictive means could have achieved the pro-competitive benefits of an exclusive dealing arrangement without totally foreclosing competition.

The issue of duration which troubled us in considering *§ 2* is also relevant here: a transitory advantage does not significantly harm competition and therefore should not violate *§ 1*, but plaintiffs have provided at least some evidence to suggest that this was not a transitory **[**64]** advantage, but rather was a substantial impediment to competition. For example, Apothecon's general **[*510]** manager reported that even though its offer price to the Eckerd and CVS drugstore chains was as much as 25 percent below Barr's, neither was willing to leave Barr after having devoted substantial time to switching patients and getting their pharmacists comfortable with the new product. The assessment of long-term effects depends greatly on credibility of the evidence, which is the task of the jury.

Once again, the district court resolved crucial factual disputes against the non-moving party on a motion for summary judgment. We think plaintiffs' evidence provides a *prima facie* case of a *§ 1* violation, and the district court should not have terminated the case on summary judgment.

V *Clayton Act Section 7*

We pass now to the claimed violation of the ***HN19***[] *Clayton Act. Section 7* of the Clayton Act prohibits mergers or acquisitions if the effect "may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18 (2000)*. Prior to 1996, Apotex, which is owned indirectly by Dr. Sherman, had owned 75 percent of ACIC/Brantford. In 1996 Apotex purchased **[**65]** the remaining 25 percent to become ACIC/Brantford's sole owner. Plaintiffs claim the 1996 purchase tended to impede competition and monopolize the warfarin sodium market in violation of *§ 7* because the acquisition enabled defendants to misuse ACIC/Brantford's monopoly in the clathrate market to gain competitive advantage in the warfarin sodium market. Due to the various parent/subsidiary relationships connected to Apotex, plaintiffs included as defendants to this claim Apotex, Dr. Sherman, Apotex Holdings, Inc., Sherman Delaware, Inc. and Barr.

The district court dismissed the *§ 7* claim against all entities except Apotex because it ruled that "the only entity that may be held liable under *§ 7* is the acquirer, Apotex Inc." *201 F. Supp. 2d at 279*. The district court gave no explanation for why defendants Dr. Sherman, Apotex Holdings, Inc. and Sherman Delaware, Inc., were not also potentially liable since the Clayton Act by its terms applies to both "direct and indirect" acquisitions, and the court had previously found that Dr. Sherman, through several subsidiaries, owned 100 percent of Apotex Holdings and 100 percent of Sherman Delaware, which combined own 100 percent **[**66]** of Apotex. Aside from pointing out that plaintiffs cited no cases that extend liability under *§ 7* beyond the acquirer, the court offered no analysis of its own.

While we find sparse case law either supporting or rejecting the district court's conclusion -- indeed only one case seems to have addressed the question head on, *see* *Cmty. Publishers, Inc. v. Donrey Corp., 882 F. Supp. 138 (W.D. Ark. 1995)* -- the Clayton Act's application to "direct or indirect" acquisitions suggests to us that parent/subsidiary relationships, or any other corporate structure, ought not preclude application of the *Clayton Act § 7* to any entity that had an active role in an acquisition that tends "substantially to lessen competition." However, we need not decide in this case whether any defendant that directly or indirectly owned Apotex played a sufficient role to be held liable, for we hold that plaintiffs have failed to demonstrate that the acquisition itself was likely to impair competition.

HN20[] Although *§ 7 of the Clayton Act* targets restraint of trade and monopolization, it is not co-extensive with the Sherman Act. After *§ 7* was amended in 1950, the Supreme Court recognized **[**67]** that *§ 7* was intended to be a pre-emptive tool that gave the Federal Trade Commission and the courts the power to stop mergers that "tended" to impair trade, even before the **[*511]** effects reached the level of violating the Sherman Act. *See* *Brown Shoe, 370 U.S. at 317*; *see also* *id. at 312-23* (surveying the history and purpose of *§ 7* in light of the 1950 amendments). *Section 7* therefore provides for scrutiny of a transaction to evaluate if the acquisition will tend to increase concentration of market power and/or inhibit competition. *See* *Copperweld, 467 U.S. at 777*. The Supreme Court also confirmed that the focus of *§ 7*, like the Sherman Act, is on competition not competitors. *Brown Shoe, 370 U.S. at 320*.

Plaintiffs' allegations as to the specific anti-competitive effects of Apotex's purchase of ACIC/Brantford are meager indeed, occupying but a single paragraph of their appellate brief. As best we can glean, plaintiffs allege that Apotex, Dr. Sherman, and the various subsidiaries were all passive investors in ACIC/Brantford prior to 1996, but that their purchase in 1996 of the remainder of ACIC/Brantford's **[**68]** shares enabled them to take anti-competitive actions. According to plaintiffs, lack of a minority shareholder meant that defendants were free to take steps that were not in ACIC/Brantford's economic interests, such as misleading Geneva and refusing to fill Geneva's order for clathrate. Plaintiffs assert that these actions were a misuse of ACIC/Brantford's monopoly in the clathrate market designed to gain advantage in the generic warfarin sodium market.

Whatever the merits of this characterization of defendants' motive and actions, the allegations are not of a sort that implicates the Clayton Act. ***HN21***[] The Clayton Act is concerned with whether an acquisition or merger *itself* may cause antitrust injury. *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 115-17, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986)*. Plaintiffs themselves assert in other causes of action that ACIC/Brantford had a monopoly on clathrate even before Apotex purchased the remaining shares of ACIC/Brantford, indicating that the acquisition itself had no effect on the degree of concentration or competition in the clathrate market. Further, the Barr/ACIC/Brantford exclusive dealing agreement, which is the crux of the **[**69]** antitrust claims, was entered into before the purchase of ACIC/Brantford.

Plaintiffs have alleged no potential antitrust harm stemming from the acquisition, and thus, at most, allege that the purchase gave ACIC/Brantford unity of ownership. The fact that the 1996 purchase removed a layer of internal corporate control is not by itself a concern of the Clayton Act, for that removal standing alone is not an antitrust violation.

Without directly saying so, plaintiffs appear to hint that Dr. Sherman's connection with Barr -- he was a significant shareholder and member of Barr's Board of Directors in 1996 -- should lead us to examine the vertical aspects of the acquisition. The Supreme Court and this Court have set forth standards for assessing if a vertical merger violates the Clayton Act: ***HN22***[] "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "'clog on competition' which 'deprive[s] . . . rivals of a fair opportunity to compete.'" *Brown Shoe, 370 U.S. at 324*; *United States v. Am. Cyanamid Co., 719 F.2d 558, 566 (2d Cir. 1983).* **[**70]** Plaintiffs' only evidence that competitors were foreclosed or that there was a clog on competition comes from the Barr/ACIC/Brantford exclusive dealing agreement, not the 1996 acquisition itself.

All we really have before us is plaintiffs' sneaking suspicion that something illegal **[*512]** occurred from the acquisition of ACIC/Brantford. But plaintiffs have the burden to present evidence that the purchase violated the Clayton Act. They cannot on the basis of surmise and suspicion transform their Sherman Act allegations into a Clayton Act violation. The district court's dismissal of the Clayton Act claim should be affirmed.

VI Joint Venture

In the district court defendants challenged plaintiff Apothecon's standing to raise its state law claims. Apothecon and Geneva had asserted that they were joint venturers and that, under New Jersey law, Apothecon could sue for injuries to the joint venture. The district court ruled that Geneva and Apothecon were not engaged in a joint venture and consequently that Apothecon lacked standing to sue.

The trial court held the relationship lacked two crucial elements to qualify as a joint venture: a joint property interest in the subject of the venture **[**71]** and a sharing of losses. It found that under the agreement between Apothecon and Geneva, Geneva retained ownership of the finished tablets and then sold them to Apothecon. Thus, it found no joint ownership in the subject of the venture. The trial court also ruled that there was no sharing of losses, but rather only a risk of losing an initial capital investment. It ruled the possibility of losing initial funds invested in the venture was not equivalent to shared losses.

We turn first to the law. ***HN23***[] "A joint venture is a special combination of two or more persons, whether corporate, individual or otherwise, formed for some specific venture in which a profit is jointly sought without the parties designating themselves as an actual partnership or corporation." 12 Richard A. Lord, *Williston on Contracts*, 36:9 at 644 (4th ed. 1999). Under New Jersey law, which governs the plaintiffs' agreement, the elements of a joint venture are essentially the same as of a partnership. *Carney v. Hansell, 363 N.J. Super. 111, 831 A.2d 128, 134 (N.J. Super. Ct. App. Div. 2003)*. These elements "include agreement, sharing profits and losses, ownership and control of the partnership's property **[**72]** and business, community of power, rights upon dissolution and the conduct of the parties towards third persons, among others." *Am. Fire & Cas. Ins. Co v. Manzo, 347 N.J. Super. 100, 788 A.2d 925, 929 (N.J. Super. Ct. App. Div. 2002)*. Joint venture status is created by contract, express or implied, and depends on the mutual intent of the parties. *Sullivan v. Jefferson, Jefferson & Vaida, 167 N.J. Super. 282, 400 A.2d 836, 839 (N.J. Super. Ct. App. Div. 1979)*.

We find the cases applying New Jersey law to be inconsistent on the evaluation of joint venture status. Some cases hold, for example, that sharing of profits *and* losses is required, while others hold that sharing of profits *or* losses is sufficient. *See*, *e.g.*, Wittner v. Metzger, 72 N.J. Super. 438, 178 A.2d 671, 675 (N.J. Super. Ct. App. Div. 1962) (sharing of profits and losses required); *Hellenic Lines, Ltd. v. Commodities Bagging & Shipping, Process Supply Co., 611 F. Supp. 665, 679 (D. N.J. 1985)* (venturers must share profits or losses); Ruta v. Werner, 1 N.J. Super. 455, 63 A.2d 825 (N.J. Super. Ct. Ch. Div. 1948) **[**73]** (finding a joint venture despite agreement's lack of allocation of losses); Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield, 49 F. Supp. 2d 728, 736-37 (D. N.J. 1999) (lack of shared losses does not preclude finding of joint venture); First Mechanics Bank v. Commissioner, 91 F.2d 275, 278 (3d Cir. 1937) (same).

Additional cases suggest that the absence of one or more factors does not foreclose a finding of a joint venture. *See*, *e.g.*, Rodin, 49 F. Supp. 2d at 736 (unequal management responsibilities does not preclude **[*513]** finding joint venture) (quoting 46 Am. Jur. 2d Joint Ventures § 16 (1994) ("[A] joint venture may exist although the parties have unequal control of operations.")). Still other cases consider only some factors but not others. *See* Upper Penns Neck Tp., Salem County v. Lower Penns Neck Tp., Salem County, 20 N.J. Super. 280, 89 A.2d 727, 732 (N.J. Super. Ct. Law Div. 1952) (Joint venture requires an "agreement to enter into an undertaking in the objects or purpose of which the parties to the agreement have a community of interest **[**74]** and a common purpose in its performance.").

After reviewing this inconsistent and sometimes conflicting case law, we think on balance that the relationship between Geneva and Apothecon contains sufficient indicia of a joint venture to satisfy New Jersey law. Despite being styled a "Development and Supply Agreement," it is clear that the contract is more than a standard supply contract and in fact envisions a substantial sharing of resources towards a joint enterprise.

We agree with the district court's point that the potential for losing initial capital investments is not equivalent to shared losses. Nevertheless, such potential loss points to a mutual interest in success since both parties have an investment at stake and each depends on the other to ensure they do not lose that investment. The potential shared loss of investments, while not itself sufficient evidence of a joint venture, still suggests a fiduciary relationship towards each other and supports the finding of a joint venture based on the other evidence.

Next, we consider the facts. We make six points in developing our divergence from the trial court. First, ***HN24***[] a classic element of a joint venture is that there is a **[**75]** limited objective and scope of the venture. The Apothecon/Geneva agreement specifically is limited to the development and distribution of twelve pharmaceutical preparations specified in Appendix A to the agreement. It is also limited in duration, having a fixed term of five years with options for extension.

Second, the contract provides for significant sharing and pooling of resources, skills and knowledge. In sections of the agreement titled "Cooperation" and "Product Development," the contract provides that the parties will share scientific and medical information as well as pre-clinical and clinical data, including "all toxicological, analytical, chemical data and the like." The "Recitals" provisions outline the skills and expertise that each party brings to the arrangement, a consideration not usually relevant to a supply contract.

Third, there is a shared interest, although not strictly speaking shared ownership, over the subject matter of the venture. For example, Apothecon was responsible for funding Geneva's research and development costs in the formulation, testing, and development of the twelve products. Each party had registration and filing responsibilities, Geneva with **[**76]** the FDA and Apothecon with state medicaid agencies. The district court noted that Geneva retained title to the drugs until it sold them to Apothecon, but failed to note that Apothecon purchased the raw materials used to manufacture the drugs. In sum, regardless the state of title to the drugs at any given moment, the agreement envisioned that both parties would be involved in the development of the drugs and both had an ongoing interest in the endeavor.

Fourth, the contract provides for some degree of overlapping control and management over the development. Each party had the right to audit the books and records pertaining to the development and **[*514]** sale of the products. Geneva was required to permit Apothecon's representatives to visit and inspect its facilities at any time. Apothecon had the right to audit Geneva for compliance with the Current Good Manufacturing Practices promulgated by the FDA. Geneva had the right to a quarterly accounting from Apothecon detailing the quantity of goods sold, total receipts, Apothecon's profit and loss on each product, and the inventory on hand. This degree of mutual oversight suggests to us a close relationship.

Fifth, there was a joint expectation **[**77]** of and participation in profits. Geneva was to be paid a percentage of Apothecon's sales of the drugs.

Sixth, plaintiffs presented some evidence that they held themselves out as partners, for example by issuing advertisements and launch packages that showed Apothecon and Geneva as partners. There is also evidence that defendants recognized Geneva and Apothecon were partners. ACIC/Brantford's Sergio Getrajdman for example referred to Apothecon and Geneva as "partners on the product," and Barr's chief operating officer, Paul M. Bisaro, said Barr was aware of "the relationship between Apothecon, Bristol-Myers and Invamed." Signs of a relationship are not always signs of a joint venture, but the evidence is not inconsistent with a finding of a joint venture.

We conclude that these aspects of the venture demonstrate Geneva and Apothecon's mutual intent to engage in a joint endeavor. More broadly, we are convinced that if there were antitrust violations, Apothecon was likely injured by them and should not be barred from seeking redress. While the district court cannot be faulted for reaching a contrary conclusion given the state of the case law, we nevertheless must reverse its ruling **[**78]** that Apothecon lacks standing to sue. We hold instead that Apothecon and Geneva were engaged in a joint venture under New Jersey law and that Apothecon therefore has standing to pursue claims as a plaintiff for injuries to the joint venture.

CONCLUSION

Accordingly, for the foregoing reasons, we (1) reverse the grant of summary judgment dismissing all plaintiffs' claims brought pursuant to the Sherman Act §§ *1* and *2*; (2) affirm the dismissal of the Clayton Act claim; and (3) reverse the ruling that plaintiff Apothecon lacks standing to sue. The case is remanded to the district court for further proceedings consistent with this opinion.

End of Document

Triple 7, Inc. v. Intervet, Inc.

United States District Court for the District of Nebraska

October 19, 2004, Decided

8:04CV8

Reporter

338 F. Supp. 2d 1082 *; 2004 U.S. Dist. LEXIS 20952 **; 2004-2 Trade Cas. (CCH) P74,595

TRIPLE 7, INC., Plaintiff, vs. INTERVET, INC., Defendant.

Disposition: Defendant's motions to dismiss granted in part and denied in part.

Core Terms

antitrust, allegations, promissory estoppel, deceptive trade practices, defense motion, rule-of-reason, veterinary, promise

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

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

HN1[] **Sherman Act, Remedies**

In considering a motion to dismiss a complaint under *Fed. R. Civ. P. 12(b)(6)*, a court must assume all the facts alleged in the complaint are true, and must liberally construe the complaint in the light most favorable to a plaintiff. A *Rule 12(b)(6)* motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. Thus, as a practical matter, a dismissal under *Fed. R. Civ. P. 12(b)(6)* should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Antitrust & Trade Law > Sherman Act > General Overview

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

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN2[] **Antitrust & Trade Law, Sherman Act**

Although courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators, there is no blanket prohibition against dismissal of antitrust claims for failure to state a claim. The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's *Fed. R. Civ. P. 12(b)(6)* motion.

Antitrust & Trade Law > Sherman Act > Claims

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Antitrust Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. To prove a *§ 1* violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. The unreasonableness of a restraint is determined using either a per se standard or a standard that examines all of the circumstances, the so-called rule-of-reason test. Under the per se standard, conduct that is manifestly anticompetitive or would always or almost always tend to restrict competition, is conclusively presumed to restrain competition unreasonably without elaborate inquiry as to the precise harm it has caused or the business excuse for its use. Practices that have been held to be unlawful per se include price fixing, division of markets, group boycotts, and tying arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN4[] **Vertical Restraints, Nonprice Restraints**

For purposes of ***antitrust law***, there is a presumption in favor of a rule-of-reason standard and departure from that standard must be justified by demonstrable economic effect. Moreover, interbrand competition is the primary concern of the antitrust laws. Thus, vertical restraints are generally more defensible than horizontal restraints. Accordingly, vertical nonprice restraints are not per se unlawful restraints of trade. Similarly, vertical maximum price-fixing is not per se unlawful, but should be analyzed under the "rule of reason."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] **Price Fixing & Restraints of Trade, Vertical Restraints**

For purposes of ***antitrust law***, concerted action between competitors at the same level of the market structure is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints.

Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

For purposes of ***antitrust law***, under the rule-of-reason test, the issue is whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. Accordingly, a plaintiff must allege facts that show that a defendant's activities had an impact upon competition in a relevant market. In order to state a viable claim under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, the plaintiff is required to allege facts which, if proven true, would demonstrate that the defendant's agreements with its distributors were likely to result in an anticompetitive effect. The plaintiff cannot make that showing absent allegation of facts demonstrating its power or share in the market.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Remedies**

Under the rule-of-reason standard, a plaintiff's failure to allege a relevant market amounts to a failure to state a claim under *§ 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8[] **Monopolies & Monopolization, Actual Monopolization**

In order to state a claim for monopolization under *§ 2* of the Sherman Antitrust Act, *15 U.S.C.S. § 2*, a plaintiff must allege: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To state an attempted monopolization claim, the plaintiff must establish: (1) that the defendant has engaged in predatory or anticompetitive conduct; with (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power. The plaintiff's failure to allege any facts that show its market power or market share is fatal to a *§ 2* claim.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] **Regulated Practices, Private Actions**

A private plaintiff seeking to state a claim for violation of *§§ 1* or *2* of the Sherman Antitrust Act, *15 U.S.C.S. §§ 1* or *2*, must allege that it has suffered an "antitrust injury." The antitrust injury requirement obligates the plaintiff to demonstrate, as a threshold matter, that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. The antitrust laws were enacted for the protection of competition, not competitors.

Business & Corporate Compliance > ... > Contract Formation > Consideration > Detrimental Reliance

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

Contracts Law > Contract Formation > Consideration > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN10[] **Consideration, Detrimental Reliance**

Promissory estoppel is a situation involving a promise by one party upon which another relies to his detriment, and which the promisor should reasonably have foreseen would cause the promisee to so rely. Under Nebraska law, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. Stated another way, a cause of action for promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.

Business & Corporate Compliance > ... > Contract Formation > Acceptance > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

Business & Corporate Compliance > ... > Contract Formation > Consideration > Promissory Estoppel

HN11[] **Contract Formation, Acceptance**

Promissory estoppel provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. It requires only that reliance be reasonable and foreseeable and does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN12[] **Consumer Protection, Deceptive & Unfair Trade Practices**

The Nebraska Uniform Deceptive Trade Practices Act, *Neb. Rev. Stat. § 87-301 et seq.*, prohibits a broad panoply of deceptive trade practices. However, it does not provide a private right of action for damages. *Neb. Rev. Stat. § 87-303*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN13[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Nebraska's Consumer Protection Act (CPA) mirrors federal law. The CPA is essentially the Nebraska state version of the Sherman Antitrust Act. Although the CPA provides both a private right of action and a public right, disputes that fall within the ambit of the CPA are unfair or deceptive trade practices that affect the public interest.

Counsel: [1]** For Triple 7, Inc., a Nebraksa corporation, Plaintiff: Richard D. Dunn, PANSING, HOGAN LAW FIRM, Omaha, NE.

For Intervet, Inc., a Delaware corporation, Defendant: Laurie A. Novion, Todd W. Ruskamp, SHOOK, HARDY LAW FIRM - KANSAS CITY, Kansas City, MO.; Michael K. Huffer, CASSEM, TIERNEY LAW FIRM, Omaha, NE.

Judges: JOSEPH F. BATAILLON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOSEPH F. BATAILLON

Opinion

[*1084] MEMORANDUM AND ORDER

This matter is before the court on defendant Intervet, Inc.'s motion to dismiss (Filing No. 4). [1] This is an action for breach of contract and for violations of the Sherman Antitrust Act, *15 U.S.C. §§ 1* & *2*, the Nebraska Uniform Deceptive Trade Practices Act, *Neb. Rev. Stat. § 87-301 et seq.*, and the Nebraska Consumer Protection Act, *Neb. Rev. Stat. § 59-1601 et seq.* Plaintiff, a corporation engaged in the business of supplying veterinary services and products, alleges that defendant, a veterinary pharmaceuticals manufacturer, breached an agreement to provide certain rebates in connection with plaintiff's purchase of veterinary pharmaceuticals. Plaintiff further alleges that defendant violated the Sherman Act by "[acting] in concert with **[**2]** certain distributors to disrupt Plaintiff's business by failing to pay the rebates to which Plaintiff is entitled" and alleges that these actions "are preventing Plaintiff from actively engaging in the business of selling veterinary products" and that as a result of defendant's actions "plaintiff's customers and the public in general are not able to obtain veterinary products at a competitive price in western Nebraska."

Defendant asserts that plaintiff's complaint fails to state a claim for relief under the Sherman Antitrust Act, the Nebraska Uniform Deceptive Trade Practices Act and the Nebraska Consumer Protection Act. ***HN1***[] In considering a motion to dismiss a complaint under *Rule 12(b)(6)*, the court must assume all the facts alleged in the complaint are true, and must liberally construe the complaint in the light most **[**3]** favorable to the plaintiff. *Schmedding v. Tnemec Co., 187 F.3d 862, 864 (8th Cir. 1999)*. A *Rule 12(b)(6)* motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Id.* Thus, as a practical matter, a dismissal under *Rule 12(b)(6)* should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Id.* In addition, ***HN2***[] although courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery, because the proof of illegal conduct lies largely in the hands of the alleged antitrust conspirators, there is no blanket prohibition against dismissal of antitrust claims for failure to state a claim. *Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 559 (8th Cir. 1998)*. The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's *Rule 12(b)(6)* motion. *Id. at 558*.

HN3[] *Section 1 of the Sherman Antitrust Act* **[**4]** prohibits "[e]very contract, combination in the form of trust or otherwise, **[*1085]** or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1 (1994)*. To prove a *Section 1* violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058 (8th Cir. 2000)*. The unreasonableness of a restraint is determined using either a *per se* standard or a standard that examines all of the circumstances, the so-called rule-of-reason test. *Id.* Under the *per se* standard, conduct that is "manifestly anticompetitive" or "would always or almost always tend to restrict competition," is conclusively presumed to restrain competition unreasonably "'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.'" *Id.* (quoting *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998))*. Practices that have been held to be unlawful *per se* include price fixing, division of markets, group boycotts, and tying arrangements. *Id.*

HN4[] There **[**5]** is a presumption in favor of a rule-of-reason standard and departure from that standard must be justified by demonstrable economic effect. *See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. Moreover, interbrand competition is the primary concern of the antitrust laws. *Id.* Thus, vertical restraints are generally more defensible than horizontal restraints. [2] *See, e.g., Arizona v.*

[1] Defendant has moved for leave to file the reply brief attached to Filing No. 11. Leave is hereby granted, and the court has considered that reply brief in making its determinations of this motion.

[2] ***HN5***[] Concerted action between competitors at the same level of the market structure is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints. *United States v. Topco Assocs., 405 U.S. 596, 607-08, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*.

Maricopa County Medical Soc., 457 U.S. 332, 348 n.18, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982). Accordingly, vertical nonprice restraints are not *per se* unlawful restraints of trade. *Business Elecs. Corp, 485 U.S. at 726*. Similarly, vertical maximum price-fixing is not *per se* unlawful, but should be analyzed under the "rule of reason." *State Oil Co. v. Khan, 522 U.S. 3, 21, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997)*.

[6]** ***HN6***[] Under the rule-of-reason test, the issue is whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. *Id. at 9*. Accordingly, plaintiff must allege facts that show that the defendant's activities had an impact upon competition in a relevant market. *See Dickson v. Microsoft Corp., 309 F.3d 193, 212 (4th Cir. 2002), cert. denied, 539 U.S. 953, 156 L. Ed. 2d 647, 123 S. Ct. 2605 (2003)*. In order to state a viable *Section 1* claim, a plaintiff is required to allege facts which, if proven true, would demonstrate that defendant's agreements with its distributors were likely to result in an anticompetitive effect. *Id.* A plaintiff cannot make that showing absent allegation of facts demonstrating its power or share in the market. *Id.*

Plaintiff has not pled facts that could amount to a *per se* violation. It essentially alleges only a vertical restraint. The court must thus apply a rule-of-reason analysis. ***HN7***[] Under the rule-of-reason standard, plaintiff's **[**7]** failure to allege a relevant market amounts to a failure to state a *Section 1 Sherman Act* claim. *See id.*

Plaintiff similarly fails to allege facts that would entitle him to relief under *Section 2 of the Sherman Antitrust Act*. ***HN8***[] In **[*1086]** order to state a claim for monopolization under *Section 2 of the Sherman Act*, a plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. To state an attempted monopolization claim, a plaintiff must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. Plaintiff's failure to allege any facts that show its market power or market share is fatal to its *Section 2* claim.

Also, ***HN9***[] a private plaintiff seeking to state a claim for violation of *Sections 1* or *2* of the Sherman **[**8]** Act must allege that it has suffered an "antitrust injury." *See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)*. The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543 (2d Cir. 1993)*. "The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962))*. Plaintiff's complaint contains no allegations of injury to competition. Accordingly, the court finds that plaintiff's complaint fails to state a claim under the Sherman Antitrust Act.

Plaintiff's second claim is for "detrimental reliance." Defendant asserts that in Nebraska, detrimental reliance is a measure for damages under breach of contract, not a separate cause of action. *See Anderson Excavating & Wrecking Co. v. Sanitary Improvement District No. 177, 265 Neb. 61, 67, 654 N.W.2d 376 (2002).* **[**9]** The court finds defendant mischaracterizes the nature of plaintiff's claim. However denominated, the court finds plaintiff's allegations state a claim for relief under the theory of "promissory estoppel." ***HN10***[] Promissory estoppel is a situation involving a promise by one party upon which another relies to his detriment, and which the promisor should reasonably have foreseen would cause the promisee to so rely. *Farmland Service Coop, Inc. v. Klein, 196 Neb. 538, 244 N.W.2d 86, 90 (Neb. 1976)*. Nebraska follows the *Restatement (Second) of Contracts § 90* (1981) with regard to promissory estoppel. *Yankton Production Credit Asso. v. Larsen, 365 N.W.2d 430, 433, 219 Neb. 610 (Neb. 1985)*. The Restatement provides as follows:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) Contracts § 90. "Stated another way, a cause of action for promissory estoppel is based upon a promise which the **[**10]** promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance." *Goff-Hamel v. Obstetricians & Gyns., P.C., 256 Neb. 19, 588 N.W.2d 798 (Neb. 1999)*. *Maxwell, **[*1087]** Inc. v. Kenney Deans, Inc., 1999 Neb. App. LEXIS 271, 1999 WL 731846 (Neb. App. 1999)* (quoting *Rosnick v. Dinsmore, 235 Neb. 738, 457 N.W.2d 793, 799 (Neb. 1990)*. ***HN11***[] Promissory estoppel provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. *Rosnick, 457 N.W.2d at 799*. It requires only that reliance be reasonable and foreseeable and does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. *Hawkins Constr. Co. v. Reiman Corp., 245 Neb. 131, 511 N.W.2d 113, 117 (1994)*. The court finds the plaintiff has adequately alleged promissory estoppel as an alternative theory to its breach of contract claim.

Plaintiff's fourth claim is for violations of the Nebraska Uniform Deceptive Trade Practices Act, *Neb. **[**11]** Rev. Stat. § 87-301 et seq.* ("UDTPA"). ***HN12***[] The UDTPA prohibits a broad panoply of deceptive trade practices. *Id.* However, it does not provide a private right of action for damages. *Neb. Rev. Stat. § 87-303*. Plaintiff does not seek injunctive relief. Accordingly, plaintiff's UDTPA claim will be dismissed.

HN13[] Nebraska's Consumer Protection Act (CPA) mirrors federal law. *Compare* *15 U.S.C. § 45(a)(1)* ("Unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") *with* *Neb. Rev. Stat. § 59-1602* ("Unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."). In the context of plaintiff's allegations, the CPA is essentially the state version of the Sherman Antitrust Act. *See* *State ex rel. Douglas v. Associated Grocers of Nebraska Cooperative, Inc., 214 Neb. 79, 332 N.W.2d 690, 692-93 (Neb. 1983)*. Although the CPA provides both a private right of action and a public right, disputes that fall within the ambit of the CPA are unfair or deceptive trade practices that affect the public interest. *Nelson v. Lusterstone Surfacing Co., 258 Neb. 678, 605 N.W.2d 136 (Neb. Jan. 28, 2000).* **[**12]** Plaintiff has failed to state a claim under the CPA for the same reasons discussed in connection with its Sherman Antitrust Act claim. Plaintiff has not alleged any unfair practices or actions by defendant that affect the public interest. It has not alleged any facts showing that this claim involves anything more than an ordinary breach of contract. In order to state a claim under the CPA, a plaintiff must show aggravating factors indicating that the act in question is more than a mere breach of contract. *See* *Raad v. Wal-mart Stores, Inc. 13 F. Supp. 2d 1003, 1014 (D. Neb. 1998)*. Accordingly,

IT IS HEREBY ORDERED:

1. Defendant's motion to dismiss plaintiff's Sherman Antitrust Act claims is granted. Plaintiff's Sherman Antitrust Act claims are dismissed.

2. Defendant's motion to dismiss plaintiff's UDTPA claim is granted. Plaintiff's UDTPA claim is dismissed.

3. Defendant's motion to dismiss plaintiff's CPA claim is granted. Plaintiff's CPA claim is dismissed.

4. Defendant's motion to dismiss plaintiff's detrimental reliance claim, construed as a promissory estoppel claim, is denied.

Dated this 19th day of October, 2004.

BY THE COURT:

JOSEPH F. BATAILLON

UNITED **[**13]** STATES DISTRICT JUDGE

End of Document

Knowles v. Visa U.S.A.

Superior Court of Maine, Cumberland County

October 20, 2004, Decided

CIVIL ACTION DOCKET NO. CV-03-707

Reporter

2004 Me. Super. LEXIS 227 *; 2004-2 Trade Cas. (CCH) P74,642

CATHERINE J. KNOWLES, et al, Plaintiffs v. VISA U.S.A. INC., et al, Defendants

Prior History: In re Visa Check/MasterMoney Antitrust Litig., 2004 U.S. Dist. LEXIS 8729 (E.D.N.Y., Apr. 27, 2004)

Disposition: **[*1]** Defendants' motion to dismiss complaint for lack of standing granted.

Core Terms

consumers, merchants, antitrust, factors, anti trust law, indirect, debit card, duplicative, damages, retail, class action, plaintiffs', credit card, defendants', purchasers, settlement, courts, overcharge, purposes, apportionment, parties, wording, billion, injunctive relief, issue of standing, motion to dismiss, district court, speculative, decisions, costs

Judges: Thomas D. Warren, Justice.

Opinion by: Thomas D. Warren

Opinion

ORDER

This action is brought by plaintiffs Catherine J. Knowles and Diane Roberts, suing on behalf of themselves and a proposed class of all similarly situated Maine consumers, against defendants Visa U.S.A. Inc. and MasterCard International Inc. alleging violations of Maine's antitrust statutes, 10 M.R.S.A. §§ 1101, 1104 (1996). Before the court is defendants' motion to dismiss on the ground that plaintiffs lack standing for purposes of the antitrust laws.

1. *The Wal-Mart Class Actions*

This action follows on the heels of the settlement of a group of antitrust class actions brought in the U.S. District Court for the Eastern District of New York styled *In re Visa Check/MasterMoney Antitrust Litigation,* No. 96-CV-5238 (JG) (E.D.N.Y.) also known as *Wal-Mart Stores, Inc., et al v. Visa U.S.A. Inc., et al.* (the "*Wal-Mart* class actions")

The *Wal-Mart* class actions were brought by merchants who asserted that they had been harmed by defendants' requirement that merchants had to accept Visa and MasterCard debit cards in order to be allowed **[*2]** to accept Visa and MasterCard credit cards. The merchants alleged that this constituted an illegal tying arrangement in violation of the antitrust laws.

In February 2000 the federal district court granted class certification to a national class consisting of all merchants who accepted Visa or MasterCard credit cards and consequently had been required to accept Visa or MasterCard debit cards. *In re Visa Check/MasterMoney Antitrust Litigation, 192 F.R.D. 68, 90 (E.D.N.Y. 2000)*. In October 2001 the district court's class certification order was affirmed by the *U.S. Court of Appeals for the Second Circuit. 280 F.3d 124 (2d Cir. 2001)*, *cert. denied,* *536 U.S. 917 (2002)*.

On April 11, 2003 the federal district court denied a motion for summary judgment by Visa and MasterCard and granted partial summary judgment to the class plaintiffs on a number of specific issues. *In re Visa Check/MasterMoney Antitrust Litigation, 2003 U.S. Dist. LEXIS 4965, 7-12 (E.D.N.Y. 2003)*. The court concluded, however, that issues of disputed fact remained, *inter alia,* on issues "that lie at the heart of the merchants' [Sherman Act] claims: whether **[*3]** Visa and MasterCard's Honor All Cards rules harmed competition in the debit card services market, and whether the defendants acted together to produce that result." *Id.* at 19.

On April 30, 2003, on the eve of trial, the parties reached a settlement of the *Wal-Mart* class actions. This settlement was ultimately approved by the district court in December 2003. *In re Visa Check/MasterMoney Antitrust Litigation, 297 F. Supp.2d 503 (E.D.N.Y. 2003)*. The settlement involved a payment to the class of more than $ 3 billion plus injunctive relief preventing Visa and MasterCard from tying debit and credit cards in the future. In approving the settlement and awarding $ 220 million in attorneys fees, the district court noted that this constituted "the largest antitrust settlement in history," *297 F. Supp.2d at 508*, and further noted that in addition to the $ 3 billion to be paid in settlement, the injunctive relief that had been agreed to was estimated to result in future savings of $ 25 billion to $ 87 billion. *Id. at 511*. [1]

[*4] 2. *The Consumer Class Actions*

Once the merchants' class had been settled, consumer class actions began to be filed. It is the court's understanding that the case at bar is one of approximately 20 consumer class actions filed against Visa and MasterCard in state courts around the country.

Like their counterparts in other states, Knowles and Roberts allege that the unlawful tying of Visa and MasterCard credit and debit cards harmed consumers because the merchants subjected to the allegedly illegal tying arrangement passed the increased costs on to consumers. Neither the class nor plaintiffs' theory of the case is limited to Maine consumers who actually used Visa or MasterCard debit or credit cards. Instead, plaintiffs' theory is that because merchants had to pay artificially inflated amounts as a result of defendants' unlawful tying agreement, the merchants passed those amounts on to all their customers by increasing the price of *all* retail goods they sold -- regardless of whether payment was made by cash, check, credit card, debit card or otherwise. Thus the proposed class in this case consists of all consumers who purchased any item from any Maine merchant who accepted **[*5]** Visa or MasterCard during the period from December 1999 to December 2003.

Specifically, the class plaintiffs allege that because Visa and MasterCard credit cards are dominant and ubiquitous, acceptance of these cards is critical to the business success of all or most retail merchants. As a result, plaintiffs contend, Visa and MasterCard were able to require that retail merchants accept Visa or MasterCard debit cards if they wanted to accept Visa or MasterCard credit cards, and were able to impose artificially inflated costs and fees upon the merchants, who then passed on those costs to consumers. Complaint PP32, 38-40, 54, 56-58. Plaintiffs allege that Visa and MasterCard were able to set the same fees for their debit cards as for their credit cards even though, in an unrestrained market, debit cards would have commanded lower fees. Complaint PP40, 44. Moreover, according to plaintiffs, the particular kind of debit cards which Visa and MasterCard required merchants to accept

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[1] With respect to the merits, the district court noted that the *Wal-Mart* plaintiffs did not have an open and shut case as to liability. *See* *297 F. Supp. 2d at 511* (plaintiffs' ability to prove that the "honor all cards" rule was anticompetitive was "no sure thing"). This was particularly true in light of the difficult questions of law involved. *See* *297 F. Supp. 2d at 510*, *quoting* Hovencamp, *Tying Arrangements and Class Actions,* *36 Vand.L.Rev. 213, 213 (1983)* to the effect that "few areas of federal ***antitrust law*** are more confusing than the law that governs tying arrangements."

involved a higher level of credit risk for merchants than other kinds of debit cards offered by entities other than Visa and MasterCard. [2] *Id.* P43.

[*6] Plaintiffs further allege that Visa and MasterCard were able to impose a "no discount, no surcharge" policy on retailers. This prevented retailers from either adding a surcharge for the riskier off-line debit cards offered by Visa and MasterCard or giving consumers a discount for paying through a less expensive means, such as cash or an online debit card. Complaint P7.

One of the named plaintiffs in the case at bar, Diane Roberts, is also a plaintiff in a class action brought in the District of Columbia. *Peterson, et al v. Visa U.S.A. Inc., et al.,* Civil Action No. 03-008080 (D.C. Superior Court, filed Dec. 1, 2003). That action includes claims under the laws of the District of Columbia and seventeen states (including Maine) and seeks to have the District of Columbia court certify a multi-state class action on behalf of consumers from Maine and the 16 other states. In the District of Columbia action, plaintiffs are seeking monetary damages and injunctive relief against Visa and MasterCard's "no discount, no surcharge" policy. D.C. Complaint PP187-92. Only monetary damages are sought in the case before this court. [3]

[*7] 3. *The Contentions of the Parties with respect to Standing*

Visa and MasterCard contend that plaintiffs lack standing to pursue their antitrust claims under the rationale of the U.S. Supreme Court's decision in *Associated General Contractors v. California State Counsel of Carpenters, 459 U.S. 519 (1983)*. That decision sets forth various factors to be considered, including the directness of the injury, when determining whether a plaintiff has standing for antitrust purposes. Visa and MasterCard argue that the direct victims of their allegedly unlawful tying scheme (the merchants) have already settled their claims and that an allegation of indirect injury to consumers is insufficient to provide consumers with standing for antitrust purposes.

Plaintiffs have a simple response. They point out that while the U.S. Supreme Court has ruled that under federal ***antitrust law*** only direct victims of anti-competitive practices may sue for treble damages, *Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977)*, Maine and a number of other states have passed legislation rejecting the *Illinois Brick* rule for purposes of their state antitrust laws. Specifically, **[*8]** the Maine legislature amended *10 M.R.S.A. § 1104(1)* in 1989 to provide a private antitrust treble damage remedy for any person injured "directly *or indirectly* in its business or property." *See* Laws 1989, ch. 367 (emphasis added). The legislative history of this provision demonstrates that the legislature intended to allow "indirect purchasers" to sue manufacturers who had engaged in price-fixing. L.D. 1653, 114th Legis., 1st Sess. (1989). Given this so-called *Illinois Brick* repealer, plaintiffs argue, federal precedent limiting standing for antitrust purposes is inapplicable in Maine.

The threshold issue on this motion, therefore, involves the legal effect of Maine's *Illinois Brick* repealer on the issue of antitrust standing.

4. *The Effect of the Illinois Brick Repealer*

In considering a motion to dismiss, the court must accept the allegations in the complaint as true. Given their allegations in this case, plaintiffs' argument on standing is straightforward. They argue that the language of *10 M.R.S.A. § 1104 (1)* as amended by Laws 1989, ch. 367, is unambiguous and expressly permits suits by indirect victims. Under these circumstances, they contend, the court **[*9]** should not go beyond the statutory wording and should conclude that the issue of standing has been legislatively resolved.

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[2] The Visa and MasterCard debit cards complained of by the class plaintiffs are off-line debit cards, as opposed to on-line debit cards offered by other entities.

[3] Because of the pendency of the District of Columbia action, plaintiffs originally sought to have this action stayed to await developments in the District of Columbia. Plaintiffs thereafter withdrew their request for a stay. The court agrees that this case should proceed. There is an undoubted benefit in having Maine courts construe Maine's antitrust laws and determine what relief, if any, should be available to Maine consumers.

In most other contexts, the court would be inclined to agree that the plain wording of the statute would control. However, the court does not agree that it should limit its analysis to the statutory wording in this case for several reasons. First, the U.S. Supreme Court expressly stated that it did not base its ruling in *Illinois Brick* on standing and observed that the issue of standing and the indirect purchaser rule were "analytically distinct." *431 U.S. at 728 n.7*. As a result, the fact that the Maine legislature decided to overrule *Illinois Brick* on the issue of whether indirect purchasers may assert a remedy does not necessarily resolve the issue of standing.

Second, it is well established that the antitrust laws set forth broad general principles and leave the application and elaboration of those principles to the courts. As the U.S. Supreme Court noted in *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88 (1978)*:

> One problem presented by the language of § 1 of the Sherman Act **[*10]** is that is cannot mean what it says ….
> Congress … did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition. [4]

This same language was quoted by the U.S. Supreme Court when it was faced with the task of defining standing for antitrust purposes in *Associated General Contractors. 459 U.S. at 531*.

Thus, the antitrust laws constitute a broad grant of authority to the courts to fashion a common law of antitrust in furtherance of a general principle to prevent anticompetitive restraints of trade. *See, e.g., SAS of Puerto Rico v. Puerto Rico Telephone Co., 48 F.3d 39, 43 (1st Cir. 1995)* **[*11]** ("Despite its statutory framework, ***antitrust law*** is largely the handiwork of federal judges and antitrust enforcers …."). In this context, the rule that a court should not look beyond the wording of a statute does not have its usual force. Although the court must heed the legislature's intent in enacting the *Illinois Brick* repealer, it must recognize that in the particular context of antitrust, statutory wording is only the beginning and not the end of any inquiry.

Notably, when asked at the hearing what standing principles plaintiffs would apply in this case, counsel for plaintiffs directed the court's attention to Justice Brennan's dissent in *Illinois Brick. See* Tr. of June 17, 2004 hearing at 36. In that dissent Justice Brennan conceded that "despite the broad wording of [the statute] there is a point beyond which the wrongdoer should not be held liable." *431 U.S. at 760* (Brennan, J., dissenting). *See id. at 748 n.2*. Although Justice Brennan went on to argue for a liberal rule of standing defined in terms of the "target area" of the violation, *id. at 760-61*, what is important for present purposes is that he did not dispute **[*12]** that some limits have to be placed on the standing of indirect victims. The wording of the statute, therefore, does not resolve the issue of standing.

5. *Standing under Associated General Contractors*

The court is accordingly faced with a choice between the "target area" test for standing espoused by Justice Brennan in *Illinois Brick* and the *Associated General Contractors* test adopted by the U.S. Supreme Court in 1983. As the Supreme Court noted in *Associated General Contractors,* the target area test poses the prospect of "contradictory and inconsistent results." *459 U.S. at 536 n.33*. Moreover, the target area test does not take account of prudential concerns that may significantly affect whether specific plaintiffs are proper parties to enforce the antitrust laws. "Although the law is written broadly, the Superior Court's doctrine of antitrust standing has significantly narrowed the number of persons entitled to bring suit." *RSA Media, Inc. v. AK Media Group, Inc., 260 F.3d 10, 13 (1st Cir. 2001)* (footnote and citations omitted).

Associated General Contractors has remained the template for determining standing under the federal **[*13]** antitrust laws for the past 20 years. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP,*

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[4] The specific statutory language referred to in the above-quoted citation, section 1 of the Sherman Act, is mirrored by *10 M.R.S.A. § 1101*, the provision of Maine ***antitrust law*** which plaintiffs allege Visa and MasterCard violated in this case.

124 S.Ct. 872, 884-85 (2004) (Stevens, J., concurring); RSA Media Inc. v. AK Media Group Inc., 260 F.3d at 13-14. It is probable that the Maine Law Court, if presented with this issue, would look to the *Associated General Contractors* factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent that those factors cannot be reconciled with the legislature's adoption of the *Illinois Brick* repealer.

In *Associated General Contractors,* the U.S. Supreme Court began by observing that standing in an antitrust case is not limited to the requirement of injury in fact but requires a further inquiry to determine whether the plaintiff is a proper party to bring a private antitrust action. 459 U.S. at 535 n. 31. The Court then set forth the following specific factors that must be considered as part of that inquiry:

> (1) the causal connection between the plaintiffs' alleged injury and defendants' claimed violation of the antitrust laws. 459 U.S. at 537. **[*14]**
>
> (2) the alleged improper motive of the defendant. 459 U.S. at 537 and n. 35.
>
> (3) the nature of plaintiffs' alleged injury, including whether it is the type Congress sought to redress in the antitrust laws and whether the plaintiff was a consumer or competitor in the market in which trade was restrained. 459 U.S. at 538-39.
>
> (4) the directness or indirectness of the alleged injury. 459 U.S. at 540.
>
> (5) whether there exists a more immediate class of potential plaintiffs whose self-interest could be expected to motivate them to enforce the antitrust laws. 459 U.S. at 541-42.
>
> (6) whether the damages or injuries claimed are speculative. 459 U.S. at 542-43.
>
> (7) whether the complexity of the case can be kept "within judicially manageable limits", avoiding the risk of duplicative recoveries and the danger of complex apportionment of damages. 459 U.S. at 543-44. [5]

[*15] Looking at these factors in the instant case, it is evident that plaintiffs have adequately pleaded a causal connection and an improper motive. As *Associated General Contractors* demonstrates, however, those factors alone do not confirm standing if they are outweighed by other factors. *See* 459 U.S. at 537.

Inquiry with respect to the nature of the alleged injury presents a somewhat closer case. As noted above, *Associated General Contractors* suggests that one of the subsidiary issues in this inquiry is whether plaintiffs are consumers or competitors in the relevant market. 459 U.S. at 539. The plaintiffs before the court are neither consumers nor competitors in the specific market in which trade was allegedly restrained, which is the market among retail merchants' debit and credit card services. *See* In re Visa Check/MasterMoney Antitrust Litigation, 2003 U.S. Dist. LEXIS 4965, 8-10 (E.D.N.Y. 2003) (relevant market is among merchants, not consumers). Nevertheless, plaintiffs have adequately alleged an injury of the type that Congress sought to redress. *See* Blue Shield of Virginia v. McCready, 457 U.S. 465, 483 (1982). **[*16]** Moreover, Maine's adoption of an *Illinois Brick* repealer further suggests that the court should not deny standing just because plaintiffs are not participants in the actual market where trade was allegedly restrained. This factor weighs in favor of standing.

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[5] There are some minor variations in the manner in which courts have summarized the factors set forth in *Associated General Contractors.* The above represents this court's own distillation of those factors.

In light of Maine's *Illinois Brick* repealer, the next factor -- directness or remoteness of the asserted injury -- should be disregarded entirely in any inquiry as to standing under Maine's antitrust laws.

The remaining factors are whether there exist more immediate plaintiffs, whether the damages or the injuries are speculative, whether there is a danger of duplicative recoveries, and whether there is a need for complex apportionment. *See* *459 U.S. at 541-44*. These factors are the prudential concerns that have caused federal courts to limit the right of private parties to sue even when a violation exists and the plaintiff has been damaged. *See* *SAS of Puerto Rico v. Puerto Rico Telephone Co., 48 F.3d at 43*. In the court's view, all these factors weigh against standing in this case.

First, there is indisputably a more immediate class of potential plaintiffs motivated to enforce the antitrust **[*17]** laws in this case -- namely, the merchants who have already sued and obtained a settlement of more than $ 3 billion as well as injunctive relief putting an end to the allegedly illegal tying arrangement. *See* *297 F. Supp.2d 503*. This injunctive relief benefits consumers as well as merchants and puts to rest any concern that unless remote plaintiffs are allowed to sue, the antitrust laws will remain unenforced in this case. *See* *Associated General Contractors, 459 U.S. at 542*; *SAS of Puerto Rico,* 147 F.3d at 45. In contrast, if this case presented a situation where potential antitrust violations would remain unredressed unless the parties bringing suit were found to have standing, the case for standing would be immeasurably improved.

Second, both the asserted damages and the chain of causation in this case are speculative. Plaintiffs' contention is that merchants subjected to overcharges as a result of defendants' illegal tying arrangement passed those overcharges on to consumers. To determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental **[*18]** uncertainty and complexity. Depending on their other costs, their competitive position in the market, their profit margins, and the specific products they sold, some merchants could have absorbed a substantial portion of any overcharge instead of passing it on. To a significant extent, whether an overcharge was passed on would depend on the elasticity of demand in the various product markets in which the merchant sells. [6]

In this case, where plaintiffs are alleging that retailers raised **[*19]** prices generally and that plaintiffs therefore paid overcharges on every single purchase, *see* Complaint PP7, 46-47, 58, 66, the extent to which damages were incurred by the class would depend on the specific elasticity of demand for any given product sold at retail in the State of Maine by any retailer who accepted Visa or MasterCard credit cards -- essentially every product of any kind sold to anyone in the State. While this might be a manageable inquiry if only one product were involved, the complexity of inquiry is geometrically increased when all of the different pricing variables applicable to each and every retail product sold in the state must be considered. For any given consumer, the issue is even more complicated and speculative because the inquiry would involve what items that particular consumer purchased, what that consumer paid for each item, and what percentage of overcharge, if any, was contained in that price.

For example, if plaintiff Diane Roberts purchased a number of items at a Shaw's Supermarket on a specific date during the relevant time period and paid $ 2.49 for a carton of orange juice, her right to damages would depend on what portion of that $ 2.49 **[*20]** was attributable to defendants' alleged restraint of trade with respect in providing debit card services to Shaws -- as opposed to such factors as competitive pricing by other supermarkets, the wholesale cost of orange juice, labor costs and other overhead, the elasticity of demand for orange juice, and strategic pricing decisions made by Shaw's. [7] Moreover, the same issues would arise for every other item in Ms. Roberts' grocery cart and for every other item that she purchased from any other retailer that day. This process would then need to be repeated for every single day of the alleged four-year damages period.

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[6] *See, e.g.,* *Illinois Brick Co. v. Illinois, 431 U.S. at 750 n.3* (Brennan, J, dissenting) ("If the market is relatively inelastic, he may pass on a relatively large portion [of any overcharge]. If demand is relatively elastic, he may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume. It is extremely unlikely that a middleman could pass on the entire cost increase. But rarely would he have to absorb the entire increase.").

[7] This is a modified version of an example offered by defendants in their memorandum of law.

It might be argued that such an inquiry is not necessary for each consumer because relief can be afforded on a generalized basis once the damage to the class has been determined. But even if no inquiry were required as to the specific damages incurred by each consumer, determination of the damage incurred **[*21]** by the class as a whole would require determining what portion of any overcharge had been passed on to consumers with respect to every item sold in Maine over a four year period by every supermarket, every large retailer, every gas station, every restaurant, and every other merchant that accepted Visa or MasterCard. To say that such an inquiry would be highly speculative and problematic is an understatement.

The remaining *Associated General Contractors* factors are the danger of duplicative recovery and the problem of complex apportionment. Duplicative recovery is a major issue in this case in light of the more than $ 3 billion already recovered by the merchants in settlement of the *Wal-Mart* class actions. If double recovery is to be avoided, a complex apportionment between the damages already recovered by merchants and the damage recoverable by the class will be necessary. As noted above, there would also be a complex apportionment necessary to determine the relief that should be afforded to individual class members. Both those issues have a significant effect on the ability of this case to be kept within "judicially manageable limits." *Associated General Contractors,* 459 U.S. at 741. **[*22]**

Plaintiffs argue that in light of the *Illinois Brick* repealer, the court should conclude that the Maine legislature has expressly authorized duplicative recoveries and this factor should therefore not be weighed against them on the issue of standing. The court does not agree. The 1989 amendment to *10 M.R.S.A. § 1104* expressly authorizes indirect purchasers to sue but it does not expressly authorize duplicative recoveries. One of the major arguments for allowing indirect purchasers to sue is that in many cases the direct victims of a restraint of trade are reluctant to bring suit and antitrust violations would therefore otherwise go unremedied. Although this rationale justifies eliminating the *Illinois Brick* bar against suits by indirect purchasers, it does not answer the question of what should happen when the direct victims have in fact already brought suit.

The most forceful opponent of the *Illinois Brick* ruling -- Justice Brennan -- believed that double recovery was only a theoretical possibility. Thus in his *Illinois Brick* dissent, he expressed the view that while arguments based on the potential dangers of double recovery had "some abstract merit", those concerns **[*23]** were unrealistic "as a practical matter." *431 U.S. at 761*. *See* *id. at 762-64*. To the extent those concerns actually materialized, however, Justice Brennan's dissent makes it clear that he contemplated that duplicative recoveries should be prevented and that apportionment between the direct and indirect victims could and should be made. *See* *431 U.S. at 761-63*. He specifically approved the Ninth Circuit's discussion of the procedural mechanisms available to prevent duplicative recovery in *In re Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973)*, *cert. denied, 415 U.S. 919 (1974)*, and he noted that those mechanisms could be used to require antitrust plaintiffs to litigate among themselves "their appropriate shares of the total recovery" in the event that a problem of double recovery was actually presented. *431 U.S. at 763*. Thus, if the dissenters had prevailed in *Illinois Brick,* indirect victims would be able to sue but would not necessarily be entitled to subject defendants to duplicative recoveries.

Other states that have enacted *Illinois Brick* repealers have provided **[*24]** statutory mechanisms to deal with the problem of duplicative recoveries, in some cases expressly authorizing their courts to take appropriate steps to avoid such recoveries. *See* *Bunkers Glass Co. v. Pilkington PLC, 75 P.3d 99, 108 (Ariz. 2003)*; *Ciardi v. F. Hoffman-LaRoche Ltd., 762 N.E.2d 303, 321 (Mass. 2002)* (Sosman, J., dissenting). While the treatment of potential duplicative recovery when direct and indirect antitrust victims have both brought suit is an unresolved issue under Maine law, the guidance from Justice Brennan's *Illinois Brick* dissent is that duplicative recovery should at least be prevented to the extent possible. In the court's view, the danger of duplicative recovery and the complex apportionment that may be necessary to avoid such recovery are legitimate factors that must be considered for purposes of antitrust standing. These factors, like the other prudential considerations discussed above, weigh against the standing of the plaintiffs in this case.

In the final analysis, the court has weighed the *Associated General Contractors* factors and has concluded that notwithstanding Maine's enactment of an *Illinois Brick* repealer, **[*25]** the factors that militate against standing outweigh those in favor of standing. Accordingly, defendants' motion to dismiss for lack of standing is granted.

In light of its decision that plaintiffs lack standing under *Associated General Contractors* the court does not have to reach defendants' alternative argument that even if plaintiffs have standing, *10 M.R.S.A. § 1104* is only intended to create a remedy for "indirect purchasers" and that the class members here are not indirect purchasers of debit card services. Nor does it have to consider plaintiffs' response that if defendants are correct as to their indirect purchaser argument, plaintiffs should be allowed to redefine their proposed class to consumers who made purchases with a Visa or MasterCard debit card. [8]

[*26] The entry shall be:

Defendants' motion to dismiss the complaint for lack of standing is granted. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: October 20, 2004

Thomas D. Warren

Justice, Superior Court

Since the court heard oral argument on defendants' motion to dismiss and took that motion under advisement, counsel for defendants have sent a number of letters to the court submitting various decisions from other state trial courts. Plaintiffs' counsel have not objected to any of these submissions. On October 15, 2004 plaintiffs' counsel filed a motion for leave to submit supplemental authorities, enclosing materials from pending cases in New Mexico and Minnesota. Defendants do not object to this motion but have submitted a response commenting on plaintiffs' submissions.

Plaintiffs' motion for leave to submit supplemental authorities is granted. For the record, the court's view is that parties should be permitted to submit copies of decisions from other courts that they contend are relevant to the issues pending before this court. However, to avoid any perceived need for responsive filings, all parties submitting **[*27]** decisions from other courts should limit themselves to directing the court's attention to the portions of the decisions that they contend are relevant and should refrain from any argument or commentary on the import of those decisions.

October 20, 2004

Thomas D. Warren

Justice, Superior Court

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[8] As of the writing of this decision, the court is aware that seven other state trial courts have dismissed consumer antitrust claims brought against Visa and MasterCard based on allegations similar to those asserted in this case. *Tackitt v. Visa U.S.A. Inc.,* No. C103-740, Nebraska District Court, Lincoln County, order filed October 19, 2004; *In re Credit/Debit Card Tying Cases,* J.C.C.P. No. 4355, California Superior Court, San Francisco County; order filed October 14, 2004; *Cornelison v. Visa U.S.A. Inc.,* Civil No. 03-1350, South Dakota Circuit Court, Pennington County, order filed September 29, 2004; *Gutzwiller v. Visa U.S.A. Inc.,* No C4-04-58, Minnesota District Court, Clay County, order filed September 15, 2004; *Beckler v. Visa U.S.A. Inc.,* Civil No. 09-04-C-00030, North Dakota District Court, Cass County, opinion filed August 23, 2004; *Stark v. Visa U.S.A. Inc.,* No. 03-055030-CZ, Michigan Circuit Court, Oakland County, opinion and order filed July 23, 2004; *Ho v. Visa U.S.A. Inc.,* No. 1123166/00, New York Supreme Court, New York County, order filed April 26, 2004. All of the states in question, like Maine, have enacted *Illinois Brick* repealers. Some of these decisions have been based on standing, others have been based on the view that the consumers bringing suit did not qualify as indirect purchasers, and some have been based on both grounds.

Plaintiffs have also directed the court's attention to a preliminary ruling by a trial court in New Mexico expressing the view that the *Associated General Contractors* test per se is not applicable in New Mexico but that some of the *Associated General Contractors* factors may nevertheless be relevant to standing under the New Mexico antitrust statute. *Nass-Romero v. Visa U.S.A. Inc.,* No. D0101-CV-200400413, New Mexico District Court, Santa Fe County, transcript of proceedings on September 17, 2004. The New Mexico court invited further briefing on the issue.

Doe v. Abbott Labs.

United States District Court for the Northern District of California

October 21, 2004, Decided ; October 21, 2004, Filed

No. C 04-1511 CW

Reporter

2004 U.S. Dist. LEXIS 29129 *; 2004 WL 3639688

JOHN DOE 1 and JOHN DOE 2, on Behalf of Themselves and All Other Persons Similarly Situated, Plaintiffs, v. ABBOTT LABORATORIES, Defendant.

Subsequent History: Related proceeding at *SEIU Health & Welfare Fund v. Abbott Labs., 2005 U.S. Dist. LEXIS 46123 (N.D. Cal., Mar. 2, 2005)*

Motions ruled upon by *In re Abbott Labs. Norvir Anti-Trust Litig., 2005 U.S. Dist. LEXIS 24238 (N.D. Cal., Sept. 12, 2005)*

Related proceeding at *Meijer, Inc. v. Abbott Labs., 544 F. Supp. 2d 995, 2008 U.S. Dist. LEXIS 31816 (N.D. Cal., Apr. 11, 2008)*

Motion denied by *In re Abbott Labs., 2008 U.S. Dist. LEXIS 138642 (N.D. Cal., July 8, 2008)*

Reversed by *Doe v. Abbott Labs., 571 F.3d 930, 2009 U.S. App. LEXIS 14841 (9th Cir. Cal., July 7, 2009)*

Core Terms

boosted, Sherman Act, argues, patents, monopoly, monopolization, booster, unfair, essential element, anti trust law, amended complaint, class action, anticompetitive, competitors', antitrust, business practice, unjust enrichment, increased price, relevant market, side effect, injunctive, prescribed

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] Complaints, Requirements for Complaint

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*. Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. *Fed. R. Civ. P. 8(e)*. These rules do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.

Antitrust & Trade Law > Sherman Act > Defenses

HN3[] Sherman Act, Defenses

The possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] Sherman Act, Claims

A monopolist who acquires a dominant position in one market through patents and copyrights may violate § 2 of the Sherman Act if the monopolist exploits that dominant position to enhance a monopoly in another market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Monopolies & Monopolization, Actual Monopolization

Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

In order to assert standing in an antitrust case, a party must allege antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Antitrust injury requires (1) unlawful conduct, (2) causing injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. In addition, a party must satisfy a fifth element: the injured party must be a participant in the same market as the alleged violator. The party must either be a consumer of the alleged violator's goods or services or otherwise be a competitor in the relevant market.

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

Antitrust & Trade Law > Sherman Act > Claims

HN7[] **Actual Monopolization, Claims**

In order to plead a monopolization claim under § 2 of the Sherman Act, a party must allege three essential elements: (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury.

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

HN8[] **Attempts to Monopolize, Sherman Act**

To plead an attempted monopolization claim under § 2 of the Sherman Act, a party must allege (1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.

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

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Actual Monopolization, Claims**

Regarding a monopolization claim under § 2 of the Sherman Act, courts generally require a 65 percent market share to make a prima facie showing of market power.

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

HN10[] **Attempts to Monopolize, Sherman Act**

Addressing the interrelatedness of the attempted monopolization elements, the United States Court of Appeals for the Ninth Circuit has ruled that a dangerous probability of success under the last element may be inferred from conduct that could support an inference of intent or from direct evidence of specific intent plus proof of conduct directed toward accomplishing the unlawful goal.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN11[] **Trade Practices & Unfair Competition, State Regulation**

Under *Cal. Bus. and Prof. Code § 17200*, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice. The unfair competition law embraces anything that can properly be called a business practice and that at the same time is forbidden by law. In other words, *§ 17200 et seq.* "borrows" violations from other laws and makes them independently actionable as unfair business practices.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN12[] **State Regulation, Claims**

Pleading that a defendant's business activity was unlawful is all that *Cal. Bus. and Prof. Code § 17200* requires.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN13[] **Types of Contracts, Quasi Contracts**

The United States Court of Appeals for the Ninth Circuit has applied a three-pronged test for unjust enrichment: (1) a benefit conferred upon the defendant, (2) the defendant's appreciation or knowledge of the benefit, and (3) retention of the benefit under such circumstances as to make the retention inequitable.

Counsel: [*1] For John Doe 1, John Doe 2, on Behalf of Themselves & All Other Persons Similarly Situated, Plaintiffs: Sharon T. Maier, Christopher T. Heffelfinger, Joseph J. Tabacco, Jr., Michael Walter Stocker, Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA; Kristin Janet Madigan, Quinn Emanuel Urquhart Oliver & Hedges, San Francisco, CA.

For Service Employees International Union Health and Welfare Fund, Consol Plaintiff: Michael Walter Stocker, Bernard Persky, Craig L. Briskin, Hollis L. Salzman, Labaton Rudoff & Sucharow LLP, New York, NY; Dan Drachler, Seattle, WA; David S. Nalven, Hagens Berman LLP, Cambridge, MA; Joseph Lipofsky, Zwerling Schachter & Zwerling, LLP, New York, NY; Steve W. Berman, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Elaine T. Byszewski, Hagens Berman LLP, Los Angeles, CA.

For Abbott Laboratories, Defendant: Gail Susan Greenwood, Michael Adam Sweet, Michael Kip Maly, Thomas C. Mavrakakis, Winston & Strawn LLP, San Francisco, CA; David J. Doyle, George C. Lombardi, James F. Hurst, Samuel S. Park, Winston & Strawn LLP, Chicago, IL.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER DENYING DEFENDANT'S MOTION TO **[*2]** DISMISS FIRST AMENDED CLASS ACTION COMPLAINT

Defendant Abbott Laboratories moves to dismiss Plaintiffs' first amended class action complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. Plaintiffs oppose the motion. This matter was heard on September 17, 2004. Having considered all of the papers filed by the parties and oral argument on this motion, the Court DENIES Defendant's motion to dismiss Plaintiffs' first amended class action complaint.

BACKGROUND

Plaintiffs' first amended class action complaint alleges as follows. Defendant is a pharmaceutical company that has participated in HIV research since the early days of the AIDS epidemic. Defendant is one of several companies currently manufacturing protease inhibitors (PIs), considered the most potent class of drugs to combat the HIV virus. Plaintiffs bring this action on their own behalf and as representatives of all similarly situated individuals who purchased Norvir, a PI manufactured and sold by Defendant, from December 3, 2003 to the present.

Defendant originally developed Norvir for use as a stand-alone PI, but quickly discovered that the drug had serious side effects when **[*3]** used in large dosages. However, when Norvir is prescribed in smaller dosages along with other PIs, it both "boosts" the antiviral effect of those PIs and reduces their harmful side effects. There is no other drug that "boosts" PIs the way Norvir does, and all but one PI currently prescribed for HIV treatment benefit from the use of Norvir as a booster. Norvir thus affects two distinct markets: the "booster market," which Norvir alone constitutes, and the "boosted market," which consists of those PIs that are prescribed for use with Norvir as a booster.

In September, 2000, Defendant introduced its own boosted PI regimen: Kaletra. Kaletra, which comes in the form of a pill that contains both Defendant's PI lopinavir and Norvir, causes significant and harmful side effects. Nevertheless, by June, 2003, Kaletra had secured a seventy-five percent share of the boosted market. In June, 2003, Bristol-Meyers Squib introduced Reyataz, a competing PI that is boosted by Norvir. In October, 2003, GlaxoSmithKline introduced Lexiva, another PI capable of being boosted by Norvir. Kaletra prescriptions began to decrease as HIV patients switched to boosted regimens that result in less harmful side effects **[*4]** than does Kaletra.

On December 3, 2003, just five weeks after Lexiva entered the boosted market, Defendant increased the wholesale price of Norvir by 478 percent. In doing so, Defendant significantly raised the cost of using all PIs in the boosted market -- the increase in annual cost for using Lexiva was over $ 6,200 -- but did not pass along the same Norvir price increase to its own Kaletra. As a result, the cost of Kaletra overnight became substantially cheaper than the cost of using all other PIs in conjunction with Norvir. Plaintiffs allege that the December 3, 2003 Norvir price increase constitutes an illegal attempt to achieve an anticompetitive purpose in the boosted market.

Plaintiffs filed their first amended class action complaint on June 10, 2004, alleging (1) violations of *section 2* of the Sherman Act, (2) fraudulent, unfair or deceptive business practices under *California Business and Professions Code section 17200, et seq.*, and (3) unjust enrichment.

LEGAL STANDARD

HN1[] A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; **[*5]** *Fidelity Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1435 (9th Cir. 1986)*. All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999)*.

HN2[] A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." *Fed. R. Civ. P. 8(e)*. These rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." *Conley, 355 U.S. at 47*.

DISCUSSION

I. Defendant's Liability Under ***Antitrust Law***

Defendant argues that it has a complete defense to every count in Plaintiffs' amended complaint because **[*6]** Defendant owns patents on Norvir and its use as a booster. However, it is "well settled that ***HN3***[] the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United States v. Singer Mgmt. Co., 374 U.S. 174, 196-97, 83 S. Ct. 1773, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547 (1963)*.

Defendant does not dispute this settled law, and concedes that ***antitrust law*** is implicated when a patent owner extends its monopoly beyond the scope of the patent. However, Defendant argues that Plaintiffs fail to allege that Defendant has engaged in unlawful activity outside of the scope of its patent rights. In support of this argument, Defendant urges the Court to take judicial notice of two patents that purportedly cover Norvir and its use as a booster. [1] However, in addition to the fact that Plaintiffs neither refer to nor rely upon Defendant's patents in the amended complaint, Defendant does not argue that the patents cover anything other than Norvir and its use as a booster. Even when directly addressing the boosted market, Defendant argues only that the Norvir patents cover "a method for improving the pharmacokinetics of protease inhibitors. **[*7]** " Def.'s Reply Br. at 5.

Plaintiffs concede that Defendant owns a monopoly in the booster market. Plaintiffs define the booster market as the market for Norvir and its use as a boosting agent. Plaintiffs' contention is that Defendant's actions constitute illegal anticompetitive activity in the boosted market, which Plaintiffs define as the market for PIs that are prescribed together with Norvir as a booster. Defendant does not argue that its Norvir patents cover the market for PIs that are prescribed along with Norvir. In fact, Defendant acknowledges in its moving papers that there are at least seven competing PIs in the boosted market.

Plaintiffs' complaint alleges that Defendant has used its monopoly in one market (the booster market) in order to achieve an anticompetitive purpose in a separate market **[*8]** (the boosted market). In *Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997)*, the court noted that ***HN4***[] "a monopolist who acquires a dominant position in one market through patents and copyrights may violate *§ 2* if the monopolist exploits that dominant position to enhance a monopoly in another market." In *Image Technical*, the court ruled that Kodak violated the Sherman Act when it used its monopoly over Kodak parts, many of which Kodak had patented, in order to gain a monopoly over the service of Kodak equipment. *Id. at 1215-16*. The court demanded that Kodak sell its parts to independent service organizations that serviced Kodak equipment, holding, ***HN5***[] "Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." *Id. at 1219*. The successful "monopoly leveraging theory" relied upon by the plaintiffs in *Image Technical, Id. at 1208*, is the theory Plaintiffs assert in their amended complaint to trigger Sherman Act liability.

II. Plaintiffs' Standing to Sue Under the Sherman Act

[*9] A. Damages Under the Sherman Act

Defendant argues that Plaintiffs lack standing to seek damages under the Sherman Act because Plaintiffs are not direct purchasers. In their amended complaint, Plaintiffs seek judgment pursuant to *15 United States Code section 15*; however, in their opposition to this motion Plaintiffs state that they are seeking only injunctive relief under the Sherman Act. Because Plaintiffs do not contest Defendant's argument on this issue and now profess to seek only injunctive relief under the Sherman Act, the Court rules that Plaintiffs lack standing to recover money damages under their Sherman Act claims.

B. Injunctive Relief Under the Sherman Act

Defendant argues that Plaintiffs lack standing to seek an injunction under the Sherman Act because Plaintiffs fail to allege an injury that bears a causal relationship to the alleged antitrust violation. ***HN6***[] In order to assert standing in an antitrust case, a party must allege "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).* **[*10]** Antitrust injury requires "(1) unlawful conduct, (2) causing injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)*. In addition, a party must satisfy a fifth element: the injured party must be a participant in the same market as the alleged violator. The party must either be a consumer of the alleged violator's goods or services or otherwise be a competitor in the relevant market. *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)*.

[1] Defendant requests that the Court take judicial notice of U.S Patent No. 6,037,157 (the 157 patent) and U.S. Patent No. 5,886,036 (the036 patent). The Court takes judicial notice of the existen these patents.

Here, Defendant argues that Plaintiffs have not satisfied the *American Ad* test because Plaintiffs have not alleged an injury caused by, or that "flows from," loss of competition in the boosted market. Defendant argues that, in fact, while Plaintiffs complain of having to pay higher prices for Norvir as a result of the price increase, Defendant's own drug in the boosted market, Kaletra, is actually less expensive than the competitors' PIs. Defendant argues that having to pay less money does not give rise to a **[*11]** legally cognizable injury.

In order to demonstrate that they have suffered a cognizable injury as a result of Defendant's allegedly unlawful activity in the boosted market, Plaintiffs rely on *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*. In *McCready*, a consumer plaintiff alleged that her group health plan conspired with, among others, a group of neuropsychiatric physicians to restrain competition in the psychotherapy market. The health plan reimbursed its members for psychotherapy treatment administered by psychiatrists, but refused to provide reimbursement for treatment given by psychologists. According to the *McCready* Court, this practice amounted to forcing subscribers into a Hobson's choice between forfeiting reimbursement by visiting a psychologist or receiving reimbursement by foregoing treatment by the practitioner of their choice. *Id. at 483*. The Court ruled that the plaintiff had standing under the Sherman Act because "the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id. at 484*.

Plaintiffs allege a similar **[*12]** and analogous injury here. They argue that the Hobson's choice into which they have been forced -- paying more for competing boosted regimens versus paying less for Defendant's Kaletra while accepting the drug's harmful side effects -- is intertwined with the injury that Defendant sought to inflict on its competitors and on the boosted PI market. Plaintiff's injury is distinguishable from the injuries complained of in *Brunswick* and *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*, relied upon by Defendant. In *Brunswick, 429 U.S. at 484*, the injury complained of was lost profits resulting from *increased* competition, and in *Cargill, 479 U.S. at 113*, the injury was alleged to have arisen from a *decrease* in prices in the relevant market. Neither injury is of the type the antitrust laws were intended to prevent, and neither fact scenario is relevant here. Plaintiffs have standing to seek injunctive relief under the Sherman Act.

III. Essential Elements of *Section 2* of the Sherman Act

Defendant argues that Plaintiffs have failed to plead all of the essential elements of their Sherman Act claims. Plaintiffs **[*13]** argue both monopolization and attempted monopolization theories under *section 2*. ***HN7***[] In order to plead a monopolization claim, a party must allege three essential elements: "(1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of that power, and (3) causal antitrust injury."' *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)*. ***HN8***[] To plead an attempted monopolization claim, a party must allege "(1) specific intent to control prices or destroy competition in the relevant market, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success." *Id.*

A. Monopolization

Defendant argues that Plaintiffs have not plead all essential elements of a monopolization claim because Plaintiffs have failed to demonstrate that Defendant possesses a monopoly power in the boosted market. ***HN9***[] Courts generally require a sixty-five percent market share to make a prima facie showing of market power. *Image Technical, 125 F.3d at 1206*. Here, Plaintiffs allege that Defendant had a seventy-five percent market share in June, 2003. Plaintiffs do acknowledge **[*14]** that Defendant's share of *new* PI prescriptions began a precipitous decline following the introduction of competitors' PIs into the boosted market and that those competing PIs began to make inroads into Kaletra's market share. However, Plaintiffs allege that Defendant's December 3, 2003 Norvir price increase was enacted in order to "*maintain* its dominant position in the Boosted Market." Pl.'s Compl. P 19 (emphasis added). Plaintiffs make a specific factual allegation that Defendant had a dominant share of the boosted market in June, 2003, and further allege that Defendant continued to maintain that dominant share six months later when the allegedly illegal activity took place. Plaintiffs have adequately plead Defendant's possession of monopoly power in the relevant market, and have adequately plead all essential elements of a monopolization claim.

B. Attempted Monopolization

Defendant argues that Plaintiffs have not adequately plead all essential elements of an attempted monopolization claim because Plaintiffs have not alleged that there is a dangerous probability that Defendant will achieve monopoly power in the boosted market. ***HN10***[] Addressing the interrelatedness of the attempted **[*15]** monopolization elements, the Ninth Circuit has ruled, "A dangerous probability of success under the last element may . . . be inferred from conduct that could support an inference of intent or from direct evidence of specific intent plus proof of conduct directed toward accomplishing the unlawful goal." *Thurman Indus., Inc. v. Pay N Pak Stores, Inc., 875 F.2d 1369, 1378 (9th Cir. 1989)*. Plaintiffs allege that Defendant seeks illegal anticompetitive goals in the boosted market. Plaintiffs further allege that Defendant, by raising the price of Norvir by 478 percent for every PI in the boosted market except its own, threatens to undercut competing PIs and to discourage competitors from developing new PIs in the future. Plaintiffs have therefore alleged both intent and conduct directed toward achieving the unlawful goal. Plaintiffs have adequately plead all essential elements of an attempted monopolization claim under *section 2* of the Sherman Act.

IV. Unfair Competition

Defendant argues that Plaintiffs' cause of action under *California Business and Professions Code section 17200 et seq.* should be dismissed because Plaintiffs have **[*16]** failed to allege that Defendant's business practices are unlawful, unfair or fraudulent. ***HN11***[] Under *section 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. The unfair competition law "embraces anything that can properly be called a business practice and that at the same time is forbidden by law." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1135, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (Cal. 2003)*. In other words, *section 17200 et seq.* "borrows" violations from other laws and makes them independently actionable as unfair business practices. *Id.*

Here, Defendant argues that because Plaintiffs have failed to allege any actionable violation under the Sherman Act, there is nothing to "borrow" under *section 17200 et seq.* However, the converse of Defendant's argument is also true. If Plaintiffs have adequately plead their Sherman Act claims, *section 17200 et seq.* is triggered because the underlying unlawful activity is properly alleged. Because the Court rules that Plaintiffs have adequately plead their Sherman Act claims, the Court will not dismiss Plaintiffs' **[*17]** unfair competition claim.

Defendant argues correctly that Plaintiffs have failed to allege that Defendant's business practices were fraudulent in any way. Plaintiffs' complaint does not allege any facts that could support a fraud claim. Plaintiffs do allege in their opposition papers that Defendant's claim that Norvir's daily cost is lower than that of competitors' PIs is misleading, but that allegation was not made in Plaintiffs' amended complaint. Plaintiffs' amended complaint does not mention any claim made by Defendant relating to Norvir's cost. However, this is immaterial because Plaintiffs have adequately ***HN12***[] plead that Defendant's business activity was unlawful, and that is all that *section 17200* requires.

V. Unjust Enrichment

Defendant argues that Plaintiffs' unjust enrichment claim should be dismissed because it rests on Plaintiffs' faulty allegations that Defendant violated federal antitrust laws. However, the Court rules that Plaintiffs have adequately plead their federal antitrust claims.

HN13[] The Ninth Circuit recently applied a three-pronged test for unjust enrichment: (1) a benefit conferred upon the defendant, (2) the defendant's appreciation or knowledge of the benefit, **[*18]** and (3) retention of the benefit under such circumstances as to make the retention inequitable. *United States for Use & Benefit of Walton Tech., Inc. v. Weststar Eng'g, Inc., 290 F.3d 1199, 1204 (9th Cir. 2002)*. Here, Plaintiffs allege that Defendant knowingly benefitted in the boosted market from its Norvir price increase, and that it would be unfair to allow Defendant to retain that benefit. Plaintiffs have adequately plead their cause of action for common law unjust enrichment.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiffs' first amended class action complaint is DENIED.

IT IS SO ORDERED.

Dated: October 21, 2004

CLAUDIA WILKEN

United States District Judge

Fabri v. United Techs. Int'l, Inc.

United States Court of Appeals for the Second Circuit

April 1, 2004, Argued ; October 21, 2004, Decided

Docket Nos. 03-7090 (L); 03-7249 (XAP)

Reporter

387 F.3d 109 *; 2004 U.S. App. LEXIS 21943 **; 59 Fed. R. Serv. 3d (Callaghan) 1192

JUAN F. FABRI, SR., and JUAN F. FABRI, JR., d/b/a Juan F. Fabri, Plaintiffs-Intervenor-Defendants-Appellees-Cross-Appellants, v. UNITED TECHNOLOGIES INTERNATIONAL, INC., UNITED TECHNOLOGIES CORPORATION and SIKORSKY AIRCRAFT CORPORATION, Defendants-Appellants-Cross-Appellees, BOGLE & GATES, PLLC, Intervenor-Plaintiffs.

Subsequent History: As Amended, November 18, 2004.

Prior History: **[**1]** Appeal and cross-appeal from a judgment of the United States District Court for the District of Connecticut. (Peter C. Dorsey, Judge).

Fabri v. United Techs. Int'l, Inc., 193 F. Supp. 2d 480, 2002 U.S. Dist. LEXIS 6610 (D. Conn., 2002)

Disposition: Affirmed in part, vacated and remanded in part.

Core Terms

district court, defendants', award of punitive damages, good faith, plaintiffs', punitive damages, attorney's fees, unfair, contract claim, fundamental error, unjust enrichment, reduction, terminate, fair dealing, helicopter, hourly rate, prevail, compensatory damages, quantum meruit, trial court, common law, warranties, expenses, damages, factors, sheet, sufficiency of evidence, breach of contract, common law claim, contracts

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Standards of Review, De Novo Review**

A district court's denial of a *Fed. R. Civ. P. 50(b)* motion is reviewed de novo. The district court can grant the motion only if after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, it finds that there is insufficient evidence to support the verdict. The district court cannot set aside the jury's credibility findings and cannot find for the movant based on evidence the jury was entitled to discredit. Federal appellate courts apply the same standards.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] Trials, Judgment as Matter of Law

To make a sufficiency argument on appeal, a party must have challenged the sufficiency of the evidence to support the particular element in question before the jury retires. *Fed. R. Civ. P. 50(a)(2)*. Notwithstanding the general rule, federal appellate courts may reach the waived issue if to ignore it would result in manifest injustice. Federal appellate courts also may correct a purely legal error despite the lack of a timely request in the district court.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > Objections

Criminal Law & Procedure > Trials > Verdicts > Inconsistent Verdicts

HN3[] Plain Error, Definition of Plain Error

When a charge or verdict sheet may lead to inconsistent verdicts, a party must object before the jury begins its deliberations. *Fed. R. Civ. P. 51*. If a timely objection is not made, the failure can be excused only if the district court committed a "fundamental error," a standard that is more stringent than the plain error standard applicable to criminal appeals under *Fed. R. Crim. P. 52(b)*.

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Remedies > Damages > Punitive Damages

HN4[] Costs & Attorney Fees, Costs

No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *Conn. Gen. Stat. § 42-110b(a)*. Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by *§ 42-110b*, may bring an action to recover actual damages, punitive damages, and equitable relief. Conn. Gen. St. 42-110g(a). Subsection (d) of *section 42-110g* allows the court to award costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery.

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Governments > Courts > Common Law

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN5[] **Antitrust & Trade Law, Federal Trade Commission Act**

The Connecticut Unfair Trade Practices Act (CUTPA) is to be construed in accord with interpretations by the Federal Trade Commission and by the federal courts interpreting the Federal Trade Commission Act. *Conn. Gen. Stat. § 42-110b(b)*. Thus, Connecticut has adopted the Commission's "cigarette rule" to determine whether a practice is unfair under CUTPA. The factors to be weighed under the cigarette rule are (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen). A CUTPA plaintiff need not establish all three criteria to demonstrate unfairness. Instead, a practice may be shown to be unfair either because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. The practice attacked may be actually deceptive or a practice amounting to a violation of public policy. The plaintiff need not show intent to deceive.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Contracts Law > Breach > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive Labeling & Packaging > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN6[] **State Regulation, Claims**

A simple breach of contract does not violate the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-101b, and the plaintiff must show aggravating circumstances.

Civil Procedure > ... > Justiciability > Mootness > General Overview

Constitutional Law > Congressional Duties & Powers > Contracts Clause > General Overview

HN7[] **Justiciability, Mootness**

The *Contract Clause, U.S. Const. art. I, § 10*, prohibits the impairment by the state of existing contracts. Even if it takes a judicial interpretation of a statute to give it unconstitutional effect, the statute must have been passed after the contract was executed.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN8[] **Trade Practices & Unfair Competition, State Regulation**

Under Connecticut law, punitive damages may be awarded on a Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-101b, claim if the evidence reveals a reckless indifference to the rights of others or an intentional and wanton violation of those rights.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > Business Torts > Unfair Business Practices > Remedies

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

HN9[] **Damages, Punitive Damages**

The *Due Process Clause of the Fourteenth Amendment* prohibits a State from imposing a grossly excessive punishment on a tortfeasor. States may impose punitive damages to further legitimate interests, including the prevention of deceptive trade practices. However, elementary notions of fairness enshrined in U.S. constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. To determine whether a defendant has been given adequate notice, courts look to the so-called Gore factors, including the degree of reprehensibility of the relevant conduct; the disparity between the harm or potential harm suffered by plaintiff and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN10[] **Standards of Review, De Novo Review**

Federal appellate courts review de novo a district court's conclusion that an award of punitive damages is within constitutional limits.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

HN11[] **Procedural Due Process, Scope of Protection**

The first factor in determining whether states may impose punitive damages to further legitimate interests, namely, the reprehensibility of the defendant's conduct, is "perhaps the most important." In judging reprehensibility, courts consider whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN12[] **Damages, Punitive Damages**

Although the State Farm Court noted that single-digit multipliers are more likely to comport with due process than awards with ratios in the range of 500 to 1, it also recognized that this proposition may not apply where the plaintiff receives an insignificant or nominal compensatory award. In considering a punitive damages award where the jury awarded no compensatory damages and only one dollar in nominal damages, the United States Court of Appeals for the Second Circuit has said: In Gore, a 500 to 1 ratio was "breathtaking." However, in a *42 U.S.C.S. § 1983* case in which the compensatory damages are nominal, a much higher ratio can be contemplated while maintaining normal respiration. Since the use of a multiplier to assess punitive damages is not the best tool here, courts must look to the punitive damage awards in other civil rights cases to find limits and proportions.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN13[] **Trade Practices & Unfair Competition, State Regulation**

The Connecticut Unfair Trade Practices Act (CUTPA) provides that the Attorney General of Connecticut may recover a civil penalty of $ 5,000 for each willful CUTPA violation. *Conn. Gen. Stat. § 42-110o(b)*.

Contracts Law > Breach > General Overview

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN14[] **Contracts Law, Breach**

The implied warranty of good faith is read into all Connecticut contracts.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Implied in Fact

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

HN15[] **Types of Contracts, Contracts Implied in Fact**

Parties who have entered into controlling express contracts are bound by such contracts to the exclusion of inconsistent implied contract obligations.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Remedies > Equitable Relief > General Overview

HN16[] **Types of Contracts, Express Contracts**

Unjust enrichment applies even where the parties have an express contract if: (1) the plaintiff cannot recover under the contract because the plaintiff is guilty of breach of contract, and (2) the defendant would nevertheless be unjustly enriched by keeping the plaintiff's services or money without some payment.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

HN17[] **Consumer Protection, Deceptive & Unfair Trade Practices**

In a Connecticut Unfair Trade Practices Act lawsuit, the trial court may award, to the plaintiff, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. *Conn. Gen. Stat. § 42-110g(d)*. The award is committed to the discretion of the trial court, and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN18[] **Attorney Fees & Expenses, Reasonable Fees**

The Connecticut Supreme Court has repeatedly held that courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. Not only is expert testimony not required, but such evidence, if offered, is not binding on the court.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN19[] **Consumer Protection, Deceptive & Unfair Trade Practices**

A trial court can compensate a plaintiff for attorney hours spent on unsuccessful claims as long as those claims are related to the Connecticut Unfair Trade Practices Act (CUTPA) claim and there is no reasonable basis for segregating the hours. However, the court can award attorney's fees under CUTPA only for those expenses that were related to the prosecution of a CUTPA claim. Great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

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HN20[] **Damages, Punitive Damages**

The Connecticut Unfair Trade Practices Act instructs courts not to base an attorney's fees award on the amount of a party's recovery. *Conn. Gen. Stat. § 42-110g(d)*.

Counsel: EVAN A. DAVIS, Cleary, Gottlieb, Steen & Hamilton, New York, NY (Beth M. Sasfai, on the brief), for Defendants-Appellants-Cross-Appellees.

EDWARD T. KRUMEICH, Ivey, Barnum & O'Mara, LLC, Greenwich, CT (Al Van Kampen, Rohde & Van Kampen PLLC, Seattle, WA, on the brief), for Plaintiffs-Intervenor-Defendants-Appellees and Cross-Appellants.

Judges: Before: FEINBERG, CABRANES, and POOLER, Circuit Judges.

Opinion by: POOLER

Opinion

[*116] POOLER, Circuit Judge:

Like Humpty Dumpty, a jury verdict once broken is difficult to put together again. At least, it is difficult to refashion the verdict in a way that accords each party substantial justice. Hence, elementary considerations of fairness support certain procedural obstacles to challenges to a jury's verdict. For instance, a party who fails to object to the sufficiency of the evidence on a particular claim may lure his opponent into failing to present evidence that would cure the asserted defect. The Federal Rules provide a prophylactic against such a strategy **[**2]** by requiring that a party make its sufficiency challenges with some specificity before the other party rests. See *Fed. R. Civ. P. 50(a)(2)*. Similarly, allegedly inconsistent verdicts do not necessarily imply that the jury erred by rendering a verdict favoring plaintiff. Instead, the jury may have made an error favoring defendant, or there may be no real inconsistency. Thus, a party concerned about the possibility of an inconsistent verdict must challenge the court's charge or projected verdict sheet before submission to the jury. See *Fed. R. Civ. P. 51(d)* (allowing a party to claim error based on a charge only if it timely objected to the charge at trial). If a party does not object before the jury retires to consider its verdict, we ordinarily will not consider the argument on appeal. On this appeal, defendants seek reversal on bases that they did not properly place before the district court. Finding no reason to excuse their defaults, we refuse to consider their arguments.

BACKGROUND

Juan F. Fabri, Sr. ("Fabri, Sr.") and Juan F. Fabri, Jr. ("Fabri, Jr.") do business as Juan F. Fabri **[**3]** (collectively, the "Fabris"). For over thirty years, the Fabris acted as sales representatives in Argentina for Sikorsky Aircraft Corporation ("Sikorsky"), whose parent is United Technologies, Inc. ("UTI"), and for various other UTI-affiliated entities. Each year the Fabris entered into a Sales Representation Agreement ("SRA") with UTI to make sales on behalf of Sikorsky and other UTI entities (collectively, "defendants"). Pursuant to the SRA in effect at the time of the events under review, the Fabris would receive "commissions and/or other compensation" from UTI in exchange for selling UTI's products. Further, the Fabris warranted and represented to UTI that

> none of such commissions nor any other money or thing of value has been or will be paid, offered, given or promised by the Representative, his agents or employees, directly or indirectly, to:
>
> . . .
>
> (c) any political party or official thereof, any candidate for political office, or any officer or employee of any government or of any instrumentality controlled by any government, or any person acting on behalf of any government or any instrumentality controlled by any government, for the purposes of:
>
> > (I) **[**4]** [i]nfluencing any act or decision of such party, official, candidate, officer, employee, or person in his or its official capacity;

> > (ii) [i]nducing any such party, official, candidate, officer, employee, or person to use his or its influence with a government or government controlled instrumentality to affect or influence any act or decision of such government or government controlled instrumentality,
>
> in order to promote sales of [the companies'] products or otherwise to assist **[*117]** [the companies] in any aspect of [their] business.

The agreement authorized either party to terminate it on thirty days written notice. In addition, UTI and its subsidiaries had a unilateral right to immediately terminate the agreement under several circumstances, including when "UTI has reason to believe that the representations and warranties made by the [Fabris and quoted above] are no longer valid." Upon termination, UTI or its affiliate had no obligation to pay a commission on any sale the Fabris had arranged unless a sales contract had been signed before the termination. These provisions were included in the SRA to protect Sikorsky and other UTI companies from liability **[**5]** under the *Foreign Corrupt Practices Act ("FCPA"), Pub. L. No. 95-213, 91 Stat. 1494 (1977)*, as amended, codified in pertinent part at *15 U.S.C. § 78dd-2* (imposing liability on companies that pay commissions to sales representatives while knowing that all or part of the commission will be used to bribe a foreign official).

On November 24, 1993, defendants terminated the SRA purportedly because "[v]arious discussions that [they] had with [the Fabris] during the course of the [prior] three weeks had given [defendants] reason to believe that [the Fabris had] violated the terms of [the Fabris' warranty not to pay or agree to pay any portion of their commission as a bribe]." At the time, the Fabris were negotiating with Argentinian president, Carlos Saul Menem, for the purchase of one of Sikorsky's S-70A helicopters. After terminating the Fabris, Sikorsky continued negotiations with Argentinian officials, who ultimately agreed to purchase the helicopter on the terms and conditions that had been proposed by the Fabris. In September 1994, Sikorsky delivered the helicopter, for which it was paid almost $ 16 million.

On November 21, 1996, the Fabris **[**6]** filed a complaint in the United States District Court for the District of Connecticut. Their claims included breach of contract, promissory estoppel, unjust enrichment, quantum meruit, tortious interference, violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), *Conn. Gen. St. § 42-110a et seq.*, breach of the duty of good faith and fair dealing, and invasion of privacy.

Prior to trial, the Fabris withdrew their invasion of privacy claim. At the beginning of the trial, Judge Dorsey dismissed the breach of good faith claim, finding that it was not a cause of action independent of the breach of contract claim. The judge also determined that the jury would not consider unjust enrichment. Finally, he limited the jury's consideration of the quantum meruit claim.

At the close of plaintiffs' proof, defendants moved, pursuant to *Rule 50(a)*, for judgment as a matter of law. As to the CUTPA claim, they argued: (1) plaintiffs' claims for breach of contract, promissory estoppel, unjust enrichment, and quantum meruit could not support a CUTPA claim; (2) therefore, the viability of the CUTPA claim depended on plaintiffs' claim of tortious interference-i.e., that defendants improperly **[**7]** interfered with plaintiffs' contracts with other businesses; and (3) plaintiffs had not proven tortious interference. Defendants renewed this motion without further argument before the case was submitted to the jury pursuant to *Rule 50(b)*.

The jury found that although plaintiffs had not established their claims for breach of the SRA, promissory estoppel, breach of an oral contract, quantum meruit, or tortious interference, they had proven a CUTPA violation. Despite awarding plaintiffs no compensatory damages, the jury awarded one dollar in nominal damages. Finally, the jury found that defendants' **[*118]** violation of CUTPA was willful, reckless, malicious, or oppressive and that plaintiffs were entitled to $ 500,000 and legal fees as punitive damages.

After the verdict, defendants renewed their motion for judgment as a matter of law. They argued: (1) the CUTPA verdict should be set aside because the jury found that plaintiffs failed to prove an ascertainable loss, which, defendants argued, is an element of a CUTPA violation; (2) the evidence did not support a CUTPA violation; (3) the jury should not have been allowed to consider punitive damages or attorney's fees because those issues **[**8]** are for the court not the jury; (4) the punitive damage award was legally and factually unsupported; and (5) even it were allowed to stand, the award was excessive. With respect to the insufficiency of the CUTPA evidence, defendants principally argued that because plaintiffs had offered the same factual allegations and evidence on the common law and CUTPA claims, the jury's verdict in defendants' favor on the common law claims mandated dismissal of the CUTPA claim.

The district court denied defendants' motion. It found that the CUTPA claim could be differentiated from plaintiffs' common law claims and that the jury's general verdict rejecting the common law claims did not necessarily reject the factual allegations underlying those claims. The district court also saw no merit in defendants' alternative argument that the jury's failure to award compensatory damages required that the court set aside the liability verdict.

Judge Dorsey also rejected each of defendants' challenges to the punitive damages award. Finally, he found that the jury's assessment that plaintiffs should receive attorney's fees was, at worst, a harmless advisory opinion because the court would consider plaintiffs' **[**9]** attorney's fees motion at a later date.

Defendants subsequently moved for reconsideration on the CUTPA claim based on a recent decision of the Connecticut Supreme Court, *Gomes v. Commercial Union Insurance Company, 258 Conn. 603, 783 A.2d 462 (Conn. 2001)*. The district court denied this motion as untimely, but also found that it lacked merit.

Plaintiffs requested an award of approximately $ 1.6 million in attorney's fees and expenses based on their CUTPA recovery. The district court awarded slightly more than $ 600,000 as fees and expenses after making reductions on several different bases.

On appeal, defendants argue: (1) the district court improperly imposed a super-fairness standard on their conduct when it found that there was sufficient evidence to support the CUTPA verdict; (2) under the correct CUTPA standard, the jury's conclusion that defendants terminated the SRA in good faith, which was necessary to rule in defendants' favor on the contract claim, precluded a verdict in plaintiffs' favor on the CUTPA claim; (3) in any case, defendants' conduct was not unfair under the "cigarette rule" Connecticut uses to assess CUTPA claims; (4) the district court's **[**10]** interpretation of CUTPA impaired defendants' contractual rights in violation of the *Contracts Clause of the United States Constitution*, *U.S. CONST. art. I, § 10, cl. 1*; (5) the district court's interpretation of CUTPA conflicts with the FCPA; (6) the award of punitive damages should be reversed because there was no evidence of malice or wanton disregard of plaintiffs' rights; and (7) in any event, the punitive damages award should be reduced.

On their cross-appeal, the Fabris argue that (1) the district court should not have dismissed the good faith and fair dealing claim; (2) the district court misinterpreted **[*119]** the law on unjust enrichment and quantum meruit; and (3) the district court erred by reducing the requested attorney's fees.

DISCUSSION

I. Defendants' Appeal

A. Standard of review and procedural requirements.

The parties' positions implicate both the standard of review of the district court's denial of judgment as a matter of law and two potential procedural bars. ***HN1***[] The district court's denial of a *Rule 50(b)* motion is reviewed de novo. *Yurman Design, Inc., v. PAJ, Inc., 262 F.3d 101, 108 (2d Cir. 2001)*. The district court can grant the motion **[**11]** only if after viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in favor of the non-moving party, it finds that there is insufficient evidence to support the verdict. *Tolbert v. Queens College, 242 F.3d 58, 70 (2d Cir. 2001)*. The district court cannot set aside the jury's credibility findings and cannot find for the movant based on evidence the jury was entitled to discredit. Id. We apply the same standards. Id.

The first of the potential procedural bars is the general requirement that *HN2*[] to make a sufficiency argument on appeal, a party must have challenged the sufficiency of the evidence to support the particular element in question before the jury retires. *Kirsch v. Fleet St., Ltd., 148 F.3d 149, 164 (2d Cir. 1998)* (citing *Fed. R. Civ. P. 50(a)(2)*). Notwithstanding the general rule, we may reach the waived issue if to ignore it would result in manifest injustice. See Id. We also may correct a purely legal error despite the lack of a timely request in the district court. *Baker v. Dorfman, 239 F.3d 415, 420 (2d Cir. 2000).* **[**12]**

The second of the potential procedural bars governs a claim of inconsistent verdicts. As we will explain, defendants implicitly argue that the verdicts dismissing plaintiffs' other claims, especially the contract claim, and the verdict sustaining the CUTPA claim are incurably inconsistent. *HN3*[] When a charge or verdict sheet may lead to inconsistent verdicts, a party must object before the jury begins its deliberations. *Jarvis v. Ford Motor Co., 283 F.3d 33, 56-57 (2d Cir. 2002)* (citing *Fed. R. Civ. P. 51*). If a timely objection is not made, the failure can be excused only if the district court committed a "fundamental error," a standard that is more stringent than the plain error standard applicable to criminal appeals under *Federal Rule of Criminal Procedure 52(b)*. *Id. at 62*.

B. CUTPA liability.

CUTPA provides: *HN4*[] "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Conn. Gen. St. § 42-110b(a)*. "Any person who suffers any ascertainable loss of money or property, real or **[**13]** personal, as a result of the use or employment of a method, act or practice prohibited by *section 42-110b*, may bring an action" to recover actual damages, punitive damages, and equitable relief. *Conn. Gen. St. 42-110g(a)*. *Subsection (d) of Section 42-110g* allows the court to award "costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery."

HN5[] CUTPA is to be construed in accord with interpretations by the Federal Trade Commission and by the federal courts of the *Federal Trade Commission Act*. *Conn. Gen. St. § 42-110b(b)*. Thus, Connecticut has adopted the Commission's "cigarette rule" to determine whether a **[*120]** practice is unfair under CUTPA. [1] The factors to be weighed under the cigarette rule are

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial **[**14]** injury to consumers [(competitors or other businessmen)].

Cheshire Mortgage Serv. Inc. v. Montes, 223 Conn. 80, 612 A.2d 1130, 1143 (Conn. 1992). A CUTPA plaintiff need not establish all three criteria to demonstrate unfairness. Id. Instead, a practice may be shown to be unfair either "because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id. at 1143-44* (internal quotation marks omitted). The practice attacked may be actually deceptive "or a practice amounting to a violation of public policy." *Id. at 1144*. The plaintiff need not show intent to deceive. Id.

[15]** Defendants make three attacks on the CUTPA verdict. First, they argue that because the jury found in their favor on all of the common law grounds, it could have found in the Fabris' favor on the CUTPA claim only by imposing a super-fairness standard. Defendants' argument is subtle and complex, but it ultimately founders on their failure to object to the charge and verdict sheet. Defendants begin by noting that the district court instructed the jury that to defeat the contract claim, defendants must establish that they had a good faith reason to believe that the

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[1] The Connecticut Supreme Court first used the term "cigarette rule" in *McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 473 A.2d 1185 (Conn. 1985)*, to refer to a 1964 Federal Trade Commission publication listing the factors to be considered in determining whether a practice that is neither deceptive nor a violation of ***antitrust law*** is nevertheless unfair. See Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. ***29 Fed. Reg. 8324, 8355 (1964)***.

Fabris had breached the warranties in the SRA. Defendants then reason that, absent a super-fairness standard, they could not have violated CUTPA without also breaching their duty of good faith and fair dealing under the contract.

With respect to the contract claim, the court charged the jury:

> The contract provides that defendants may terminate the contract when in the exercise of good faith and fair dealings they have reason to believe that the plaintiffs violated the sales representation agreement by payment, offer or promise of money or thing of value to an Argentine official.
>
> In determining whether the plaintiffs **[**16]** were entitled to payment under the contract, you must determine whether the defendants have proven that they had good-faith reason to believe that plaintiffs violated the sales representation agreement.

With respect to the CUTPA claim, the court charged that the plaintiffs must prove "an unfair or deceptive act or practice by defendants." It further instructed:

> There have been certain guidelines established to help you decide what constitutes an unfair trade practice.
>
> One, whether the practice, though not previously considered unlawful, offends a public policy established by statutes, common law or otherwise. Whether, in other words, it is within the scope of a **[*121]** concept of unfairness established by the common law or statutes.
> Two, whether it is immoral, unethical, oppressive or unscrupulous.
> Three, whether it causes substantial injury to other business persons.

The court then went on to tell the jury that it need not find all three factors, that one present to a great extent might demonstrate an unfair practice, and that in order to prevail on the third factor, the plaintiffs must show that the injury was indeed substantial and that it was not outweighed **[**17]** by benefits of the practice.

Defendants did not object to either the contract or the CUTPA charge, and they did not object to the verdict sheet, which stated the two claims separately and contained no indication that a verdict in defendants' favor on the common law claims mandated the same verdict on the CUTPA claim.

Although defendants frame their challenge to the verdict as a challenge to the sufficiency of the evidence, any problem with the verdict is a result of the charge and verdict sheet, which allowed the jury to find in favor of defendants on all of the common law claims, but also in favor of plaintiffs on the CUTPA claim. Because defendants' sufficiency challenge is truly an attack on the consistency of the contract and CUTPA verdicts, defendants were required to object before the jury began its deliberations. *Jarvis, 283 F.3d at 56-57*. Since they did not object, defendants must demonstrate fundamental error in the charge and verdict sheet in order to prevail. [2] *Id. at 62*. "Fundamental error is more egregious than the 'plain' error that can excuse a procedural default in a criminal trial and is so serious and flagrant that it goes to the **[**18]** very integrity of the trial." Id. (internal quotation marks and citation omitted).

[19]** Defendants cannot establish fundamental error because none of the authorities on which they rely--*Gomes v. Commercial Union, 258 Conn. 603, 783 A.2d 462 (Conn. 2001)*; *Rudel Mach. Co. v. Giddings & Lewis, Inc., 68 F. Supp. 2d. 118 (D. Conn. 1999)*; and *McKeown Distribs. v. Gyp-Crete Corp., 618 F. Supp. 632 (D. Conn. 1985)*--establish that the jury's verdict in favor of defendant on the contract claim precluded it from finding for the Fabris on the CUTPA claim. In Gomes, the only case from Connecticut's highest court, the court dismissed claims for

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[2] Defendants' reliance on their motion for judgment as a matter of law to preserve their inconsistency argument is unavailing. In support of that motion, defendants argued that a verdict in the Fabris' favor on the contract, promissory estoppel, unjust enrichment, or quantum meruit claims would not justify a verdict in their favor on the CUTPA claim. In order to prevail on the CUTPA claim, defendants argued, plaintiffs must show either aggravated conduct associated with the breach of contract or tortious interference, neither of which they had done. This argument is quite different from defendants' current claim that the jury's finding that defendants acted in good faith with respect to their contract obligations precluded the jury from also finding that defendants violated CUTPA. See *Jarvis, 283 F.3d 33 at 61* (holding that movant must have "clearly apprised" the trial court of the error in the charge and verdict sheet and given the trial court an opportunity to correct its error).

intentional tort and negligence based on: (1) a hotel desk clerk's failure to notify authorities of a break-in at plaintiffs' gas station after the clerk had assured a guest that she would call and (2) an insurance company's subsequent demand that plaintiffs repay money the company had paid due to plaintiffs' alleged negligence. *783 A.2d at 465*. The court then held:

> Having determined that the conduct of the desk clerk was not actionable **[*122]** under either an intentional tort or negligence theory, we conclude that the plaintiffs' CUTPA claim similarly must fail because the **[**20]** factual predicate of the claimed unfair or deceptive act or practice, as required by *General Statutes § 42-110b(a)*, does not exist.

Id. at 473.

Whatever persuasive authority *Gomes* might have in a different procedural context, it does not establish fundamental error. The Connecticut court did not hold that a plaintiff could never prevail on a CUTPA claim if it also failed to prevail on a contract claim in which defendants were assigned the burden of proving good faith. Instead, the Gomes court primarily determined "whether, under the circumstances of this case, the defendants owed a duty to the plaintiffs to refrain from preventing a third person from rendering aid to prevent damage to the plaintiffs' properties." *Id. at 464*. Thus cabined, Gomes has little precedential force in determining whether the verdicts in this case are incurably inconsistent. It certainly does not establish that fundamental error occurred.

Rudel and McKeown are federal district court decisions. As we have discussed, the fundamental error standard is stricter than the plain error standard that applies when a defendant fails to object to an asserted error in a criminal **[**21]** trial. On plain error review, we "typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this court." *United States v. Whab, 355 F.3d 155, 158 (2d Cir.)* (internal quotation marks omitted), cert. denied, *58 L. Ed. 2d 519, 124 S. Ct. 2055 (2004)*. Because fundamental error review is even more deferential than plain error review, we doubt that we could find fundamental error in a district court's action on a state law claim in the absence of clear authority from the state's highest court.

Even if we could, neither *Rudel* nor *McKeown* clearly supports defendants' argument. In McKeown, the district court, acting as a fact-finder, rejected a CUTPA claim based on its finding that defendant had good cause to cancel the contract. *618 F. Supp. at 644*. However, the court also noted that it was arguable that McKeown could have shown an unfair trade practice simply by showing that the injury it incurred outweighed any benefit to consumers arising from the practice. Id. n. 7. Thus, McKeown does not rule out a CUTPA claim whenever plaintiff fails to prevail on any of its common **[**22]** law claims. Rudel also leaves open the possibility that a CUTPA claim can survive even though the jury finds no breach of contract. *68 F. Supp. 2d at 130* ("Even assuming that . . . conduct [not in breach of the contract] could give rise to a claim under the second prong of the cigarette rule, to be cognizable it would have to entail a degree of bad faith not shown here."). [3]

Therefore, we hold that defendants waived their challenge to the sufficiency of the evidence supporting the CUTPA claim to the extent that the claimed insufficiency rests on an implication that the jury found no bad faith because it held in defendants' favor on the contract claim. **[**23]** Moreover, we find no fundamental error.

Putting aside any inference that might be drawn from the verdict on the contract claim, we must nevertheless determine whether there was sufficient evidence **[*123]** to support the CUTPA claim. See *Lavoie v. Pacific Press & Shear Co., 975 F.2d 48, 57 (2d Cir. 1992)* (holding that where defendant waives its objection based on inconsistency in the verdicts, the reviewing court is not limited to considering "the sufficiency of the evidence of [the theory on which the jury found for the plaintiff] which is reconcilable with a finding that the [defendant] is not . . . liable" on another theory). Because of defendants' waiver, and because the jury made no findings as to which of

[3] We, too, have held that ***HN6***[] a simple breach of contract does not violate CUTPA and that the plaintiff must show aggravating circumstances. See *Boulevard Assocs. v. Sovereign Hotels, Inc., 72 F.3d 1029, 1040 (2d Cir. 1995)*. That holding, however, does not establish that a CUTPA violation cannot occur without a breach of contract.

plaintiffs' allegations of misconduct it rejected and which it accepted, we must consider all of plaintiffs' evidence of misconduct in determining whether the jury could have properly found a CUTPA violation.

Included in the relevant evidence the Fabris adduced was proof that: (1) they had a thirty-year relationship with defendants in which defendants never had cause to doubt the Fabris' honesty; (2) defendants' investigation of possible misconduct was triggered **[**24]** by Fabri, Jr.'s, report to them of an attempt by an Argentinian government official to corrupt him; (3) defendants knew there were innocent explanations for conduct by the Fabris that defendants viewed as suspicious; (4) defendants terminated the SRA only after the Fabris had effectively obtained the contract for them; (5) after terminating the SRA, defendants offered the Fabris a consulting contract, which required the Fabris to make the same representation that they would not bribe Argentinian officials, but which gave them less compensation than the SRA; and (6) defendants did not reinstate the SRA after the sale went through without a bribe having been paid despite their representative's prior acknowledgment that selling the helicopter without paying a bribe would be substantial evidence of the Fabris' innocence.

As we have discussed, a jury can find a violation of CUTPA if a practice, even if not previously deemed unlawful, offends public policy as expressed in the state's statutes and common law, the conduct is immoral, unethical, or oppressive, and/or it causes substantial harm to a business that outweighs benefits of the practice. *Cheshire Mortgage Serv., 612 A.2d at 1143.* **[**25]** The Fabris have not identified any statute or public policy that defendants' conduct violated. The jury, however, could have found in the Fabris' favor on the other two CUTPA analysis factors. That is, the jury could have found that defendants' investigation and its post-termination actions were unethical and oppressive. Or, it could have found that defendants' failure to reopen their investigation based on new information caused the Fabris significant economic harm without creating a concomitant benefit, especially in light of the thirty-year relationship between the Fabris and defendants. Although defendants certainly had a right and an obligation to act promptly to protect themselves from FCPA liability, they arguably could have reinstated the SRA after receiving more evidence of the Fabris' innocence without jeopardizing their status as government contractors. The jury also could have found that although defendants were entitled to terminate the SRA under its terms, they acted unethically by taking advantage of the Fabris' labor without paying for it.

Because in considering the sufficiency of the evidence to support the CUTPA verdict, we must set aside the fact that the jury **[**26]** found in Sikorsky's favor on the contract claim, and because the evidence viewed in the light most favorable to plaintiffs is sufficient to support the verdict, we reject defendants' sufficiency/inconsistency argument.

Defendants next argue that the district court's interpretation of CUTPA **[*124]** conflicts with the policies of the FCPA and is thus preempted. Defendants claim that they adequately preserved their preemption defense by: (1) including an assertion in their amended answer that the FCPA compelled them to act as they did; (2) adducing expert testimony concerning their FCPA obligations; and (3) raising the FCPA issue, albeit not specifically preemption, in their *Rule 50(b)* motion. Defendants point out that it would have made no sense to raise the issue of preemption before the district court held that the jury could have properly interpreted CUTPA as imposing higher standards than the SRA.

Whether or not defendants waived their preemption claim, it lacks merit in light of our disposition of the sufficiency issue. Defendants' argument is triggered by the district court's holding that the jury could have imposed a higher standard on defendants with respect to the CUTPA claim than **[**27]** it did with respect to the contract claim. However, our affirmance of the district court's verdict does not rest on the district court's conclusion. Instead, we have held: (1) we must consider all proof offered in support of the CUTPA claim and not just proof that is consistent with the jury's verdict on the contract claim and (2) viewed in this fashion, the evidence was sufficient to support the CUTPA verdict. Because our analysis does not rest on or require a super-fairness standard, there is no merit to defendants' preemption contention.

Finally, defendants argue that allowing the Fabris to recover on the CUTPA claim impaired defendants' rights in violation of the *Contracts Clause*. Defendants concede that they did not raise an impairment of contracts claim in district court. They argue, however, that this court can nevertheless reach the issue because it is a purely legal one requiring no additional fact-finding. See, e.g., *Krumme v. Westpoint Stevens Inc., 238 F.3d 133, 142 (2d Cir. 2000)*.

Again, defendants could have avoided the procedural dilemma in which they now find themselves by asking the court to charge the jury that plaintiff could not prevail on its **[**28]** CUTPA claim if it found defendants had not breached the duty of good faith implicit in the SRA. Their failure to do so requires us to find fundamental error in the jury charge or verdict sheet to address the purported error. We do not do so for two reasons. First, any error in the district court's analysis is mooted by our conclusion that no super-fairness standard is required to sustain the CUTPA verdict. Second, defendants have not identified any error and certainly have not established fundamental error. ***HN7***[] The *Contract Clause* prohibits the impairment by the state of existing contracts. *Kinney v. Connecticut Judicial Dep't, 974 F.2d 313, 314 (2d Cir. 1992)* (per curiam). Even if it takes a judicial interpretation of a statute to give it unconstitutional effect, the statute must have been passed after the contract was executed. *Id. at 315*. It is undisputed that CUTPA was passed long before the parties entered into the latest SRA. Therefore, there has been no unconstitutional impairment of a contract.

C. Punitive damages.

Defendants argue both that there was no evidence on which the jury could have premised a punitive damages award and that **[**29]** the damages awarded are excessive. ***HN8***[] Under Connecticut law, punitive damages may be awarded on a CUTPA claim if the evidence "reveal[s] a reckless indifference to the rights of others or an intentional and wanton violation of those rights." *Gargano v. Heyman, 203 Conn. 616, 525 A.2d 1343, 1347 (Conn. 1987)*.

[*125] Defendants did not object to the submission of the CUTPA punitive damages claim to the jury. At the close of plaintiffs' case, defendants asked for dismissal of all claims but did not argue in the alternative that, even assuming a claim had been made out, plaintiffs had not shown an entitlement to punitive damages. Before the jury retired to deliberate, defendants simply reiterated the bases on which they had previously moved. Thus, defendants waived any argument that there was insufficient evidence to support a punitive damages award. Cf. *Local Union No. 38 v. Pelella, 350 F.3d 73, 87-88 (2d Cir. 2003)* (holding that Union waived its objection to award of punitive damages in absence of award of compensatory damages by failing to object to charge in which judge told jury it could award punitive damages without awarding compensatory damages), **[**30]** cert. denied, *541 U.S. 1086, 159 L. Ed. 2d 248, 124 S. Ct. 2821 (2004)*. Because defendants' argument does not present a claim of purely legal error, see *Baker, 239 F.3d at 420*, and because failure to consider it will not result in manifest injustice, see *Kirsch, 148 F.3d at 164*, we decline to reach the sufficiency question.

We turn instead to defendants' claim that the damages award must be set aside as grossly excessive. ***HN9***[] "The *Due Process Clause of the Fourteenth Amendment* prohibits a State from imposing a grossly excessive punishment on a tortfeasor." *BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)* (internal quotation marks omitted). States may impose punitive damages to further legitimate interests, including the prevention of deceptive trade practices. *Id. at 568*. However, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id. at 574*. To determine whether a defendant has **[**31]** been given adequate notice, we look to the so-called Gore factors, including "the degree of reprehensibility of the [relevant conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id. at 575*. ***HN10***[] We review de novo the district court's conclusion that an award of punitive damages is within constitutional limits. *Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001)*.

In this case, applying the Gore factors will require a new trial on punitive damages unless plaintiffs agree to a reduction, in an amount to be determined by the district court, in their punitive damages. ***HN11***[] The first factor, the reprehensibility of the defendant's conduct, is "perhaps the most important." *Gore, 517 U.S. at 575*. In judging reprehensibility, we consider "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had **[**32]** financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419, 155 L. Ed. 2d 585, 123 S. Ct. 1513 (2003)*.

The criteria for establishing reprehensibility, as applied to this case, cut in different directions. The harm here was economic, rather than physical, and there was no disregard of the health or safety of others. We accept that the Fabris were **[*126]** somewhat financially vulnerable because an arms embargo had prevented them from doing business in Argentina on defendants' behalf, that the jury could have found that defendants' conduct was intentional and motivated by malice, and that the unfair conduct involved repeated actions rather than an isolated incident. Nevertheless, the conduct in this case differs only in degree from that in a more typical CUTPA claim, and, altogether, the criteria for establishing reprehensibility call into question the amount of punitive damages in this case.

The second Gore factor--the relationship between actual damages and punitive damages--would, if fully applicable, **[**33]** cut strongly in favor of defendants because plaintiffs received one dollar in nominal damages and $ 500,000 in punitive damages. However, the very fact that plaintiffs received only nominal damages counsels against reducing their punitive damages award too substantially. ***HN12***[] Although the State Farm Court noted that "single-digit multipliers are more likely to comport with due process . . . than awards with ratios in [the] range of 500 to 1," it also recognized that this proposition may not apply where the plaintiff receives an insignificant or nominal compensatory award. *State Farm, 538 U.S. at 425*. In considering a punitive damages award where the jury awarded no compensatory damages and only one dollar in nominal damages, we said:

> In *Gore*, a 500 to 1 ratio was "breathtaking." However, in a *§ 1983* case in which the compensatory damages are nominal, a much higher ratio can be contemplated while maintaining normal respiration. Since the use of a multiplier to assess punitive damages is not the best tool here, we must look to the punitive damage awards in other civil rights cases to find limits and proportions.

Lee v. Edwards, 101 F.3d 805, 811 (2d Cir. 1996). **[**34]**

Applying the third Gore factor, which examines civil penalties available for similar violations, further persuades us that the punitive damages award is excessive. ***HN13***[] CUTPA provides that the Attorney General of Connecticut may recover a civil penalty of $ 5,000 for each willful CUTPA violation. *Conn. Gen. St. § 42-110o(b)*. That sum is 1/100 of the punitive damages awarded here. However, civil verdicts also are relevant, see *Lee 101 F.3d at 811*, at least where there is some parity between the injuries suffered by the plaintiff in the case under review and those suffered by the plaintiffs in the cases being compared, see *id. at 812-13* (reducing award because plaintiff received damages solely on his malicious prosecution claim and his award exceeded punitive damages given to plaintiffs who suffered severe physical and psychological harms).

We have found no case in which a Connecticut court approved a punitive damages award of the magnitude approved by the district court here in which there was neither bodily injury nor a pattern of misconduct by the defendant that affected entities other than the plaintiffs. The largest punitive damages award we **[**35]** have found for solely economic loss without allegations of pattern and practice is approximately $ 340,000. See *Advanced Fin. Servs. v. Associated Appraisal Servs., 79 Conn. App. 22, 830 A.2d 240, 249 (Conn. App. Ct. 2003)*. However, Advanced Financial differs from this case in two significant respects. First, the court awarded compensatory damages in the amount of half the punitive damages award. *Id. at 250*. Second, the Connecticut court found that defendants committed actual fraud, rather than the aggravated **[*127]** sharp dealing the jury in this case permissibly could have found. *Id. at 246*.

Based on our consideration of all the Gore factors, we hold that a corporation such as UTI or Sikorsky would not have been on notice that its conduct could trigger a punitive damages award of $ 500,000. We therefore hold that the punitive damages award is so excessive as to have denied defendants due process. Because the district court is far more familiar with this case than this court, we vacate the punitive damages award and remand for the district court to set the appropriate remittitur amount. See *Smith v. Lightning Bolt Prods., 861 F.2d 363, 375 (2d Cir. 1988).* **[**36]**

II. The Cross-Appeal

The Fabris contend that the district court erred by: (1) dismissing sua sponte their breach of good faith and fair dealing claim; (2) dismissing their claims for unjust enrichment and quantum meruit; and (3) reducing their award of attorney's fees.

A. Good faith and fair dealing.

The Fabris contend that a breach of the duty of good faith and fair dealing is an independent claim under Connecticut law. Further, they assert that the district court's error in dismissing the claim was not cured "by adding the bare words 'good faith,' and the phrase 'good faith and fair dealing' to the instructions on the breach of contract claim." Appellees' Br. at 72.

We are not certain whether Connecticut courts would allow a litigant to proceed on theories of both breach of the implied warranty of good faith and breach of contract. It appears that allowing plaintiffs to plead both claims would be duplicative because ***HN14***[] the implied warranty of good faith is read into all contracts. See *Celentano v. Oaks Condo Ass'n, 265 Conn. 579, 830 A.2d 164, 188 (Conn. 2003)*. However, in *Miller v. Guimaraes, 78 Conn. App. 760, 829 A.2d 422 (Conn. App. Ct. 2003),* **[**37]** the court upheld, without discussion, liability verdicts for both breach of contract and breach of the implied duty of good faith and fair dealing. *Id. at 432-33*. Even assuming that Miller presages a holding that a plaintiff can maintain separate claims for breach of contract and breach of the duty of good faith and fair dealing, the Fabris cannot prevail because they suffered no prejudice. The district court charged the jury that in order to terminate the contract, defendants were required to have held a good faith belief that the Fabris had breached their warranties. The court also charged that Sikorsky must prove that it had a good faith reason for its belief. If anything, plaintiffs, who would have borne the burden of proof on the independent claim, benefitted from the allocation of the burden on the contract claim. Therefore, if the district court erred in refusing to charge the good faith claim separately, its error was harmless as a matter of law and thus not a basis for reversal. See *28 U.S.C. § 2111*.

Plaintiffs also contend that the trial court denied their request for a charge that would have better explained the obligation to exercise **[**38]** good faith, making it clear that this obligation extended not just to defendants' initial reason for their belief that plaintiffs were engaged in conduct contrary to the SRA, but also to defendants' investigation of plaintiffs. Defendants deny that plaintiffs made any such request. Plaintiffs moved in this court and the district court to supplement the record to reflect the substance of the charge conference, which was not on the record. All of the motions to correct the record were denied. Plaintiffs concede that, absent the charging conference, the record does not contain any objections to the court's charge, which would require us to consider whether the charge caused a fundamental **[*128]** injustice. Because we conclude that-even if plaintiffs had timely objected to the charge-they have not demonstrated harmful error, much less fundamental injustice, we reject plaintiffs' challenge to the good faith charge.

B. Quantum meruit and unjust enrichment.

The district court dismissed plaintiffs' unjust enrichment claim with respect to the sale of both the S-70A helicopter, which has been the principal focus of our analysis thus far, and an S-76 helicopter, which plaintiffs claimed **[**39]** was bought by Argentina in 1997 because of their efforts. The court also dismissed plaintiffs' quantum meruit claim with respect to the S-70A helicopter and instructed the jury that it could not find in plaintiffs' favor on the S-76 quantum meruit claim if it found the work performed to sell the S-76 was within the scope of the SRA. The Fabris contend that the district court erred in all these decisions. The district court did not err by dismissing the quantum meruit claim on the S-70A sale and by limiting it on the S-76 sale. ***HN15***[] "Parties who have entered into controlling express contracts are bound by such contracts to the exclusion of inconsistent implied contract obligations." *H.B. Toms Tree Surgery, Inc. v. Brant, 187 Conn. 343, 446 A.2d 1, 3 (Conn. 1982)*. Because an express contract governed the relationship between the Fabris and defendants, the quantum meruit claim was appropriately rejected.

HN16[] Unjust enrichment applies even where the parties have an express contract if: (1) the plaintiff cannot recover under the contract because the plaintiff is guilty of breach of contract, and (2) the defendant would nevertheless be unjustly enriched by keeping the plaintiff's **[**40]** services or money without some payment. Vines v. Orchard Hills, Inc., 181 Conn. 501, 435 A.2d 1022, 1028 (Conn. 1980) ("The purchaser must show more than that the contract has come to an end and that the seller retains moneys paid pursuant to the contract. To prove unjust enrichment, in the ordinary case, the purchaser, because he is the party in breach, must prove that the damages suffered by his seller are less than the moneys received from the purchaser.").

Here, the proof presented to the jury focused on whether defendants had a reasonable good faith belief that the Fabris' warranties were no longer valid. Defendants did not attempt to prove that the Fabris actually breached the SRA, and the Fabris certainly did not admit to a breach. Therefore, the Fabris were not entitled to an unjust enrichment charge.

C. Attorney's fees.

The Fabris claim that the district court erred in calculating attorney's fees by: (1) reducing their uncontested claimed hourly rates; (2) halving hours worked on claims clearly interrelated with the CUTPA claim; (3) denying all fees for a second senior attorney at trial; (4) not allowing fees related to polygraph evidence, **[**41]** which allegedly demonstrated that Fabri, Jr. neither offered nor paid a bribe; (5) double discounting; and (6) making miscellaneous calculation errors. Defendants suggest that if this court eliminates or significantly reduces the punitive damages verdict, it also should remand for recalculation of fees in light of the Fabris' diminished success.

HN17[] In a CUTPA lawsuit, the trial court "may award, to the plaintiff, . . . costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery." Conn. Gen. St. § 42-110g(d). The award is committed to the discretion of the trial court, "and the exercise of such discretion will not ordinarily be interfered **[*129]** with on appeal unless the abuse is manifest or injustice appears to have been done." Gargano v. Heyman, 203 Conn. 616, 525 A.2d 1343, 1347 (Conn. 1987).

Plaintiffs requested almost $ 1.6 million in attorney's fees. Judge Dorsey first reduced the hourly rate for partners from a requested maximum of $ 275 an hour to a maximum of $ 225 per hour, the hourly rate for associates from a requested maximum of $ 170 per hour to a maximum of $ 150 per hour, the hourly rate for **[**42]** paralegals, summer associates, and interns from an unknown maximum to $ 75 per hour, and the hourly rate for litigation support to $ 40 per hour. These rate reductions resulted in the subtraction of $ 167,866 from the requested fee award. Judge Dorsey acknowledged that plaintiffs supported their fee requests with an affidavit from a Connecticut attorney who "stated that the rates charged by Plaintiffs' counsel were reasonable and comparable to rates charged by similar firms engaged in complex litigation." The judge noted, however, that the attorney did not claim that the individual attorneys involved in the litigation deserved such rates. Judge Dorsey rested his reduction not on record evidence but rather on his own assessment that the plaintiffs' attorney's fees were higher than those prevailing in the area and on his observation of the trial proceedings.

The Fabris contend that it was an abuse of discretion for the judge to discount their hourly rates because there was no evidence to the contrary, but HN18[] the Connecticut Supreme Court has "repeatedly held that courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. **[**43]** Not only is expert testimony not required, but such evidence, if offered, is not binding on the court." Piantedosi v. Floridia, 186 Conn. 275, 440 A. 2d 977, 980 (Conn. 1982) (internal quotation marks omitted). Therefore, the hourly rate reduction was well within the discretion accorded to the district court.

After reducing hourly rates, the district court made reductions in the hours of attorney time that plaintiffs claimed. We discuss only those reductions that the Fabris contest. Although defendants challenged the time the Fabris' attorneys spent on any claim other than the successful CUTPA claim, the court refused to eliminate hours spent on the Fabris' claims for breach of written contract, breach of the duty of good faith and fair dealing, and unjust enrichment because these claims "were factually intertwined with [the] CUTPA claim." However, the court found that the claims for "breach of oral contract (related to the S-61 helicopter sale), promissory estoppel (related to the S-61 helicopter sale), quantum meruit (related to the S-76 helicopter sale), tortious interference with business relations, equitable estoppel, and invasion of privacy were not factually intertwined **[**44]** with these other claims and were not meritorious." It held that awarding fees for the time spent on those claims would neither be appropriate nor "reasonable" within the meaning of CUTPA. The court found that, within the parameters it had set, approximately 50% of the time entries were not related to the CUTPA claim. The court therefore reduced the requested fee by an additional $ 215,279.

The Fabris contend that because all their claims were factually intertwined, no reduction was merited. However, they fail to explain how the claims are interrelated. Instead, they rely principally on their incorporation of all factual allegations to support their CUTPA claim and on the district court's conclusion that plaintiffs could rely on all of their evidence to avoid **[*130]** judgment as a matter of law on the CUTPA claim.

HN19[] A trial court can compensate a plaintiff for attorney hours spent on unsuccessful claims as long as those claims are related to the CUTPA claim and there is no reasonable basis for segregating the hours. See *Bristol Tech. Inc., v. Microsoft Corp., 127 F. Supp. 2d 64, 70 (D. Conn. 2000)*. However, "the court can award attorney's fees under CUTPA only for those **[**45]** expenses that were related to the prosecution of a CUTPA claim. Great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness." *Jacques All Trades Corp. v. Brown, 57 Conn. App. 189, 752 A.2d 1098, 1105 (Conn. App. Ct. 2000)* (internal quotation marks and indicators of alterations from the original omitted).

In this case, the district court's reliance on facts proven in support of other claims to justify the CUTPA verdict does not establish that those claims were interrelated with the CUTPA claim. It was reasonable for the judge to conclude he must consider all proof adduced on all claims in determining whether to set aside the jury's verdict and yet find on the attorney's fees motion, which was committed to his discretion, that certain legal claims were not significantly related to the CUTPA claim. Therefore, he did not abuse his discretion by reducing the verdict to account for hours spent on these non-CUTPA claims.

Two senior attorneys and one junior attorney represented the Fabris at trial. Judge Dorsey refused to compensate the Fabris for the services of the second senior attorney. He found **[**46]** that only two attorneys were necessary "for the prosecution of this case." Disallowing the services of one senior attorney resulted in a reduction of $ 45,575 from the attorney's fee award. Plaintiffs contend this reduction was an abuse of discretion because "the case plainly required three attorneys" and "Sikorsky usually had *four* attorneys in the courtroom." Appellees' Br. at 89. The number of attorneys reasonably necessary to prosecute a claim is best judged by the trial court, which actually observes the roles played by the attorneys at trial. Therefore, we have no basis for holding that the trial court abused its discretion when it denied fees for a second senior attorney.

Judge Dorsey would not allow attorney's fees and expenses relating to the polygraph testing of Fabri, Jr. He found that "the Fabris do not adequately explain why the expenses were reasonable, aside from conclusory assertions that the polygraph exams were 'important' and 'significant' to aid settlement discussions and to speculation that they may have enticed Defendants to withdraw an affirmative defense." He also found the fees "excessive" and "pertaining to evidence that is not admissible and thus unnecessary **[**47]** in that regard." He therefore deducted the $ 35,105 attributable to the polygraph evidence from the fee and expenses award.

Plaintiffs contend that Judge Dorsey plainly erred in reaching this conclusion because the results were relevant to show that defendants had conducted a flawed investigation. They also argue that the polygraph results, which allegedly demonstrated Fabri, Jr.'s innocence, caused Sikorsky to withdraw its affirmative defense that it would have been impossible under the FCPA to pay the Fabris a commission. The district court did not abuse its discretion by concluding otherwise and disallowing the fees and expenses.

Finally, the Fabris urge that the district court failed to factor in earlier reductions when it made later ones and made other calculation errors. Because we vacate the punitive damages award, **[*131]** plaintiffs may apply to the district court on remand to correct any miscalculations that may have occurred. However, we decline defendants' request that we allow the district court to reduce the attorney's fees award in light of the contemplated reduction in the punitive damages award. ***HN20***[] CUTPA instructs us not to base the attorney's fees award on the amount of a **[**48]** party's recovery. See *Conn. Gen. St. § 42-110g(d)*.

CONCLUSION

The liability verdict is affirmed. We vacate the award of punitive damages and remand in order that the district court can set a remittitur amount by applying the *Gore* factors. Should plaintiffs refuse to accept the reduced damages award, a new trial on punitive damages will be necessary. The district court shall also consider any request plaintiffs may make for a correction of calculation errors in the attorney's fees award.

Telecom Tech. Servs. v. Rolm Co.

United States Court of Appeals for the Eleventh Circuit

October 21, 2004, Decided

No. 02-14131

Reporter

388 F.3d 820 *; 2004 U.S. App. LEXIS 21859 **; 73 U.S.P.Q.2D (BNA) 1001 ***; 2004-2 Trade Cas. (CCH) P74,593; 17 Fla. L. Weekly Fed. C 1177

TELECOM TECHNICAL SERVICES INC., a Texas Corporation, Plaintiff-Counter Defendant, REALCOMM OFFICE COMMUNICATION, INC., a Georgia Corporation, NOVA USA TELECOMMUNICATIONS CO., a Virginia Corporation, AMERICAN TELECOM CORP., DD HAWKINS COMMUNICATIONS, INC., a Texas Corporation Headquartered in Denison, Texas, SHARECOM DIVISION OF START TECHNOLOGIES CORPORATION, a Division of the Delaware Corporation, CMS COMMUNICATIONS, INC., a Missouri Corporation Headquartered in St. Louis, Missouri with Offices in Houston and Dallas, Texas, OLDE YORK VALLEY INN, a Pennsylvania Proprietorship Headquartered in York, Pennsylvania, Plaintiffs-Counter Defendants-Appellants, versus ROLM COMPANY, Defendant-Counter Claimant, SIEMENS ROLM COMMUNICATIONS, INC., Defendant-Appellee.

Subsequent History: Rehearing, en banc, denied by *Telecom Tech. Servs. v. Rolm Co., 126 Fed. Appx. 465, 2004 U.S. App. LEXIS 28634 (11th Cir. Ga., Dec. 21, 2004)*

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Georgia. D.C. Docket No. 95-00649-CV-WBH-1.

Telecomm Tech. Servs. v. Siemens Rolm Communs., Inc., 150 F. Supp. 2d 1365, 2000 U.S. Dist. LEXIS 21493 (N.D. Ga., 2000)

Disposition: Affirmed.

Core Terms

software, patent, district court, license, customers, jury verdict, infringement, misuse, antitrust, passwords, copied, copyright infringement, partnership, activate, monopoly, patent infringement, present evidence, antitrust claim, intellectual property rights, operating system, summary judgment, anti trust law, sell part, counterclaims, contracts, features, selling, repair, intellectual property, sufficient evidence

LexisNexis® Headnotes

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN1[] **Attempts to Monopolize, Elements**

To demonstrate a violation of § 2 of the Sherman Act, plaintiffs must show (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

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

HN2[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a district court's grant of summary judgment.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN3[] **Ownership & Transfer of Rights, Assignments**

The Patent Act provides the patent owner with what amounts to a permissible monopoly over the patented work. Patent laws are in pari materia with the antitrust laws and modify them pro tanto (as far as the patent laws go). As a number of recent cases have observed, there is a tension between the protections offered by patent and antitrust laws.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > Appeals

HN4[] **Inequitable Conduct, Anticompetitive Conduct**

In the context of patent law, the U.S. Court of Appeals for the First Circuit has held that it cannot presume that elimination of an intermediate seller of repair parts harms consumers; indeed, consumers are likely to benefit by not having to accept a third-parties' mark-up of the defendant's prices. Further, a direct sales policy does not act as a significant barrier to market entry by competitors offering lower prices for higher quality support services.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

HN5[] **Ownership & Transfer of Rights, Assignments**

The Copyright Act gives copyright owners the exclusive right to distribute protected works by transfer of ownership, or by rental, lease, or lending. *17 U.S.C.S. § 106*. This right potentially conflicts with the Sherman Act.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6[] **Standards of Review, Clearly Erroneous Review**

An appellate court reviews issues of law de novo and a district court's findings of fact for clear error.

Business & Corporate Law > ... > Dissolution & Winding Up > Dissolution > General Overview

Mergers & Acquisitions Law > Sales of Assets > General Overview

Business & Corporate Law > General Partnerships > Dissolution & Winding Up > General Overview

Business & Corporate Law > ... > Dissolution & Winding Up > Winding Up > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > Transfers of Interests

HN7[] **Dissolution & Winding Up, Dissolution**

Where all of the partners directly exchange their partnership interest for shares in the corporation, the partnership ends without a "winding up" and all of the assets of the partnership transfer directly to the corporation.

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

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN8[] **Standards of Review, Abuse of Discretion**

An appellate court reviews evidentiary rulings for abuse of discretion.

Evidence > Types of Evidence > Documentary Evidence > Best Evidence Rule

HN9[] **Documentary Evidence, Best Evidence Rule**

The best evidence rule applies where the party presenting evidence seeks to prove the specific contents of a writing.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN10[] **Standards of Review, De Novo Review**

An appellate court reviews *Fed R. Civ. P. 50* motions de novo and applies the same standard as the district court. In doing so, it draws all inferences in favor of the non-moving party. It affirms the jury verdict unless there is no legal basis upon which the jury could have found for the non-moving party.

Copyright Law > ... > Formalities > Notice > General Overview

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

HN11[] **Formalities, Notice**

See *17 U.S.C.S. § 401(a)*.

Computer & Internet Law > ... > Formalities & Ownership Interests > Ownership Interests > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Computer & Internet Law > ... > Copyright Protection > Formalities & Ownership Interests > General Overview

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Formalities > Notice > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

HN12[] **Formalities & Ownership Interests, Ownership Interests**

Regulations relating to the Copyright Act permit some flexibility in how copyright owners must mark their protected works. *37 C.F.R. § 201.20(g)(4)*. Because different work is transferred or leased in varying forms of media, the best way to notify a user of the copyright protections may vary.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

Torts > Procedural Matters > Preemption > General Overview

Computer & Internet Law > ... > Copyright Protection > Civil Infringement > General Overview

Copyright Law > ... > Civil Infringement Actions > Online Infringement > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > Federal Preemption

Copyright Law > Scope of Copyright Protection > Assignments & Transfers > General Overview

Copyright Law > ... > Assignments & Transfers > Licenses > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Protected Subject Matter > Literary Works > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN13[] **Copyright Infringement Actions, Civil Infringement Actions**

In the context of whether a state law tortious interference with contract claim involves the same conduct as a copyright infringement claim and, thus, is preempted by federal copyright law, if the state law involves different or additional elements for recovery, then it is not preempted because it is not the same action. A tortious interference claim involves an additional element. A tortious interference claim requires a plaintiff to demonstrate that the defendant violated the terms of plaintiff's software license for third parties, which is an element beyond federal copyright law that prohibits unauthorized copying. As such, the state law claim is not preempted because the claim at issue is not equivalent to the claim under *17 U.S.C.S. § 106*.

Copyright Law > ... > Ownership Rights > Reproductions > General Overview

Copyright Law > Scope of Copyright Protection > Ownership Rights > General Overview

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Copyright Law > ... > Ownership Rights > Performances > General Overview

HN14[] **Ownership Rights, Reproductions**

See *17 U.S.C.S. § 106*.

Counsel: For Realcomm Office Communication, Inc., Nova USA Telecommunications Co., DD Hawkins Communications, Inc., Sharecom Division of Start Technologies Corporation, CMS Communications, Inc., Olde York Valley Inn, Appellants: Leftwich, J. Daniel, Berry & Leftwich, Washington, DC.

For Appellant: Hansen, Mark C., Kellogg, Michael K., Benz, Steven F., Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Berry, Robert Stephen, Baruch, Gergory, Berry & Leftwich, Washington, DC.

For Siemans Rolm Communications, Inc., Appellee: Campbell, Charles E., McKenna, Long, & Aldridge, Cavender, Jeffery W., Long Aldridge & Norman, LLP, Atlanta, GA; Gallo, Kenneth A., Paul, Weiss, Rifkind, Wharton & Garrison, LLP, O'Shea, Michael A., Roellke, Jon R., Bald, Leiv H., Crowley, Patricia C., Clifford Chance Rogers & Wells, LLP, Campbell, Bret A., Cadwalader, Wickersham & Taft, Washinton DC.

Judges: Before BLACK and KRAVITCH, Circuit Judges, and STROM [*], District Judge.

Opinion by: KRAVITCH

[*] Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Opinion

[*1003]** **[*823]** KRAVITCH, Circuit Judge:

The appellants, a group of independent telephone service companies and telephone system customers, appeal the dismissal on summary judgment of their antitrust claim against Siemens Rolm Communications ("Siemens"). The issue is whether Siemens's refusal to sell or license patented or copyrighted goods to the appellants is an illegal use of monopoly power in a secondary market. The appellants also appeal the jury verdicts on Siemens's cross-claims against them stemming from copyright and patent infringement.

I. Facts

Siemens produces private branch exchanges ("PBXs"), also referred to as "switches," which are computers that direct telephone calls and data transmissions through a network of private extensions. Businesses that have multiple telephone lines use PBXs to send and receive calls. The PBXs include hardware **[**2]** (the physical parts making up the switch) and software components (the telephone system program). Siemens possesses intellectual property rights over some of the hardware and all of the software used in its PBXs. Siemens does not sell the software, but sells licenses to use the system. Depending on the what type of system the customers want and the price they wish to pay, the software can be activated to provide more or fewer features.

In addition to selling licenses to use its PBXs, Siemens also sells PBX servicing for its products. Siemens has a patent on many of its parts and does not sell parts to third parties for resale. A customer can service its PBX in one of three ways. First, it can hire Siemens **[***1004]** to service the PBX. Second, it can order the parts directly from Siemens (or an authorized distributor) and make arrangements to service the machine themselves. Third, it can hire an independent service organization ("ISO") to service the machine, although Siemens requires that the customer furnish the ISO with a letter of agency authorizing it to order the part on the customer's behalf before Siemens sells the part.

The appellants, primarily a group of ISOs that specialize in **[**3]** servicing PBX systems, allege that Siemens has created a monopoly in the market for servicing Siemens's PBXs. [1] They claim that Siemens's refusal to sell parts to third parties is designed to prevent competition in the service market. The district court initially denied Siemens's motion for summary judgment on the antitrust claim, but later reversed that ruling based on the Court of Appeals for the Federal Circuit's holding that an antitrust claim could not be brought based on a refusal to sell patented parts or license copyrighted software. [2] **[*824]** See *CSU, L.L.C. v. Xerox Corp. (In re Independent Serv. Orgs. Antitrust Litig.), 203 F.3d 1322 (Fed. Cir. 2000)* ("In re ISO"). The ISOs now appeal.

[4]** Siemens filed counterclaims against certain individual appellants stemming from their alleged infringement on Siemens's patents and copyrights. Siemens claimed that all of the ISOs had infringed on its copyrights and patents by copying and distributing software covered by Siemens's intellectual property rights. Siemens further claimed that by distributing protected software, the ISOs tortiously interfered with Siemens's contractual relations with its customers. Finally, Siemens claimed that three ISOs (ATC, TTSI, and RealCom) misappropriated trade secrets by stealing passwords that allowed the ISOs to activate features that customers had not licensed from Siemens.

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[1] None of the appellants allege that Siemens has a monopoly over the market for PBX sales. Companies other than Siemens, including Lucent Technologies and Nortel, also compete with Siemens for PBX customers. *Telecomm Tech. Servs. v. Siemens Rolm Communs., Inc., 66 F. Supp. 2d 1306, 1310 (N.D. Ga. 1998)*.

[2] The district court believed that this case would be appealed to the Court of Appeals for the Federal Circuit. That court, however, determined that it did not have jurisdiction over this case because the patent claims were only raised as counterclaims. The case was then transferred back to this court.

The district court, before dismissing the antitrust claim altogether, bifurcated the antitrust claim and the counterclaims into separate trials. A trial was held on the counterclaims and the jury returned a verdict for Siemens on all claims. The district court, however, limited the damage award because awards for the different claims were duplicative. The court upheld only the damage award for copyright infringement within the three-year statute of limitations period because all of the other claims were derivative of the **[**5]** copyright infringement. The ISOs appeal the jury verdict on a number of grounds. Siemens does not appeal the reduction in damages.

II. The Antitrust Claim

The issue here is whether Siemens's refusal to sell parts for its PBX systems, some of which are protected by patent or copyright, is a use of monopoly power *in the service market* in violation of antitrust laws.

1. Procedural Background

The district court, relying on the Supreme Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992)* ("Kodak I"), initially determined that the plaintiffs presented sufficient evidence to withstand a motion for summary judgment on their antitrust claim. In Kodak I, as in this case, ISOs brought suit against Kodak for failure to sell parts required to service Kodak machines. Kodak had a policy of refusing to sell parts to any ISO and would only ship parts to customers who planned to service the machines themselves. The ISOs argued, and the Supreme Court agreed, that they should be able to proceed to trial on two antitrust claims. The ISOs' first claim was that Kodak "tied" the parts and service markets **[**6]** in violation of *§ 1 of the Sherman Act*. In short, the plaintiffs claimed that Kodak was using its market power in the *parts market* to require that customers also buy from Kodak in the *service market*. By making access to Kodak parts contingent on buying Kodak service, Kodak was illegally using its market power in one market (parts) to limit competition in another market (service).

The ISOs's second claim was that Kodak was attempting to maintain a monopoly in violation of *§ 2 of the Sherman Act*. ***HN1***[] To demonstrate a violation of *§ 2*, the plaintiffs must show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical **[*825]** accident." *Id. at 480*. The Supreme Court held that the ISOs presented **[***1005]** sufficient evidence to withstand summary judgment for both elements by demonstrating that Kodak controlled 100% of the parts market and used this power to dominate 80% to 95% of the service market.

Here, the district court considered whether Siemens used illegal means to dominate the service market. **[**7]** [3] **[**8]** The ISOs alleged that Siemens violated *§ 2 of the Sherman Act* by using its control of the *parts* market to establish and maintain a monopoly in the *service* market. [4] Siemens responded with two arguments. First, Siemens disputed whether the purchase of the PBX system and the servicing of the system were two separate markets. Siemens maintained that the existence of a competitive market for the purchase of PBX systems prevented the company from undertaking anti-competitive action in the service market. [5] If only one market existed, then Siemens

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[3] The appeal here, unlike *Kodak*, does not involve a § 1 tying claim.

[4] To demonstrate that Siemens was illegally using monopoly power in the service market, the ISOs presented evidence that Siemens's prices for servicing were 30% to 60% higher than comparable ISO prices.

[5] Siemens's argument is based on a "life-cycle" theory of consumer buying where the consumers include present and future costs (such as servicing) when deciding which telecommunications system to purchase. In short, Siemens argued that customers considered the costs of service when making initial purchasing decisions and that this prevented Siemens from later charging super-competitive prices to service the PBX system. The Supreme Court rejected a similar life-cycle argument in Kodak I, but stated that a court needed to look at the facts of each case in evaluating whether consumers would realistically use life-cycle pricing when making purchasing decisions. *504 U.S. at 472-77*. Here, the ISOs argue that the life-cycle theory is

could not illegally tie or leverage its dominance in one market into another market. Second, Siemens argued that its intellectual property rights in its PBX parts and software granted it the right to refuse to sell to competitors and, thereby, insulated it from antitrust liability under *§ 2 of the Sherman Act*. The district court initially rejected both of these arguments. The court found that there was sufficient evidence for a jury to determine whether two markets existed and held that Siemens's intellectual property rights in the parts market did not immunize it from antitrust liability in the service market.

[9]** The district court reversed its original summary judgment ruling, however, after the Court of Appeals for the Federal Circuit issued its decision in *In re ISO, 203 F.3d at 1322*. There, a group of ISOs, relying on Kodak, argued that Xerox was establishing a monopoly in the servicing of its machines by refusing to sell parts to independent service companies. *In re ISO, 203 F.3d at 1326-27*. The Court of Appeals for the Federal Circuit rejected that argument, finding that Xerox could refuse to sell *patented* parts and not run afoul of ***antitrust law***. Id. If Xerox's policy with regards to its patented products happened to create a monopoly in the service market, this was simply an outgrowth of Xerox's statutory patent rights in the parts market and not an antitrust violation. *Id. at 1328-30*.

The district court applied Federal Circuit law because it believed (correctly at the time) that the patent issues involved placed an appeal in this case under the Federal Circuit's jurisdiction. The court, **[*826]** therefore, altered its earlier ruling to be consistent with the In re ISO decision. The district court determined that Siemens's **[**10]** failure to sell *patented parts or copyrighted software* was not an antitrust violation, but that Siemens's refusal to sell parts or license software not protected by intellectual property law could be a violation of *§ 2 of the Sherman Act*. Nonetheless, the district court granted summary judgment for Siemens because the ISOs failed to separate the effects of Siemens's lawful conduct (refusing to sell patented parts) and alleged unlawful conduct (refusing to sell unpatented parts) in the service market. As a result, the plaintiffs failed to establish a sufficient causal relationship between the alleged unlawful activity and their injury. In addition, the district court credited the ISOs' claim that they could not perform timely and efficient service if denied access to *any* important part and, thus, the district court determined that the ISOs would be unable to compete in the service market by Siemens's legal activity alone.

In the time between the district court's order and this appeal, however, the Supreme Court determined that the Federal Circuit does not have jurisdiction over appeals unless a patent issue is on the face of the initial complaint. See *Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 153 L. Ed. 2d 13, 122 S. Ct. 1889 (2002)*. **[**11]** Because the face of the complaint, here, addresses antitrust issues and patent infringement issues are only raised as counterclaims, the Federal Circuit determined that it did not have jurisdiction over the present case and transferred it to this court. **[***1006]** Consequently, the Federal Circuit opinion in In re ISO now only has persuasive authority.

2. Antitrust Issue

Several circuits have directly confronted the question of how to weigh the significance of a firm's assertion of intellectual property rights as a justification for its refusal to deal in the context of a *§ 2 Sherman Act* action. See *In re ISO, 203 F.3d at 1327-28*; *Image Tech. Servs v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997)* ("Kodak II"); *Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994)*. We recognize that this question lies at the intersection of intellectual property law and ***antitrust law*** and presents a difficult and increasingly important issue. In this case, however, we do not need to reach to this question, because we can resolve the antitrust issue on other grounds alone. [6]

[12]** As an introductory note, we observe the importance of carefully distinguishing between the various intellectual property regimes--patent, copyright, and trademark. Each of these regimes confers somewhat different property rights and provides a different type of protection.

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unrealistic, as it was in Kodak, because there are high initial costs to leasing a PBX system and customers are then "locked-in" to the system even if Siemens charges super-competitive prices for service.

[6] ***HN2***[] We review de novo the district court's grant of summary judgment. *Williams v. BellSouth Telecomms., Inc., 373 F.3d 1132 (2004)*.

(a) PBX Repair Parts

Siemens asserts that its right to refuse to sell PBX repair parts derives from the patent protection it enjoys for many of those parts. ***HN3***[] *The Patent Act* provides the patent owner with what amounts to a permissible monopoly over the patented work. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. Patent laws "are in pari materia with the antitrust laws and modify them pro tanto (as far as the patent laws go)." *Simpson v. Union Oil Co., 377 U.S. 13, 14, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*. As a number **[*827]** of recent cases have observed, there is a tension between the protections offered by patent and antitrust laws. See *In re ISO, 203 F.3d at 1325-26*; *Kodak II, 125 F.3d at 1215*; *Data General, 36 F.3d at 1187*. [7]

[13]** As noted above, however, we need not address what impact Siemens's patent rights may have on its refusal to sell its parts. Under *Data General*, Siemens's behavior does not constitute exclusionary conduct in violation of *§ 2 of the Sherman Act* because there is no evidence of any harm to equipment owners, completely independent of any patents Siemens may have on these parts.

In Data General, the defendant Data General designed, manufactured, and serviced mini-computers. *36 F.3d at 1152-54*. Grumman also serviced computers made by Data General. Data General adopted a policy of only selling its repair parts to owners of its equipment. Thus, a third party such as Grumman had no way to obtain the parts from Data General. An equipment owner could, however, order the repair parts and then use a third party to perform the servicing. The parts were not patented. Nonetheless, the First Circuit held that

> ***HN4***[] we cannot presume that elimination of an intermediate seller of such items harms consumers; indeed, consumers are likely to benefit by not having to accept [third-parties'] mark-up of [the defendant's] prices. Further, a direct sales policy does not act as a **[**14]** significant barrier to market entry by competitors offering lower prices for higher quality support services. [Third-party] technicians may … install spare **[***1007]** parts the customer has ordered from [the defendant.]

Id. at 1189.

The case at bar presents even stronger facts than were present in Data General. As in Data General, here the equipment owner has the option of ordering the PBX repair parts and then asking an ISO to install them. In addition, here an equipment owner can also provide an ISO with a letter of agency such that the ISO may order the part from Siemens and carry out the installation-an option not available in Data General. Applying the *Data General* rationale, we conclude that there is not actionable harm to consumers and therefore **[*828]** the ISOs have failed to prove a violation of *§ 2 of the Sherman Act* with respect to the parts policy.

(b) Copyrighted Software

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[7] Each of these decisions adopted a different approach to dealing with the issue. In In re ISO, the Federal Circuit held that patent holders who unilaterally refuse to license their products are exempt from the antitrust laws unless one of three conditions exist: (1) the patent was obtained by fraud on the Patent Office, (2) the patent holder tied the sale of the patent to other goods or services, or (3) the patent holder brought sham enforcement proceedings to interfere with a competitor's business. *In re ISO, 203 F.3d at 1326-28*. In Data General, the court adopted a rebuttable presumption standard in a copyright case, drawing an analogy between copyright and patent law. *Data General, 36 F.3d at 1188-89*. Finally, in Kodak II, the court purported to apply the Data General presumption in a patent case, but held that it is possible to rebut this presumption is through evidence of pretext. *Kodak II, 125 F.3d at 1219*. Commentators have criticized all of these approaches. In particular, the approaches of the Ninth Circuit and Federal Circuit have received extensive commentary. See 3 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 709b (2d ed. 2002) (criticizing Ninth Circuit approach); Jonathan I. Gleklen, *Per Se Legality for Unilateral Refusals to License IP is Correct as a Matter of Law and Policy*, The Antitrust Source (July 2002), *at* http://www.antitrustsource.com (same); Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 Antitrust L.J. 913 (2001) (criticizing Federal Circuit approach); Jeffrey K. MacKie-Mason, *Antitrust Immunity for Refusals to Deal in (Intellectual) Property is a Slippery Slope*, The Antitrust Source (July 2002), *at* http://www.antitrustsource.com (same).

The ISOs also contend that Siemens violated *§ 2 of the Sherman Act* by using its reconfiguration software to control PBX operating system updates. There are two types of software at issue here. First, Siemens licenses operating system software along with sales of the **[**15]** PBXs to all end users and to licensed distributors of its products. This software is necessary for the PBXs' operation. Second, Siemens has reconfiguration software which can modify and activate features in the operating system software. Siemens does not license or sell its reconfiguration software to anyone, as that software allows Siemens to control the licenses it extends to users and distributors for its PBX operating system. Siemens also uses this reconfiguration software to update its users' operating system software as such updates become available, for an additional licensing fee. The ISOs contend that Siemens used its control over the reconfiguration software to prevent ISOs from performing necessary software updates for equipment owners, and that this behavior constitutes a monopolization of the service market.

HN5[] The Copyright Act gives copyright owners the exclusive right to distribute protected works by "transfer of ownership, or by rental, lease, or lending." *17 U.S.C. § 106*. As other circuit courts have recognized, this right potentially conflicts with the *Sherman Act*. See *Kodak II, 125 F.3d at 1215*; *Data General, 36 F.3d at 1187.* **[**16]** [8]

We need not address this potential conflict here, as the present case involves **[**17]** a different type of software than was at issue in Data General and Kodak II. In both those cases, the software was diagnostic software which technicians used to assist in their service efforts. See *Kodak II, 125 F.3d at 1214*; *Data General, 36 F.3d at 1152*. That software was copyrighted material which served to make its owner or licensee competitive in the *service* market for the defendant's products. By contrast, the software at issue in the present case has no diagnostic or repair function; it is operating system software which operates the PBX hardware and proprietary reconfiguration software which allows Siemens to control its licenses on the operating system software. The software helps to make Siemens competitive in the *product* market for PBX products. Neither type of software, however, is intended to help diagnose problems and make repairs. Thus, the software does not give Siemens a competitive advantage in the *service* market. As such, Siemens' refusal to deal its copyrighted material cannot constitute a violation of *§ 2 of the Sherman Act* with respect to the market for service.

For the forgoing reasons, we affirm the district's **[**18]** grant of summary judgment in favor of Siemens. Because we affirm the grant of summary judgment, we **[*829]** do not reach the plaintiffs' claim that the district court erred in denying them class status.

III. The Jury Verdict for Siemens on its Counterclaims.

The ISOs also appeal the jury verdict for Siemens on patent and copyright infringement. For the reasons that follow, we affirm the jury verdict.

1. Ownership of the PBX Copyrights and Patents

The ISOs begin by appealing the district court's holding that Siemens owned the copyrights **[***1008]** and patents at issue in this case and, thus, had standing to bring these infringement claims. [9] The ISOs claim that the relevant intellectual property was not properly transferred from the Rolm Company Partnership to Siemens Rolm Communications, Inc.

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[8] Both the First and Ninth Circuits have found that a copyright owner is entitled to a rebuttable presumption that its refusal to deal copyrighted material is based on a legitimate business justification, and therefore not in violation of *§ 2 of the Sherman Act*. *Kodak II, 125 F.3d at 1218*; *Data General, 36 F.3d at 1187*. The Ninth Circuit went further, finding that the presumption had been rebutted by "evidence of pretext," and finding a *Sherman Act* violation. *Kodak II, 125 F.2d at 1219*. In the court's words, "neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct." Id. The First Circuit reached the opposite result, finding that in its case the presumption was not rebutted and the *Sherman Act* not violated. *Data General, 36 F.3d at 1187-89*.

[9] ***HN6***[] We review issues of law de novo and a district court's findings of fact for clear error. *SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 (11th Cir. 2001)*.

The original owner of the intellectual property **[**19]** was the Rolm Company, a Delaware partnership. The partners signed a subscription agreement to convert the partnership into a Delaware corporation. The appellants argue that Delaware law does not permit the merger of partnerships into corporations without a "winding up," which Rolm Company did not complete. The ISOs contend that, without a "winding up," Rolm Company never transferred its intellectual property rights to the Siemens Rolm Corporation, and, thus Siemens does not own the patents and copyrights.

The district court found, and we agree, that ***HN7***[] where all of the partners directly exchange their partnership interest for shares in the corporation, the partnership ends without a "winding up" and all of the assets of the partnership transfer directly to the corporation. Delaware law is silent on the issue, so the district court looked to the rules of other jurisdictions as well as treatises and found that a winding up period is not required. See *Carnes v. McNeal, 224 Ga. App. 88, 479 S.E. 2d 474 (Ga. Ct. App. 1996)*; *Judelson v. Weintraub, 55 A.D.2d 906, 390 N.Y.S.2d 455 (2d Dep't 1977)*; Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein **[**20]** on Partnership, Vol. 2, Rel. 6 Suppl., p. 281-82 (1999). We affirm the district court's finding that Siemens owns the intellectual property rights originally established by the Rolm Company Partnership.

2. Evidence of Contract Terms

The jury found that the ISOs violated copyright and patent law by distributing additional software to existing Siemens customers who had not licensed the additional software from Siemens. For instance, a customer could license a Siemens PBX with limited capabilities for a certain price, and Siemens alleged that the ISOs would then install copied software on the PBX that the customer did not pay to license. At trial, the ISOs defended their distribution of Siemens's copyrighted software by arguing that Siemens had sold its software. Under the "first sale" defense, a sale of the software would protect the ISOs from a copyright infringement suit. In rebuttal, Siemens presented testimony and unexecuted contracts, as evidence of its policy to license, rather than sell, its software.

The ISOs argue that the district court erred by allowing Siemens to present the unexecuted copies of its licensing contracts instead of the actual contracts in violation **[**21]** of the "best evidence" rule. The ISOs argue admission of these contracts prejudiced their case because the contracts varied **[*830]** widely and the ISOs could not examine Siemens's witnesses concerning the specifics of individual contracts.

HN8[] We review evidentiary rulings for abuse of discretion, *United States v. Smith, 231 F.3d 800, 807 (11th Cir. 2000)*, and find that the district court did not err in admitting these contracts. ***HN9***[] The best evidence rule applies where the party presenting evidence seeks to prove the specific contents of a writing. See *Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1543 (11th Cir. 1994)* . Here, the rule is inapplicable because Siemens sought to prove its policy of leasing software, not the terms of its contractual relationship with any one client. See id. (finding that the best evidence rule should not have prevented an insurance company employee from testifying about the company's policy); see also *United States v. Castro, 89 F.3d 1443, 1455 (11th Cir. 1996)* (finding that the best evidence rule did not prevent the government from using testimony, rather than a detailed federal fund report, to show that a county **[**22]** received federal grants). As such, Siemens could prove its licensing policy through testimony, which it also presented, *or* documentary evidence. Because Siemens sought to demonstrate a company policy, not specific terms of any contract, the district court did not err and the ISOs were not prejudiced.

3. "Distribution Infringement" Damages

The ISOs appeal the award of damages for their copyright infringement claiming that the damages were too speculative. The district court charged the jury to award damages based on "the amount of an ISO's profits that were gained because of the infringement." In a separate holding, the district court found that Siemens had not lost sales based on the infringement. For example, Siemens did not necessarily lose sales because the ISOs gave customers more capabilities than the customer had licensed from Siemens - the customer might not have ordered those capabilities if it had to pay for them. The ISOs use this secondary **[***1009]** holding to argue that if the district court found that Siemens did not lose sales, then the necessary corollary is that the ISOs did not *profit* as a result of the infringement. We reject this argument and affirm the decision **[**23]** of the district court.

HN10[] We review Rule 50 motions de novo and apply the same standard as the district court. *Russell v. North Broward Hosp., 346 F.3d 1335, 1343 (11th Cir. 2003)*. In doing so, we draw all inferences in favor of the non-moving party. Id. We affirm the jury verdict unless there is no legal basis upon which the jury could have found for Siemens. See id. The district court instructed the jury that Siemens had the burden of proving that the ISOs profited from their unlicensed transfer to customers. Siemens presented evidence at trial that the ISOs were selling used PBX parts that were running unlawfully copied Siemens software, and that the ISOs would not have made many of their equipment sales without this copyright infringement. The jury evidently credited this evidence because it returned a verdict for Siemens and awarded damages. Given the evidence presented, we hold that the jury verdict is reasonable.

4. Misuse Defense

The ISOs next appeal the district court's decision to include their claims of copyright and patent misuse in the antitrust proceeding, rather than as a defense in the trial on the infringement counterclaims. The ISOs **[**24]** argue that they presented questions of fact as to whether Siemens misused its copyrights and patents by extending their copyrights and patents beyond established legal limits. In essence, the **[*831]** ISOs wanted to be able to argue in the counterclaims trial that Siemens engaged in activities similar to leveraging and tying that are impermissible uses of copyright under antitrust laws. This circuit has not recognized, but has not rejected, misuse as a defense for infringement suits. In *BellSouth Advert. & Pub. Corp. v. Donnelley Info. Pub., 933 F.2d 952, 960-61 (11th Cir. 1991)*, this court found that there was a copyright infringement and discussed the conditions under which a company could misuse its copyright protection:

The antitrust misuse defense is an established defense to patent infringement. The policy supporting the patent misuse defense lies in the equitable clean hands doctrine. A patentee who comes into court, praying that defendant's patent infringement be enjoined will not be gratified if he is guilty of abusing his patent rights. Some courts have concluded that a misuse of copyright defense is inherent in the law of copyright just as a misuse of patent defense **[**25]** is inherent in patent law. Although the patent misuse defense closely fits the copyright law situation and may someday be extended to discipline those who abuse their copyrights, we decline to extend the application in the context before us because there is no antitrust violation. (Footnotes omitted.)

This decision, however, was vacated and reversed en banc. *BellSouth Advert. & Pub. Corp. v. Donnelley Info. Pub., 999 F.2d 1436 (11th Cir. 1993)*. The en banc court found that there was no copyright infringement and, therefore, never reached the issue of whether to recognize a misuse defense. Id. Similarly, we need not reach the issue of copyright abuse here. Even if such a defense exists, it would not help the ISOs because we conclude that Siemens's actions do not violate intellectual property or ***antitrust law***.

5. Sufficient Evidence for the Patent Infringement Claims

The jury found that the ISOs had infringed on Siemens's patents by illegally copying and selling Siemens's software that included one or more of Siemens's patents without a license from Siemens. The ISOs argue that Siemens failed, as a matter of law, to present sufficient evidence to support **[**26]** a jury verdict of patent infringement. [10]

The ISOs first argue that, under the doctrine of "first sale," Siemens had exhausted its patent when it sold its hardware and that this "first sale" defense was improperly rejected by the jury. The argument is not on point, however, because Siemens presented evidence to the jury that it had instituted valid restrictions on the sale or license of its patented products. Thus, a reasonable jury could reject the "first sale" defense and find that the ISOs had violated Siemens's patents.

[10] We review Rule 50 motions de novo and apply the same standard as the district court. *Russell, 346 F.3d at 1343*. We draw all inferences in favor of the non-moving party. Id. We affirm the jury verdict unless there is no legal basis upon which the jury could have found for Siemens. See id.

The ISOs next argue that there was insufficient evidence for five of the elements necessary to prove patent infringement. The elements **[***1010]** are: (1) Siemens failed to prove what **[**27]** versions of its patented Phonemail system were illegally transferred, (2) Siemens failed to show that the ISOs used its patented methods, (3) Siemens could not establish patent liability based on "mismatch," [11] (4) Siemens could not establish liability based on the unauthorized "feature activation," and (5) Siemens **[*832]** failed to prove that the infringement took place after the ISOs received notice of possible liability.

The district court held that Siemens presented evidence that its software was copied and distributed without its actual or implied authorization. At trial, Siemens presented evidence that it owned **[**28]** three patents that cover its Phonemail software. Siemens also presented testimony from ISO representatives that they had installed copies of the Phonemail software and activated features without authorization from Siemens. Furthermore, Siemens presented evidence that the ISOs copied 9000 and 9751 PBX software and used Siemens's patented methods of testing software. The district court found this to be sufficient evidence of patent infringement and we agree. [12]

6. The Copyright Claim

The jury also found that the ISOs had illegally copied Siemens's software and distributed the software to customers without a license to do so. The ISOs now argue that this claim should not have been presented to the jury because the judge should have ruled that Siemens's software was in the public domain. The ISOs argue that Siemens failed **[**29]** to attach a copyright notice to each disk containing copyrighted programs, and, thus, these works entered the public domain. Although Siemens's software does not carry a copyright notice, the hardware containing the software does. Anyone seeking to copy the software would necessarily view the notice affixed to the hardware. The ISOs contend that this notification of copyright is insufficient under the Copyright Act, *17 U.S.C. § 401(a)*, which applies to publicly-distributed copyrighted work. [13]

We reject this argument and affirm the district court's holding. **[**30]** The jury found that the copyrights held by Siemens were valid. It could have reasonably reached this determination either by finding that Siemens issued its work in a limited publication (exempting it from *§ 401*), or by finding that the work contained adequate notification. [14] Siemens presented sufficient evidence to support both of these theories. As such, we see no reason to disturb the jury verdict.

[31]** 7. The Trade Secret Misappropriation Claim

The jury found that three of the ISOs had misappropriated Siemens's trade **[*833]** secrets by wrongfully acquiring passwords to activate additional Siemens features. The first ISO, Realcom, argues that evidence that one of its

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[11] Siemens assigns a serial number to all of its hardware and coordinates that number to the software license for that specific system. If software is installed on the hardware that does not match the serial number, then Siemens knows that someone has copied its software and installed it on the hardware. When the serial numbers on the hardware and software are not coordinated, this is called a "mismatch."

[12] In its jury instructions, the district court covered, in detail, the necessary evidence for a findings of patent infringement and the ISOs did not object to any of these instructions.

[13] *§ 401*. Notice of copyright: Visually perceptible copies

(a) ***HN11***[] General provisions. Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device. (Emphasis added.)

[14] The district court noted, and we agree, that ***HN12***[] regulations relating to the Copyright Act permit some flexibility in how copyright owners must mark their protected works. See *37 C.F.R. 201.20(g)(4)*(permitting copyright notice to be affixed to containers that are permanent receptacles for the software copies). Because different work is transferred or leased in varying forms of media, the best way to notify a user of the copyright protections may vary. Here, Siemens affixed copyright notices to hardware cards contained with the PBX system. Anyone who tried to copy the software would see these cards.

employees used his knowledge from his previous employment with Siemens to transfer passwords was "mere speculation." Siemens, however, provided evidence that Realcom could only gain access to Siemens's passwords maintenance-level passwords by using higher-level engineering passwords from the employee. This is sufficient evidence to support the jury verdict.

The two other ISOs, ATC and TTSI, claim that the jury verdict against them was in error because they did not use any passwords. ATC was found to use RCTL, a computer program, to activate certain Siemens features. ATC argues that the use of RCTL alone does not show that it knowingly used Siemens's passwords, **[***1011]** and, thus, does not prove that it appropriated trade secrets. TTSI argues that it never used RCTL to activate features-it only sold a PBX system to another ISO who did so. Siemens, however, presented evidence that the only way to activate features in the Siemens **[**32]** PBX system was to use its passwords and that ATC and TTSI purchased the RCTL program to attain these passwords. This is sufficient evidence for the jury to find ATC and TTSI knew that the RCTL program was unlawful.

8. Tortious Interference of Contract Claim

Finally, the ISOs finally argue that Siemens's ***HN13***[] state law tortious interference with contract claim involves the same conduct as the copyright infringement claim and, thus, is preempted by federal copyright law. See *Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983)*. [15] If, however, the state law involves different or additional elements for recovery, then it is not preempted because it is not the same action. See *Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1549 (11th Cir. 1996)*. The district court found, and we agree, that the tortious interference claim involves an additional element. The tortious interference claim requires Siemens to demonstrate that the ISOs violated the terms of Siemens's software license for third parties, which is an element beyond federal copyright law that prohibits unauthorized copying. See *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 433 (8th Cir. 1993)*. **[**33]** As such, the state law claim is not preempted because the claim at issue is not equivalent to the claim under *§ 106*.

[34]** **[*834]** For the above reasons, we AFFIRM the judgments of the district court.

End of Document

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[15] In Crow, this court found that Florida could not criminally prosecute Crow for selling copied Tammy Wynette eight-tracks because *§ 301 of the Copyright Act* preempts state law remedies that are equivalent to the exclusive rights under *§ 106 of the Copyright Act*. *Id. at 1225-26*, see *17 U.S.C. § 106 (2004)*. *§ 106* states:

> ***HN14***[] Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

In re Pineapple Antitrust Litig.

Judicial Panel On Multidistrict Litigation

October 25, 2004, Filed

DOCKET NO. 1628

Reporter
342 F. Supp. 2d 1348 *; 2004 U.S. Dist. LEXIS 21639 **; 2005-1 Trade Cas. (CCH) P74,801

IN RE PINEAPPLE ANTITRUST LITIGATION

Subsequent History: [1]** RELEASED FOR PUBLICATION.

Motion granted by, Remanded by, in part *Barry v. Del Monte Fresh Produce Co. N.A. (In re Fresh Del Monte Pineapples Antitrust Litig.), 2005 U.S. Dist. LEXIS 6825 (S.D.N.Y., Apr. 20, 2005)*

Prior History: *Vassilatos v. Del Monte Fresh Produce Co., 2004 U.S. Dist. LEXIS 22123 (S.D. Fla., July 23, 2004)*

Disposition: Defendants' motion to transfer granted.

Core Terms

pineapples, consolidated, purchasers, antitrust, indirect, pretrial proceedings, state court, Centralization, coordinated, defendants', extra-sweet, motions, parties, purport

Judges: BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, D. LOWELL JENSEN, J. FREDERICK MOTZ, ROBERT L. MILLER, JR., KATHRYN H. VRATIL AND DAVID R. HANSEN, JUDGES OF THE PANEL.

Opinion by: Wm. Terrell Hodges

Opinion

[*1348] ***TRANSFER ORDER***

This litigation currently consists of the six actions in the Southern District of New York, two actions in the Central District of California and one action in the District of Arizona as listed on the attached Schedule A. [1] Before the Panel is a motion, pursuant **[*1349]** to *28 U.S.C. § 1407*, brought by defendant Del Monte Fresh Produce

[1] The defendants have notified the Panel of a related action pending in the District of Nevada. This action and any other related actions will be treated as potential tag-along actions. *See* Rules 7.4 and 7.5, R.P.J.P.M.L., *199 F.R.D. 425, 435-36 (2001)*. The motion before the Panel as originally filed also pertained to three additional actions. These three actions -- *Conroy v. Fresh Del Monte Produce, Inc., 325 F. Supp. 2d 1049 (N.D. California 2004)*; *Vassilatos v. Del Monte Fresh Produce Co., 2004 U.S. Dist. LEXIS 22123, S.D. Florida, C.A. No. 9:04-80450*; and *Williams v. Del Monte Fresh Produce Co., 325 F. Supp. 2d 855 (M.D. Tennessee 2004)* -- have been remanded to their respective state courts, and, accordingly, the question of *Section 1407* transfer with respect to the actions is moot.

Company and other related entities (collectively Del Monte) for coordinated or consolidated pretrial proceedings of these actions in the Southern District of New York. [2] Plaintiffs in the six Southern District of New York actions support the motion for transfer to that district. Plaintiffs in the other three actions oppose the motion. These plaintiffs variously proposed the Southern District of Florida or, in the alternative, the Northern District of California, as transferee district, in the event the Panel ordered transfer over their objections. Moving defendants then acknowledged **[**2]** that the Southern District of Florida would be an appropriate transferee forum.

[3]** On the basis of the papers filed and hearing session held, the Panel finds that these nine actions involve common questions of fact, and that centralization under *Section 1407* in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All actions allege that Del Monte, by fraudulently procuring and wrongfully enforcing a patent on an extra-sweet variety of pineapple, has monopolized an asserted market for extra-sweet pineapples in violation of federal ***antitrust law*** or state antitrust statutes. Certain of the constituent actions also allege that defendants' conduct violated other statutory and common law proscriptions of various states. The named plaintiffs in each action purport to sue on behalf of classes of either direct or indirect purchasers of defendants' pineapples, in particular, Del Monte Gold pineapples. Centralization under *Section 1407* is thus necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, including those with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary.

We are persuaded **[**4]** that the Southern District of New York is an appropriate transferee forum for this docket. We note that 1) six of the nine actions are pending in this district, have been consolidated and are proceeding apace before one judge; 2) the Southern District of New York actions include claims of both direct and indirect purchasers; and 3) the purported classes in those actions encompass the indirect purchaser classes sought in the three other actions. We also note that the plaintiffs opposed to transfer base their objections, *inter alia,* on their motions to remand to state court. We observe, however, that both courts in which the three actions are pending stayed proceedings in those actions pending a decision by the Panel, and, moreover, plaintiffs' motions to remand to state court can be presented to and decided by the transferee court. *See, e.g., In re Ivy, 901 F.2d 7 (2nd Cir. 1990)*; *Uresti v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. of Am. Sales Practices Litig.), 170 F. Supp.2d 1346, 1347-48 (J.P.M.L. 2001)*.

IT IS THEREFORE ORDERED that, pursuant to *28 U.S.C. § 1407*, the actions listed on Schedule A and pending outside the Southern **[**5]** District of New York are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Richard M. Berman for coordinated or consolidated pretrial proceedings with the actions pending **[*1350]** in that district and listed on Schedule A.

FOR THE PANEL:

Wm. Terrell Hodges

Chairman

SCHEDULE A

MDL-1628 -- In re Pineapple Antitrust Litigation

District of Arizona

Eileen Churosh v. Del Monte Fresh Produce, N.A., Inc., C.A. No. 2:04-1067

Central District of California

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[2] The motion was also filed on behalf of Del Monte Fresh Produce Inc.; Del Monte Fresh Produce N.A., Inc.; Del Monte Fresh Produce (Florida), Inc.; Del Monte Fresh Produce (West Coast), Inc.; and Fresh Del Monte Produce Inc.

James Linden, et al. v. Fresh Del Monte Produce, Inc., et al., C.A. No. 2:04-2708

Jonathan Weiss v. Del Monte Fresh Produce (West Coast), Inc., et al., C.A. No. 2:04-2709

Southern District of New York

American Banana Co., Inc. v. Del Monte Fresh Produce Co., et al., C.A. No. 1:03-10230

J. Bonafede Co., Inc. v. Del Monte Fresh Produce Co., et al., C.A. No. 1:04-705

Just-A-Mere Trading Co., LLC v. Del Monte Fresh Produce Co., et al., C.A. No. 1:04-1687

Gary Freed, et al. v. Del Monte Fresh Produce Co., et al., C.A. No. 1:04-1950

Meijer, Inc., et al. v. Del Monte Fresh Produce Co., et al., C.A. No. 1:04-2406

[6]** *Neil Schwam v. Del Monte Fresh Produce Co., et al.,* C.A. No. 1:04-2526

Crouch v. Crompton Corp.

North Carolina Superior Court, New Hanover County

October 26, 2004, Decided

02-CVS-4375, 03-CVS-2514

Reporter

2004 NCBC 7 *; 2004 NCBC LEXIS 6 **

AULEY M. CROUCH, III, on behalf of himself and all others similarly situated, Plaintiff v. CROMPTON CORPORATION, CROMPTON MANUFACTURING COMPANY, INC., formerly named in North Carolina as Uniroyal Chemical Company, Inc., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LIMITED PARTNERSHIP OF NORTH CAROLINA, BAYER AG, BAYER CORPORATION, AND RHEIN CHEMIE RHEINAU GMBH, Defendants; TIMOTHY J. MORRIS, on behalf of himself and all others similarly situated, Plaintiff v. VISA U.S.A. INC. and MASTERCARD INTERNATIONAL, INC., Defendants

Prior History: **[**1]** *In re Visa Check/Mastermoney Antitrust Litig., 297 F. Supp. 2d 503, 2003 U.S. Dist. LEXIS 22898 (E.D.N.Y., Dec. 19, 2003)*

Core Terms

purchaser, indirect, cases, chemicals, manufacturers, tires, settlement, consumers, factors, products, rubber, damages, anti trust law, retail, prices, price fixing, antitrust, chain, debit card, pass through, merchants, Shoe, overcharge, rubber-processing, antitrust violation, double recovery, class action, speculative, state ***antitrust law***, economic analysis

Counsel: Lea, Rhine & Associates, PLLC by Christopher A. Chleborowicz and Joel R. Rhine; Lerach Coughlin Stoia Geller Rudman & Robbins LLP by Robert J. Gralewski, Jr. and Bonny E. Sweeney; The David Danis Law Firm by Alexander E. Barnett, Michael J. Flannery and James J. Rosemergy for Plaintiff Crouch.

Moore & Van Allen, PLLC by Joseph W. Eason; O'Melveny & Myers, LLP by Benjamin G. Bradshaw, Richard G. Parker and Ian Simmons for Defendants Crompton Corporation, Crompton Manufacturing Company, Inc. and Uniroyal Chemical Company Limited.

Womble Carlyle Sandridge & Rice by Pressley M. Millen; Gibson, Dunn & Crutcher, LLP by D. Jarrett Arp, James Slear and Daniel G. Swanson; Covington & Burling by Michael J. Fanelli, William D. Iverson and Vijay Shanker for Defendants Flexsys America, LP, Flexsys America Limited Partnership of North Carolina, and Flexsys NV.

Helms, Mulliss & Wicker, PLLC by Henry L. Kitchin, Jr. and Bradley R. Kutrow; Jones Day by Thomas Demitrack, William V. O'Reilly and J. Andrew Read for Defendants Bayer Corporation and Rhein Chemie Corporation.

Hardison & Leone, L.L.P. **[**2]** by Kenneth L. Hardison, Elizabeth A. Leone and Joseph W. Osman; Susman Godfrey, L.L.P. by Mark A. Evetts, Drew D. Hansen and Neal S. Manne; Markun Zusman Compton & David, L.L.P. by Kevin Eng, David S. Markun, Edward S. Zusman; Friedman & Shube by Noah Shube for Plaintiff Morris.

Ellis & Winters, LLP by Richard W. Ellis, Stephen C. Keadey, and Matthew W. Sawchak; Robinson, Bradshaw & Hinson, PA by Everett J. Bowman, Mark W. Merritt and John R. Wester; Heller Ehrman White & McAuliffe LLP by Stephen V. Bomse, David M. Goldstein and Rachel M. Jones; Arnold & Porter LLP by Robert C. Mason for Defendant Visa U.S.A. Inc.

Womble Carlyle Sandridge & Rice by Pressley M. Millen; Paul Weiss Rifkind Wharton & Garrison, L.L.P. by Gary R. Carney, Patricia C. Crowley and Kenneth A. Gallo for Defendant MasterCard International, Inc.

Opinion

OPINION, ORDER AND JUDGMENT

[*P1] The above captioned cases are before the Court on motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. They are treated together because they both present the same legal issues. The first issue is whether indirect purchasers have standing under *N.C.G.S. § 75-16* to sue for violations of the state antitrust **[**3]** laws. The Court holds, as it has before, that the decision of the Court of Appeals in *Hyde v. Abbott Laboratories, Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996)*, *disc. rev. denied, 344 N.C. 734, 478 S.E.2d 5 (1996)*, is controlling, and indirect purchasers do have standing to sue under North Carolina's antitrust laws. If indirect purchasers have standing, the question becomes whether there are applicable limitations on that standing. The Court holds that indirect purchaser standing is not limitless; that there are standing requirements that apply to indirect purchasers. Application of those standards to the pleadings in each of these cases results in dismissal.

I.

FACTUAL BACKGROUND IN *CROUCH*

[*P2] Plaintiff Crouch is an individual residing in New Hanover County, North Carolina. Plaintiff purchased four B.F. Goodrich tires (Advantage GT model # P195-70R14 90SM+S) for his automobile on October 19, 2002 from Sam's Club of Wilmington. Plaintiff brings this claim individually and on behalf of all other persons who purchased tires, other than for resale, that were manufactured using the rubber-processing chemicals sold by Defendants since 1994. [1]

[*P3] Defendant Crompton Corporation ("Crompton") is a Connecticut corporation with its principal place of business in Greenwich, Connecticut. Crompton is a global marketer and manufacturer of specialty chemicals, polymer products and processing equipment, which includes chemicals used for the processing of rubber and tires. Crompton's actions have affected commerce within the State of North Carolina.

[*P4] Defendant Uniroyal Chemical Company Limited ("Uniroyal") is a Delaware corporation with its principal place of business in Akron, Ohio. It is a wholly-owned subsidiary of Crompton and is responsible either independently or jointly with Crompton Manufacturing Company, Inc. for the manufacture, sale and/or distribution of rubber-processing products as part of its ordinary and customary business. Uniroyal manufactures several rubber-processing products including specialty products for tires and industrial rubber goods. Uniroyal's actions have affected commerce within the State of North Carolina.

[*P5] Defendant Crompton Manufacturing Company, Inc., **[**5]** formerly legally named in North Carolina as Uniroyal Chemical Company, Inc. ("Crompton Manufacturing"), is a New Jersey corporation with its principal place of business in Greenwich, Connecticut. It is a wholly-owned subsidiary of Crompton and is responsible either independently or jointly with Uniroyal for the manufacture, sale and/or distribution of rubber-processing products as part of its ordinary and customary business. Crompton Manufacturing's rubber-processing products include specialty products for tires and industrial rubber goods. Crompton Manufacturing's actions have affected commerce within the State of North Carolina.

[*P6] Defendant Flexsys NV is a joint venture between Solutia, a United States company, and Akzo Nobel, a Netherlands company. Flexsys NV has its headquarters in Woluwe, Belgium.

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[1] Am. Compl. P 20. At oral argument the Court understood **[**4]** plaintiff's counsel to say that the class would be limited to retail consumers, excluding, for example, customers who purchased used cars with new tires.

[*P7] Defendant Flexsys America LP ("Flexsys") is the United States subsidiary of Flexsys NV. Flexsys is a Delaware corporation with its headquarters located in Akron, Ohio. Flexsys NV is the world's leading supplier of chemicals to the rubber industry. Flexsys' actions have affected commerce within the State of North Carolina.

[*P8] Defendant Flexsys America Limited Partnership of North Carolina **[**6]** ("Flexsys NC"), the legal name in North Carolina of Flexsys America LP, is the United States subsidiary of Flexsys NV. Flexsys NC is a Delaware corporation with its headquarters located in Akron, Ohio.

[*P9] Defendant Bayer AG is a corporation organized and existing under the law of the Federal Republic of Germany and maintains its principal place of business in Leverkusen, Federal Republic of Germany. Bayer AG is the parent company of Bayer Corporation, the wholly-owned subsidiary that sells and markets rubber-processing chemicals in the United States.

[*P10] Defendant Bayer Corporation ("Bayer") is a wholly-owned subsidiary of Bayer AG. Bayer has its principal place of business in Pittsburg, Pennsylvania, and is incorporated under the laws of Pennsylvania. Bayer develops, manufactures, sells and distributes a variety of pharmaceutical and chemical products, including rubber-processing products.

[*P11] **[**7]** Bayer develops, manufactures, sells and distributes its rubber-processing products through its Fibers, Additives and Rubbers Division. The Division is headquartered in Akron, Ohio. The Division manufactures rubber-processing chemical products which have a variety of differing roles in rubber-processing.

[*P12] Defendant Rhein Chemie Rheinau GmbH ("Rhein GmbH") is a business organized under the laws of the Federal Republic of Germany with its principal place of business located in Mannheim, Federal Republic of Germany. Rhein GmbH, a subsidiary or affiliate of Bayer AG, manufactures, sells and distributes the relevant rubber-processing chemicals throughout the global market, including the United States.

[*P13] Defendant Rhein Chemie Corporation ("Rhein"), a New Jersey corporation and a wholly-owned subsidiary and/or affiliate of Rhein GmbH, is responsible for the manufacture, sale and/or distribution of the relevant rubber-processing products throughout the United States, including North Carolina.

[*P14] On September 26, 2002, inspectors from the European Commission's Competition Division, assisted by officials from the Commission's member states, carried out unannounced inspections at defendants' European **[**8]** offices. According to a memorandum issued by the Commission on October 10, 2002, the stated purpose of the inspections was to "ascertain whether there is evidence of a cartel agreement and related illegal practices concerning price fixing for rubber chemicals." (Am. Compl. P 43.) On October 14, 2002, the Associated Press reported that Crompton, Bayer and Flexsys made press releases verifying that their respective companies were under investigation for alleged price collusion in rubber chemicals both by U.S. and European Union authorities. [2] On May 27, 2004, Crompton pled guilty to participating in a conspiracy to suppress and eliminate competition by maintaining and increasing the price of certain rubber chemicals sold in the United States and elsewhere during the period between July 1995 to 2001. The U.S. federal court imposed a fine of $50 million. On May 28, 2004, Crompton pled guilty to one count of conspiring to lessen competition unduly in the sale and marketing of certain rubber chemicals in Canada. The Canadian federal court imposed a sentence requiring Crompton to pay a fine of $7 million. On July 14, 2004, Bayer pled guilty to charges filed by the U.S. Department of Justice **[**9]** in Federal District Court in the Northern District of California and agreed to a $66 million fine for participating in an international conspiracy to fix prices in the rubber chemicals market.

[*P15] Plaintiff filed this action on November 5, 2002, only thirty days after the European investigation was announced, alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), including *N.C.G.S. §§ 75-1.1*, *75-2*, *75-5*, *75-16*, *75-16.1*. Plaintiff alleges that defendants "entered into an agreement, arrangement, contract, combination, conspiracy and/or understanding that was intended to and which did have the effect of fixing, raising, stabilizing and maintaining the price for the relevant rubber-processing chemicals." (Am.

[2] Miles Moore, *U.S., EU Probing Rubber Chemical Suppliers,* RUBBER & PLASTICS NEWS, Oct. 14, 2002, at 1.

Compl. P 40.) Plaintiff alleges that defendants' "supracompetitive pricing" was reflected in the prices of automobile tires manufactured using these rubber-processing chemicals. (Am. Compl. P 41.) Therefore, plaintiff alleges that consumers who purchased these automobile tires, not directly from defendants but rather from tire retailers, paid more **[**10]** than they would have in the absence of the alleged anticompetitive agreement. (Am. Compl. P 55.) Similar suits have been filed in other jurisdictions that recognize indirect purchaser standing. Plaintiff seeks to represent only persons who purchased tires at retail.

[*P16] Direct purchasers have filed a nationwide class action lawsuit seeking to recover the alleged overcharge that is the subject of the state litigation. *In re Rubber Chemicals Antitrust Litig.,* Master Docket No. C-03-1496 (N.D. Cal. (Judge Martin J. Jenkins)).

[*P17] Defendants have responded by moving to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted based upon plaintiff's lack of standing to sue under North Carolina's antitrust laws.

[*P18] The case was assigned to this Court by Order dated April 19, 2004.

II.

Factual Background in *Morris*

[*P19] Plaintiff, Timothy Morris, is a resident of North Carolina. Plaintiff brings this contemplated class action on behalf of all North Carolina consumers who purchased goods from merchants who accepted Visa and/or MasterCard credit cards and debit cards during the four years preceding the filing of the Complaint.

[*P20] Defendant Visa U.S.A. Inc. ("Visa") is a Delaware corporation. **[**11]** Visa's principal place of business is San Francisco, California. Visa transacts business within the State of North Carolina. At all relevant times, Visa was a national bankcard association whose members included more than 6,000 banks.

[*P21] Defendant MasterCard International, Inc. ("MasterCard") is a Delaware corporation. MasterCard's principal place of business is Purchase, New York. MasterCard transacts business within the State of North Carolina. At all relevant times, MasterCard was a national bankcard association whose members included more than 6,000 banks.

[*P22] In October 1996, Wal-Mart Stores, The Limited, Sears Roebuck, Safeway, Circuit City, the International Mass Retail Association, the National Retail Federation, the Food Marketing Institute, Bernie's Army-Navy Store, Auto-Lab of Farmington Hills, Burlington Coat Factory Warehouse, Sportstop, Payless Shoesource Shoes, Etc., the Coffee Stop, UCC Kwik Doc, Computer Supplies Unlimited, Denture Specialist, Inc./Geneva White D.M.D., Shark 3 Audio, 53, Inc., and Scrub Shop collectively filed a claim challenging the "Honor All Cards" rules of Visa and MasterCard that require all merchants accepting Visa and MasterCard credit cards to also **[**12]** accept their debit cards. The plaintiffs alleged that this requirement was a tying arrangement violating section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*. Plaintiffs further asserted that Visa and MasterCard attempted and conspired to monopolize the debit card market in violation of section 2 of the Sherman Act, *15 U.S.C. § 2*. Plaintiffs alleged that the defendants' actions resulted in excessive fees to merchants for the debit card processing services. *See In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68 (E.D.N.Y. 2000) aff'd, 280 F.3d 124 (2d Cir. 2001), cert. denied, 536 U.S. 917, 153 L. Ed. 2d 201, 122 S. Ct. 2382 (2002)*.

[*P23] In February 2000, a plaintiff class of approximately four million merchants who have accepted Visa and/or MasterCard credit cards and therefore were required to accept VisaCheck and/or MasterMoney debit cards under the "Honor All Cards" rule was certified. *Id.* Oral arguments on motions for summary judgment were heard on January 10, 2003. On April 1, 2003, the federal court granted the merchants' motion for summary judgment in part and denied it in part. The defendants' motions for summary judgment were denied in their entirety. In addition, MasterCard's **[**13]** motion for a severance was denied. *See In re Visa Check/MasterMoney Antitrust Litig., 2003 U.S. Dist. LEXIS 4965, at *27 (E.D.N.Y. Apr. 1, 2003)*.

[*P24] On the day that opening statements were to occur, April 28, 2003, MasterCard agreed to settle with the plaintiff class. *In re Visa Check/ MasterMoney Antitrust Litig., 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003)*. Visa agreed to settlement two days later, April 30, 2003. On December 19, 2003, the federal court issued an order providing final approval of the settlements. Pursuant to the settlement, merchants who accept Visa and MasterCard credit cards were free to reject Visa and MasterCard debit cards. In addition, Visa and MasterCard will pay more than $3 billion into a settlement fund to be distributed to the merchant class. *Id. at 506-08*.

[*P25] Plaintiff filed this action on December 31, 2003, alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act, *N.C.G.S. § 75*. Plaintiff asserts consumer antitrust claims that attack the manner in which the "Honor All Cards" rules of the MasterCard and Visa national payment systems are applied to merchants across the country. Plaintiff's claim in this action is founded upon the same alleged **[**14]** "tying" conduct by Visa and MasterCard that was at issue in the federal merchant class antitrust action. (*Compare* Compl. PP 2-6, 27(m), 28-57, *with* *In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. at 71-73*.) Plaintiff alleges that consumers paid higher prices for goods sold by the merchants bringing the claim in the federal action. Plaintiff alleges that because merchants were "compelled to pay supracompetitive prices," merchants, in turn, passed along their extra costs to consumers by raising the price of goods. (Compl. PP 57-58.)

[*P26] Defendants have responded by moving to dismiss under Rule 12(b)(6) based on two grounds: first, that plaintiff lacks standing to sue under North Carolina's antitrust laws; and second, that plaintiff seeks relief that would violate the *Commerce Clause of the United States Constitution*, which forbids states from regulating interstate commerce that requires uniform national regulation.

[*P27] The case was assigned to this Court by Order dated May 11, 2004.

III.

LEGAL STANDARD

[*P28] When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon **[**15]** which relief may be granted." *Harris v. NCNB, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)*. In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true. *See* *Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996)*. The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See Id.*

IV.

[*P29] An understanding of the issues in these two cases necessarily begins with examination of the standing requirements under federal ***antitrust law***. That examination begins with the study of two cases, *Hanover Shoe Co. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. The interrelationship of those two cases is best described by William Landes and Richard Posner in their seminal article: *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick.

> In *Illinois Brick Co. v. Illinois,* the Supreme **[**16]** Court held that indirect purchasers do not have standing to sue for violations of the antitrust laws under section 4 of the Clayton Act, which authorized private treble-damage suits by individuals or firms injured in their business or property by a violation of those laws. To understand this decision, one must go back to *Hanover Shoe Co. v. United Shoe Machinery Corp.,* a suit by a shoe manufacturer against a manufacturer of shoe machinery who had earlier been found to have monopolized the shoe machinery industry in violation of section 2 of the Sherman Act. The defendant argued that it should be allowed to show that *its* customer had not in fact been injured by the antitrust violation because the customer had passed on the costs of the violation to its customers, the purchasers of shoes. The Supreme

> Court rejected this argument, holding that there is no "passing on" defense to a suit by a direct purchaser; the direct purchaser is entitled to get the overcharge back, trebled, whether or not he was really injured to that extent.
>
> *Illinois Brick* is the mirror image of *Hanover Shoe.* The plaintiffs in *Illinois Brick,* represented by the state of Illinois suing on behalf of itself and some 700 **[**17]** local government entities in the Chicago area, claimed overcharges in connection with various construction projects. The defendants, manufacturers and distributors of concrete block alleged to be in collusion, sold the block to masonry contractors who submitted bids to general contractors who in turn submitted bids to customers such as the plaintiffs. The *Illinois Brick* plaintiffs were therefore indirect purchasers of concrete block, standing in the same relation to the defendants as the buyers of shoes at retail stood to United Shoe Machinery Corporation. The predicate of the *Illinois Brick* suit was the passing on of all or part of the overcharge by the direct purchaser; without passing on, there could be no injury to indirect purchasers.
>
> Unless they are willing to countenance multiple liability, the courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a "passing-on defense" against direct purchaser plaintiffs. As the Court recognized in *Illinois Brick,* there are only two ways of avoiding unacceptable multiple liability: (1) allow indirect purchasers to sue but overrule *Hanover Shoe* or (2) retain *Hanover Shoe* and preclude indirect purchasers **[**18]** from suing.

46 U. CHI. L. REV. 602, 602-03 (1979)(footnotes omitted).

[*P30] The rule governing indirect purchaser standing in federal antitrust cases has not changed since *Illinois Brick.* The fact that there has been no congressional or judicial repeal of the rule indicates that the policy behind it has proven effective. That policy holds that the direct purchaser suit is on balance a more effective instrument for enforcement of the antitrust rule prohibiting price fixing than the indirect purchaser suit. [3] Under the federal scheme, where avoidance of a double recovery is favored, the federal government has chosen the direct purchaser suit as the most effective means of enforcing the antitrust laws, particularly in price fixing cases.

[*P31] The choice made in the federal system had the effect of preventing indirect purchasers who were actually injured by a price fixing scheme from recovering their damages. It was a policy decision that was not well received in some states. There were rational arguments that the decision was wrong from a policy standpoint. Those arguments were made effectively by Justice Brennan in a well-reasoned dissent in *Illinois Brick.* A minority of states

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[3] William Landes and Richard Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick,* 46 U. Chi. L. Rev. 602, 634-35 (1979). The authors stated:

> Our analysis has suggested that the rule of *Illinois Brick,* which bars indirect purchasers from bringing private antitrust damage actions, is probably the soundest rule from the standpoint of maximizing the effectiveness of antitrust enforcement. **[**19]** We anticipate the argument that, however abstractly desirable it may seem to confine enforcement to direct purchasers, to do so is to alter the fundamental character of the private antitrust action in a way that cannot be squared with the intent of Congress in creating private damage remedies for antitrust violations. One way of characterizing our position is that it allows someone who may not be injured (or not injured much) -- the direct purchaser -- to recover (treble) damages while denying the right to recover any damages to other people -- indirect purchasers-who may in fact be injured. There is an element of paradox in this result, but it is dispelled by careful analysis. As we have shown, even if indirect purchasers were given the nominal right to sue, they would often fail to receive significant compensation. And anyone troubled by the windfall element in the judgment received by the direct purchaser must in logic reexamine the entire structure of private antitrust enforcement. Two-thirds of every private antitrust damage judgment (the punitive component of the judgment) is a windfall to the purchaser. In a class action, much of even the compensatory portion of the judgment **[**20]** may end up in the pockets of lawyers or in state treasuries, rather than in the pockets of the people who were actually harmed by the antitrust violation. The windfall element cannot be purged by the private antitrust suit without a complete reworking of antitrust enforcement. Until that is done, society will be well-advised to allow some direct purchasers to enjoy windfalls if, as we have argued, the direct purchaser suit is on balance a more effective instrument for enforcing the antitrust rule prohibiting price fixing than the indirect-purchaser suit.

Id. (footnote omitted).

chose to alleviate the problems created for indirect purchasers by *Illinois Brick* by either passing statutes (*Illinois Brick* repealer statutes) or interpreting their existing **[**21]** statutes as permitting indirect purchaser standing under the state ***antitrust law*** based upon some differentiation in language between the state and federal statutes. For example, the District of Columbia passed a statute [4] which was modeled directly on Justice Brennan's dissent in *Illinois Brick.* It specifically provides for indirect purchaser standing and it adopts the "target area" test for standing mentioned by Justice Brennan in his dissent. [5] It is a model for states desiring to create a clear statutory framework for indirect purchaser cases.

[*P32] The recognition of indirect purchaser standing by this minority of states created an unusual situation. In federal price **[**22]** fixing cases, direct purchasers were permitted to recover the artificially inflated price and treble damages even though they may have passed on the artificially inflated price to someone else in the distribution chain. They receive a windfall in some instances; but that windfall is predicated upon the policies that the federal scheme was (a) the most effective deterrent, (b) eliminated double recovery, (c) eliminated extraordinarily difficult damage proof [6] and (d) was economically rational. [7] When the minority states reacted by repealing *Illinois Brick,* they created a situation which (a) restored the ability of indirect purchasers to recover for injuries actually sustained as a result of anticompetitive behavior, (b) added a redundant and less effective deterrent, (c) condoned double recovery (trebled) against violators and (d) created the potential for extremely difficult damage proof issues.

[*P33] Not surprisingly, the state efforts to restore indirect purchasers' ability to recover for injuries sustained as a result of antitrust violations were challenged, primarily **[**23]** on the ground that state statutes were preempted by the federal scheme. That challenge was directly rejected by the United States Supreme Court in *California v. ARC America Corp., 490 U.S. 93, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989)*. The Supreme Court held that states may allow an indirect purchaser to sue under state antitrust laws.

> When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.

California v. ARC Am. Corp., 490 U.S. 93, 105-06, 104 L. Ed. 2d 86, 109 S. Ct. 1661 (1989).

This Court has previously noted the problems created by this dual enforcement in *Adams v. Aventis, S.A., 2003 NCBC 7, at P 23 (No. 01 CVS-2119, Craven County Super. Ct. August 26, 2003)(Tennille, J.)*. The Court stated:

> In 1995, the Section of ***Antitrust Law*** of the American Bar Association published a Report of the Indirect Purchaser Task Force outlining proposed legislative changes to address the "indirect purchaser problem." **[**24]** *Report of the Indirect Purchaser Task Force: Section of* ***Antitrust Law*** *American Bar Association,* 63 ANTITRUST L.J. 993 (Spring 1995). The report stated that the results of state *Illinois Brick* repealer laws are that:

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[4] *See* *D.C. Code Ann. § 28-4509(a)*(1981).

[5] Justice Brennan suggested a target area test as one possible approach to standing, but did not actually endorse it as a test to be adopted. It is worthy of note that Justice Brennan was among the majority in its holding in *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*(*"AGC"*), which was decided subsequent to *Illinois Brick* and prior to the 1996 amendments to the North Carolina statute.

[6] *See* Lands and Posner, *supra* note 3, at 609, 615, 619-20.

[7] *See* Landes and Posner, *supra* note 3, at 611-12, 617-18, 620, 625.

> (1) The full amount of the overcharge, trebled, can be recovered by (i) direct purchasers who sue under federal law; (ii) the customers of those direct purchasers who sue under state law; and (iii) under most state *Illinois Brick* repealers, by indirect purchasers at every other stage of distribution down the line.
> (2) The overcharge that an indirect purchaser can have trebled may be a multiple of the overcharge to the direct purchaser because indirect purchasers can claim that their seller's markups on the original overcharge are also inflated because of that overcharge.
>
> (3) The direct purchaser cases can be prosecuted in federal court and the indirect purchaser cases can be prosecuted in state court(s). Indeed, the Supreme Court seemed to encourage that kind of multiple litigation in *ARC America* by broadly hinting to federal courts that they utilize pendent jurisdiction principles for state law indirect purchaser claims.
>
> (4) The results in the direct and indirect purchaser **[**25]** cases need not be consistent. The overcharge which is treated as the direct purchaser's in the federal court can be treated as the indirect purchaser's in the state court. In fact, if indirect purchaser cases are brought in several state courts, there may be inconsistencies in those decisions.

Thus, defendants in horizontal price-fixing cases face not only the burden and expense of multiple treble-damage lawsuits, but also enormous potential liability -- not just three, but multiples of three times the overcharge, if a lay jury finds liability. Few companies can afford to "roll the dice" on a jury verdict when the exposure is that high, no matter how innocent they believe they are.

Additionally, the current law turns judicial economy -- the principal reason for the decisions in *Hanover Shoe* and *Illinois Brick* -- on its head. Federal *and* state judicial resources are finite *and* precious. It makes little sense to permit, much less encourage, multiple litigation in federal and state courts. It makes even less sense to permit inconsistent judgments as to who bore the overcharge.

2003 NCBC 7, at P 23.

[*P34] Thus, states may provide indirect purchaser recovery based upon state antitrust laws even **[**26]** though (1) the result may and almost assuredly will be a double recovery and (2) a preferable deterrent exists under federal law. It is clear then that the primary rational for enforcement of the state antitrust laws is to provide a recovery for indirect purchasers *actually* injured by antitrust violations. That goal should be kept in mind when interpreting and applying the statute.

[*P35] The inquiry into standing in federal antitrust cases does not end with *Hanover Shoe* and *Illinois Brick.* Those cases dealt only with apportionment of damages in price fixing situations.

[*P36] The Supreme Court specifically noted that its decision was not directed to standing. It said:

> Because we find Hanover Shoe dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

Illinois Brick, 431 U.S. at 728 n.7 (citation omitted).

[*P37] Since *Illinois Brick,* the federal courts have addressed standing in other situations involving indirect **[**27]** purchasers or persons indirectly injured by alleged antitrust activity. The leading federal case on standing in situations not involving price fixing is *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*(*"AGC"*). [8] In that case, the Unions sought

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[8] The application of the *AGC* standing requirements was not originally argued in *Crouch,* but was argued in *Morris.* Subsequent to the oral argument in *Morris,* counsel in *Crouch* were afforded the opportunity to address the application of the *AGC*

damages under section 4 of the Clayton Act. [9] They alleged that the employer group defendant had coerced some of its members to enter into business relationships with nonunion contractors and subcontractors, thus adversely affecting the trade of the unionized firms and consequently the unions themselves.

[*P38] In holding that the Union was not a person **[**28]** injured by reason of a violation of the antitrust laws within the meaning of section 4 of the Clayton Act, the Supreme Court adopted a five factor standing test which it derived in part by looking at the standard applied in common law damage actions when the Clayton Act's predecessor was originally passed in 1890.

[*P39] Significantly, the Supreme Court rejected the argument made by both plaintiffs in these cases that because the language in the statutes (section 4 of the Clayton Act and Chapter 75) is broad and unrestricted, it covers any and every arguable injury flowing from an antitrust violation. [10] In rejecting a limitless interpretation of the language the Supreme Court said:

> A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way. But before we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning.

AGC, 459 U.S. at 530 **[**29]** (footnote omitted).

[*P40] The Court then went on to hold:

> As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 263, n. 14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*. Just last Term we stated:
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>> An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." [*Illinois Brick Co. v. Illinois, 431 U.S.], at 760, 52 L. Ed. 2d 707, 97 S. Ct. 2061. (BRENNAN, J. dissenting)*. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. *Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*.

Id. at 534-35.

[*P41] The Supreme Court found that there was no single bright line test that could be applied in determining standing. Rather, **[**30]** it required federal judges to evaluate the plaintiff's harm, the alleged wrongdoing by the defendant and the relationship between the two according to five factors. The five factors to be used by federal courts in determining standing as set forth in *AGC* are: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market, (2) whether the injury alleged is direct and a first hand product of the restraint alleged, (3) whether there exists more directly injured parties with motivation to sue, (4) whether the damage claims are speculative and (5) whether the claims (a) risk duplicative recovery and (b) would require a complex apportionment of damages.

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requirements as well as the application of a target area test to the fact situation in Crouch. Each side filed supplemental briefs on those questions.

[9] *15 U.S.C. § 15 (2004)*. That provision is the model after which the North Carolina statute is patterned. *See infra* P 46.

[10] *See* Pl.'s Opp'n Defs.' Mot. Dismiss at 8-9 in *Morris;* Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 4-9 in *Crouch.*

[*P42] The holding in *AGC* has been followed consistently in the federal courts. *See, Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 219 (4th Cir. 1987)*(affirming dismissal because "though there obviously is a causal relation between the conduct and harm as alleged, it is remote rather than direct"); *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 539-43 (9th Cir. 1987)* (affirming dismissal because plaintiffs "were neither consumers nor competitors in the relevant market," who alleged injuries derivative **[**31]** of others who also had sued defendants); *Henke Enters., Inc. v. Hy-Vee Food Stores, Inc., 749 F.2d 488, 489-90 (8th Cir. 1984)*(affirming dismissal because plaintiff "was neither a competitor, participant, nor consumer within the [allegedly restrained] market" and its alleged injury was "an incidental by-product of the conspirators' claimed anticompetitive action"). Viewed in the broader context of standing enunciated in *AGC, Illinois Brick* appears as a per se disqualification of indirect purchasers in price fixing cases under application of factors 2, 3 and 5. *Illinois Brick* and *AGC* are logically consistent.

[*P43] If *Hyde* is correct that the North Carolina statute created indirect purchaser standing and if the courts of this state are required to interpret our antitrust statutes consistently with federal law [11], reconciling *Illinois Brick* and *AGC* in this state requires that factor 3 be modified and that the application of factors 2 and 5 be limited by the statutory recognition of indirect purchaser claims. The courts of this state may not deny standing based upon *Illinois Brick* but must still determine standing based upon relevant factors.

[*P44] "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002)* (*quoting Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002))*. "The term ['standing'] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., 115 N.C. App. at 114, 574 S.E.2d at 51-52* (*quoting Sierra Club v. Morton, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972))*. Standing consists of three elements:

> (1) "injury in fact" -- an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is *fairly traceable* to the challenged action of the defendant; and (3) it is *likely, as opposed to merely speculative,* that the injury will be redressed by a favorable **[**33]** decision.

Neuse River Found., 155 N.C. App. at 114, 574 S.E.2d at 52 (*quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992))*(emphasis added).

"The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Street v. Smart Corp., 157 N.C. App. 303, 305-06, 578 S.E.2d 695, 698 (2003)*(*quoting Texfi Industries v. City of Fayetteville, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979)*, *aff'd, 301 N.C. 1, 269 S.E.2d 142 (1980))*. "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Neuse River Found., 115 N.C. App. at 114, 574 S.E.2d at 52*.

V.

[*P45] The federal law and the issue of preemption of state antitrust laws by federal law being clear, the Court turns to a review of the North Carolina experience in indirect purchaser cases.

A.

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[11] *See infra* P 49; *N.C.G.S. § 75-1* (1999); Act of **[**32]** June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 550 (titled "An Act to Revise the Statutes Regarding ***Antitrust Law*** to Ensure That These Provisions are Internally Consistent and Consistent with Federal Antitrust Laws").

[*P46] That review begins with the statute and its history. The only appellate decision interpreting the statute is *Hyde v. Abbott Laboratories, Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996)*, *disc. rev.* ***[**34]*** *denied, 344 N.C. 734, 478 S.E.2d 5 (1996)*. As this Court has previously noted:

> The *Hyde* decision is the only North Carolina appellate decision dealing with indirect purchaser standing. That case was settled after the Court of Appeal's decision and before review by the North Carolina Supreme Court. In *Hyde,* plaintiffs filed a class action against manufacturers of infant formula, alleging violations of North Carolina's antitrust laws. *123 N.C. App. at 573, 473 S.E.2d at 681*. The purported class consisted of ultimate consumers who purchased infant formula from parties other than the manufacturer. *Id. at 574, 473 S.E.2d at 681-82*. The defendants filed a motion to dismiss alleging that plaintiffs were indirect purchasers and therefore lacked standing to sue under *N.C.G.S. § 75-16*. *Id.* The Superior Court granted the motion to dismiss, and plaintiffs appealed. *Id.*
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> The Court of Appeals reversed the Superior Court and found that under North Carolina's antitrust statute, an indirect purchaser may sue a manufacturer for antitrust violations. The Court of Appeals based this finding upon a review of the plain language of *N.C.G.S. § 75-16*. North Carolina's antitrust statute provides:
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>> If any person **[**35]** shall be injured or the business of any person, firm or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. *N.C.G.S. § 75-16* (1999).
>
> The current version of *N.C.G.S. § 75-16* was amended in 1969. Prior to the amendment, the first sentence of the provision began: "If the business of any person, firm, or corporation shall be broken up . . . ." 1913 N.C. Sess. L. 66, 70. The *Hyde* court found it significant that, in amending the statute, the legislature decided to add the phrase "if any person shall be injured" to the beginning of the provision. *123 N.C. App. at 578, 473 S.E.2d at 684*. The court found that this evidenced an intent to expand the class of persons with standing to sue under Chapter 75, and thus provide a recovery "for all consumers," including indirect purchasers. *Id. at 577-78, 473 S.E.2d at 684*. **[**36]** A review of the legislative history also leads to the conclusion that the General Assembly intended to create indirect purchaser standing to sue under the state antitrust laws when it amended the statute. There is simply no logical reason for the amendment other than the creation of indirect purchaser standing.
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> In holding that indirect purchasers have standing to sue under North Carolina ***antitrust law***, the Court of Appeals specifically declined to interpret the statute consistent with federal ***antitrust law***. As originally enacted in 1913, the North Carolina antitrust statute was modeled after federal ***antitrust law***, codified as Section 7 of the Sherman Act. *See* An Act to Declare Illegal Trusts and Combinations in Restraint of Trade, Ch. 41, § 14, 1913 Sess. Laws 66. Section 7 of the Sherman Act was recodified as Section 4 of the Clayton Act. Both federal and state law have been amended throughout the years; however, the language of the North Carolina statute has remained similar to the language of the Clayton Act.

Bruggers v. Eastman Kodak Co., 2000 NCBC 3, at PP 5-8 (No. 97CVS11278, Wake County Super. Ct. March 17, 2000)(Tennille, J.).

[*P47] This Court has previously held that unless and until **[**37]** *Hyde* is overruled by the Supreme Court or new legislation is passed, this Court is bound by the decision in *Hyde* to the extent that it holds that indirect purchasers have standing under the North Carolina antitrust laws. *See, Bruggers, 2000 NCBC 3, at P 17*; *Adams, 2003 NCBC 7, at P 8*; *MJM Investigations, Inc. v. Microsoft Corp.* (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004)(Tennille, J.)(Order Approving Settlement). In *Hyde,* the Court of Appeals was only asked to consider the question of whether the statute provided indirect purchaser standing. It was not called upon to delineate the scope and breadth of standing under the statute.

[*P48] Since *Hyde* was briefed and argued there have been several developments which might have impacted the scope, if not the actual outcome, of that decision. Those developments demonstrate that the landscape upon which these types of claims are viewed has changed significantly since *Hyde* was decided.

[*P49] First, in June 1996 the General Assembly ratified a bill entitled "An Act to Revise the Statutes Regarding ***Antitrust Law*** to Ensure That These Provisions Are Internally Consistent and Consistent With Federal Antitrust **[**38]** Laws." Act of June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 550 ("1996 amendments"). That legislative history is important for two reasons. First, if the General Assembly had desired to change the statute to provide for an *Illinois Brick/Hanover Shoe* limitation, it could have done so then. It did not, and it has done nothing to change the law since the *Hyde* decision. Second, and equally important, the General Assembly signaled a clear intent for the state courts to follow federal decisional guidance in interpreting and enforcing state antitrust laws. Clearly, counsel for the parties did not bring the 1996 amendments to the attention of the *Hyde* court. [12] The statutory direction to follow federal guidance has a bearing on this Court's decisions in these two cases, requiring the Court to reconcile the indirect purchaser standing statute with the federal standing requirements enunciated in *AGC.*

[*P50] Second, a track record is available which provides information not available to the *Hyde* court. [13] The **[**39]** track record to date establishes that state indirect purchaser cases are generally parasitic. They are not self-generating or supporting but almost always are dependent on some triggering federal action for their genesis. The track record also establishes that these cases pose significantly complex proof issues both as to damages and liability. [14] The track record establishes that they can in fact result in double recovery. [15] That same track record discloses that these types of cases are difficult to administer from a settlement standpoint and that the complexities and administrative costs and difficulties result in settlements that are something less than sterling from the consumer's point of view. [16] None of that information was available to the court in *Hyde.* This Court has previously

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[12] The *Hyde* court held: "Unlike Texas, our General Assembly has not mandated that our antitrust laws be construed in harmony with federal antitrust laws." *123 N.C. App. at 581, 473 S.E.2d at 686*.

[13] *See* discussion *infra* Part V.B (describing the indirect purchaser litigation since *Hyde* was decided).

[14] The *Hyde* court specifically found that there were no complex damage or proof issues before it and further held that there was nothing in the record **[**40]** in that case to establish that other cases would pose difficult damage and administrative issues. The *Hyde* court said:

> It is clear that a suit by indirect purchasers under our antitrust laws will be complex. However, when asked at oral argument whether "chaos reigned" in states which have allowed indirect purchaser suits, defendants were unable to cite a single example. This failure to cite a single indirect purchaser case in which a court has been faced with an impossible complex situation counsels us that a fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser.

123 N.C. App. at 584, 473 S.E.2d at 687-88.

The facts in *Hyde* presented a fairly simple case. The product was a commodity which was not altered or incorporated in another product in the distribution chain, and the price fixing took place at the wholesale level, only one level removed from the consumer. Direct impact on the consumer and pass through were not difficult issues to prove. The question of whether the fixed price was absorbed by the consumer was not difficult. The complexity presented by *Morris* and Crouch differs dramatically from *Hyde.*

[15] The *Hyde* court found: "However, there are few, **[**41]** if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation." *123 N.C. App. at 583, 473 S.E.2d at 687*. In *Crouch,* plaintiffs seek to recover the same damages for which direct purchasers such as tire companies may seek treble damages. In *Morris,* defendants have already agreed to a multibillion dollar settlement with the direct purchaser class. In *Bruggers,* the class recovered for the same offenses which were the subject of federal direct purchaser actions. Likewise, in *Microsoft,* the plaintiffs recovered on the same claims which were asserted by direct purchasers. The problems recognized with possible double recovery are obvious.

pointed out the problems with settlement of these kinds of cases. In approving the *Microsoft* indirect purchaser class action settlement, the Court noted:

> There is no definitive decision from the North Carolina Supreme Court ruling upon the issue of indirect purchaser standing in North Carolina, nor is there a clear legislative history. Accordingly, every plaintiff argues that there is indirect purchaser standing, and every defendant argues that there is no standing under North Carolina law. The stakes are almost always too high for either side to risk trial and an appeal. Further, numerous issues flowing from indirect purchaser standing remain unanswered. For example, who has the burden of proof on pass-through issues, and what must be shown? How indirect can the purchaser be? Who has the burden of showing that an indirect purchaser did not pass through the price increase to another consumer? Are there reliable means to determine pass through and the amount thereof? The answers to these questions dramatically affect liability and the potential for recovery. It is no surprise that neither **[**43]** plaintiffs lawyers nor defendants have wished to incur the expense of trial and appeal which would be necessarily incurred in getting the answers to these questions. It is likely that more than one trial would be required to get all the required answers.
> Additionally, there were significant questions concerning the application of the law of damages and how damages were to be determined in this case. The federal case which spawned this and other indirect purchaser cases was not a price fixing case. It involved anticompetitive behavior and not price fixing. The cost of Microsoft products at issue had decreased relatively speaking over the time in question. While there had been a determination in the federal action that Microsoft had a monopoly, there was no finding that it had used that monopoly to artificially increase prices. Proving damages by pass through of artificially inflated prices would have raised numerous novel questions of law. Proving damages to indirect purchasers by anticompetitive actions (which may have included artificially deflated prices) would raise a whole host of other issues for which there is no statutory or case law guidance.
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> In short, the process of trying this **[**44]** case and going through an appeal and possible retrial meant that the case would not be finally resolved for at least four or five years. Final judgment would have been entered some ten years after the alleged damages were incurred. For reasons explained more fully below, that time lag was a significant issue.
> While there is a possible philosophical argument that this uncertainty has a salutary effect in promoting settlement of cases, this court does not believe it is the function of the law to create ambiguity and uncertainty. If consumers have a cause of action they should be entitled to full recovery, not a compromise amount. On the other hand, if no cause of action exists or damages are limited to direct pass through of artificially inflated prices, businesses ought not to have to pay for unfounded claims even if they are compromised. Under the present system, only the lawyers really benefit from the uncertainty. One of their clients is paying an unnecessary price.
> ….
>
> Two factors are critical to the Court's decision to approve the terms of this settlement affecting purchasers of Microsoft products -- timing and purchaser identification. Most indirect purchaser cases involve common **[**45]** problems -- how to identify the class members and distribute small amounts of money to them. This case is no different. Plaintiff's counsel and Microsoft have represented to the Court that a means of identifying all consumers who purchased the software at issue does not exist and cannot be created. Thus, there will be a claim process of some sort no matter the outcome of settlement or trial. As counsel for one of the interveners

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[16] The settlements in *Long v. Abbott Laboratories, 1999 NCBC 10 (No. 97CVS8289, Mecklenburg County Super. Ct. July 30, 1999)(Tennille, J.)*, *Bruggers* and *Microsoft* demonstrate the difficulties inherent in consumer class action cases. *Long was a cy pres* settlement that provided no benefit to the class. *Bruggers* resulted in a settlement that went to class members under a cumbersome administrative process which did not likely reach anything more than a small minority of the class. *Microsoft* **[**42]** is a classic example of the complex administrative problems that can be created. It will likely result in primarily a *cy pres* settlement. All of these cases fit the forecast of difficulties made by Landes and Posner in their article. *See supra* note 3.

has suggested, even in cash refund cases, the claims process is abysmally ineffective, with only single-digit percentages of potential beneficiaries making claims. It thus appears to the Court that there will have to be a claims process no matter the outcome. If the case were tried and some amount awarded for damages to purchasers of specific products, a mechanism would have to be put in place for identification of products purchased, claims and payment. If that process were to be put in place three to five years from now and it covered products purchased in the late 1990s, it is unlikely that the claims process would result in any significant payout. Most of these technology products will have been replaced well before any claims process begins. If the funds **[**46]** were not paid out, Microsoft would get to keep the money. Purchasers would be required to prove purchases which occurred many years before the claim process begins. That will be difficult enough now, and perhaps impossible years from now. Settlement now, while there is some prospect that purchasers will have records of their purchases, is far more beneficial to the class. Here, most of the purchasers are businesses that arguably have better records of their purchases. For consumers, the settlement has the benefit of not requiring proof of purchase for smaller claims. The combination of the more current claim process and the *cy pres* component of the settlement make acceptance of the coupon aspect of the settlement acceptable, even if it is not the most desirable process. Given the rapid advancements in technology, it is also likely that computer owners will make purchases of new hardware and software, making the coupons more valuable than they would be for products not likely to be replaced.

MJM Investigations, Inc. v. Microsoft Corp. (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004)(Tennille, J.) (Order Approving Settlement).

[*P51] Third, **[**47]** there are cases from other indirect purchaser states which provide some guidance with respect to limitations on standing. The case law has evolved from interpretations of state statutes to determine if they provide for indirect purchaser standing (as happened in *Hyde*) to a more detailed examination of standing requirements. Not unexpectedly, the far reaches of the claims against Visa and MasterCard in the various indirect purchaser states have prompted some of that evolution.

[*P52] At least eight other courts have rejected standing for plaintiffs with claims identical to those presented in the *Morris* case. Each of those states recognizes indirect purchaser claims. In South Dakota the court simply dismissed the case without detailed explanation. [17] In North Dakota the plaintiff's case was dismissed with the holding: "As 'non-purchasers' of defendants' debit card services to merchants, the Court believes that plaintiffs lack standing to sue for the alleged restraint of trade in such services. Their alleged injury is simply too remote." [18]

[*P53] In Michigan [19] the trial court applied the five *AGC* factors directly in dismissing similar claims, finding that each failed to support standing. Significantly, the Michigan court rejected an argument similar to that made by plaintiffs in these two cases that the broad language of the state statute trumped application of the *AGC* factors. In addition, the court found that plaintiff was not an indirect purchaser under the statute.

[*P54] In Minnesota the courts have also applied *AGC* factors in determining standing for indirect purchasers even though *Illinois Brick* was not applied to preclude indirect purchaser claims. In a well-reasoned opinion in the *Gutzmiller* [20] case, the court applied factors 1, 4 and 5 under *AGC* in denying standing to plaintiffs under the Minnesota statute, which is similar to North Carolina's ***antitrust law***.

[*P55] In New York, the Commercial Court in *Ho* [21] rejected standing for plaintiffs under circumstances identical to the *Morris* case. **[**49]** The court applied several of the *AGC* factors in determining that the plaintiffs lacked standing under New York antitrust laws.

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[17] Cornelison v. Visa U.S.A., Inc., Civ. No. 03-1350 (Pennington County Cir. Ct., S.D. Sept. 29, 2004).

[18] Beckler v. Visa U.S.A., Inc., Civ. No. 09-04-C-00030, **[**48]** at 5 (Cass County Dist. Ct., N.D. Aug. 23, 2004).

[19] Stark v. Visa U.S.A., Inc., No. 03-055030-CZ (Oakland County Cir. Ct., Mich. July 23, 2004).

[20] Gutzwiller v. Visa U.S.A., Inc., No. 14-C4-04-000058 (Clay County Dist. Ct., Minn. Sept. 15, 2004).

[*P56] In California the trial judge hearing the consolidated cases against Visa and MasterCard dismissed all the claims arising under the Cartwright Act, *Cal. Bus. &. Prof. Code § 16720, et seq.*, applying the *AGC* factors to find no standing. The court also held that plaintiffs were neither direct nor indirect purchasers of card services. [22]

[*P57] In Nebraska, the trial court applied the five *AGC* factors in dismissing the identical claims by plaintiff. Specifically, the court held that the plaintiff failed to satisfy factors 2 and 3 under *AGC.* The court also held that the plaintiff was not an indirect purchaser within the scope of the state statute, which expressly grants standing to indirect purchasers. [23]

[*P58] In Maine **[**50]** the trial court rejected standing for the plaintiffs under an application of the AGC factors. The court held that factors 3, 4 and 5 particularly weighed against standing. [24]

[*P59] In Superior Court in Buncombe County, North Carolina, Judge Dennis Winner dismissed the plaintiff's indirect purchaser claim, which was virtually identical to the claim in *Crouch,* stating:

> It is the opinion of the undersigned that notwithstanding the enactment of the amendment in 1996, the *Hyde* decision is still the law of this State with respect to the issue of suit by an indirect purchaser. Nevertheless, this Court believes that the General Assembly never intended that the antitrust laws of this State be used in the manner in which the Plaintiff has attempted in this case, and that this case is therefore distinguishable from the *Hyde* case. To rule otherwise would put this Court in an impossible position of attempting to determine whether the alleged price-fixing by an oligopoly of an ingredient used to make tires had anything to do with the price paid by the Plaintiff when he bought the tires. This Court believes that **[**51]** without some allegation and proof that the tire manufacturers themselves were an oligopoly and were fixing prices, that it would be impossible to show the price the Plaintiff paid was not set by the normal laws of supply and demand in our open economic system, and that even if it were possible to show that, there would be no way for the Court to, in any fair or just way, determine an amount the Plaintiff was damaged.
> Therefore, it is the opinion of this Court that the General Assembly could not have intended that our Antitrust Statue be used by an indirect purchaser of tires against the manufacturers of an ingredient placed in those tires.

Weaver v. Cabot Corp., No. 03CVS04760 (Buncombe County Super. Ct., N.C. Mar. 29, 2004)(Winner, J).

B.

[*P60] A review of indirect purchaser cases in North Carolina is informative. The Court does not believe the North Carolina experience differs substantially from the national experience. State indirect purchaser cases have common characteristics. They are seldom *sui generis.* More commonly they originate after a federal triggering event. Those triggering events include a guilty plea to federal price fixing, a class action suit by direct purchasers, or notice **[**52]** of a settlement of antitrust claims with private plaintiffs or the Department of Justice. *Morris* is an excellent example. Sometimes only the announcement in an SEC filing that there is an investigation underway will trigger suit. The *Crouch* case is an excellent example. Almost all of the cases are brought as class actions. [25] Discovery tracks the federal action permitting class counsel to piggyback on the work of the government or counsel for the

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[21] ***Ho v. Visa U.S.A., Inc., No. 112316/00, 3 Misc. 3d 1105A, 787 N.Y.S.2d 677, 2004 N.Y. Misc. LEXIS 577 (New York County Super. Ct., N.Y. Apr. 21, 2004)***.

[22] Credit/Debit Card Tying Cases, No. CJC-03-004335 (City and County of San Francisco Super. Ct., Cal. Oct. 14, 2004).

[23] Tackitt v. Visa U.S.A., Inc., No. C103-740 (Lincoln County Dist. Ct., Neb. Oct. 19, 2004).

[24] Knowles v. Visa U.S.A. Inc., No. CV-03-707 (Cumberland County Super. Ct., Me. Oct. 20, 2004).

[25] The *Adams* case is an exception. In that case the plaintiffs were individual hog farmers who opted out of a class action settlement that they believed was disadvantageous.

direct purchasers. Both plaintiffs and defendants have a vested interest in seeing the federal action proceed first. Cases are filed in most if not all states having indirect purchaser standing, frequently by the same lawyers. The cases are seldom, if ever, tried. They get settled far short of trial. [26] Often and not unexpectedly, the settlements in the various indirect purchaser standing states track each other closely. The *Microsoft* case is an excellent example. Sometimes the state and federal actions are settled together. [27] The Court is unaware of any case in which the settlement reflected treble damages. Rather, most settlements are less than a whole recovery of the alleged overcharge and are not particularly satisfying from the perspective **[**53]** of the consumer class member. *Cy pres* settlements are not uncommon since the difficulties inherent in distributing tiny amounts among large numbers of consumers are daunting and expensive. The settlement in *Long v. Abbott Laboratories, 1999 NCBC 10 (No. 97CVS8289, Mecklenburg County Super. Ct. July 30, 1999)(Tennille, J.)* is an excellent example. The North Carolina cases mirror the national characteristics.

[*P61] This Court has presided over a number of class action settlements involving indirect purchaser claims, beginning with *Long v. Abbott Laboratories.* That case is instructive for a number of reasons. It was parasitic in the sense that it was filed after a federal direct purchaser antitrust case was filed and discovery consisted **[**54]** of following discovery in the federal case. Similar cases were filed in ten other states by the same counsel appearing in North Carolina. Fortunately for the plaintiffs, a class action settlement of the various state claims was reached prior to trial of the federal action. The federal case was decided adverse to the plaintiffs, and no antitrust violations were found. Since a settlement agreement had been reached, it was enforced. The agreement provided for a settlement fund of approximately $9 million for North Carolina residents of which class counsel sought approximately twenty-five percent. [28] Since the settlement could not be distributed to the class, which consisted of all North Carolinians who purchased a prescription drug at a retail drugstore, a *cy pres* fund for people who could not afford their medications was created. Class members received nothing, and the defendants [29] paid a cost of litigation settlement although no underlying claim was ever proved.

[*P62] In *Bruggers,* the state claim was filed after federal triggering **[**55]** events, including a federal action. *2000 NCBC 3, at P 15*. Claims were filed in other indirect purchaser states. [30] The defendants were alleged to have fixed the price of x-ray film. The class consisted of all consumers of x-ray film in North Carolina. The problems created by the great variety of purchasers and the number of distribution chains made settlement difficult. In the end, a settlement fund of approximately $200,000 was created and divided among claimants on a two fund basis. One fund went to purchasers based upon the pro rata amount of film they purchased and the other fund provided one lump sum payment to anyone who filed a claim, determined per capita based on the number of claims. In total, 116 claimants sought recovery through the settlement fund. However, only 100 claims were found valid. Potential claimants numbered in the thousands. In this instance, money actually went to class members although the payment was small and the cost of administration high. Class counsel sought and obtained a reasonable fee based upon the amount recovered for the class. Counsel for both sides urged the Court to approve the settlement based upon the uncertain state of the law in North Carolina **[**56]** and the difficulty of proof involving so many different purchasers and distribution methods. The pass through issues were extremely difficult, including questions of whether hospitals absorbed the cost or passed it on to patients and insurance companies and whether the dentist or patient ended up paying the cost for dental x-ray film. The Court is convinced that the vast majority of class members declined to take advantage of the settlement because the dollar amount was not worth the effort required by the claims process.

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[26] The reasons for settlement are aptly described in the ABA Report of Indirect Purchaser Cases at *supra* P 33.

[27] See the settlements in *Adams,* and *Thai Holding v. Archer Daniels Midland Co.,* (No. 03CVS15096, Mecklenburg County Super. Ct., N.C. Aug. 24, 2004)(Tennille, J.)(Order Staying Action).

[28] The court reduced the request to approximately ten percent based on the poor results for the class.

[29] Twenty three of the largest drug companies in the world.

[30] The original complaint sought a nationwide class consisting of residents of all states which had indirect purchaser standing. The complaint was amended to limit the claims to North Carolina.

[*P63] The Court's most recent experience has been in the settlement of indirect purchaser claims against Microsoft. [31] Again, the action was filed after a federal triggering event, the determination in the government's federal case of abuse of monopoly power by Microsoft. Lawsuits were filed in numerous states and discovery coordinated with federal actions by direct purchasers. The direct purchasers recovered little in the federal action, and their counsel intervened in the state actions **[**57]** to try to obtain some of the attorney fees in the state actions even though they had no agreements with local counsel and had made no appearances in the cases. The settlement was complicated and had a significant *cy pres* component. [32] Counsel for the plaintiffs and Microsoft urged approval of the settlement over significant objections based in part on the complicated proof of damages and the uncertain state of the North Carolina law. Like *Morris,* that case did not involve allegations of price fixing among competitors.

[*P64] The Court is aware of other cases in this state. A class action settlement was approved in an alleged price fixing scheme involving vitamins. Those cases followed guilty pleas to federal criminal charges. That case was not before this Court, but a number of large hog farmers opted out of what they believed was an inadequate class settlement and filed their own indirect purchaser actions. This Court ruled that they had standing. [33] The defendants declined **[**58]** the Court's suggestion to seek appellate review of that decision, and those cases have settled without necessity of court approval since they were individual and not class actions. Another case involving price fixing of monosodium glutamate products has been stayed in this Court pending a global settlement covering the federal claims and all state indirect purchaser claims. [34] Such settlements are preferable, but rare. They produce a more rational allocation of the liability fund.

[*P65] The Court is not aware of any North Carolina class action that did not have a federal triggering event. The Court is not aware of any indirect purchaser case in North Carolina that has proceeded to trial, presumably because there is a federal triggering event establishing liability. In each case before this Court, the argument is made that the case must be compromised because the proof of damages is difficult and uncertain. Such arguments lead to a question of whether standing is appropriate. Settlements are to be encouraged, but **[**59]** they should have some basis in reality, and class counsel should be prepared to show the court more than the simple fact that the issues are difficult. That preparation undoubtedly requires some time and expense on the part of class counsel. Some investigation before rushing to the courthouse after a federal triggering event might generate better results or prevent dismissal on a challenge to standing.

VI.

[*P66] The following policy considerations are relevant in deciding the standing requirements in indirect purchaser cases in North Carolina.

[*P67] If Hyde is correct, the General Assembly intended for persons *actually* injured to be able to recover for injuries resulting from violations of the state antitrust laws.

[*P68] The General Assembly has directed the state courts to follow federal guidelines in determining standing.

[*P69] There is already an adequate deterrent to violation of the antitrust laws in the federal system. Accordingly, the focus of state law should be recovery for those *actually* injured: i.e., victim compensation.

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[31] MJM Investigations, Inc. v. Microsoft Corp. (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004)(Tennille, J.)(Order Approving Settlement).

[32] See the description at supra P 50.

[33] Adams, 2003 NCBC 7, at P 31.

[34] Thai Holding v. Archer Daniels Midland Co. (No. 03CVS15096, Mecklenburg County Super. Ct., N.C. Aug. 24, 2004)(Tennille, J.)(Order Staying Action).

[*P70] State indirect purchaser standing creates the prospect of double recovery, both as between direct and indirect purchasers and between indirect purchasers at different levels in **[**60]** the distribution chain. Double recovery is not favored, and where, as here, it is permitted between direct and indirect purchasers, it should be narrowly construed to ameliorate the adverse consequences.

[*P71] Indirect purchaser cases are expensive, inefficient and low-yield for consumers. The cost of obtaining information relevant to pass through of added costs from antitrust violations and investigating the pricing decisions made in the distribution chain is high. Apportionment among various tiers in the distribution chain involves extremely difficult problems of economic analysis and measurement. The practical difficulties of estimating both supply and demand elasticity at any one level and then over and among multiple tiers in the distribution chain results in speculative damage estimates. From an economics perspective, indirect purchasers face negligible price increases in comparison to direct purchasers. [35] Apportionment results in added cost of litigation and uncertainty. The actual recovery for class members in consumer class actions is relatively small and is frequently outweighed by the cost of administration and attorney fees. The yield is low given the potential expense of litigation. **[**61]** That is one explanation for the settlements which do not reflect actual injury as much as the costs of litigation.

[*P72] There is no single bright line test that works in every case. Each standing case must be decided based on its own factual situation.

[*P73] Given those policy considerations, the decision of the Court of Appeals in *Hyde,* the developments since *Hyde,* the history of the amendment of the statute and the subsequent directions from the General Assembly to follow federal guidelines, and the clear federal approach to standing, the Court believes that the North Carolina courts would apply a multifactor test to determine standing in indirect purchaser cases. The requirements would recognize indirect purchaser standing, but engraft upon the statute the requirements of standing enunciated in *AGC,* modified to recognize the right to recover for injury created by statute for indirect purchasers. The factors would include:

1. Whether the plaintiff is a consumer or competitor in the allegedly restrained market. This inquiry focuses on the market the alleged restraint was designed to impact and the intent of the actor in engaging in the restraint. **[**62]** One key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place. This factor recognizes that the antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. This factor would have supported standing in *Hyde.*

2. The directness of the impact on the plaintiff. This factor is modified to eliminate the restriction of *Illinois Brick* against indirect purchaser standing. Being an indirect purchaser does not preclude standing. However, the causal connection between the act and the claimed injury cannot be too remote. Purchasers in the direct chain of distribution are more likely to be able to show sufficiently direct injury than those outside the chain of distribution. Purchasers who buy the product which is the subject of the restraint are more likely to be able to show sufficiently direct injury than those who purchase a product with a component which is the subject of the restraint. Purchasers of products whose manufacture was impacted by the restraint face significant hurdles showing sufficiently direct impact. Within the chain of distribution, the relative positions **[**63]** of the purchaser and the actor can be significant, depending on the length and complexity of the distribution chain. Even though a purchaser is removed from the direct restraint, he or she may still show direct injury. *See Blue Shield of Va. v. McCready, 457 U.S. 465, 478-81, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. This factor would have supported standing in *Hyde.*

3. Whether there exist other indirect purchasers in the distribution chain who are more directly impacted by the alleged violation. The nature of the market is significant here. Courts must look at the nature of the product and the market for the product as well as the chain of distribution to determine the likelihood of direct pass through of the cost of the restraint or inflated price. The nature of the restraint must also be considered. Double

[35] *See* Landes and Posner, *supra* note 3, at 617.

recovery among indirect purchasers should be avoided. This factor would have supported standing in Hyde where the distribution chain was short.

4. The speculative nature of the damage claims. As damage claims move from direct to indirect and the distribution chain becomes more complex, the possibility of factors intervening to affect causation and price multiplies, and claims become **[**64]** more speculative. It is appropriate for purposes of determining indirect purchaser standing "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." *McCready, 457 U.S. at 475 n.11*. In *McGready* the Court noted that the courts were required to be cautious when dealing with speculative, abstract and impractical damage theories. *Id.* This factor would not have prevented standing in *Hyde*. This factor focuses on sound economic analysis. Important factors would include reliable demand and supply curve studies and sufficient regression analysis to eliminate other factors in pricing.

5. The risk of duplicative recovery and danger of complex apportionment of damages. While these factors are limited by the General Assembly's creation of indirect purchaser standing, they should not be totally eliminated when considering the state claims. The courts still have the same interest in keeping the scope of a complex antitrust trial within judicially manageable limits. *AGC, 459 U.S. at 543*. The factors are simply taken down a level and the *Hanover Shoe*/*Illinois Brick* restrictions eliminated. State cases may present apportionment issues which are simply **[**65]** too complex and for which there exists no measure of recovery which is not speculative. It is clear that the General Assembly did not intend that every purchaser in the distribution chain have a right of recovery or that there be duplicative recovery among indirect purchasers. Such an interpretation would be contrary to the clear guidance to follow federal precedent and harmonize state ***antitrust law*** with federal law. Rather, it should be clear that the General Assembly intended that those who can show with some degree of certainty that they were directly impacted by the alleged acts in restraint of trade should be able to recover even though they are indirect purchasers. The courts must be cognizant that the problems between direct and indirect purchaser cases replicate themselves in state indirect purchaser cases where there are multiple levels in the distribution chain and multiple distribution chains. There should only be one fund constituting the amount of the alleged overcharge to North Carolina residents, and the courts must guard against multiple liability for the fund and prejudice to absent victims or non-class members. The complexity of the distribution chain and the variety **[**66]** of consumers in *Bruggers* highlight the issues this factor would implicate. As the Supreme Court noted in *AGC* and *Illinois Brick*, massive and complex damages litigation undermines the effectiveness of treble damage suits. The poor results obtained in settlement in the North Carolina cases confirms this view.

[*P74] There is no bright line test: each situation must be considered on its facts and the factors applied. Different factors might be important in different cases. Accordingly, the Court turns to the application of those factors to these two cases.

VII.

A. The *Crouch* Case

[*P75] The Court's analysis is premised on the underlying proposition that defendants have engaged in illegal price fixing in the market for rubber chemicals.

[*P76] Both Crompton and Bayer have pled guilty to conspiring to fix prices and suppress competition in the sale of certain rubber compounds and chemicals. On October 13, 2004, the Associated Press reported that Bayer pled guilty to a criminal charge involving a rubber compound used in hoses, belts, seals, adhesives and sealants. Crompton pled guilty in Canada to fixing prices on chemicals used in the manufacture of tire-quality rubber and non-tire applications such as automobile **[**67]** parts, conveyor belts, weather stripping and rubber latex gloves from July 1995 to 2001. Certain of the findings in the Agreed Statements of Facts in the *Crompton* plea agreement are instructive. It states:

> On a commercial basis, rubber chemicals are produced synthetically through highly sophisticated processes. It is apparent that rubber chemicals are now a commodity product and over capacity in the industry has been a constant restraint upon profitable operation and re-investment. Rubber chemicals are significant in the production of useable modern rubber products, principally tires. There are no practical or reasonable economic substitutes to certain rubber chemicals which are the subject of this proceeding, although innovation in both application and production does from time to time cause some products to be superseded. The accused and its co-conspirators are best situated from the perspective of size, experience and incentive to participate in such developments. Based upon facts obtained by the Commissioner, which Crompton is not aware of but does not contest for the purposes of this proceeding, rubber chemicals are said to constitute about 1% of the value of finished tires, they **[**68]** are a practical sine qua non to the manufacture of over $2 billion worth of tires produced in Canada annually. An additional approximately 30% of rubber chemical sales are devoted to non-tire uses in various automobile parts, surgical gloves and other commercial, industrial and health applications.
> The rubber chemical producers identified above manufactured and/or sold the substantial majority of the rubber chemicals that were sold or distributed in Canada during the period of the offence for use in the tire, automobile parts, industrial applications and health industries. Indeed a significant amount (approaching 50% in some instances) of the rubber chemicals manufactured in Canada are exported. Each of the above referred to entities participate, to varying degrees, in the globally organized tire manufacturing industry. The principal Tire Producers buy centrally (not in Canada) for delivery to their regional production facilities. The rubber chemical producers in turn organize their delivery logistics to best meet customer demands and their own production facilities. There is a significant buyer power within the tire-destined rubber chemical business.
> . . . .
>
> It is a matter of some debate **[**69]** between Crompton and the Commissioner as to the quantum of commerce affected by the illegal activity herein referred to. This requires specifically a consideration of the "lasting effect" of various price increases on certain specific rubber chemicals. This analysis however, given the prevailing conditions in the market, does not give credit to the fact that price increases may not have been appropriate at all and one or more producers may have had to exit the market, in the absence of such restraints upon the normal market processes. If Crompton's analysis is correct the gap between the opposing views of affected commerce may be measured in hundreds of millions of dollars. In any event it is agreed that the assessment of competitive injury is largely one of judgment in all of the relevant circumstances.

The Queen v. Crompton Corp., [May 2004] F.C._(Can.)(Agreed Statement of Facts).

[*P77] The Canadian plea agreement highlights two problems significant to the standing determination. First, the calculation of the impact on prices of the conspiracy will be difficult to determine. As noted, "In any event, it is agreed that the assessment of competitive injury is largely one of judgment in all **[**70]** of the relevant circumstances." That factor is complicated by the significant buyer power within the tire-destined rubber chemical business. Second, the impact on the retail consumer will be minimal. The example in paragraph 79 below highlights the degree of impact on the retail purchaser.

[*P78] The problems inherent in the *Crouch* claims are the same alluded to by Judge Posner in his noted article on pass through economic analysis. [36] First, the price-fixed item is a product consumed or altered in the manufacturing process. Accordingly, its use will vary with the type of rubber product being made. It may also vary with the nature of the product (chemical) being used and how it is used in the manufacturing process. Different direct purchasers (here, tire manufacturers) might use the various chemicals in various ways in differing products.

[*P79] The price today for a set of four BF Goodrich (R) Touring T/A SR4-P195/70R14 90S tires, which are similar in size and quality to those purchased by Crouch, is $222.64 at Sam's Club's posted price on the Internet. If the value of the chemicals represents 1% of the value of the tires, [37] the chemicals in the **[**71]** tires have a total

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[36] *See* Landes and Posner, *supra* note 3, at 615-21.

[37] One percent was the actual number used by Canadian authorities in their case against Crompton. *See supra* P 76.

value of $2.23 or $0.56 per tire. If we assume that in an industry with overcapacity and strong buyer power the conspirators were able to artificially inflate prices by as much as 20 % [38] and assume that all of that can be proven to be passed through to retail consumers, Crouch's injury can be calculated to be $0.44 for the set of tires or $0.11 per tire. Bigger tires will cost more, smaller tires less. Thus, it is likely that the recovery per tire sold in North Carolina will be in the range of $0.01 to $0.11. That number represents a remote impact on its face. Certainly it would not represent a meaningful recovery for consumers. In any event, the costs associated with litigation and administration of any settlement would far outweigh the benefits to consumers. Few consumers are likely to fill out a claim form for $0.44 or even $1.32 (trebled damages). While the above calculations would affect class certification, they also are relevant to a determination of the remoteness of injury.

[*P80] In this instance, Crouch would be required to establish tire prices in North Carolina by manufacturer both before and after the alleged conspiracy period. Because this case involves a product used in the manufacturing process, regression analysis would be required to disaggregate any effect of other changes in the manufacturing process for each manufacturer for each product category. Further regression analyses would be required to disaggregate the impact on price, if any (by product category and by manufacturers), of other influences on the manufacturer's price. As the product moved down the distribution chain into various avenues of distribution, each step would require additional regression studies to disaggregate other impacts on prices until the final price paid by a consumer for different products purchased in different markets is determined. To perform such studies the economists will require enormous amounts of information, parts of which **[**73]** will constitute trade secrets or confidential information of nonparties, principally tire manufacturers. Many manufacturers are foreign companies. Determining a price differential per tire for tires sold in North Carolina which were manufactured using price-fixed chemicals during the relevant time period would be a Herculean task and one which the Court believes would not be free from speculation given the enormous number of disaggregating factors to be considered in the process.

[*P81] Clearly, the tires made for SUVs will differ from those made for compact cars. The market for these tires will vary. There is a range in quality and price of the products made using the price-fixed chemicals. If, as is usually the case, there is cheating among the price fixers, additional variations are created. [39] In this situation there are a small number of large producers, some or all of which could exert great pressure on price. Thus, at the outset the multiple of variations in pass through analysis is daunting. The discovery involved in ascertaining the production methods, costs and pricing strategies of tire manufacturers would intrude into their most fundamental confidential business information and **[**74]** trade secrets, insuring a long and difficult battle over access. If that information is available, the demand and supply curves must then be calculated for this myriad of products and suppliers and the prices determined by the intersections of those curves tested against rigorous regression analysis to insure that no external factors affected the pricing and pass through at the manufacturer level.

[*P82] Then the process of determining the subsequent pass through begins. Demand and supply curves and regression analysis must be created for the various lines of distribution and for the various companies and for the various products. Here, it is significant that consumers are at least three steps removed from the original offense. That makes apportionment of damages/pass through extremely difficult and raises a greater risk of double recovery.

[*P83] Again, the distribution processes may vary with producers and products. Are there tires on the market which were made with non-price-fixed chemicals? If so, how do they affect price? What is the effect of foreign competition? Do company owned stores **[**75]** or franchises sell at different prices than Sam's Club or Wal-Mart?

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[38] The calculation of this number will be difficult, but it is difficult **[**72]** to conceive of prices being artificially inflated at a higher level in a market with strong buyer power and overcapacity. It is also unlikely that 100% of the inflated cost was passed through to consumers or that it affected consumer prices.

[39] Price fixing schemes frequently fall apart because the temptation to cheat to get market share is great.

Does the corner gas station price yet another way? Must the pass through expense be determined with reference to the customer base? These are but a sampling of the difficulties inherent in determining pass through in this case. [40]

[*P84] Each case must be analyzed individually. There will be cases where the economic analysis is not difficult. *Hyde* may have been one of those cases. There could be other examples where a component, such as a computer chip, is price fixed, and its costs passed through directly to purchasers of the product in which it is incorporated. [41] Individual cases will vary, and the factors must be considered in each case. The relevant reliability of economic analysis is a key factor in applying those factors. The economic analysis cannot be oversimplified. *See In re Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1503 (D. Kan. 1995)*. There, the court rejected an expert report which failed to apply standard economic methodology **[**76]** to test the conclusions reached. In ruling on a motion *in limine* the court said:

> The goal of a prudent economist in performing the "before and after" analysis is to determine the hypothetical or "counter-factual" prices that would have prevailed during the conspiracy period, but for the conspiracy. In applying the "before and after" model of damages, it is fundamentally necessary to explain the pattern of forces outside the violation period using factors that might have changed (i.e., supply, demand, and the differences in competition) to predict the prices during the conspiratorial period. In this context, as in most economic problems, failure to keep "other things equal" is one of the known "pitfalls in the path of the serious **[**77]** economist." Samuelson, P. and Nordhaus, W.D., *Economics* (13th ed.) at p. 7. This case presents two potential normative periods, a "before" period and an "after" period that have distinctly different price levels. One therefore must identify the reasons for the disparate price levels. According to Dr. Siegfried, the field of economics supplies a statistical methodology for making this determination on a scientific basis, and the generally accepted means of predicting the prices that would have prevailed absent the conspiracy is regression analysis. At a minimum, regression analysis addresses supply and demand factors by looking at price trends over time. A prudent economist must account for these differences and would perform a minimum regression analysis if utilizing the "before and after" model.

Id. at 1503-04 (footnotes omitted).

[*P85] The five key factors are analyzed with respect to *Crouch* below.

1. The relevant market. The chemical manufacturers accused of price fixing sold to rubber manufacturers. Because the number of sellers and the number of buyers was relatively small, the price fixing scheme had to have at its core an effort to affect price pressure from the oligopolists in the **[**78]** tire manufacturing business. The antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. This is a mixed case, as there are two relevant markets: the first is the market for chemicals, and the second is the market for rubber products indirectly affected by the artificial influence in the chemical market. As a purchaser at retail of a rubber product, Crouch is in a market secondarily affected by the restraint in the original chemical market. That is a complicating factor for standing. This factor weighs slightly against standing, as the alleged price fixing was directed at the market for chemicals, not the market for tires. Prices were allegedly fixed for chemicals used to manufacture other rubber products. However, the plaintiff purchased a product the price of which *may* have been influenced by the illegal restraint.

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[40] *See,* Michele Molyneaux, Comment, *Quality Control of Economic Expert Testimony: The Fundamental Methods of Proving Antitrust Damages, 35 Ariz. St. L.J. 1049, 1074-75 (2003)*.

[41] The Court notes that certain manufacturers of DRAM chips used in a variety of computer products have been accused of price fixing. *See,* Stephen Labaton, *Infineon To Pay a Fine In the Fixing Of Chip Prices,* N.Y. Times, Sept. 16, 2004, at C6. The Court expresses no opinion on standing in that situation. Each case must be judged on its own merits, and that case is not before the Court. The Court simply notes that the nature of the component can make a difference.

2. Directness of impact on plaintiff. The fact that the artificially restrained price impacts the manufacturing process removes it at least one level of directness. Unlike a component that remains unchanged when incorporated in the final product, manufacturing costs are less directly passed through and may be affected **[**79]** by differing manufacturing processes used by producers. While it is clear that in most instances some portion of a price-fixed cost gets passed along, the directness can be impacted by the nature of the item subject to price fixing, be it a component, labor cost, or something used in the manufacturing process.
The nature of the item can influence the directness of the impact on the price of the end product at retail. Because these chemicals are products used in a manufacturing process, the direct impact at retail is less clear and subject to variation among manufacturers using the chemicals. The smaller the component, the less likely there will be impact on the final price. Here the chemicals only comprise 1% of the value of a tire, reducing the likelihood that total final price was significantly affected.
There is also an additional question of the length of the distribution chain. While plaintiff purchased from Sam's Club, which may have purchased directly from a manufacturer, other class members may have purchased through other lengthier distribution chains.
This factor weighs against standing.

3. Other indirect purchasers. This is the factor which gets most confusing when *Illinois* ***[**80]*** *Brick* is eliminated. State courts should focus this inquiry on whether or not the existence of other indirect purchasers in the chain of distribution gives rise to other claims against the fund representing the amount by which the price of the retail item has been artificially inflated. It becomes more of an examination of whether there will be double recovery on the state claim (eliminating the concern about double recovery created by standing holdings in *Hanover Shoe/Illinois Brick*). Here the other indirect purchaser claimants may be distributors and retailers who claim to have absorbed some of the price increase. No claims have been filed on their behalf. This factor would adversely impact standing in *Crouch* based on this record.

4. & 5. Speculative nature of damage claims and complexity. These items sometimes overlap. That is the case with *Crouch.* In this case there are multiple factors which render valid economic analysis either impossible or unmanageably complex. While the number of manufacturers is not great, each will have different manufacturing processes. Those processes and the use of alleged price-fixed chemicals will vary from product to product. Products will vary in **[**81]** size, quality and costs. There will be different markets for the products - retailers like Wal-Mart, Sam's Club, K-Mart and Sears, local tire stores, gas stations, company franchise stores and Internet sales. In a typical price fixing scenario, some, if not a substantial portion, of the price increase is absorbed at the earliest stages in the distribution chains. Some retailers will buy direct; some will buy from distributors. Foreign competition, not insignificant in the tire industry, can affect price. Tracing the price of the processing chemicals through foreign manufacturers provides other problems. The price of tires may be affected by external factors such as high gas prices, which could lower demand. Each variation in manufacturer's process, price, size, quality, market, distribution method and changes in applicable externalities requires individual supply and demand analysis and may require multiple regression analyses in order to eliminate the speculative nature of any damage calculation. Given the many variables, the issues surrounding allocation of the alleged price fixing fund in this case would be exceptionally complex and the results of economic analysis speculative.

Unlike **[**82]** direct purchasers who may recover for costs which they do not incur, state indirect purchasers may recover only for injury actually incurred. Thus, they must prove pass through of the artificially inflated cost. To prevent double recovery for the same alleged injury there must be a reliable means of allocating the effects of the price fixing among the various participants in the distribution chain. It must take into account other externalities. For example, how would purchasers of tires that were recalled and replaced be treated? Factor 5 takes this complexity into account when drawing the line on remoteness of claims. The size of the impact on tire prices is relevant here. As demonstrated in paragraph 78 above, any increase in tire prices will be relatively insignificant. In *Crouch,* factors 4 and 5 dictate heavily against standing.

There may well be occasions on which the Court should defer a standing determination until there has been far ranging discovery and expert evidence produced on pass through and allocation. The problem inherent in

> delay is the enormous cost involved in getting the information and expert analysis. If it proves insufficient, substantial resources will be wasted. **[**83]** Where, as here, it is apparent from the pleadings that any analysis will either be speculative or allocations enormously complex, the Court should rule on standing early in the process. Where, as here, counsel have not made any attempt to ascertain facts relating to standing prior to filing suit, the court's job is made more difficult. The rush to file in indirect purchaser states works against adequate investigation prior to filing.

[*P86] Considering all five factors, Crouch lacks standing to pursue indirect purchaser claims.

B. The *Morris* Case

[*P87] The *Morris* case presents a far easier analysis. It is not a price fixing case.

[*P88] In *Morris,* the underlying antitrust claim is for illegal tying of credit and debit cards under the "Honor All Cards" policy. For purposes of analysis here, the Court assumes the tying arrangement was illegal. Tying cases present unique damages issues.

> In tying cases, the measure of damages to an injured purchaser is described as "the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market." However, several courts have held that damages can be recovered only if the combined fair market **[**84]** value of both the tying and tied products is exceeded by the amount actually paid for both.

Private Antitrust Suits, A.B.A. SEC. ***ANTITRUST LAW***, ***ANTITRUST LAW*** DEVELOPMENTS 875 (5th ed. 2002)(footnotes omitted).

[*P89] Here, not only would Plaintiff be required to show the underlying complicated damage to merchants, [42] but also how those damages got passed on in each and every consumer transaction by the merchant. In the case of a hot product which sells on its label (Calvin Klein jeans, for example) so that the price is unrelated to costs of sale, manufacture or distribution of the product, how could plaintiff possibly show what part of the price included a pass through cost resulting from the tying arrangement which would not have been included in the absence of the tying arrangement? [43]How could the Court administer a trial where every consumer transaction might be subject to that proof for every merchant? It cannot be done. More compelling is the fact that a determination would have to be made for every product since price elasticity varies between products. [44]

[*P90] The five key factors with respect to *Morris* are analyzed below.

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[42] For cases discussing the difficulty of proof in tying cases see, *Will v. Comprehensive Acctg. Corp., 776 F.2d 665 (7th Cir. 1985)*; **[**85]** *Kypta v. McDonald's, 671 F.2d 1282 (11th Cir. 1982)*; *Siegel v. Chicken Delight, 448 F.2d 43 (9th Cir. 1971)*.

[43] Gutzwiller v. Visa U.S.A., Inc., No. 14-C4-04-000058 (Clay County Dist. Ct., Minn. Sept. 15, 2004). Judge Vaa presented an illustrative example:

> Assume that Plaintiff purchased an item at a K-Mart store which accepted Visa and MasterCards, on March 1, 2003. To recover damages, Plaintiff would first need to prove that as a result of Defendants' alleged restraint of trade in providing debit card services to that K-Mart store, K-Mart paid excessive debit fees. Plaintiff would then need to prove that K-Mart did not absorb any such excess debit fees by making less profit, or in some other non-monetary way, such as by hiring fewer employees and/or not making major repairs to its building, but instead passed on the excess debit fees in the price of the items sold to consumers. Plaintiff would then need to prove that some identifiable portion of the item was not attributable to any factors which might affect the price of that item on that specific date. Plaintiff would then need to make the same offer of proof for any item sold by the K-Mart store not only on March 1, 2003, but for **[**86]** every other day in issue, and would have to make the same offer of proof relative to every other merchant involved in his claim.

Id. at 16.

[44] This fact alone would render class certification impossible since each customer would have different damages depending on each individual purchase they made.

1. The relevant market. Defendants refer to plaintiff as a "non-purchaser." That is shorthand for not being a purchaser in a relevant market. The relevant market in *Morris* is the sale of credit and debit card services. Morris did not make a purchase in that market. *Morris* simply made purchases of consumer goods. Antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. In this case the customers in the relevant market would be the retailers who purchase debit and credit card services, not all consumers of retail products. This factor alone would strongly support a finding of no standing in *Morris.*

2. Directness of impact. The underlying restraint alleged in *Morris* was a tying arrangement, not price fixing. It is founded on the proposition that retailers paid more for debit card **[**87]** services than necessary without the tying arrangement. Morris does not even allege he is a debit card holder. He seeks to represent a class consisting of consumers who paid by a credit card, paid cash, paid by check, bought on credit or used a debit card. The impact of the alleged tying arrangement (which applied only to retailers using debit card services) on consumers is as remote as this Court can conceive.

3. Other indirect purchasers. Since consumers are not a part of the relevant market for credit/debit card services, there are no other indirect purchasers. This is a situation where the impact, if any, of the tying arrangement falls directly on the direct purchaser.

4. Speculative nature of damage claims. This is not a price fixing case. It is at bottom a tying case which carries additional proof problems affecting the speculative nature of damages to indirect purchasers. Indirect purchasers would first have to prove what the damages were to retailers. Retailers would be required to show that the tied price of debit and credit cards was higher than the price of each sold separately in competitive markets. Indirect purchasers would then be required to show how those damages got **[**88]** passed through or had a direct impact on each consumer purchase they made in North Carolina, whether by cash, check, credit card or debit card. Two examples come to mind. When a teenager pays $100 cash for a pair of designer label jeans that cost $10 to make because they are the hot fashion item, are they paying more than they would have paid had there been no tying arrangement involving debit or credit cards? How could that be proven? What about the item that is put on sale below cost because it is outdated and needs to be cleared from inventory?

Assuming that injury at the retailer level could be quantified somehow, that injury would be attributable only to the increased use of debit cards, a minor part of the market. According to plaintiff, that cost is then spread over every consumer product sold by every retailer. If plaintiff is correct, the recovery per product will be infinitesimal. In addition, the manageability of the litigation and the administration of any settlement present insurmountable barriers. If the Court of Appeals asked today if there is an example of "an impossible complex situation," the *Morris* case would provide such an example. The Court cannot conceive of an **[**89]** economically feasible way to administer a trial which would require inquiry into how every retailer set the price for every consumer good sold in this state. Nor is it conceivable that any judgment would be in any amount which could be economically *allocated* and *paid* to *every* consumer in North Carolina.

5. Complexity. It is difficult to imagine a more complex damage case. Plaintiff's case would require an analysis of pricing of virtually every product sold at retail in North Carolina. The litigation could last an interminable period, and it is difficult to conceive of how a claims process would work. It is likely the price increases attributable to the excess cost to the retailer of using debit cards would be such a small measure that there would be no cost effective way to administer a claims process that would compensate consumers directly.

[*P91] Each *AGC* factor in *Morris* supports dismissal of the claims. Morris asserts remote claims outside the relevant market which involve speculative and complex damages. Eight other jurisdictions have agreed and thus placed limits on indirect purchaser standing. Plaintiff's counsel urged the Court to permit amendment to the pleadings to assert only claims **[**90]** for debit card holders. Such an amendment would make no difference in the outcome on this motion.

[*P92] Having found that the complaint is subject to dismissal, the Court does not need to address defendants' argument that plaintiff seeks relief that would violate the *Commerce Clause of the United States Constitution*.

CONCLUSION

[*P93] If state antitrust laws are to have any impact, they must work. Compromise *cy pres* settlements that provide no payments to consumers have little deterrent effect and no benefit for those actually injured. Where actual injury can be shown with reasonable certainty, defendants should pay those damages to the injured parties and be subject to statutory penalties. That is a real deterrent, and it benefits those injured.

[*P94] Part of the problem in dealing with indirect purchaser cases is the race to the courthouse which follows a triggering event at the federal level. Despite the fact that the case was two years old, when asked at oral argument, plaintiff's counsel in Crouch had no idea what the pass through per tire would be, either in cents or in dollars. His suggestion was for the Court to wait until class certification and address the issues in that context. Where, as **[**91]** here, it is apparent from the pleadings that either (1) sound economic analysis can only produce speculative damages or (2) the complexity of the required sound economic analysis is staggering and virtually impossible to accomplish given the inability to get at all the required information, deferral to class certification is unnecessary. The Court is not required to nor should it defer standing determinations to class certification. While there may be some overlap in the factors considered in each determination, the tests are different.

[*P95] As Justice Brennan noted in his dissent in *Illinois Brick,* the complexity of damage proof should not foreclose a claim. [45] That policy must be balanced with the need to control the manageability of litigation. Judge Posner has correctly noted that indirect consumer class actions frequently do little to provide redress for injury in indirect purchaser cases, [46] and the North Carolina cases support his conclusion. [47] The proper focus should be on insuring that those cases in which there is non-speculative proof of direct impact on consumers at something other than a negligible level get tried and those cases which fall outside the limits of rational accepted **[**92]** economic analysis are dismissed. The modified *AGC* factors provide guidelines for making those determinations at the trial level. Applying those factors to these two cases results in their dismissal. Other cases may come out differently or may require some discovery before ruling. Class actions which provide no redress to those actually injured do not fulfill the purpose of the state statute which is to redress injury to those directly impacted by the price fixing.

[*P96] State statutes do not provide as effective a deterrent as the federal scheme. There is an adequate and more effective deterrent to antitrust violations at the federal level. State indirect purchaser cases should be designed to provide relief to those directly injured by antitrust violations. Since they permit double recovery they should be narrowly construed. Similar to the judgments the legal system makes on "foreseeability" in negligence cases, judgments on "standing" are designed to place limits on what would otherwise be limitless claims. The two concepts are similar in that they set a boundary beyond which claims are determined **[**93]** to be too remote. Where a class action will provide no actual benefit or an insignificant benefit to class members, there exists a strong inference that the class claims are too remote or speculative to withstand scrutiny under the modified *AGC* factors. Sometimes, as here, the standing determination can be made early in the process and save significant resources. Other times the determination should await further discovery before decision. In either case, the five factors set out above should be applied and each case determined on its own facts. Applying the factors to the claims in *Crouch* and *Morris* results in dismissal.

It is hereby ORDERED, ADJUDGED and DECREED:

1. Defendants' Motion to Dismiss in *Crouch* is granted, and plaintiff's claims are hereby dismissed.

2. Defendants' Motion to Dismiss in *Morris* is granted, and plaintiff's claims are hereby dismissed.
3. Each party shall bear its own costs.

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[45] *431 U.S. at 758-60*.

[46] *See* Landes and Posner, *supra* note 3, at 607.

[47] *See* discussion *supra* PP 60-65.

This the 26th day of October 2004.
